

# Seven Years Since Kyllo: Understanding The Warrant Process For FLIR Scans

By Cyndi Means, San Diego County District Attorney's Office

Along with catching crooks and finding lost citizens, thermal imaging technology has over the years come to be used to detect and interpret heat anomalies associated with indoor marijuana grows.

This negative perception of FLIR was accompanied by the U. S. Supreme Court's 2001 decision in *U.S. v. Kyllo*, which stated law enforcement must get a search warrant prior to doing a FLIR scan of a residence. This was a disappointment to those associated with airborne law enforcement and led to speculation that the decision would have a chilling effect on the successful use of FLIR in the arrest and prosecution of criminals.

Now, seven years after *Kyllo*, what has actually come to pass? Do we have an answer to the question "what is a residence" in connection with when we need to get a search warrant prior to a FLIR scan? Has there been a decrease in the number of indoor marijuana grows discovered and prosecuted or the use of FLIR scans in these cases? What effect has the *Kyllo* decision had on the use of other technology integral to airborne law enforcement? Has the use of FLIR during routine patrol been adversely affected by *Kyllo*? What should you do if you inadvertently see indications of an indoor grow at a residence while out flying routine patrol without a search warrant? Why can't we get the U.S. Supreme Court to change its mind?

## The Question of Residence

Several cases citing *Kyllo* have given some guidance as to the definition of "residence." A residence is a place where someone lives and carries out intimate activities associated with the home. A building that looks like a house is not necessarily a residence. The court asks whether there is food in the refrigerator, plates in the cupboards and utensils in the drawers. Are there beds with blankets, sheets and pillows? Is there a sleeping bag on the bed? In other words, the court wants to know if someone actually lives in the place.

Likewise, just because a structure looks like a barn or outbuilding, a warrant may still be necessary if someone resides there. Additionally, a place with all the accoutrements of a residence will not be considered a residence if the inhabitant has abandoned the place, either by moving away or losing a possessive interest by failure to pay rent, for example.

And what about people who buy and rent homes solely for the purpose of maintaining an indoor marijuana grow, only stopping by on a daily basis to tend the plants? This is not a "residence," is it? Extreme caution must be taken when making these determinations. If it turns out that someone does live in the structure, failure to obtain a warrant will be fatal to the case.

## The Persistence of FLIR

Have the number of FLIR indoor marijuana cases decreased? In the surprising case of San Diego, the number of cases involving the use of FLIR to detect anomalies associated with indoor marijuana grows has increased. But these searches have been conducted after a search warrant was obtained. The aircrew does not go out on their own or at the behest of narcotics officers and specifically or intentionally perform residential indoor marijuana scans.

In San Diego, obtaining a search warrant in such cases has become routine and less cumbersome than originally thought, and the number of FLIR scans performed by the San Diego Police Department Air Support Unit has more than doubled since the *Kyllo* decision. The majority of these scans have led to additional search warrants for actual entry of the grow houses and discovery of indoor marijuana grows.

## **The Use of Other Technology**

Defense attorneys initially made attacks on everything from video cameras and cell phones to drug sniffing dogs and night vision goggles based on the ruling in *Kyllo*. Luckily, these attacks were largely unsuccessful, and the number of cases challenging other technologies has dwindled each year following the decision. Use of NVGs specifically has been upheld in every case based on *Kyllo*.

There has also been a case upholding the use of FLIR information to investigate indoor marijuana grows by a private entity, which was then turned over to and used by law enforcement. This rule would not apply if the private entity had performed the scan at the behest of law enforcement. An analogy is to the difference in rules applicable to a private security guard, whose search of a shoplifter without probable cause will not lead to suppression of the evidence. On the other hand, a law enforcement officer must only search upon probable cause or risk loss of evidence. Evidence is only suppressed in criminal cases for invasion of privacy by the government.

## **Routine Patrol**

It does not appear that use of FLIR for routine patrol has been adversely affected by the *Kyllo* decision, despite the fact that courts have stated that a FLIR scan of a residence equates to a de facto no-knock entry and search of a residence without a warrant. In other words, in the opinion of these courts, when you pass over a neighborhood with your FLIR on and pointed toward residences, you are technically doing the same thing as entering those residences and searching their interiors.

## **What Should You Do?**

What happens if you are not looking for an indoor marijuana grow but have your FLIR on and see a residence that exhibits heat anomalies that you suspect indicate a grow? Should you fly by and forget it? Should you videotape what you see? Should you take a closer look by repeatedly flying around the residence? Should you alert a narcotics officer so that they can begin an investigation? If a search warrant is generated out of your observations, should the affidavit include information that you did a FLIR scan of the suspect residence without a search warrant? And, if an indoor marijuana grow is ultimately found in the residence and the perpetrator is prosecuted, will the evidence be suppressed because it was discovered as a result of an illegal FLIR scan without a warrant?

