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Is It Hot in Here - The Eighth Circuit's Reduction of Fourth Amendment Protections in the Home

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Is it hot in here? The Eighth Circuit's Reduction of Fourth Amendment Protections in the Home

United States v. Kattaria[1]

I. INTRODUCTION

Several years ago, the United States military developed thermal imaging technology for targeting and reconnaissance purposes which law enforcement agencies subsequently adopted as a means of conducting surveillance in support of counter-narcotics efforts.[2] Police use thermal imaging devices in counter-narcotics operations by scanning buildings and homes in order to determine higher heat emissions from buildings.[3] These higher than normal thermal readings of homes act as indicators of possible marijuana grow operations due to the high output of heat from the indoor lamps commonly used for such activities.[4]

Even though a majority of jurisdictions have held that a thermal imaging scan of a home does not qualify as a search under the Fourth Amendment, and thus require a warrant,[5] in 2001, the United States Supreme Court held in *Kyllo v. United States* that the use of thermal imaging devices by police in their investigatory capacities required the issuance of a warrant.[6] The Eighth Circuit, in their recent decision of *United States v. Kattaria*, misconstrued the Supreme Court's holding in *United States v. Kyllo*. In *Kattaria,* the Eighth Circuit found that although a warrant is required prior to police using a thermal imaging device on a home, the traditional probable cause standard need not be met prior to a court or magistrate issuing such a warrant. Thus, the Eighth Circuit has created a hybrid *Terry*[7] stop / search warrant.

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1. 503 F.3d 703 (8th Cir. 2007), *reh'g granted and opinion vacated*, 519 F.3d 730 (8th Cir. 2007).

2. Matt L. Greenberg, Note, *Warrantless Thermal Imaging May Impermissibly Invade Home Privacy:* United States v. Kyllo, 68 U. CIN. L. REV. 151, 155-58 (1999).

3. *Id.* at 157-58.

4. Jonathan Todd Laba, Comment, *If You Can't Stand the Heat, Get out of the Drug Business: Thermal Imagers, Emerging Technologies, and the Fourth Amendment*, 84 CAL. L. REV. 1437, 1442 (1996).

5. *See generally* Amy Miller, Note, *Kyllo v. United States: New Law Enforcement Technologies and the Fourth Amendment*, 51 U. KAN. L. REV. 181 (2002) (listing pre-*Kyllo* decisions regarding the use of thermal imaging technology by police not to be a Fourth Amendment search).

6. 533 U.S. 27 (2001).

7. *See infra* text accompanying notes 100-09.

II. FACTS AND HOLDING

In 2004, police arrested Mohammed Kattaria after executing search warrants on two of his homes both of which contained marijuana grow operations.[8] On May 6, 2004, Special Agent Michael Perry applied "for a warrant authorizing aerial use of a thermal imaging device to measure the heat emitting from [Kattaria's] home."[9] The supporting affidavit that Perry submitted to the Ramsey County District Court averred that approximately two months prior "a cooperating defendant (CD) described Kattaria, identified his photo, said they had occasionally smoked marijuana over the past ten years, and knew Kattaria had a criminal history."[10] The CD also told Perry "that in 2002 he observed a marijuana grow operation in the basement" of one of Kattaria's homes.[11] In the affidavit, Perry also claimed that Kattaria had "a 1997 conviction and a 2000 arrest for marijuana offenses."[12] Perry further asserted that, after checking utility company records, Kattaria's home had a much higher electric power consumption between November 2003 to April 2004 than five other nearby homes.[13] Perry's final averment in support of his request for a search warrant to conduct a thermal imaging scan was that he had driven by Kattaria's home on numerous occasions and observed the blinds drawn and nothing that would explain the high energy consumption.[14]

Based on Perry's affidavit, on May 6, 2004, the district court issued a warrant authorizing a nighttime, aerial thermal imaging scan of Kattaria's home, which Perry executed the following day.[15] Later, an "experienced thermal imaging operator" determined that the readings from Kattaria's home were "consistent with indoor marijuana grow operations."[16] Based on the thermal imaging findings, the county district court granted Perry warrants to conduct physical searches of Kattaria's home on which a thermal imaging device was used, as well as another home owned by Kattaria.[17] Another investigator also sought and received a physical search warrant for a third home owned by Kattaria.[18] All three warrants to conduct physical searches relied on Perry's earlier affidavit as well as the results of the thermal imaging scan of Kattaria's home.[19] The physical searches of Kattaria's homes resulted in

8. Kattaria v. United States, 503 F.3d 703, 704 (8th Cir. 2007).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 704-05.
14. *Id.* at 705.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

the police finding "548 marijuana plants, bags of marijuana, and other incriminating evidence."[20]

After police arrested Kattaria on drug charges, Kattaria filed a motion in the United States District Court for the District of Minnesota to suppress the evidence gathered during the physical searches of his properties.[21] Kattaria's motion to suppress and motion for a *Franks* hearing were denied.[22] As a result of the denials of Kattaria's motions, he conditionally pled guilty "to conspiracy to manufacture, distribute, and possess with intent to distribute fifty or more marijuana plants in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846."[23]

On appeal to the Eighth Circuit, Kattaria argued that the warrant to conduct a thermal imaging scan of his home was not supported by probable cause and thereby violated the Fourth Amendment because "there was no statement as to the CD's reliability, the CD's observation of a grow operation in the basement two years earlier was uncorroborated stale information, and Perry's affidavit included inaccurate information."[24] In addition to the thermal imaging scan warrant, Kattaria also challenged the validity of the three subsequent physical search warrants. He claimed that since the information from the thermal imaging scan should have been suppressed the three subsequent warrants to conduct physical searches based on that information should not have been issued and the evidence supporting the physical search warrants failed to

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20. *Id.*

21. *Id.* at 704.

22. *Id.* In *Franks v. Delaware*, the Supreme Court took up the issue of the trial court's denial of defendant's motion regarding allegations by the defendant of misrepresentations in the warrant affidavit. 438 U.S. 154, 161 (1978). The Court held that an evidentiary hearing on the content of a warrant affidavit supporting probable cause for the issuance of the warrant was mandatory if the defendant could state allegations of false statements contained within the affidavit that were supported by additional evidence, and that without the allegedly false statements, the affidavit did not support a finding of probable cause for issuing the warrant. *Id.* at 171-72. If at the *Franks* evidentiary hearing the court determines the affidavit to be insufficient to support probable cause and thereby invalidates the search as unlawful under the Fourth Amendment, then the evidence gathered at the search is excluded. *Id.* at 170-71.

23. *Kattaria*, 503 F.3d at 704. 21 U.S.C §§ 841 and 846 read in part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 841 (a)(1) (2000).

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 846 (2000).

