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FLYING WITNESSES: ADMISSIBILITY OF DRONE-GATHERED EVIDENCE IN FLORIDA

By James Michael Shaw, Jr. and Ryan K. Hilton

If reported surveys are accurate, Americans are ambivalent about the potential consequences of operating drones in both the public and private sectors; however, mixed feelings do not seem to be slowing the growth in their ownership and use. It seems inevitable that trial courts will be called on to exclude or admit evidence that was gathered remotely. The following article explains the legal framework the Florida courts will use when ruling on drone-gathered evidence.

Unmanned flight isn't new,¹ nor is aerial photography. Hobbyists have been rigging cameras to model airplanes since long before the word "drone" became commonplace.² What's new is the proliferation of mass-produced, inexpensive unmanned aircraft with capabilities that surpass anything previously available to civilians. According to the Consumer Electronics Association, there may be 700,000 new drone owners as of New Year's Day 2016.³

There are already a number of articles discussing drones, most of which focus on regulatory schemes and speculation as to how tort law and criminal law will adapt to their widespread use. But this article has a much more mundane focus: When a drone is used to create photographs, audio or video recordings, or other data, how will that evidence be received by the Florida courts? The first section of this article gives a brief background on drones and what manners of evidence can be gathered by them. The second section addresses two statutory exclusionary rules that will play a major role in the law of drone-gathered evidence. Finally, the third section addresses evidentiary predicates for drone-gathered evidence in the Florida courts.

I. Drones and the Evidence They Can Gather

Drones — also called Unmanned Aerial Vehicles (UAVs) or Unmanned Aerial Systems (UAS) — are most simply described as aircraft that do not carry a human pilot.⁴ They can be remotely piloted, or they can pilot themselves based on preprogrammed instructions.⁵ They can be equipped with GPS, onboard computers, hardware, electronics, sensors, stabilizers, autopilots, servo controllers, and any other equipment the user desires to install.⁶ Drones can resemble fixed-wing airplanes but more commonly take the form of quad-copters, that is, rotor-wing aircraft that can take off and land vertically.⁷

Apart from sharing the characteristic that they do not carry a human pilot, the word "drone" can refer to a wide variety of sizes, purposes, and flight mechanisms. For instance, AeroVironment's Nano Hummingbird drone is about six-and-a-half inches long and weighs only 19 grams, but there are also drones weighing over 30,000 pounds with wingspans up to 150 feet.⁸ Most people know that drones can be weaponized or equipped with cameras, but drones can also be equipped with infrared cameras, license-plate readers,

ABOUT THE AUTHORS...



JAMES MICHAEL SHAW, JR., is a partner with Butler Weihmuller Katz Craig LLP in Tampa, Florida. His practice is primarily dedicated to representing insurance companies in coverage disputes and extracontractual-liability matters. He earned his bachelor's degree from the Honors College at Oakland University and graduated magna cum laude from the University of Miami School of Law, where he served as an Articles & Comments Editor for the University of Miami Law Review. He has also taught Legal Research & Writing as an adjunct professor for St. Petersburg College.



RYAN K. HILTON is a partner with Butler Weihmuller Katz Craig LLP in Tampa, Florida. His practice is primarily dedicated to representing insurance companies in coverage disputes. He received his bachelor's degree, magna cum laude, from the Honor's College at Ball State University and his law degree, cum laude, from Stetson University College of Law. He is a licensed private, instrument-rated pilot.

“ladar” (laser radar that generates three-dimensional images and can see through trees and foliage),⁹ thermal-imaging devices,¹⁰ or even sensors that gather data about weather, temperature, radiation, or other environmental conditions.¹¹ All of this can be used to generate images, recordings, or data that litigants will eventually want to use in court.