There has so far been no case involving the use of FLIR on the above questions, but there have been cases based on *Kyllo* that offer some insight. If you inadvertently see a suspected grow house with your FLIR, you would not want to fly away and forget it. You would not be fulfilling your duty as a law enforcement officer. You should videotape your FLIR scans. Several FLIR cases have held that without video evidence, the observation did not happen.

However, it would not be advisable to circle the residence repeatedly to get a closer look or spend any more time with your FLIR trained on the residence than is absolutely necessary to record what you have observed. This would change an inadvertent observation into an intentional one, which would arguably require a search warrant.

How will things transpire if you give the information you obtained in the above scenario to a narcotics officer? To understand what will happen if a search warrant is obtained and a grow is found due to your FLIR scan, it's important to understand the reason for the "exclusionary rule" as it pertains to suppression of evidence for searches and seizures in violation of the Fourth Amendment of the U.S. Constitution. The rule was fashioned by the courts to punish law enforcement officers for deliberately and/or recklessly violating the amendment and invading citizens' privacy rights.

Following this rationale, the courts came up with the "Good Faith Exception" for honest and inadvertent actions that officers make in violation of the Fourth Amendment law. Hopefully, "good faith" would apply to the above hypothetical situation. But it will only apply if the observation is truly inadvertent and in the course of your authorized and lawful duties as a law enforcement officer. In other situations, discoveries made by law enforcement when they are not specifically searching for contraband have been upheld due to exceptions for exigency and actions otherwise taken by officers for the public good.

For example, the discovery of drugs during valid inventory or impound searches of a vehicle have been upheld, as have search warrants based on observations of officers entering residences in hot pursuit of suspects, entering to check on the welfare of inhabitants, or by officers lawfully passing a residence and looking through an un-curtained window. There is arguably no difference between these scenarios and an

airborne officer chasing a running suspect through a neighborhood at night using FLIR and noticing suspicious heat anomalies in one of the houses he or she flies over.

After inadvertently seeing and recording a suspicious anomaly with FLIR, the airborne officer could then contact a narcotics officer, tell him or her about it, and provide the videotape so that a qualified, expert thermographer could interpret the video regarding anomalies associated with indoor marijuana grows. If it is determined that such an anomaly exists, then a search warrant affidavit could be prepared. It must be accurate, detailed and completely honest.

Every situation will be factually unique, but you should include the following in such an affidavit:

- Information about the thermal imager or FLIR, what it is, what it does and doesn't do (e.g. detects heat, doesn't see through anything, etc.).
- Information regarding your training and knowledge of how to use the technology.
- How you use the technology in your job and for what purposes (e.g. the majority of uses do not involve indoor marijuana grows).
- Information regarding your duties as a police officer, tactical flight officer or pilot in airborne law enforcement.
- How and why your FLIR was on and pointed at the suspect residence when your observations were made.
- You and/or the thermographer's expertise and training in recognizing and interpreting the heat anomalies you observed, along with an expert opinion as to why these anomalies indicate an indoor grow.

Additionally, the affidavit must include other pertinent information developed by narcotics officers in their follow up investigation, including:

- Utility bills indicating excess use of power and water and/or evidence that utilities are being stolen for the purpose of the grow.
- Receipts, discarded packaging and/or supplies found in the residence's trash that indicate the possibility of an indoor grow.
- Any other information developed about the owners, inhabitants and visitors to the residence, including criminal records and/or expert conclusions based on the amount of traffic to the residence.
- Security cameras around the house, etc.

The affidavit would also need to include a request for "night service" and provide facts supporting the request, including expertise as to why FLIR scans for indoor grows should only be done during nighttime hours. All of this information is extremely important, so if you and/or the narcotics officer cannot personally swear to it, you need to get the information from someone who can.

## **What Will the Supreme Court Do?**

Will the U.S. Supreme Court ever change its mind? Unfortunately, as the highest court in the land, its decision is final, unless and until another case on the same or a similar topic is accepted for hearing. However, it was 10 years between the FLIR scan in *Kyllo* in 1991 and the Court's decision in 2001. So, it takes a long time for a case to get to the U.S. Supreme Court under any circumstances. And, once the Court has ruled on a subject, as in *Kyllo*, most lower courts will not decide a case against its ruling.

Therefore, it will be through a scenario that involves a warrantless FLIR scan of a residence pertaining to inadvertent and arguably good faith observations that a case may make it up through the ranks to the U.S. Supreme Court.

An air support unit in southern California performed just such a FLIR scan of a residence in 2007, a search warrant was obtained and an indoor marijuana grow was found in the house. The defendant will be moving to suppress the evidence based on *Kyllo*. The case will be going to court in the near future and could be the break that law enforcement needs to expand the use of FLIR in detecting marijuana grows.