24. *Kattaria*, 503 F.3d at 705.

meet the probable cause requirement.[25] Kattaria also argued that the district court erred in denying his motion for a *Franks* hearing and that the district court awarded an unreasonably harsh sentence of ninety-eight months in prison.[26]

The Eighth Circuit responded to Kattaria's appeals by rejecting his arguments and affirming the decision of the district court.[27] The Eighth Circuit held[28] that the warrant authorizing a thermal scan of Kattaria's home did not require probable cause and, in the alternative, there was sufficient evidence to support a finding of probable cause in order to issue each of the search warrants.[29]

III. LEGAL BACKGROUND[30]

The Fourth Amendment declares the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[31] The Supreme Court has, on numerous occasions, interpreted and refined the Fourth Amendment protection against unreasonable searches and seizures through the development of several doctrines, most notably those doctrines relating to warrantless searches and administrative warrants. In *Kattaria*, the Eighth Circuit interpreted several of these distinctly separate doctrines, leading the Eighth Circuit to misconstrue the Supreme Court's holding in *Kyllo*,[32] and thereby allow the issuance of a warrant for a thermal imaging scan of a private home with a quantum of evidence less than that of probable cause.[33]

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25. *Id.*

26. *Id.* at 708.

27. *Id.* at 707-08. This decision has since been vacated and a rehearing has been ordered. United States v. Kattaria, 519 F.3d 730 (8th Cir. 2007).

28. The Eighth Circuit also held that the issue on the *Franks* hearing was not timely raised on appeal and that the district court did not abuse its discretion in determining Kattaria's sentence; however, these holdings are outside the scope of this case note and are not discussed in depth herein. *Id.* at 708-09.

29. *Id.* at 707-08.

30. The issues on appeal regarding the denial of Kattaria's motion for a *Franks* hearing and the variation in sentencing applied by the trial court are issues beyond the scope of this Note; therefore no legal background is provided for those issues as they will not be discussed in the Comment. *See infra* Part V.

31. U.S. CONST. amend. IV.

32. 533 U.S. 27, 40 (2001).

33. *See Kattaria*, 503 F.3d at 706-07.

A. Necessity of a Warrant and Probable Cause

In *Katz v. United States*, the Supreme Court laid out the modern test for determining whether there is "a constitutionally protected reasonable expectation of privacy" requiring, presumptively, law enforcement authorities to have a valid warrant for such invasion to be lawful.[34] In *Katz*, the appellant was convicted of violating a federal statute which prohibited the transmission of "wagering information by telephone."[35] Evidence used to convict the appellant included telephone conversations recorded by the FBI using an electronic listening device placed "outside of the public telephone booth from which he had placed his calls."[36] Relying on precedent that "surveillance without any trespass and without the seizure of any material object,"[37] was not a search under the Fourth Amendment, the government argued that they had not physically penetrated Katz's phone booth and as a result did not violate the Fourth Amendment when the FBI recorded Katz's conversation without a warrant. However, the Supreme Court rejected this argument, overturning the precedent on which the government relied.[38] The Supreme Court held that because the government acted without a valid search warrant, the recording of Katz's conversation could not be used in evidence to support his conviction and accordingly the Supreme Court reversed the judgment of the court of appeals.[39]

The significance of this change in precedent was that the court no longer applied the Fourth Amendment to only places, but rather to people based on the expectation of privacy that was to be expected in certain settings.[40] This change in Fourth Amendment doctrine allowed for Justice Harlan, in his concurrence, to derive the current standard for determining if a search requires a warrant.[41] In establishing the *Katz* test for determining whether a warrant is required for a search, Justice Harlan set forth a two-pronged analysis that (1) "a person [must] have exhibited an actual (subjective) expectation of privacy" and (2) "that the expectation be one that society is prepared to recognize as 'reasonable.'"[42] If both prongs of the test are met then a warrant must issue prior to the State conducting a search.

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34. 389 U.S. 347, 360-61 (1964) (Harlan, J., concurring).

35. *Id.* at 348 (majority opinion).

36. *Id.*

37. *Id.* at 353 (citing Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942)).

38. *Id.*

39. *Id.* at 359.

40. *See id.* at 353 ("[T]he Fourth Amendment protects people - and not simply 'areas' - against unreasonable searches and seizures . . . .").

41. *Id.* at 361 (Harlan, J., concurring).

42. *Id.* Justice Harlan also provides examples of each prong of the test:

> [A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that exposes to 'plain view' of outsid-

Nineteen years after *Katz*, the Supreme Court laid out its current standard of probable cause for a warrant to issue in *Illinois v. Gates*.[43] The defendants in *Gates* were arrested after a search of their vehicle and home by police, pursuant to a warrant issued by a judge, turned up weapons, contraband, and several hundred pounds of marijuana.[44] The Illinois Supreme Court held that the warrant was insufficiently supported "to permit a determination of probable cause."[45] The United States Supreme Court reversed the Illinois Supreme Court's decision to exclude evidence gathered pursuant to the warrant, because the Illinois Supreme Court applied an improper standard in reviewing whether or not there was sufficient evidence to support a finding of probable cause by the issuing court.[46] The United States Supreme Court held that probable cause should be determined based on a "totality-of-the-circumstances approach" and that probable cause is a "'practical, nontechnical conception.'"[47] In issuing a search warrant "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[48] Moreover, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of activity."[49] The Court adopted a probable cause standard requiring that "the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing" and that substantial basis need only be based on a fair probability that evidence of a crime will be found as a result of the search.[50]

B. Sanctity of the Home and Technological Intrusions

The Supreme Court maintained longstanding precedent that the home is afforded a greater degree of protection from unreasonable searches and sei-

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> ers are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id.

43. 462 U.S. 213 (1983).

44. *Id.* at 226-27.

45. *Id.* at 227-28.

46. *Id.* at 246. The Illinois Supreme Court applied the *Aguilar* and *Spinelli* two-pronged test to determine if the supporting information of the search warrant could support a finding of probable cause; however the United States Supreme Court rejected this standard in their holding in *Gates*. *Id.* at 227-230, 238; *see also* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

47. *Gates*, 462 U.S. at 230-31 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

48. *Id.* at 238.

49. *Id.* at 245 n.13.

50. *Id.* at 236 (quoting Jones v. United States, 362 U.S. 257, 271 (1960)).

zures in *Silverman v. United States*.[51] In *Silverman*, District of Columbia Police, suspecting illegal gambling activities were being carried on by the defendants, used an amplifying device to listen to and record conversations of the defendants in their home.[52] The conversations overheard by the police were "the basis for a search warrant under which other incriminating evidence was discovered."[53] The Supreme Court reversed the admission of the evidence gathered as a result of the overheard conversation on the grounds that "the officers overheard the petitioners' conversation only by usurping part of the petitioners' house or office . . . a usurpation that was effected without their knowledge and without their consent."[54] The Court further stated that they "never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard."[55] The Supreme Court placed special emphasis on the fact that the government's intrusion was into the defendants' home, stating "[t]he Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[56]

Building upon its theory in *Silverman* that a man's home is his castle, the Supreme Court, in *Payton v. New York*, reiterated the sanctity of the home.[57] Suspecting Payton of murder and acting without a warrant, police forcibly entered Payton's apartment using crowbars to pry his door open.[58] Though Payton was not home, police seized a .30-caliber shell casing that was in plain view and later submitted the casing into evidence. The New York courts admitted the casing into evidence, denying Payton's motion to suppress.[59] Defendant Obie Riddick also was arrested without a warrant, when police, suspecting Riddick of robbery, entered his home when his young son opened the door after the police knocked.[60] Before letting Riddick

51. 365 U.S. 505 (1961).

