

CHAPTER SEVEN
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Search & Seizure

As flight crew, you have obvious concern for your own safety and security while performing your job duties. As a passenger, you trust that the airline and the government are protecting you from criminal and terrorist harm. But, as always, competing interests are at play in deciding just what can be done legally to ensure one's safety from harm from criminal conduct and third parties. What is the threat from terrorists, from drunk pilots, from hi-jacking, from transporting of contraband? Is the threat sufficient to abridge fundamental and constitutional rights.

The Fourth Amendment of the U.S. Constitution states:

"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, and particularly describing the place to be searched, and the persons or things to be seized."

Notwhere in that amendment was mentioned anything about searches at airports or the use of flux-gate magnetometers. In 1972 President Nixon ordered that all airline passengers' luggage and carry-ons be screened for weapons, beginning by January 5, 1973. Since then, only about 20% of the airport arrests have had anything to do with airport security. Especially as to the 80% of "other" arrests, the courts have struggled with the proscriptions imposed by the 4th Amendment.

At issue in Florida v. Royer 460 U.S. 491, was an airport search of two suitcases belonging to a nervous young man who had paid cash for an airline ticket from Miami to New York City under an assumed name and who was approached by two narcotics officers who believed that the man's characteristics fit a "drug courier profile." In the course of the opinion, the high court considered whether approaching the traveler for questioning was a seizure, concluding it was not. As the court explained, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." The court pointed out, however, that a person approached by police for questioning "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." The United States Supreme Court's observation in Florida v.

Royer, that a person approached by police for questioning may decline to answer the questions and "may go on his way," does not imply that the manner in which a person avoids police contact cannot be considered by police officers in the field or by courts assessing reasonable cause for briefly detaining the person. There is an appreciable difference between declining to answer a police officer's questions during a street encounter and fleeing at the first sight of a uniformed police officer. Because the latter shows not only unwillingness to partake in questioning but also unwillingness to be observed and possibly identified, it is a much stronger indicator of consciousness of guilt.

In People v. Leichty (1988) 205 CA3d 914; 252 CR 669, for example, narcotics officers were called to an airport by a clerk who noticed a strong odor emanating from a package left by defendant for air shipment. After conducting an inconclusive field test, the officers took the package to a police laboratory where it was opened and extensive chemical tests performed on its contents, several used soda bottles filled with a yellow liquid. The tests were positive for methamphetamine. On the strength of the laboratory test results, a warrant was obtained and drugs were seized during a search of defendant's home. The Court of Appeal ordered the evidence seized in the search of defendant's home suppressed. The good faith exception to the exclusionary rule recognized in Leon, supra, 468 U.S. 897, the Court of Appeal reasoned, rested on the proposition that "[i]f exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, ... it must alter the behavior of individual law enforcement officers or the policies of their departments." Here, unlike in Leon, the law enforcement officers obtained the search warrant through exploitation of their primary illegal behavior in conducting laboratory tests on the contents of the ... bottles. Thus, imposition of the exclusionary rule will work to deter this illegal behavior, rather than punish a judicial or magisterial error."

In upholding airport screening searches, a majority of the court in Hyde applied the administrative search rationale. The concurring minority, reaching the same result, preferred a more generic balancing test of reasonableness. But, verbal formulations aside, both the majority and the concurring minority in Hyde relied upon essentially the same principles and factors. The majority noted: "Like all searches subject to the Fourth Amendment, an administrative screening must be measured against the constitutional mandate of reasonableness. In the case of administrative searches, however, 'there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.' It is ironic, therefore, that by adopting the administrative search doctrine to evaluate the validity of airport screening procedures we must undertake a similar process of balancing to that which would have followed from a reliance upon Terry v. Ohio (1968) 392 U.S. 1" The concurring minority reasoned: "It is now settled ... that there is no fixed standard of reasonableness that applies to all types of governmental action which is subject to the mandates of the Fourth Amendment. Where, as here, we deal with a type of official conduct that (1) has objectives qualitatively different from those of the conventional search and seizure in the criminal context and (2) cannot feasibly be subjected to regulation through the traditional probable cause standard of justification, we may assess the reasonableness of the particular type of search and seizure by examining and balancing the governmental interest justifying the search and the invasion which the search entails. We perceive no real inconsistency in the two analyses. They both employed a balancing test for reasonableness.

In People v. Hyde, 12 Cal.3d 158, the court considered the question of airport security screening searches. The majority in an opinion authored by Justice Mosk reasoned that airport searches could not be justified on the basis of Terry v. Ohio, 392 U.S. 1, because Terry carefully limited the permissible search to a patdown necessary to discover weapons, and because, before

even the limited patdown search could be conducted, Terry required there to be specific and articulable facts which would lead a reasonable officer to believe the safety of the officer was in danger.

"Nevertheless," the court stated, "we do find support under the Fourth Amendment for the pre-departure screening of prospective passengers in the series of United States Supreme Court decisions relating to administrative searches. These cases recognize that 'searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.'"

The Hyde court pointed out that the purpose of the airport search is not to ferret out contraband or preserve for trial evidence of criminal activity, although the mechanics of the search itself take the form of a search to detect criminal activity (Ingersoll v. Palmer (1987) 43 C3d 1321, p. 1331; carrying weapons or explosives aboard an aircraft). Rather, it characterized the search as "a central phase of a comprehensive regulatory program designed to insure that dangerous weapons will not be carried onto an airplane and to deter potential hijackers from attempting to board. In the reasonableness analysis under the Fourth Amendment, the court found the governmental interest substantial, the intrusion minimal, and the method effective for its purpose (in fact, it found in that case that there was no other effective means of achieving the purpose). The court pointed out it was possible for a traveler to avoid the intrusion by either checking his or her hand luggage or foregoing air travel and opting for alternate means of transportation. Finally, the court pointed out that airport searches were singularly unsuited to the warrant procedure because of the extremely high volume of air passenger traffic, rendering it impractical if not impossible to issue a warrant for any individual passenger. In addition, the consequences of not having a warrant were found mitigated by (1) neutral application of the screening process to all air passengers, minimizing the discretion of the officials in the field, and (2) limiting the intrusiveness of the search to those actions strictly necessary to disclose the presence of weapons or explosives.