II. Exclusionary Statutes

A. The Freedom from Unwarranted Surveillance Act

The Florida Legislature passed the “Freedom from Unwarranted Surveillance Act” in 2013.¹² As originally enacted, the statute prohibited law enforcement agencies¹³ from using drones to gather evidence or information¹⁴ except: (a) to counter a “high risk” of a terrorist attack “by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk”¹⁵; (b) pursuant to a search warrant¹⁶; or (c) where law enforcement has reasonable suspicion to believe that swift action is needed to prevent imminent danger to life or significant damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to facilitate the search for a missing person.¹⁷ Notably, there was no “plain sight” exception or exception for use of a drone by law enforcement in a public place. In addition to a civil remedy against law enforcement,¹⁸ the statute provided that “[e]vidence obtained or collected in violation of this act is not admissible as evidence in a criminal prosecution in any court of law in this state.”¹⁹

In the summer of 2015, the Legislature amended the statute, keeping the 2013 statute’s limits on the use of drones by law enforcement but expanding the ban to private individuals and non-law-enforcement state agencies.²⁰

The amended statute also bans a “person, a state agency, or a political subdivision” from using a drone “to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person’s reasonable expectation of privacy without his or her written consent.”²¹ The statute also

provides a presumption of a reasonable expectation of privacy when a person is “on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.”²²

The 2015 amendments also added six new exceptions to the statute’s prohibition on the use of drones to gather evidence and information, providing that the statute does not prohibit the use of a drone: (1) to assess property for ad valorem taxation on behalf of a property appraiser²³; (2) to capture images by or for an electric, water, or natural gas utility²⁴; (3) for aerial mapping, if done in compliance with FAA regulations; (4) to deliver cargo, if done in compliance with FAA regulations; (5) to capture images necessary for the safe operation and navigation of a drone that is being used for a lawful purpose; or (6) “by a person or entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such

person’s or entity’s license.”²⁵ This last exception, however, is inapplicable “to a profession in which the licensee’s authorized scope of practice includes obtaining information about the identity, habits, conduct, movements, whereabouts, affiliations, associations, trans- actions, reputation, or character of any society, person, or group of persons.”²⁶ Notwithstanding these extensive changes, the 2015 amendments did not change subsection (6), which still excludes evidence only “in a criminal prosecution in any court of law in this state.”

Two features of the statute are worth noting in its present form. First, the statute’s restriction on law enforcement’s use of drones is far broader than its restriction of others’ use. Law enforcement simply “may not use a drone to gather evidence or other information” unless its use falls within one of the exceptions. A private individual or a non-law-enforcement state agency, however, may use a drone to gather information so long as it does not offend someone’s reasonable expectation of privacy on privately owned real property. The second noteworthy feature is that the statute’s exclusionary rule applies only in criminal prosecutions but not in civil actions or other proceedings.

To illustrate, picture a Florida beach, a police officer with his drone, and a civilian with her drone. The two drones fly the length of the beach side-by-side, the police officer’s drone on the lookout for underage drinkers and the civilian’s drone on the lookout for her husband, whom she believes to be on this beach with another woman. Each drone captures nearly identical images of the civilian’s husband, smoking

The Freedom from Unwarranted Surveillance Act prohibits the private use of drones to conduct surveillance that violates an individual’s reasonable expectation of privacy.

marijuana on the beach with his mistress. In a criminal prosecution for possession of marijuana, the images taken by the police officer's drone would not be admissible because they were taken by a law-enforcement agency to gather evidence or other information in violation of the statute, but the statute would not require exclusion of images taken by the civilian's drone in the same prosecution because they were taken by a person under circumstances that did not violate the statute.²⁷ Conversely, the statute would not prohibit either drone's images from admissibility in the civilian's divorce proceeding because the exclusionary rule applies only to criminal prosecutions.

A closer question is whether the officer, knowing that the drone images are inadmissible but also knowing that the marijuana-smoking husband is about 300 yards to the north of him, may approach the man and arrest him based on his visual and olfactory observations when he gets there. Though the statute prohibits law enforcement from using a drone to gather "evidence or other information,"²⁸ its exclusionary provision only bars "evidence" but is silent about "other information."²⁹ It does not contain an express fruit-of-the-poisonous-tree provision.