52. *Id.* at 506-07.

53. *Id.* at 507 n.1.

54. *Id.* at 511.

55. *Id.* at 512.

56. *Id.* at 511; *see also id.* at 512 n.4 (quoting United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting) ("'A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty - worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is man's castle.'")).

57. 445 U.S. 573 (1980).

58. *Id.* at 576.

59. *Id.* at 576-77.

60. *Id.* at 578. The New York Court of Appeals previously affirmed both Payton's and Riddick's convictions in a single decision. *Id.* at 579.

out of bed, police rummaged through his chest of drawers and found narcotics that were later used to bring charges against him.[61] Similar to Payton's situation, the New York court found that the warrantless entry and immediate search of Riddick's home were authorized under state statute.[62]

In reversing the judgment of the New York Court of Appeals, the Supreme Court upheld the home's special place in Fourth Amendment jurisprudence by holding that "[b]ecause no arrest warrant was obtained in either of these cases, the judgments must be reversed and the cases remanded to the New York Court of Appeals for further proceedings."[63] The Court further held that "'[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.'"[64] The Court determined that "the Fourth Amendment has drawn a firm line at the entrance to the house,"[65] stating:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home - a zone that finds its roots in clear and specific constitutional terms: the right of the people to be secure in their . . . houses . . . shall not be violated. *The language unequivocally establishes the proposition that [a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.*[66]

Though the Supreme Court in *Payton* was dealing with a case involving a warrantless arrest of the defendants in their homes, instead of a warrentless search of defendants' homes, the Court found that "[t]he simple language of the [Fourth] Amendment applies equally to seizures of persons and to seizures of property."[67] The Court reiterated the sanctified position of the home once again in stating "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"[68]

In *United States v. Kyllo*, the Supreme Court faced the novel issue of whether the use of thermal imaging devices on a private home, without a war-

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61. *Id.* at 578.

62. *Id.* at 579-82.

63. *Id.* at 603.

64. *Id.* at 587 (quoting Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970)).

65. *Id.* at 590.

66. *Id.* at 589-90 (quoting *Silverman*, 365 U.S. at 511) (alteration in original) (emphasis added).

67. *Id.* at 585.

68. *Id.* (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972)).

rant, violated a homeowner's Fourth Amendment rights.[69] Through an application of the *Katz* test and by reiterating the sanctity of the home, the Supreme Court held that use of a thermal imaging device on a home was a search under the Fourth Amendment, thereby requiring a warrant.[70]

In *Kyllo,* an agent of the Department of the Interior suspected Kyllo of growing marijuana in his home. The agent later used a thermal imager to detect that Kyllo's home emitted a considerably larger amount of heat than neighboring homes.[71] The evidence of the thermal imaging scan along with tips from informants and utility bills of Kyllo's home were submitted to a magistrate who issued a warrant authorizing a physical search of the home, which found that Kyllo was, indeed, growing marijuana.[72] Kyllo filed a motion to suppress the evidence seized during the physical search of his home on the grounds that the warrant was insufficiently supported because the thermal imaging results used to support the warrant for a physical search were the fruits of an unreasonable search.[73] The district court denied his motion.[74]

In determining that the use of the thermal imaging device without a warrant was an unreasonable search, the Supreme Court applied the *Katz* test to determine that Kyllo had "a subjective expectation of privacy that society recognizes as reasonable"[75] because "the Fourth Amendment draws 'a firm line at the entrance to the house,'"[76] and "[t]o withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment."[77] Therefore, "the information obtained by the thermal imager in this case was the product of a search."[78] In applying the *Katz* test, the Supreme Court found that "in the case of the search of the interior of homes- the prototypical . . . area of protected privacy- there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*," creating a *per se* rule that any search of the interior of a home without a warrant is unreasonable.[79]

In its decision, the Supreme Court continued to regard the home as sacred[80] and held that to create a rule approving only limited "through-the-wall surveillance" would force the Court to create a new jurisprudence as to what

69. 533 U.S. at 29-31 (2001).
70. *Id.* at 34, 40.
71. *Id.* at 29-30.
72. *Id.* at 30.
73. *See id.*
74. *Id.*
75. *Id.* at 33.
76. *Id.* at 40 (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).
77. *Id.* at 34.
78. *Id.* at 34-35.
79. *Id.* at 34.
80. *Id.* at 37 ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.").

is "'intimate.'"[81] Further, the Court held that even if they were able to develop such a body of law, its application by the government would be nearly impossible as there would be no means of telling whether police were about to invade an intimate moment or not when they flip on their device.[82] With the understanding that the Fourth Amendment must be "'construed in the light of what was deemed an unreasonable search and seizure when it was adopted,'"[83] the Court held "[w]here . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[84] Therefore, the warrantless use of thermal imaging was an unlawful search.[85]

Prior to the instant case, the Ninth Circuit, in *United States v. Huggins*, was the only appellate court to apply the *Kyllo* rule on the use of technologies "not in general public use" on a home.[86] In *Huggins*, the Ninth Circuit faced similar facts to that of *Kyllo*, except that the investigating officer did receive a warrant to conduct the thermal imaging scan, which he supported with an affidavit disclosing the appellant's associate's prior arrest, a tip from an informant, and electricity consumption of the home.[87] The thermal imaging scan results were indicative of marijuana manufacturing and this information supported a warrant for a physical search which resulted in the seizure of several marijuana plants on Huggins' property.[88] The district court denied the defendants' motion to suppress the seized evidence.[89] The Ninth Circuit found that "although a thermal imaging search is less intrusive than a physical search, *the degree of probable cause required is not diminished merely by virtue of the fact.*"[90] The Ninth Circuit continued in its analysis of the lawfulness of the thermal imaging search by determining that "probable cause is a protean concept fundamentally dependent on all the individual facts of each case . . . *the quantum of probable cause necessary to justify a thermal imaging search does not differ from that necessary to justify a physical search.*"[91] However, the Ninth Circuit did not examine whether there was probable cause for the warrant to issue, but instead merely looked to the police's good faith reliance of the police on a facially valid warrant to determine that the search was lawful and the evidence seized was admissible.[92]

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81. *Id.* at 38-39.
82. *Id.*
83. *Id.* at 40 (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).
84. *Id.*
85. *Id.*
86. 299 F.3d 1039 (9th Cir. 2002).
87. *Id.* at 1041-42.
88. *Id.* at 1042.
89. *Id.* at 1043.
90. *Id.* at 1044 (emphasis added).
91. *Id.* at 1044 n.5 (emphasis added).
92. *Id.* at 1046-47.