The three concurring justices in Hyde agreed that the airport screening procedures were constitutionally permissible but questioned whether the airport search could properly be labeled an "administrative search" like a building inspection. In the view of the concurring justices in Hyde, the Fourth Amendment considerations should simply be evaluated pursuant to a balancing test of reasonableness, consisting of an assessment of the governmental interest justifying the search and the intrusiveness entailed in the search. The concurring minority had no difficulty in concluding the governmental interest was compelling and the intrusion resulting from the search was minimal. Thus, airport searches were concluded to be reasonable. No warrant was required because compliance with the warrant procedure, as the majority had also pointed out, would completely frustrate the legitimate governmental purpose.

A prospective passenger may avoid the entire screening procedure by forfeiting the opportunity to travel by airplane; but he no longer has this election after a magnetometer has been set off and a pat-down search has begun. (Morad v. Superior Court (1975) 44 C.A.3d 436; 118 C.R. 519.) There is no requirement that airport marshals specifically advise passengers that they may withdraw from the boarding area rather than submit to a search. (People v. Bleile (1975) 44 C.A.3d 280; 118 C.R. 556.)

Accordingly, People v. Dooley, 64 C.A.3d 509, 512, examines the situation where a bomb threat brings into operation the FAA requirement that all luggage be removed and subjected to a limited search for explosives. The court, reviewing late federal cases, concluded that the requirement was valid, and that the passenger has no constitutional right to retrieve the

luggage without inspection by electing not to continue with the flight.

In People v. Mayberry (1982) 31 C3d 335, 182 CR 617 the court stated: "From the foregoing, we conclude that, at least within the context of an airport luggage search, passengers (and others transporting narcotics) have no reasonable expectation of privacy which would preclude the use of sniffer dogs such as Corky even when there is an absence of prior specific suspicion that narcotics are present."

Drug Courier Profiles

The use of FBI and DEA drug courier profiles is generally permitted provided that the profile is "non-discriminatory" on its face. (i.e., "all Columbians", for example, would be discriminatory). However, these profiles are not public information, and, as noted by Justice Marshall, vary from case to case including the following factors: first to deplane, last to deplane, deplaned in the middle; one-way ticket, round-trip ticket, non-stop flight, changed planes; no luggage, gym bag, new suitcase; traveling alone, traveling with a companion; acted nervously, acted too calmly.

Border Searches

Airports of entry are not unlike crossing the national border. The executive branch of the government, exercised through the Customs Dept., has employed the use of searches of persons and their belongings who seek to enter into this country. Justification for such has been stated on the basis of protecting citizens from health hazards, entry of contraband, collection of import duties and taxes, and protection from terrorist or armed threats from abroad.

Drug Testing

Drug testing of aviation personnel has resulted in only a .5% positive rate. Does such a result justify the intrusion on personnel privacy and the consequences that can occur from the test results reaching the employer, insurance companies, police, or to even the individual who has diabetes, is pregnant, or has AIDS? Does the threat of detection have a deterrence effect, making aviation safer than without drug testing?

In the Fourth Amendment context, federal courts have upheld urinalysis testing of air traffic controllers, pilots, aviation mechanics, and flight attendants; drug counselors; Army-employed civilian police and guards (National Federation of Federal Employees v. Cheney, 884 F.2d at pp. 610_615).

Aerial Searches

If a warrant is needed to search a person's home, should the police be allowed to look within an enclosed yard by use of aircraft surveillance?

In People v. Sneed (1973) 32 C.A.3d 535, 108 C.R. 146, officers flew a helicopter back and forth across a 20-acre ranch, hovering as low as 20 feet above the ground to discover marijuana plants. The court held that the low hovering, manifestly exploratory, was an unreasonable governmental intrusion into personal privacy. The court said: "[r]easonable expectations of privacy may ascend into the airspace and claim Fourth Amendment protection."

In Dean v. Superior Court, the officers, acting on a tip, conducted an airplane search at altitudes between 300 and 700 feet, which revealed a marijuana plot half the size of a football field, with plants reaching 20 feet in height. Held, the evidence was admissible. "The contraband character of his crop doubtless arouses an internal, uncommunicated need for secrecy; the need is not exhibited, entirely subjective, highly personalized, and not consistent with the common habits of mankind in the use of agricultural and woodland areas. Aside from an uncommunicated

need to hide his clandestine activity, the occupant exhibits no reasonable expectation of privacy consistent with the common habits of persons engaged in agriculture. The aerial overflights which revealed petitioner's open marijuana field did not violate Fourth Amendment restrictions." The court added that the issue of legality of police conduct involves elements more objective than subjective: (1) the common habits of people, and (2) the needs or expectations exhibited (i.e., communicated) by the particular occupant.

In People v. Ciralo (1984) 161 C.A.3d 1081, 208 C.R. 93, a police officer, acting on a tip that defendant was growing marijuana in his backyard, went to the residence, but was prevented from seeing the backyard by two high fences completely surrounding the property. The officer then conducted an aerial surveillance of the property at 1,000 feet and observed marijuana. The California Court of Appeals ruled that the warrantless overflight was an unreasonable search. " [A] person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy regarding the activities occurring there in all circumstances.' "

The ruling was then appealed to the U.S. Supreme Court. In California v. Ciralo (1986) 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210, the Supreme Court reversed People v. Ciralo. The majority concluded that the touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy pursuant to a two-part inquiry: has the individual manifested a subjective expectation of privacy in the object of the challenged search (A: yes) , and is society willing to recognize that expectation as reasonable? As to the second question, the observations in this case took place within public navigable airspace, in a physically nonintrusive manner. It was irrelevant that the observation was directed at identifying the plants and the officers were trained to recognize marijuana, for such observation is precisely what a judicial officer needs to provide a basis for a warrant. Defendant's expectation that his garden was protected from such observation was unreasonable and was not an expectation that society is prepared to honor. "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."

U.S. 9th Circuit Court of Appeals

BLUESTEIN v. SKINNER
908 F.2d 451 (9th Cir. 1990)

Petition for Review of an Order of the Federal Aviation Administration.
Before CHAMBERS, CANBY and NORRIS, Circuit Judges.