By comparison, Florida's Security of Communications Act, discussed below, contains a fruit-of-the-poisonous-tree provision excluding both intercepted communications and "evidence derived therefrom,"³⁰ and at least one other state's statute addressing the admissibility of drone-gathered evidence contains a similar provision excluding both the improperly obtained image or communication and evidence derived from it.³¹ For example, in a Florida case where a conversation was secretly recorded in violation of the Security of Communications Act, the statute required not only the suppression of the recording itself but also the prosecutor's use of the recording to formulate deposition questions.³²

Florida's Freedom from Unwarranted Surveillance Act, however, excludes only the "[e]vidence obtained or collected in violation of this act"³³ Though it would seem that the inclusion of the "derived from" verbiage in other statutes, but not in the Freedom from Unwarranted Surveillance Act, indicates a legislative intention to limit the scope of the statute's exclusionary rule, caution is recommended. An Illinois statute providing that "[a]ny evidence obtained in violation of this article is not admissible in any civil or criminal trial" was held to imply a fruit-of-the-poisonous tree rule even where not specifically codified in the statute.³⁴ And indeed, returning to the above example, it seems inconsistent with the purpose of the Freedom From Unwarranted Surveillance Act if law enforcement were free to violate it by gathering "other information" so long as they follow up with lawful evidence-gathering methods and use only the latter as evidence in court. The legislative history is similarly ambiguous and could be read as supporting either side of the issue, explaining:

Law enforcement agencies are not permitted to use information or evidence that is gathered through the prohibited use of a drone in a criminal prosecution. Therefore, citizens should not be subject to criminal prosecution in cases that are based upon information or evidence gathered beyond the scope of the bill's exceptions, unless the case can be prosecuted on some independent basis.³⁵

Given that no Florida case has yet construed the statute, it is simply too early to tell whether the statute will prohibit admissibility of evidence that was lawfully gathered but which law enforcement only knew to gather

after illegally using a drone to gather information.

If we move the pair from the beach to the mistress's fenced-in backyard, however, the likely result is that neither drone's photographs would be admissible. The police officer's drone-taken photographs would be automatically inadmissible because they were taken by a law-enforcement officer under circumstances that do not fit within one of the exceptions. The civilian's photograph would also be inadmissible because it would be an image of an owner and invitee on private property, under circumstances where they have a reasonable expectation of privacy, taken without their written consent.

B. Security of Communications Act

Drones can do something that manned aircraft cannot: they can get close enough, undetected, to a person to make audio (or video with audio) recordings of her communications. Florida's Security of Communications Act, albeit with several enumerated exceptions,³⁶ prohibits the intentional interception³⁷ of any oral communication³⁸ without the permission of all of the parties to the communication.³⁹ The statute almost certainly applies to oral communications intercepted by a drone equipped with a microphone.

The Security of Communications Act bars admissibility of both the illegally intercepted communication and "evidence derived therefrom" in "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof"⁴⁰ The ban is absolute⁴¹; there is no "good faith" exception to the exclusionary rule⁴² and no "impeachment evidence" exception.⁴³

In contrast to the Freedom From Unwarranted Surveillance Act's restrictions on the use in criminal prosecutions of evidence gathered

in violation of its provisions, the Security in Communications Act contains a nearly exhaustive ban that applies to both civil and criminal actions and to recordings made by both law enforcement and private citizens.⁴⁴ It also provides for a procedure by which any aggrieved party may move to suppress the contents of any communication intercepted unlawfully, pursuant to an order authorizing interception that is insufficient on its face, or pursuant to an order of authorization but not in conformity therewith.⁴⁵

Even so, it has been held that the statute does not prohibit the *accidental* recording of a wire or oral communication, so a recording made accidentally is admissible.⁴⁶ There is also an exception for communications intercepted by law enforcement where one party consents to the interception and where the purpose is to obtain evidence of a criminal act,⁴⁷ though utilizing a drone for such interception would still run afoul of the Freedom From Unwarranted Surveillance Act if it did not fall within one of the exceptions.

Given the difficulties in navigating the Security of Communications Act, a party gathering evidence with a drone may wish to consider whether audio is absolutely necessary. Where it is, litigants should consult with counsel to ensure that the Security of Communications Act will not become a barrier to admissibility.