C. Warrantless Searches and Seizures

In *Carroll v. United States*, the United States Supreme Court held that, in a case involving the illegal transportation of "intoxicating liquor," a warrantless search of a vehicle did not violate the Fourth Amendment.[93] The Court found that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of the individual citizens."[94] Attempting to determine the original intent of the drafters of the Fourth Amendment, the Supreme Court analyzed statutes passed by the First Congress involving the "necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel," as well as subsequent statutes passed by Congress.[95] The Court determined that the original understanding of the Fourth Amendment, as applied to the facts of the case, allowed for a police officer to stop and search a vehicle without a warrant if the police officer had probable cause to do so.[96] The Court further defined probable cause as "'[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient'"[97] and that "'good faith is not enough to constitute probable cause.'"[98] The Court affirmed the defendants' convictions on the grounds that the search and seizure that led to the defendants' arrest and conviction were reasonable, despite the fact that the search was conducted without a warrant because in light of the facts and cited authority "the officers here had justification for the search and seizure."[99]

Following *Carroll*, the Supreme Court continued to carve out exceptions to the Fourth Amendment's text, holding that a warrant need not always issue prior to conducting a search or seizure. In *Terry v. Ohio*, a police officer observed Terry and two other men outside of a store acting suspiciously, based on their repeated activity of peering into a store window and then walking off to confer with one another.[100] The police officer stopped Terry and patted

93. 267 U.S. 132, 162 (1925).

94. *Id.* at 149.

95. *Id.* at 150-56.

96. *Id.* at 156.

97. *Id.* at 161 (quoting Stacey v. Emery, 97 U.S. 642, 645 (1878)). The Court further defined probable cause as "'a reasonable ground for belief of guilt,'" *id.* (quoting McCarthy v. De Armit, 99 Pa. 63 (1881)), and that probable cause "'must be grounded on facts within knowledge of the . . . agent, which in the judgment of the court would make his faith reasonable.'" *Id.* at 161-62 (quoting Dir. Gen. of R.R.s v. Kastenbaum, 263 U.S. 25, 28 (1923)).

98. *Id.* at 161 (quoting *Kastenbaum*, 263 U.S. at 28).

99. *Id.* at 162.

100. 392 U.S. 1, 5-7 (1968).

him down to discover that Terry was carrying a pistol under his overcoat.[101] As a result, defendant Terry was arrested for unlawfully carrying a concealed weapon.[102] Terry argued for the suppression of the evidence of the pistol, because the police officer's search of Terry's person was unreasonable. The Supreme Court found that the pistol discovered during the warrantless search and seizure was admissible evidence in support of criminal charges against Terry.[103]

Relying heavily on a policy argument, the Supreme Court held that in most circumstances "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure;" however, under exigent circumstances a warrant is not required for a police officer to conduct a search.[104] Examining the facts of the case, the Court determined that probable cause to make an arrest was not present when the police officer approached Terry.[105] However, the officer's search did serve a "legitimate investigative function" and, because it was reasonable, though done without a warrant, the search passed the Fourth Amendment prohibition of unreasonable searches.[106] Balancing the government's interest in allowing law enforcement officers to protect themselves and others nearby against the individual liberty interest to be free from unreasonable searches, the Court held that a police officer could search an individual "regardless of whether he has probable cause to arrest the individual for a crime."[107] In effect, the *Terry* Court lowered the *Carroll* standard requiring probable cause to conduct a warrantless search[108] to a new standard that a police officer need only have a degree of reasonableness in conducting a limited search without a warrant.[109]

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101. *Id.* at 6-7.

102. *Id.*

103. *Id.* at 30. The search and seizure conducted by the police officer in *Terry* has come to be known as a *Terry* stop.

104. *Id.* at 20.

105. *Id.* at 22-24.

106. *Id.*

107. *Id.* at 27.

108. *See* Carroll v. United States, 267 U.S. 132, 156 (1925).

109. *Terry*, 392 U.S. at 30-31. The Court applied *Carroll* to set the objective standard for a warrantless search by a police officer to be based on a question: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22 (quoting *Carroll*, 267 U.S. at 162). The Court created a standard of reasonable suspicion on which "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22. The Court more clearly lays out the standard of reasonable suspicion to support a reasonable search and seizure under the Fourth Amendment in its final holding:

> We merely hold today that where a police officer observes unusual conduct which leads him *reasonably to conclude* in light of his experience that criminal activity may be afoot and that the persons with whom he is

Four years later, in *Adams v. Williams*, the Supreme Court expanded and reaffirmed *Terry* when the constitutionality of a police officer's actions was questioned once again. The officer, acting on a tip from an informant that the appellant was in possession of a gun and drugs, approached the appellant and removed a revolver from the appellant's waistband. The officer then searched the appellant's vehicle and found "substantial quantities of heroin."[110] The Court stated that "'a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating . . . criminal behavior even thoughthere [sic] is no probable cause to make an arrest.'"[111] The Court further found that, instead of a police officer simply having to "shrug his shoulders and allow a crime to occur," the officer could "adopt an intermediate response" and make a limited search of an individual pursuant to the state's interest in allowing the officer to protect himself in the course of his investigation.[112] The Court held that the "intermediate response" allowed for a warrantless search of an individual in certain circumstances and that the evidence gathered in such a search was admissible in court.[113] In essence, the Court's decision further expanded *Terry*'s reasonable suspicion standard by allowing a police officer to rely on informants' tips in conducting a warrantless search under reasonable suspicion, instead of only relying on the police officer's personal observations, as a close reading of the *Terry* holding might imply.[114]

In *United States v. Brignoni-Ponce*, a case involving the search and seizure of illegal aliens near the United States-Mexico border in California, the Supreme Court further expanded the doctrine of reasonable suspicion to conduct warrantless searches under *Terry* and *Adams*.[115] The Court held "that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime."[116] Relying on "the govern-

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> dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 30-31 (emphasis added).

110. 407 U.S. 143, 144-47 (1972).

111. *Id.* at 145 (quoting *Terry*, 392 U.S. at 22).

112. *Id.* at 145-46.

113. *Id.* at 148-49.

114. *See id.* at 147; *see also Terry*, 392 U.S. at 30-31.

115. 422 U.S. 873, 874-75, 881-82 (1975).