WILLIAM A. NORRIS, Circuit Judge:

This is a petition for review of Federal Aviation Administration (FAA) regulations requiring random drug testing of flight crew members, maintenance personnel, air traffic controllers, and several other categories of employees in the private commercial aviation industry. Petitioners argue that the regulations violate the Fourth Amendment and are arbitrary and capricious in violation of 10(e) of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). We reject both of petitioners' arguments and uphold the regulations.

I. BACKGROUND

A. The Regulations

The FAA initially proposed random drug testing in an advance notice of proposed rule making. 51 Fed.Reg. 44432 (Dec. 9, 1986). After receiving over 650 written comments, the FAA issued a

notice of proposed rule making. 53 Fed.Reg. 8368 (March 14, 1988). Over 260 written comments were filed in response to this notice, and the FAA also held a series of public hearings. The final rule was issued on November 21, 1988. 53 Fed.Reg. 47024.

The FAA concluded that while drug use is not "widespread" among commercial aviation personnel and there is no "overwhelming" drug problem in the industry, nevertheless the record "does show concrete evidence of drug use in the commercial aviation sector." 53 Fed.Reg. 47029, 47030. Accordingly, the FAA decided that "[i]n order to ensure that aviation safety is not compromised by a failure to detect drug users in the aviation industry, the FAA believes that it is appropriate and necessary to establish a comprehensive anti_drug program at this time." 53 Fed. Reg. 47025.

The regulations adopted by the FAA require employee drug testing to be performed by every Part 121 and 135 certificate holder (generally, commercial air carriers, both scheduled and unscheduled, carrying passengers or cargo), as well as each air traffic control facility.² 53 Fed.Reg. 47057_58 (App. I _ definition of "employer"). The following employees must be tested: (a) flight crew members; (b) flight attendants; (c) flight instructors or ground instructors; (d) flight testing personnel; (e) aircraft dispatchers; (f) maintenance personnel; (g) aviation security or screening personnel; and (h) air traffic controllers. 53 Fed.Reg. 47058 (App. I III). Tests must be performed for marijuana, cocaine, opiates, phencyclidine (PCP) and amphetamines. Id., IV.

The regulations require testing of these employees on a random basis. Id., V.C. To eliminate any supervisory discretion in selecting the employees to be tested and to avoid "potential bias toward and selective harassment of an employee," 53 Fed.Reg. at 8375, selection of employees to be tested must be made "using a random number table or a computer_based number generator that is matched with an employee's social security number, payroll identification number, or any other alternative method approved by the FAA." 53 Fed.Reg. 47058, V.C. After the first year of testing, employers must conduct random tests at an annualized rate of not less than 50 percent of the employees performing the functions listed. Id., V.C.(c)(2).³

The procedures under which the testing is to be done are described in Procedures for Transportation Workplace Drug Testing Program, 53 Fed.Reg. 47002 (Nov. 21, 1988); see also 53 Fed.Reg. 47056_61, and closely follow the HHS drug_testing procedures for government employees set forth at 53 Fed.Reg. 11,970 (April 11, 1988). Upon arriving at the "collection site," the employee must present photographic identification or be identified by a representative of the employer, and must remove any outer garments, such as a coat or jacket. The employee may choose to provide the required urine specimen in a stall or otherwise partitioned area. The toilet water is to be tinted with a blue dye to prevent use of that water to adulterate the specimen, and a monitor of the same gender as the employee must remain in the area, but outside the stall. After receiving the specimen, the monitor must inspect it to ensure that it is of proper volume, temperature, and color. The monitor must then arrange, following specified chain_of_custody procedures, to ship the specimen to an HHS_certified drug testing laboratory.

The laboratory to which the specimen is sent must perform an immunoassay test. If the specimen tests positive, the test must be confirmed using gas chromatography/mass spectrometry techniques. If the initial positive test is confirmed, the employer's Medical Review Officer (who must be a qualified physician) determines whether there is an "alternative medical explanation" and in that connection must provide the employee with an opportunity to discuss the result and submit any medical records regarding legally prescribed medication. The employee may also demand a retest of the original specimen at the original laboratory or another HHS_certified laboratory.⁴ In addition, there is an absolute prohibition against the release of drug test results to third parties without the specific, written consent of the employee.

Employees who test positive for prohibited drugs and are unable to offer a satisfactory alternative explanation must be removed from their positions, and may not return to duty except upon the recommendation of a Medical Review Officer or the Federal Air Surgeon.

B. This Litigation

Petitioners in this case include employees engaged in various occupations within the commercial aviation industry who are subject to the FAA drug testing rules, the principal labor organizations in the industry, and an organization of aviation employees and employers. Following the FAA's issuance of the rules, timely petitions for review were filed in this Circuit, the Fifth Circuit, and the D.C. Circuit. Those petitions were then consolidated in this proceeding. We have jurisdiction under 49 U.S.C.App. 1486.

II. ANALYSIS

A. The Fourth Amendment Challenge

Petitioners' primary contention is that the drug tests required by the FAA are unreasonable searches in violation of the Fourth Amendment. Our disposition of this issue is guided by the Supreme Court's decisions in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989), and Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In Von Raab, the Court upheld a United States Customs Service requirement that employees seeking transfers or promotions to certain positions undergo urinalysis. In Skinner, the Court upheld a Federal Railroad Administration program requiring railroads to administer blood and urine tests to train workers involved in major railroad accidents, and permitting railroads to administer breath and urine tests to employees who violate certain safety rules.

Von Raab and Skinner settle some of the threshold questions in this case. First, drug testing performed by private employers under compulsion of government regulations constitutes governmental action subject to constitutional restrictions. See Skinner, 109 S.Ct. at 1411_12. Second, because "it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable," urinalysis "must be deemed [a] search [] under the Fourth Amendment." Skinner, 109 S.Ct. at 1413; accord Von Raab, 109 S.Ct. at 1390. Third, the usual Fourth Amendment requirements of a warrant and probable cause do not necessarily apply in the drug testing context. Rather, when a search "serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Von Raab, 109 S.Ct. at 1390.

In the present case it is clear that the FAA drug testing requirements serve "special needs, beyond the normal need for law enforcement" within the meaning of Von Raab. As in Von Raab, the FAA rules specify that "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent." *Id.* Moreover, just as the Customs Service testing program in Von Raab was designed "to deter drug use among those eligible for promotion to sensitive positions . . . and to prevent the promotion of drug users to those positions," *id.*, so is the FAA's program designed to deter drug use among employees in safety-sensitive positions and to prevent the performance of safety-sensitive functions by employees under the influence of narcotics. We must therefore determine the constitutionality of the FAA program by balancing the government's interests against the employees' privacy interests.