116. *Id.* at 881.

mental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives," the Court found that a border patrol officer could stop a vehicle if his or her "observations lead him to reasonably . . . suspect" a vehicle is carrying illegal aliens.[117] The Court also provided a non-exhaustive list of factors that an officer could consider in making a reasonable determination to include his previous experience, adding further elements of subjectivity to the *Terry* doctrine. However, the Court held that Mexican ancestry alone could not be a valid reason for such a stop and affirmed the Ninth Circuit's suppression of evidence gathered in the search and seizure of the defendants and their vehicle due to the unreasonableness of the initial stop.[118]

D. "Special Needs" Doctrine and Warrantless Searches

In a recent line of cases, the Supreme Court further expanded the scope of a *Terry* stop, where, in certain limited circumstances, the "special needs" of the situation allowed for simple reasonableness to conduct a search, setting a standard well short of probable cause. In *T.L.O. v. New Jersey*, a 14-year-old student at a public school was caught smoking by a teacher and was taken to the principal's office where, after the student denied smoking, a search of the student's purse was conducted. The vice-principal found marijuana, drug paraphernalia, money, and a list of names who owed T.L.O. money.[119] The juvenile argued for the suppression of the items found in her purse as being the fruits of an unlawful search.[120] The Supreme Court held that the Fourth Amendment was applicable to "searches conducted by school authorities."[121] However, due to the special setting of a school, "some easing of the restrictions to which searches by public authorities are ordinarily subject," is required and that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[122] The Court further stated that "[o]rdinarily, a search- even one that may permissibly be carried out without a warrant - must be based upon 'probable cause' to believe that a violation of the law has occurred;" however, in a school setting some modification of the rule must be made.[123] Applying the *Terry* test of reasonableness, the Court said the determination of reasonableness must first "consider 'whether the . . . action was justified at its inception' . . . second, one must determine whether the search as actually conducted 'was reasonably related in scope to the cir-

117. *Id.*
118. *Id.* at 884-87.
119. 469 U.S. 325, 328 (1985).
120. *Id.* at 329.
121. *Id.* at 337.
122. *Id.* at 340.
123. *Id.*

cumstances which justified the interference in the first place.'"[124] The Court held that the vice-principal's search of T.L.O.'s purse was reasonable based on the *Terry* test, and, thus, "the evidence of marihuana dealing" was admissible.[125]

The Supreme Court again applied the *Terry* test, as elaborated in *T.L.O.*, in *United States v. Montoya de Hernandez*, which involved a drug-smuggler trying to bring drugs into the United States in her alimentary canal.[126] In *Montoya de Hernandez*, the Supreme Court found another special circumstance in which conducting a search and seizure based on a lower standard than probable cause was permissible, stating "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border."[127] The Court still commanded that a search and seizure be reasonable but only as judged "upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."[128] The Court held that a "reasonable suspicion" standard applied to "the detention of a traveler at the border" for cases involving a reasonable suspicion of "smuggling contraband in [one's] alimentary canal," and that the customs agents in this case appropriately applied such a standard in detaining the appellant.[129]

Following *Montoya de Hernandez*, the Supreme Court again discussed the concept of warrantless searches based on "special needs" and how the issuance of a warrant "pursuant to a regulatory scheme need not adhere to the usual . . . probable-cause requirements."[130] In *Griffin v. Wisconsin*, the appellant, while on probation, was in possession of a handgun, thereby violating a Wisconsin statute forbidding felons on probation from possessing a firearm.[131] A handgun was found by a probation officer who conducted a warrantless search of Griffin's home pursuant to another Wisconsin regulation that made "it a violation of the terms of probation to refuse to consent to a home search."[132] The United States Supreme Court held that the warrantless search of Griffin's home "did not violate the Fourth Amendment" because "[a] State's . . . probation system, like its operation of a school . . . or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."[133]

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124. *Id.* at 341 (alteration in original) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

125. *Id.* at 347-48.

126. 473 U.S. 531, 542 (1985).

127. *Id.* at 538.

128. *Id.* at 537 (citing *T.L.O.*, 469 U.S. at 337-42).

129. *Id.* at 541, 544.

130. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

131. *Id.* at 871-72.

132. *Id.* at 870-71.

133. *Id.* at 872-74.

Justice Blackmun dissented, arguing for the creation of a new standard on which a warrant might be issued - that of reasonableness.[134] The majority rejected Justice Blackmun's proposition, noting that such a warrant is not supported by the text of the Constitution or by any other prior decision.[135] Further, the majority maintained that "'[i]f a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue.'"[136] In a footnote, the Court noted that "[i]n the administrative search context" the probable cause necessary to support the issuing of a warrant "[refers] not to a quantum of evidence, but merely to a requirement of reasonableness."[137] However, the Court also pointed out that in other "special needs" contexts, the Court applies a standard that looks to the quantum of evidence and only in special needs circumstances is "a lesser quantum such as 'reasonable suspicion'" permitted.[138]

E. Administrative Warrants and a Less Than Probable Cause Standard

Contrary to the Supreme Court's statement in *Griffin* regarding the issuing of warrants on less than probable cause,[139] the issuing of warrants with less than traditional probable cause supporting them, has been upheld by the Supreme Court in certain limited circumstances.[140] In *Camara v. Municipal Court of San Francisco*, the Supreme Court established a new standard under which certain warrants may be issued.[141] Camara refused to allow the entry of city employees attempting to conduct a building inspection into his apartment unless the employees had a warrant to enter his home.[142] The City charged Camara with violating a municipal ordinance that required him to allow entry to city employees carrying out routine maintenance and inspections.[143] The Court held that the city inspectors were required to have a warrant prior to gaining entry to Camara's apartment, because administrative searches such as the one here "are significant intrusions upon the interests protected by the Fourth Amendment."[144] However, the Court stated that "[w]here considerations of health and safety are involved, the facts that would

134. *Id.* at 881 (Blackmun, J., dissenting).
135. *Id.* at 877 (majority opinion).
136. *Id.* at 878 (quoting Frank v. Maryland, 359 U.S. 360, 373 (1959)).
137. *Id.* at 877 n.4.
138. *Id.* at 878-79.
139. *Id.* at 877.
140. *See generally* United States v. Lucas, 499 F.3d 769, 776-77 (8th Cir. 2007) (collecting cases supporting the issuing of administrative warrants).
141. 387 U.S. 523 (1967).
142. *Id.* at 525-26.
143. *Id.* at 526.
144. *Id.* at 534.

justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken."[145] Thus, the Court shifted the traditional probable cause standard necessary for the issuance of a warrant to that of a lesser quantum in the case of limited circumstances such as for purposes of routine entry of building inspectors.[146] The Court further held that "[t]he test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search," and that "specific knowledge . . . of the particular dwelling" is not necessary, only that the warrant support a search based on such standards as "the passage of time, the nature of the building . . . or the condition of the entire area."[147]

Further elaborating on the Supreme Court's conception of warrants issued on less than probable cause, the Court in *Marshall v. Barlow's, Inc.* determined that, in the case of an Occupational Safety and Health Administration (OSHA) inspector trying to gain access to an employer's facility for the purposes of ensuring relevant regulations were being satisfied, "[p]robable cause in the criminal law sense is not required."[148] The Court applied the *Camara* standard of probable cause where "the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"[149] Here, the Court again allowed for a reduced level of probable cause in the issuance of a warrant in limited administrative circumstances. The Court held, as it did in *Camara*, that the statute authorizing an inspection "without [a] warrant or its equivalent" is unconstitutional.[150]

Despite the varying principles and doctrines encompassed by the Fourth Amendment, such as probable cause, the sanctity of the home, use of technology not in common usage, warrantless searches and *Terry* stops, the special needs doctrine, and administrative warrants, the Eighth Circuit has attempted to aggregate all of these doctrines to support their holding in *Kattaria.*

145. *Id.* at 538.
146. *Id.*
147. *Id.*
148. 436 U.S. 307, 309, 320 (1978).
149. *Id.* at 320-21 (alteration in original) (citing *Camara*, 387 U.S. at 538).
150. *Id.* at 325.

IV. INSTANT DECISION[151]

The Eighth Circuit, affirming the lower courts' issuance of a warrant to conduct a thermal imaging scan of Kattaria's home as well as the warrants authorizing physical searches of Kattaria's properties that were based on the findings of the thermal imaging scan, held that the thermal imaging warrant did not require probable cause.[152] Instead of applying the traditional standard under which a search warrant may issue, the Eighth Circuit held that a lower standard of reasonableness was all that was required in order to support the thermal imaging warrant and thereby also validated the three warrants for physical searches of Kattaria's properties that were based in part on the findings of the thermal imaging scan.[153] Also, regarding the validity of the warrants, the Court held that, in the alternative, "Perry's supporting affidavit provided probable cause to issue the initial thermal imaging warrant[, and] [t]he affidavits supporting the three later warrants, which included the thermal imaging results . . . likewise provided sufficient probable cause to issue warrants."[154]

The Eighth Circuit began its analysis of Mohammed Kattaria's appeal by considering Kattaria's claim that the warrants issued by the district court were invalid due to the absence of probable cause traditionally necessary for a court to issue a search warrant.[155] The Eighth Circuit attacked this issue on appeal on two grounds. First, the Eighth Circuit broke down Kattaria's argument against all four warrants to the crux of the issue: whether the first warrant authorizing a nighttime thermal imaging scan of Kattaria's home was valid.[156] Denying Kattaria's assumption that traditional probable cause must support a thermal imaging search warrant, the Eighth Circuit established a different rule.

The Court initially noted that the baseline rule is set out in *United States v. Kyllo* "that a warrant is required before conducting" an aerial thermal im-

151. The Eighth Circuit also affirmed the district court's denial of Kattaria's motion for a *Franks* hearing, because he did not timely raise the issue on appeal and determined that the district court did not abuse its discretion in sentencing Kattaria. United States v. Kattaria, 503 F.3d 703, 708 (8th Cir. 2007), *reh'g granted and opinion vacated*, 519 F.3d 730 (8th Cir. 2007). However, these portions of the Eighth Circuit's decision as well as the court's analysis of these issues are beyond the scope of this case note, as the relevant material to the discussion herein is only the court's analysis and instant decision regarding their findings on the warrants issued to search Kattaria's homes.

152. *Kattaria*, 503 F.3d at 709.

153. *Id.* at 706-08.

154. *Id.* at 707-08.

155. *Id.* at 705.

156. *Id.*

aging search.[157] However, the Court pointed out that the Supreme Court never explicitly stated "what showing is constitutionally required to obtain a warrant to conduct a thermal imaging search."[158] The Eighth Circuit relied on the Supreme Court's decisions that permitted warrantless searches and the doctrine that a warrant may issue without supporting probable cause, as long as reasonableness is balanced between "governmental and private interests."[159] The Eighth Circuit also found that "'in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime,'" thereby allowing the Court to shift the traditional analysis of probable cause for warrants to one of reasonableness based on the factors stated in *Brignoni-Ponce*, primarily the "practical alternatives" factor.[160]

The Court then shifted its focus to the issue of "the quantum of evidence required to obtain a warrant *solely for the purpose of conducting investigative thermal imaging*."[161] The Court argued that Perry was simply conducting an investigatory search in order to confirm "the probable presence of an indoor grow operation" prior to actually subjecting Kattaria to a "*full physical search*."[162] To the Eighth Circuit, this sequence of investigative techniques was "constitutionally reasonable," and the Court rested its holding that a warrant for a thermal imaging search need not be supported by probable cause on a public policy argument, stating "[i]f the same probable cause is required to obtain both kinds of warrants, law enforcement will have little incentive to incur the expense of a minimally intrusive thermal imaging search before conducting a highly intrusive physical search."[163] The Court held that "the same . . . reasonable suspicion standard that applies to *Terry* investigative stops should apply to the issuance of a purely investigative warrant to conduct a limited thermal imaging search" of a home.[164]

Alternatively, the Court also held that there was sufficient evidence to support the lower court's issuance of the thermal imaging warrant.[165] Though the Eighth Circuit admitted that the cooperating defendant's (CD) statement about grow operations being conducted in the house two years prior to the

157. *Id.* (citing Kyllo v. United States, 533 U.S. 27, 40 (2001) ("'[W]hen the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.'")).

158. *Id.* at 706.

159. *Id.* (quoting New Jersey v. T.L.O, 469 U.S. 325, 340-41 (1985)).

160. *Id.* (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)). The factors for determining if probable cause exists are "the importance of the governmental interests at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives." *Brignoni-Ponce*, 422 U.S. at 881.

161. *Kattaria*, 503 F.3d at 707.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

affidavit submission was stale, the evidence of Kattaria's criminal background, as well as the increased power consumption of Kattaria's home, provided enough supporting evidence of the CD's statement to support a finding of probable cause to issue a warrant.[166] The Eighth Circuit applied the standard of review as established in *Illinois v. Gates*, where a reviewing court "'is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.'"[167] The Court found that Officer Perry's initial affidavit "provided probable cause to issue the . . . thermal imaging warrant" and that the subsequent warrants authorizing a physical search of Kattaria's properties based on Perry's initial affidavit and the thermal imaging findings were likewise sufficiently supported by probable cause.[168]

V. COMMENT

The Eighth Circuit's holding in *Kattaria* misconstrued the United States Supreme Court's holding in *Kyllo*. By holding that probable cause is not the standard to be used when issuing warrants authorizing law enforcement officials to use thermal imaging devices to conduct searches of private homes, the Eighth Circuit created a wholly new standard on which warrants are issued that is not supported by either the text of the Constitution nor by previous decisions.

In *Kyllo*, the Supreme Court applied the *Katz* test to determine that the warrantless use of a thermal imaging device on a private home was a search.[169] The Supreme Court also set forth the rule that for a police officer to conduct searches of a home with technology not in use by the general public, a warrant is required to authorize such a search.[170] Though the Eighth Circuit is correct in arguing that the Supreme Court did not expressly state the standard on which a warrant for the use of a thermal imaging device is to issue,[171] the normal rule for any search that requires a warrant is the traditional probable cause standard.[172]

166. The Eighth Circuit stated, "'[t]he passage of time is less significant when where there is cause to suspect continuing criminal activity . . . . [W]here recent information corroborates otherwise stale information, probable cause may be found.'" *Id.* (alteration in original) (quoting United States v. Ozar, 50 F.3d 1440, 1446 (8th Cir. 1995)). The Court also noted that though the admission of the electrical power consumption was challenged by Kattaria as a violation of state law, the Court refused to consider it due to Kattaria not timely raising the issue since it was raised first in his reply brief to the Court and was not objected to earlier. *Id.* at 705 n.3.