In striking this balance, we take our primary guidance from Von Raab, because we think that the random testing at issue in this case is more closely analogous to the facts of Von Raab than to those of Skinner. In Von Raab, as in this case, the testing program did not require any level of individualized suspicion or the occurrence of any suspicion-triggering event; in Skinner, on the

other hand, testing was limited to those employees involved in a train accident or safety rule violation. Accordingly, we proceed to consider whether this case can be distinguished from Von Raab in a way that would tip the balance against the constitutionality of the FAA's drug testing program.

In Von Raab, the Customs Service initiated a program of testing employees for drugs as a condition of employment in positions that met any one of three criteria: (1) direct involvement in drug interdiction or enforcement of related laws; (2) a requirement that the incumbent carry a firearm; or (3) a requirement that the incumbent handle "classified" material. See *id.* at 1388. The drug tests followed procedures quite similar to the FAA procedures at issue in this case. See *id.* at 1388_89, 1394 n. 2. A union of federal employees challenged the program as violative of the Fourth Amendment. The Supreme Court upheld the testing program as applied to the first two categories of employees listed above, and remanded as to the third category (employees handling classified information).

After concluding that the testing program invaded reasonable expectations of privacy and that the tests were motivated by special needs other than law enforcement, the Court balanced the private and governmental interests at stake, and decided that the balance justified the testing program. The Court reasoned that

[t]he Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of the Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.

Id. at 1397_98.5

In reaching this conclusion, the Court rejected the petitioners' contention that there was insufficient evidence of a drug problem in the Customs Service to justify suspicionless testing. The Court noted that drug abuse is a pervasive social problem, and stressed that the testing program was aimed as much at deterrence as at detection. "In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances," the Court wrote, "the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable." *Id.* at 1395.

The government interest in preventing drug use by persons holding safety_sensitive positions in the aviation industry is at least as compelling as the interest in preventing drug use by Customs officers. Indeed, petitioners concede that "the government has a strong interest in assuring aviation safety and that the drug_related job_impairment of any safety_sensitive aviation employee is a basis for the most serious concern." Reply Brief of Petitioners at 15_16.

Nonetheless, petitioners argue that the FAA has failed to demonstrate a sufficiently high level of drug use in the industry to justify its testing program.

In our view, the evidence relied upon by the FAA is stronger than the evidence relied upon by the Customs Service in Von Raab. In Von Raab, the Service's testing scheme was not implemented in response to any perceived drug problem among Service employees, and there was evidence that only 5 employees of 3,600 tested positive for drugs. *Id.* at 1394. As discussed earlier, the Supreme Court rejected the argument that this evidence was insufficient to establish a substantial governmental need, because of the deterrent purposes of the program and the potential for serious harm. *Id.* at 1395.

In the present case, the FAA administrative record included evidence that a number of pilots and other airline crew members had received treatment for cocaine overdoses or addiction; that tests by companies in the industry had turned up instances of drug use by pilots and mechanics; and

that drugs were present in the bodies of pilots in two airplane crashes.⁶ Moreover, the harm that can be caused by an airplane crash is surely no less than the harm that might be caused by drug impairment in the course of Customs Service employment. When viewed in this light, the need for the FAA's testing program equals, if not exceeds, that for the Customs Service program approved in *Von Raab*.

Petitioners also argue that the FAA testing program intrudes more deeply on privacy interests than the program approved in *Von Raab*.⁷ They point to the fact that the FAA provides for unannounced (i.e., immediate) testing, while the Customs Service program requires at least five days' notice; and that the FAA program is random, while the Customs Service program is only activated by certain events (i.e., applying for certain positions).

Although these factors add some weight to the "invasion of privacy" side of the Fourth Amendment balance, they are insufficient to tip the scales against the FAA drug testing program at issue here. The reasoning of the D.C. Circuit in *Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir. 1989), is instructive. In *Harmon*, the court upheld (as to some employees) a Justice Department testing plan that provided for random testing and notice "on the same day, preferably within two hours, of the scheduled testing." 878 F.2d at 486 (interior quotation omitted). The court noted:

Certainly the random nature of the OBD testing plan is a relevant consideration; and, in a particularly close case, it is possible that this factor would tip the scales. We do not believe, however, that this aspect of the program requires us to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*.

Id. at 489. This is particularly true in light of the FAA's reasonable conclusion that random testing without advance notice will prove to be a greater deterrent than testing with advance notice.⁸

Finally, petitioners argue that the FAA plan grants employers too much discretion. This argument is unpersuasive. First, the strict randomness requirements ensure that no employer will have discretion in deciding which employees should be searched. Second, employers' discretion as to how to structure their testing programs will be limited by collective bargaining and the requirement that the FAA approve the plans of individual employers.⁹

In sum, we conclude that the Fourth Amendment issue in this case cannot be meaningfully distinguished from the Fourth Amendment issue addressed by the Supreme Court in *Von Raab*. We therefore reject petitioners' constitutional challenge to the FAA drug testing program.

B. The APA Challenge

Petitioners argue that the FAA failed to offer a satisfactory explanation for its decision, and that the decision was therefore arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). See *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (agency must articulate a satisfactory explanation for its action). In particular, petitioners question the FAA's decision to reject the recommendation of the National Transportation Safety Board that the FAA rely on non-random forms of drug testing.

This argument is without merit. The FAA, contrary to petitioners' contention, explained specifically why it chose to require random testing, reasoning that there was more evidence supporting the efficacy of random testing programs than of nonrandom programs. See 53 Fed.Reg. 47034, 47035, 47048. Its decision that safety concerns outweighed privacy concerns in this context was a reasonable, if controversial, decision, and cannot be overturned as arbitrary and capricious.