167. *Id.* at 707 (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

168. *Id.* at 707-08.

169. Kyllo v. United States, 533 U.S. 27, 34 (2001).

170. *Id.* at 40.

171. *See Kattaria*, 503 F.3d at 706.

172. United States v. Huggins, 299 F.3d 1039, 1044 n.4 (9th Cir. 2002).

In *Kattaria*, the Eighth Circuit cited *Lucas* to support its holding that a lesser quantum than probable cause was sufficient to issue a thermal imaging search warrant.[173] However, the Supreme Court stated in *Camara* and in later discussions regarding the doctrine of administrative warrants, that the administrative probable cause standard may only be applied "[w]here considerations of health and safety are involved, [and] the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken."[174]

The Supreme Court also indicated in *Griffin* that only in unique circumstances, such as in the case of industry or building inspection programs, where the legislature has spoken and created a special regulatory scheme is the level of probable cause necessary to issue a warrant less than that traditionally applied.[175] Justice Scalia, speaking for the majority in *Griffin,* expressly rejected Justice Blackmun's contention that an administrative warrant could issue based on the facts of the case.[176] For the majority in *Griffin*, the Court had a choice - either the Court could find that the search did not require a warrant due to the special needs of the State in managing and supervising their criminal probation system, which would only require a high degree of reasonableness in order to conduct the search, or, if the Court found that this was a search that required a warrant prior to being conducted, then such a warrant must be based on the traditional probable cause standard.[177]

The *Griffin* majority even went so far as to recognize that the Court had carved out an exception for administrative warrants, as in the case of *Camara*; however, the Supreme Court rejected this exception when dealing with criminal investigations.[178] Unlike the Eighth Circuit's holding in *Kattaria*, the probable cause needed to issue a warrant for a criminal investigation can only be understood to be the traditional definition where "only a probability or substantial chance of criminal activity, not an actual showing of activity" be shown and that there is a "fair probability" that the search will uncover evidence of wrongdoing.[179]

Unlike any of the facts of *Griffin* or *Camara*, the police in *Kattaria* were clearly conducting a criminal investigation, as Special Agent Perry suspected Kattaria of growing marijuana in violation of federal criminal statutes based on an informant's tip, utility records, and Kattaria's past drug related arrests

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173. *Kattaria*, 503 F.3d at 706 (citing United States v. Lucas, 499 F.3d 769, 776-77 (gathering Supreme Court and Eighth Circuit decisions regarding administrative warrants)).

174. Camara v. Mun. Court of San Francisco, 387 U.S. 523, 538 (1967); *see also* Griffin v. Wisconsin, 483 U.S. 868 (1987).

175. *Griffin*, 483 U.S. at 873.

176. *Id.* at 877-78.

177. *See id.*

178. *Id.*

179. Illinois v. Gates, 462 U.S. 213, 238, 245 n.13 (1983).

and convictions.[180] As a result, the traditional understanding of probable cause was the proper standard which the Eighth Circuit should have applied in determining if the thermal imaging search warrant was valid.

The Eighth Circuit in *Kattaria* correctly stated that in other circumstances, especially in the line of cases following *Terry* and in the creation of the "special needs" doctrine, the Supreme Court has allowed a standard less than traditional probable cause for a reasonable search to be conducted.[181] The Eighth Circuit even went so far as to attempt to equate their new standard for issuing criminal investigatory thermal imaging search warrants to a *Terry* stop.[182] However, both the *Terry* and "special needs" lines of cases were found not to require a warrant and so the Fourth Amendment command that "no Warrants shall issue, but upon probable cause" was not violated in these cases, because the search need only be reasonable, again meeting the plain language of the Amendment.[183] However, as a result of the Supreme Court's holding in *Kyllo*, a warrant must issue prior to the execution of a thermal imaging scan of a home by police,[184] making *Terry* and the "special needs doctrine" inapplicable to the case at bar.

The Eighth Circuit, by allowing the issuance of a search warrant supported by less than what is traditionally considered probable cause, also flatly ignored the Supreme Court's line of cases that held the home to be the "prototypical . . . area of protected privacy"[185] requiring the fullest protections of the Fourth Amendment. The Supreme Court's silence in *Kyllo* regarding an appropriate quantum of evidence necessary to support a thermal imaging search of a home was not an invitation to the lower courts to create their own standards. Instead, this omission likely resulted because the Supreme Court has traditionally held that the home was afforded the Fourth Amendment's fullest protections.[186] The Supreme Court has expressed this principle of the sanctity of the home in that "'[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'" and that "'[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured

180. United States v. Kattaria, 503 F.3d 703, 704-05 (8th Cir. 2007), *reh'g granted and opinion vacated*, 519 F.3d 730 (8th Cir. 2007).

181. *See generally* New Jersey v. T.L.O, 469 U.S. 325 (1985); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

182. *Kattaria*, 503 F.3d at 707.

183. *See Griffin*, 483 U.S. at 875-76.

184. United States v. Kyllo, 533 U.S. 27, 40 (2001).

185. *Id.* at 34; *see also* Payton v. New York, 445 U.S. 573 (1980); Silverman v. United States, 365 U.S. 505 (1961).

186. *See generally Kyllo*, 533 U.S. 27; *Payton*, 445 U.S. 573; *Silverman*, 365 U.S. 505.

by the Fourth Amendment.'"[187] The Court has time and again reaffirmed that "the Fourth Amendment has drawn a firm line at the entrance of the house," wherein "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"[188] Had the Supreme Court in *Kyllo* intended to change the probable cause standard regarding the basis on which a magistrate or judge may issue a search warrant to one of "reasonable suspicion" then it would have done so. However, the Supreme Court did not, and the Eighth Circuit is mistaken in its interpretation of *Kyllo* and in its attempts to shoehorn *Kattaria* into *Terry* and administrative warrants.

In *Kattaria,* the Eighth Circuit truly rests its hat on a public policy argument. The Eighth Circuit attempts to apply the factors listed in *Brignoni-Ponce*, specifically the "practical alternatives" factor, and the Court even cites to the dissent in *Kyllo*, seemingly arguing that the dissent was right and the majority was wrong, rejecting the majority's bright-line test based on general public usage of a device and the requirement for a thermal imaging warrant.[189] The Court even goes so far as to state that "[i]f the same probable cause is required to obtain both kinds of warrants, [thermal imaging and physical search,] law enforcement will have little incentive to incur the expense of a . . . thermal imaging search before conducting a . . . physical search," thereby wiling away Fourth Amendment rights for the sake of minimizing financial burdens on law enforcement and the State.[190]

The Eighth Circuit's "practical alternatives" reasoning questions the point of allowing thermal imaging scans to be used only when there is sufficient evidence to support a finding of probable cause, which would be the same amount of evidence required for a warrant to conduct a physical search.[191] However, the answer to this question already lies in *Kyllo*, in that the Supreme Court had this realization of a lesser degree of intrusiveness made possible by new technologies. The Court refused to adopt a new understanding of searches and limited the use of technology to discover no more than what "would previously have been unknowable without physical intrusion" unless a warrant was issued in support of a more invasive search.[192] The Court determined that the personal liberty interest in one's subjective expectation of privacy in their home trumped the State's interest in using thermal imaging devices without a warrant. This determination, based on the *Kyllo* Court's strong emphasis on the home and its sacrosanct reverence for

187. *Payton*, 445 U.S. at 587 (quoting *Silverman*, 365 U.S. at 511; Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970)).

188. *Id.* at 590, 585 (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972)); *see also Kyllo*, 533 U.S. 27; *Silverman*, 365 U.S. 505.

189. United States v. Kattaria, 503 F.3d 703, 706-07 (8th Cir. 2007), *reh'g granted and opinion vacated*, 519 F.3d 730 (8th Cir. 2007).

190. *Id.* at 707.

191. *Id.*

192. *Kyllo*, 533 U.S. at 40.

the Fourth Amendment protections afforded to an individual in their home,[193] implied a requirement of traditional probable cause prior to the issuing of a thermal imaging warrant. But the Eighth Circuit has rejected the *Kyllo* majority's underlying reasoning and has created a new standard for warrants allowing for the use of technology to peer into people's homes.

This new standard on which warrants may issue gives rise to numerous problems, one of which is how the district courts are expected to apply such a standard. If a magistrate or district court need not have probable cause before issuing a warrant for a technique deemed as invasive as a traditional physical search by the Supreme Court, then what standard are the lower courts expected to apply? A simple reading of the Eighth Circuit's decision and their reliance on the *Terry* doctrine, as well as its progeny in the "special needs" doctrine, indicates that there need only be a "reasonable suspicion" before a warrant may issue to allow the police to look in on one's home.[194] Such a curtailment of Fourth Amendment guarantees is much broader than one would suspect at first glance.

The effect of the Eighth Circuit's decision encompasses more than just the application of thermal imaging devices, because the decision is the Eighth Circuit's interpretation of *Kyllo*, which did not only apply to thermal imaging devices, but to all advanced technologies "not in general public use, [used] to explore details of the home that would previously have been unknowable without physical intrusion."[195] This means that technologies, such as radar flashlights, through-the-wall imaging and magnetic resonance devices which are in development and even in use[196] may be utilized by law enforcement officers to invade the "subjective expectation of privacy that society recognizes as reasonable"[197] on grounds less than that of probable cause. Accordingly, the only standard which need now be applied by law enforcement in

193. *See id.* at 31, 40. The Court reaffirmed the high place the home has in Fourth Amendment jurisprudence in its recitation and reference to the principles voiced in *Silverman*, 365 U.S. 505, and *Payton v. New York*, 445 U.S. 573 (1980).

194. The *Kattaria* decision extrapolates its reasoning from the line of cases in the tradition of *Terry*, *T.L.O*, and *Camara*, all of which apply a lesser quantum of reasonableness than probable cause needed to conduct a search or issue a warrant. This quantum was described as merely one of "reasonable suspicion." United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).

195. *Kyllo*, 533 U.S. at 40.

196. *See* Allen Hunt, Chris Tillery, & Norbert Wild, *Through-the-Wall Surveillance Technologies*, CORRECTIONS TODAY, July 2001, *available at* http://www.ncjrs.gov/pdffiles1/nij/07_01.pdf; National Law Enforcement and Corrections Technology Center, National Institute of Justice, Justice Technology Information Network, Department of Justice Virtual Library, http://www.nlectc.org/virlib/TopicList.asp?intTopicID=39 (last visited June 21, 2008); Office of Law Enforcement Standards, National Institute of Standards and Technology, Detection, Inspection, and Enforcement Technologies, www.eeel.nist.gov/oles/detection.html (last visited June 21, 2008).

197. *Kyllo*, 533 U.S. at 33.

acquiring a warrant that authorizes the use of advanced technology to invade the home appears to be something similar to "reasonable suspicion."[198] The frightening consideration is that these more advanced technologies provide a much clearer picture of the intimate details of a home than does the simple thermal imaging device used in *Kattaria*, which could only determine which side of a house is hotter than another. This expansion of searches into the intimate details of citizens' lives seems directly contrary to the Supreme Court's intent in creating the limitations on thermal imaging searches of private homes in *Kyllo*. Had the Supreme Court intended otherwise, it would have held that use of a thermal imaging device did not require a warrant and in such a case it would really be like a *Terry* stop, wherein all that was required was a degree of reasonable suspicion, but the Supreme Court did not do this.

VI. CONCLUSION

The Eighth Circuit's decision in *Kattaria* has significantly shifted the standard by which warrants are to issue in the use of thermal imaging devices on private homes. Despite the Supreme Court's holding in *Kyllo*, the sanctity of the home as voiced in *Payton* and *Silverman*, the Court's long line of cases distinguishing "special needs" and administrative warrants from standard warrant searches, as well as a sister circuit's interpretation of *Kyllo* speaking to the contrary, the Eighth Circuit has created a completely new doctrine through mashing and conflating separate doctrines into a single concept that district courts within the Eighth Circuit must now determine how to apply. The problem goes well beyond that of simply using thermal imaging devices. Technology is ever-expanding and improving, and the instant decision, as understood beneath the rubric of *Kyllo*, allows for the issuance of a warrant to search a home with new technology on grounds less than that of probable cause as long as the search meets the policy expedient propounded by the Eighth Circuit.

Despite the Supreme Court's refusal to invade the privacy of the home beyond what physical searches in the past could do without the assistance of technology,[199] the Eighth Circuit has created a new type of warrant that requires far fewer safeguards, allowing for Fourth Amendment freedoms, protected in *Kyllo*, to be undermined. The Eighth Circuit unnecessarily created a new standard on which certain search warrants may issue, a standard contrary to what was implicit in the *Kyllo* decision and which the Ninth Circuit correctly understood to mean that "the quantum of probable cause necessary to justify a thermal imaging search does not differ from that necessary to justify a physical search."[200] Also, the Eighth Circuit may have effectively evaded

198. United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).

199. *See Kyllo*, 533 U.S. 27.

200. United States v. Huggins, 299 F.3d 1039, 1044 n.5 (9th Cir. 2002).

Supreme Court review of this case by holding, in the alternative, that sufficient probable cause supported the thermal imaging warrant, protecting the Eighth Circuit's newly established standard on which a technology-use warrant may issue. The Eighth Circuit, in their policy decision to lower the standard for allowing surveillance of our private lives, has forfeited the guarantees of the Fourth Amendment for the financial expediencies of the State.

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