Petitioners also argue that the FAA's decision to include flight attendants within the testing requirements is inconsistent with prior FAA decisions denying petitions of flight attendants to

establish safety rules limiting their on-duty time. The duty time decisions, however, do not stand for the proposition that impairment of flight attendants' performance is never a public safety consideration. Rather, the FAA concluded that, on the evidence before it, there was no correlation between flight attendant duty time and risk to passengers. We see no conflict between the duty time decisions and the inclusion of flight attendants in the drug testing program.¹⁰ Accordingly, we hold that the FAA acted within its authority in requiring random drug testing of flight attendants.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the Federal Aviation Administration.

Footnotes

[Footnote 1] See 14 C.F.R. 121.1, 135.1.

[Footnote 2] Air traffic control facilities operated by, or under contract with, the FAA or the military are excepted. 53 Fed.Reg. 47057 App. I. For the most part, controllers at these facilities are covered by other drug testing programs.

[Footnote 3] The regulations also require pre-employment testing, periodic testing at the employee's first medical examination for those employees required to take a Part 67 medical examination, post-accident testing, testing based on reasonable cause, and testing after return to duty following a positive test or a refusal to test (return to duty is authorized if the employee has completed drug rehabilitation, and the medical review officer approves his return to work). 53 Fed.Reg. 47043-44, 47058, App. I V. Petitioners do not challenge these tests.

[Footnote 4] The employee's right to demand a retest is not part of the HHS Guidelines for government agencies; it was added by DOT. 53 Fed.Reg. 47059, VI.C.

[Footnote 5] The Court found the record insufficiently clear to assess the extent of the government's interest in testing employees who handle classified material, and therefore remanded for the court of appeals "to clarify the scope of this category of employees subject to testing." Id. at 1397.

[Footnote 6] Although the FAA has made a showing of drug use by airline employees, we note that nothing in *Von Raab* requires such a showing. See *Harmon v. Thornburgh*, 878 F.2d 484, 487 (D.C. Cir. 1989) ("Nor is it necessary [under *Von Raab*] that a documented drug problem exist within the particular workplace at issue.").

[Footnote 7] The petitioners have not urged that their expectation of privacy is any less "diminished" than that of the Customs employees in *Von Raab*. We therefore assume for the purposes of our decision that this case is not distinguishable from *Von Raab* in that respect.

[Footnote 8] For other decisions upholding random drug testing in the wake of *Von Raab*, see *American Fed. of Gov't Employees v. Skimmer*, 885 F.2d 884 (D.C.Cir. 1989); *National Fed. of Federal Employees v. Cheney*, 884 F.2d 603 (D.C.Cir. 1989); *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989).

[Footnote 9] The FAA has stated that it will review the individual employer programs to ensure that discretion is in fact sufficiently limited under each plan. See 53 Fed.Reg. 47028.

[Footnote 10] Although petitioners do not directly contend in this proceeding that flight attendant positions are not safety-sensitive, it is nonetheless worth noting that the administrative record adequately supports the FAA determination that such positions are, in fact, safety-sensitive. Flight attendants must perform important safety functions in the event of emergencies, and are also routinely responsible for ensuring that luggage is safely stored and the airplane doors properly closed and locked prior to departure.

People v. Mayoff

(1986) 42 Cal.3d 1302, 729 P.2d 166; 233 Cal. Rptr. 2

We recently concluded that, unless a warrant is obtained, our state Constitution forbids intensive aerial inspection of an individual enclosed backyard based on prior suspicions that marijuana cultivation will be found within the enclosure. People v. Cook (1985) In this case, we confront a different type of police activity. Under a program designed to curb widespread commercial marijuana farming in rural and semirural areas, law enforcement officials took to the air, in fixed-wing aircraft, to identify the locations of marijuana crops being grown in open fields. Flying at elevations from which the details of human activity could not be observed, they saw indications of what they believed to be marijuana growing in a remote area. While there were signs of human habitation nearby, and the officers took photographs to show the relationship between that habitation and the growing crop, it was the crop in the open field, and not defendant's residence or curtilage, that was the principal focus of their attention. Under these circumstances we will conclude that defendant had no reasonable expectation that his land would be immune from such limited aerial surveillance, and that the surveillance was permissible under the United States and California Constitutions.

While we uphold the instant search on its facts, we recognize that a random surveillance and eradication program presents difficult constitutional and regulatory problems. Certain practices of the program operating in defendant's locale have already led to a successful class injunction suit. We invite the Legislature to participate in establishing standards which will balance the needs of law enforcement against the legitimate privacy expectations of affected citizens.

Facts

Aerial surveillance by the police revealed what they suspected were marijuana gardens growing on appellant Mayoff's land. Based on the aerial views, the police obtained a warrant for a ground search of the property. Under its authority, they seized a portion of appellant's marijuana crop. He was charged with one count of cultivation of marijuana. (Health & Saf. Code, § 11358.) He moved to set aside the information and suppress the evidence against him (Pen. Code, §§ 995, 1538.5), urging that the aerial surveillance of his property violated his constitutional rights of privacy, and against unreasonable searches and seizures. (U.S. Const., Amend. IV; Cal. Const., art. I, §§ 1, 13.) The trial court denied appellant's motions after a hearing, and he entered a plea of guilty. He was sentenced to six months in county jail and two years' probation. He now appeals, solely on the constitutional grounds rejected below.

The surveillance which led to discovery of appellant's crop was part of a program operated in several rural northern California counties where widespread commercial marijuana farming has taken root. The program is run jointly by local, state, and federal law enforcement personnel; it has been in effect in Humboldt County, where appellant resides, for approximately eight years. Fundamental to the scheme is a random pattern of warrantless flights over the entire county, focusing on rural areas. The flights are undertaken for the purpose of identifying plots of land on which it appears marijuana is being cultivated. The viewing officers note such factors as the color and spacing of plants, their relationship to nearby structures, signs of cultivation, and the location and general characteristics of the terrain under scrutiny. The vast majority of flights are made without prior information about the existence of marijuana at a particular location. The areas surveyed during a particular flight are selected almost entirely at random. "There is no exact pattern," one of the participating officers said at a preliminary hearing. "I mean, I just fly wherever I feel like flying. ... No set pattern." During each flight, the viewing officer is "looking constantly" at the ground below.

Much of Humboldt County's terrain is extremely rugged and isolated. Appellant, like roughly one-tenth of the county's rural population of about 29,000, lives in territory so remote

that it can be examined only from the air. His 40_ acre parcel is in a mountainous, wooded region, almost a mile from the nearest paved road. It cannot be seen from the road, and is connected to it by a dirt path which winds its way toward the portion of the property on which appellant resides. Only the top of one of appellant's buildings is visible from the path, which abruptly ends shortly after connecting with a turnoff to his residence. This turnoff is so rocky it is difficult to traverse without benefit of a four_ wheel_ drive vehicle.

On July 23, 1980, Agent Brown of the California Department of Justice and Detective Vulich of the Humboldt County Sheriff's Department made an antimarijuana surveillance flight from Eureka to the Garberville area in southern Humboldt County. They had no search warrant and no prior suspicion marijuana was being grown on appellant's property. From an altitude of at least 1,000 feet, one of the officers noticed what he believed to be marijuana growing on appellant's land.

Nearly two weeks later, on August 4, 1980, Detective Vulich flew again over appellant's property in order to photograph the land below. Again, it appears that an altitude between 1,000 and 2,000 feet was maintained. Vulich still had no search warrant. Apparently using an 80_200 millimeter telephoto lens, he photographed the suspicious vegetation, two trailers parked on the property, and the surrounding area. On his return to police headquarters he showed the snapshots to Agent Brown, who then executed an affidavit in support of a search warrant. On August 15, 1980, the warrant was served, and marijuana was in fact discovered on appellant's property, in two separate gardens and in one of the inhabited trailers. At least one garden was fenced, and both were surrounded by steep slopes and wilderness. There was no public vantage point on land from which the gardens or the trailers could be seen.

The aerial photographs introduced in evidence indicate that the gardens were at least 200 feet from the closest of the trailers. No fences formed a common enclosure around the trailers and the garden area.

Discussion

1. Warrantless aerial surveillance.

In California, the legality of a warrantless police intrusion into allegedly private zones of activity depends on whether the government has "unreasonably" invaded an actual expectation of privacy which society is prepared to recognize as reasonable. All parties concede that defendant sought privacy for his residence and his marijuana gardens. They were on his private property in a remote area, away from ground_ level vantage points open to the public. The gardens themselves, while not immediately adjacent to the residential structures, were carefully enclosed by fences and trees. The only issues, therefore, are whether defendant's wishes were objectively reasonable and, if so, whether the warrantless aerial observation invaded his expectations unreasonably.

Three recent cases bear on these questions but do not resolve them. The first such decision is United States v. Oliver. In two separate incidents there under review, law enforcement agents, acting without warrants or probable cause, entered remote rural private property to look for marijuana cultivation. Noting that the land inspected in each instance was some distance from any home or business, the high court found no violation of the Fourth Amendment.

The Oliver majority conceded that the Fourth Amendment provides a high degree of privacy protection to the "curtilage" of a residence — "the land immediately surrounding and associated with the home." However, it affirmed the long_ standing rule that the federal Constitution allows the authorities to inspect areas beyond the curtilage — so_ called "open fields" — at will, even where they trespass on private property which was clearly intended to be shielded from the view of outsiders.

The five majority justices concluded that open fields are not among the "persons, houses,

papers, and effects" described in the Fourth Amendment. Moreover, the Oliver majority reasoned, society is not prepared to recognize such areas as protected zones of intimate privacy, even where the individuals who seek privacy in such places have made that intention clear. Under Oliver, police observation of an open field, at least from the ground, simply is not a "search" subject to federal constitutional limitations.

In Cook, supra, we subsequently confirmed that the California Constitution, like its federal counterpart, protects with special zeal the legitimate expectation of privacy within a residential curtilage. Law enforcement agents may not defeat that expectation, we ruled, by spying at will on a private yard from an aircraft.

We were not persuaded that police officers who examine a residence from the air are simply observing what is in "plain view" from a lawful public vantage point. Such reasoning, we explained, ignores the essential difference between ground and aerial surveillance. One can take reasonable steps to ensure his yard's privacy from the street, sidewalk, or neighborhood, and police on the ground may not broach such barriers to gain a view of the enclosed area. But there is no practical defense against aerial spying, and precious constitutional privacy rights would mean little if the government could defeat them so easily.

Even if members of the public may casually see into his yard when a routine flight happens over the property, we concluded, a householder does not thereby consent to focused examination of the curtilage by airborne police officers looking for evidence of crime. No law enforcement interest justifies such intensive warrantless government intrusion into a zone of heightened constitutional privacy.

Cook was decided exclusively under the California Constitution. A more recent United States Supreme Court decision, California v. Ciraolo, has ruled that warrantless aerial surveillance of the curtilage does not contravene the Fourth Amendment.

In Ciraolo, as in Cook, one convicted on a marijuana charge urged that the police violated his constitutional rights when they examined his enclosed backyard from an airplane to confirm vague suspicions that he was engaged in illegal cultivation. Over a vigorous dissent, a bare majority of the high court disagreed. However private the curtilage in other contexts, the majority said, the realities of air travel force a modern householder to assume that his yard and anything in it are in plain view from the air.

Our state charter is a "document of independent force", and its guarantees "are not dependent on those [provided] by the United States Constitution" unless a contrary intent appears. (Cal. Const., art. I, § 24.) We grant "respectful consideration" to constitutional interpretations of the United States Supreme Court, but they are to be followed in California "only where they provide no less individual protection than is guaranteed by California law." On many occasions, we have concluded that the California Constitution accords greater protection to individual rights within our borders than federal law guarantees throughout the nation.

Having carefully examined the majority decisions in Ciraolo and Dow Chemical, cited supra, we find ourselves unconvinced by their reasoning. We adhere to our holding in Cook. The question remains whether the federal and state Constitutions nonetheless permit the "random" rural aerial surveillance at issue in this case.

Before Oliver was decided, California courts displayed some uncertainty about whether the "open fields" doctrine had survived the intervening principle of Katz, supra, that "the [Constitution] protects people, not places" and may shield "what [a person] seeks to preserve as private, even in an area accessible to the public" [what person seeks to preserve as private, even in public area, may be constitutionally protected]; [whether place such as "open field" is or is not "constitutionally protected area" does not necessarily determine reasonable expectation of

privacy]; [secluded "open field" on private property protected from ground, but not air, inspection]; [expectation of privacy in remote rural marijuana garden is reasonable if desire for privacy is exhibited.

However, pre_Oliver California cases consistently upheld warrantless surveillance of rural marijuana gardens from airplanes flying at normal altitudes, even when surveillance was part of a "random" overflight program, employed optical aids, and inspected homes or human activities near the gardens. Interpreting Katz in a manner which anticipated Oliver, the Courts of Appeal reasoned that common habits in the use of agricultural and woodland property preclude any reasonable expectation that crops growing there will not be seen from legal aerial vantage points by the public or the police. [patch located "in an isolated area of the Sierra foothills, ... hidden from view by the surrounding hills and woods"]; [overflight of ranch prompted by rumors of marijuana cultivation; "[t]he appellate courts of this state have consistently upheld aerial surveillance from lawful altitudes over rural and relatively unpopulated property. ..."];["Tents, 'other structures,' vehicles, and people ... observed" near rural garden area; trails led from structures to garden]; [binoculars used; "outbuildings resembling barns [and a] 'predominant house'" observed within 29_ acre parcel; house was "focus of particular attention" by observers]; [Humboldt County random surveillance program; plants seen "on a mountain slope in a deserted area" a mile and a half from nearest town; though "no business or other human activities were observable," the site included a tent]; [Santa Cruz County random surveillance program; binoculars and telephoto camera used; garden observed "in a heavily wooded, mountainous area"].)

Courts in other jurisdictions have applied similar principles to uphold, under a wide variety of circumstances, warrantless aerial surveillance for marijuana in rural areas. [helicopter surveillance with binoculars and telephoto lenses; seacoast ranch routinely traversed by Coast Guard helicopters for law enforcement purposes; prior site_ specific suspicion of drug smuggling]; ["isolated" episodes of surveillance over farm in "boondocks" at altitudes as low as 50 feet and distances as near as 40 feet to one of working farmhands; public overflights at low altitudes "not uncommon"]; [no reasonable expectation of privacy from aerial observation of "open field" (citing Oliver)];[unaided aerial view of cornfield containing marijuana; no reasonable expectation of privacy from airplanes; municipal airport nearby and low_ altitude cropduster flights common]; [random surveillance; binocular_ aided helicopter view of marijuana patch 15 feet from house on remote and secluded 4_ acre parcel; helicopter's maintenance of legal altitude (300 feet) and frequency of overflights by other aircraft contribute to finding of no reasonable privacy expectation]; [airplane flying at 600_700 feet observed marijuana patch 150_300 feet from dwellings on defendant's locked, posted, and secluded land in somewhat populated area; no reasonable expectation of privacy even though aircraft's altitude violated F.A.A. regulations]; [helicopter surveillance of rural field containing 5 persons from altitude of 1,800 feet; marijuana observed by police from legal aerial vantage point is in "open view"]; [observation of stolen tractor from legal height of 2,400 feet; rural field away from house and curtilage; "open field" doctrine applies].)

For state as well as federal purposes, we accept Oliver's premise that there is a greater legitimate expectation of privacy within the home and curtilage than in "open fields." We agree that the "curtilage," under both the state and federal Constitutions, is confined to those outdoor areas "immediately adjacent to the home" to which extend "the intimate activity associated with the 'sanctity of a [person's] home and the privacies of life' [citation omitted] ..."; outdoor places beyond this adjacent and intimate zone are "open fields."

Moreover, we conclude, as prior cases have suggested, that there can be no reasonable expectation of absolute privacy from warrantless aerial surveillance by the police of crops

growing in open fields. Insofar as the open fields are observed from sufficient altitude to prevent disruption or detailed observation of individual activities below, the fields are in "plain view" from the air, and aerial surveillance for illegal cultivation there is not a "search" governed by either Constitution.⁵

In our view, the crop at issue here lay outside the curtilage, in an open field. We recognize that some decisions have defined rural curtilages expansively. Yet we are not persuaded that the cultivation which drew the officers' attention here was within a zone of heightened privacy.

The suspicious vegetation was seen in a secluded, mountainous area, some 200 or more feet from trailers which might be residences. While the cultivated area was shielded from ground-level vantage points outside appellant's property, it was not in an area "immediately adjacent" to the trailers "to which ... the intimate activity associated with the 'sanctity of a man's home and the privacies of life'" could be expected to extend. There was no physical indication, such as a common enclosure, that the trailers and gardens were considered a common zone of private residential activity.

Appellant urges that, even if his crop was therefore in an open field, the officers' simultaneous scrutiny of his house and curtilage was an invalid warrantless search. That impropriety, appellant asserts, requires suppression of the marijuana discovery. For several reasons, we cannot accept this premise.

The surveying officers admitted that they did not avert their eyes from the terrain surrounding the suspicious cultivation, and the aerial photos presented to the magistrate depict not only the garden itself, but the nearby trailers, hillsides, trails, and roads. One officer conceded he unavoidably examined the apparently inhabited zone, since "the eye did encompass quite a bit."

It is clear, however, that the focus of the examination for criminal activity was the cultivated area outside the curtilage. The officers saw nothing criminal within the curtilage, and it appears that their primary interest in noticing this area was to establish its relationship, if any, to the outlying crops. The observations took place from over 1,000 feet above defendant's property. The officers testified that the photographs presented to the magistrate, though some may have been taken with telephoto equipment, accurately show the scale of objects as they appeared to the naked eye. If that is so, the details of human activity could scarcely have been discernible from the aircraft. All the photographs reveal is evidence that inhabited structures exist in the vicinity, and that they may be related to cultivation in open fields. The most casual passing airplane could see as much.

(10) We think that observation of crops growing in open fields is not transformed into an unconstitutional search when the officers incidentally and unavoidably observe the existence of a nearby home and curtilage, and its relationship to the fields, from a visual altitude at which the possibility of intrusion on private activities below is remote.

Our holding here is distinguishable from that of *Cook*, supra. There we prohibited all warrantless aerial scrutiny of a residential curtilage for the particular purpose of confirming a suspicion that criminal activity is taking place there. There is a difference, significant for constitutional purposes, between surveillance focused on a particular residential yard, on the one hand, and, on the other, surveillance which concentrates on open fields and merely notices their relationship to nearby habitation. In the former case, represented by *Cook*, there is no independent justification for the overflight; in the latter, the open fields doctrine provides an initial justification for the officers' airborne presence. Moreover, in the *Cook* situation, the intensity and focused nature of the observation, even if it occurs from substantial altitudes, enhances the danger that innocent activities occurring within a legitimate zone of protected

privacy will be unreasonably infringed.

Finally, we cannot ignore the differing law enforcement interests involved. The inquiry whether particular privacy expectations are "reasonable," and whether government has intruded upon them "unreasonably," involves a weighing of the competing privacy and law enforcement interests.

The People advise, and appellant does not dispute, that Humboldt County's random surveillance program was prompted by the rise of a large-scale illegal marijuana cultivation industry in remote areas of the county. There have been serious consequences, the People suggest, for the safety of law-abiding residents and visitors. Precisely in order to avoid discovery, the growers have retreated to places where detection from the ground is difficult or impossible. Persons who do approach a cultivated plot face the prospect of armed resistance. Secure in their weapon-enforced privacy, the farmers pursue their illicit trade unhindered.

Aerial surveillance of these remote, inaccessible, and dangerous areas may be the only feasible means of confronting this extraordinary law enforcement problem. Aerial surveillance also seems the least intrusive way of doing so, since it does not physically impinge at close range upon persons or private premises.

In our view, mere suspicion that marijuana is growing in the enclosed backyard of a single residence can never justify a warrantless aerial invasion of the enclosure. On the other hand, we do not believe that airborne police officers infringe "unreasonably" on legitimate privacy in homes and curtilages by merely observing the configuration of nearby structures while patrolling open fields for large-scale marijuana cultivation. We conclude that the surveillance here at issue did not violate appellant's constitutional rights.

In so holding on these facts, we do not minimize the difficulties involved in keeping a random surveillance program of this kind within proper bounds. At the behest of irate citizens, a United States District Court has already enjoined certain overreaching surveillance practices of the Humboldt County program. In the wake of Proposition 8, such civil actions may prove the most effective bulwark against violations of the state Constitution by agents of law enforcement.⁹ A principal advantage of this form of enforcement is that all parties will have a full opportunity to present facts bearing on the constitutional reasonableness of a particular surveillance program.

Perhaps the most significant protection for the privacy interest of innocent citizens would be the development of regulatory standards which prescribe and limit the manner in which overflights may be conducted. Such standards would have multiple advantages: they would, among other things, provide law enforcement personnel with a clear guide to the exercise of their discretion; serve as a basis for internal discipline in the event of violation; and establish a foundation for meaningful judicial review. Most of all, publicly announced standards would reassure householders who seek legitimate privacy in their homes and yards, thus promoting that peace of mind which is an important ingredient of ordered liberty. Such standards may of course be established by the Legislature, but we encourage the law enforcement agencies responsible for marijuana surveillance overflights to adopt them as administrative regulations in the first instance. Indeed, in the event of a civil lawsuit aimed at curbing abuse (see discussion, ante), the existence or nonexistence of such standards may be considered an important factor in determining the appropriateness of injunctive relief. [injunction against drunk driving survey checkpoint denied where promulgation of standards minimized police discretion];

2. Aerial identification of marijuana plants.

Appellant urges that probable cause for issuance of the warrant was not established, since it is impossible to identify marijuana plants from altitudes of 1,000 feet and above. Both Agent Brown, who was the warrant affiant, and Detective Vulich testified that their opinions arose

from the evidence of cultivation — that the suspected plants were lush green than the surrounding vegetation, spaced evenly and established in orderly rows in an area of "disturbed" earth. Moreover, the officers noted, the plants were within an enclosed area some distance from the structures on the property and connected to the structures by footpaths. Both officers admitted they could not distinguish the individual shapes or characteristics of the plants.

At the preliminary hearing, a botanist, Dr. Norris, testified that marijuana has no unique color which distinguishes it from other cultivated crops. It is impossible, said Dr. Norris, to determine from 1,000 feet the identity of common plants under cultivation.

However, the officers were permitted to use their experience in marijuana detection, 11 and their common sense, to form their opinions. Both emphasized that it was a combination of factors which aroused their suspicions. Agent Brown noted, for example, that the distance from the gardens to the trailer structures was a common pattern for marijuana in particular. The multiple well-worn footpaths connecting the structures to the garden suggested intense activity in the relatively small cultivation area. Moreover, the size and spacing of the plants, the remoteness and ruggedness of the terrain, the temporary look of the structures on the property, and the prevalence of marijuana cultivation in just such settings, all could contribute to a strong inference that this was the crop growing on appellant's land. The superior court's resolution of any factual dispute over ability to identify was thus substantially supported, and we cannot disturb it.

3. Probable cause to search multiple dwellings.

The warrant affidavit executed by Agent Brown described appellant's property as including a "structure" with a "light colored roof" and another nearby "structure ..., possibly a mobil[sic] trailer." It indicated that paths ran from each structure to the gardens, leading Brown to believe that the "occupant(s)" controlled the cultivated areas. The affidavit sought permission to search both structures because, in Brown's experience, commercial marijuana growers typically use "their houses and other outbuildings" to dry, cure, store, and hide their crops. The warrant issued on that basis.

When the warrant was executed, both structures turned out to be trailers used as residences. Both were searched; in the larger, used by appellant and his wife, marijuana and documents were found. Appellant argues that the warrant was fatally defective because the affidavit failed to establish independent probable cause for the search of multiple dwellings.

We cannot agree. In the first place, contrary to appellant's assertion, there is no indication that Agent Brown negligently or intentionally omitted the] fact of multiple dwellings from the warrant affidavit. Detective Vulich testified that both structures looked like dwellings to him from the air, but there is no evidence that this opinion was shared with, or by, Agent Brown.

Moreover, any omission in that regard neither undermined probable cause nor made the warrant affidavit "materially misleading." There was ample information from which the magistrate could reasonably conclude that both structures were connected to the cultivation activities on the parcel, and that both were likely to contain criminal evidence. [affidavit described "dwelling places and/or outbuildings" on a 28-acre parcel but stated affiant's opinion only that "the dwelling house" contained criminal evidence]; [warrant to search "all structures, tents, lean-tos, and campsites" on 3 15-acre communal ranch, based on discovery of marijuana patch not near any dwelling].)

The judgment is affirmed.