III. Evidentiary Predicates for Drone-Gathered Evidence

After clearing the hurdles presented by any potentially applicable exclusionary statutes, a litigant seeking to admit drone-gathered evidence must still meet the requirements of the Florida Evidence Code. It should go without saying that, to be admissible, drone-gathered evidence must be relevant⁴⁸ and must not be prejudicial or cumulative.⁴⁹ The more troublesome aspect will be authentication, which this section addresses.

A. Photographs

Aerial photographs have been around for a very long time, and the courts should logically be expected to treat photographs taken by drones the same way as they presently treat photographs taken by photographers in airplanes, helicopters, or balloons. Courts treat aerial photographs the same way as they treat photographs taken conventionally by a photographer with her feet on the ground,⁵⁰ holding them to be admissible as evidence if they are relevant and accurately portray what is shown in them.⁵¹

A photograph can be admitted into evidence without testimony from the photographer, so long as someone testifies that the photograph accurately depicts the thing it purports to depict.⁵² A photograph is admissible if a party with knowledge of the location identifies it as a true photograph of the scene depicted; it is unnecessary to present testimony concerning the location of the camera if this is readily apparent from the photograph itself.⁵³ It should be cautioned, however, that in some circumstances expert testimony may be required for authentication and interpretation of aerial photographs.⁵⁴ For instance, in a New York case, a municipality attempted to defend itself against an eminent-domain claim by relying on two ten-year-old aerial photographs that rebutted the plaintiffs' claim that they had adversely possessed a certain parcel of land, leveled it, and installed a retaining wall and irrigation system.⁵⁵ The town also presented testimony from an expert in analyzing aerial photographs, who opined that enlargements of the photographs showed none of the improvements alleged by the plaintiffs.⁵⁶ But the town was unable to locate a witness with knowledge of the property at the time the photographs were taken, so it couldn't authenticate them by testimony that they were fair and accurate depictions of the property at that point in time.⁵⁷ Under these circumstances, the appellate court

held that it was proper to admit one of the photographs but not the other. The admissible photograph was one taken by a contractor for the town, which had aerial photographs made and kept as business records every five years or so.⁵⁸ The other photograph, however, was purchased commercially from a photographer who took aerial photographs in hopes of later selling them, and it was held that this photograph was not sufficiently authenticated as to be admissible.⁵⁹ In this sense, the law is not noticeably different from the law concerning the admissibility of satellite photographs downloaded from Google Maps or MapQuest, which are admissible when accompanied by the testimony of a witness who, though without having ever viewed the property from the air, is familiar enough with the property to testify that the images accurately depict the location at the time and place that it was taken.⁶⁰

This is all well and good for aerial photographs depicting familiar scenes such as the position of rivers, lakes, or buildings relative to one another, but what of a photograph that depicts an image with which even the photographer is unfamiliar? Take, for example, a dispute between an insurance company and a homeowner regarding the extent of damage to a section of a roof that is not visible except from directly above. Under this circumstance, both the homeowner and the insurance company would likely wish to hover a drone above the disputed area, take photographs, and then admit them in support of their respective positions, but how can either side present testimony that the photographs accurately depict the roof damage if no one has ever viewed the roof damage from above?

We submit that the answer lies in the old "Regiscope" cases. A "Regiscope" was a device with two lenses designed to take simultaneous photographs of both a check and the person cashing it.⁶¹ A common feature of check-fraud prosecutions involving the Regiscope device was a bank teller who

could not recall the transaction, a photograph depicting the defendant's face beside a now-known-to-be-fraudulent check, and a defendant whose attorney seeks to exclude the Regiscope photograph based on the lack of testimony by anyone who remembers whether the photograph accurately depicts the check and the person who cashed it.

The Florida courts first addressed the admissibility of such photographs in *Oja v. State*,⁶² which involved a forged check cashed at a business called Pantry Pride in 1973. In *Oja*, an employee of Pantry Pride testified that someone presented her with a check payable to John Oja on account of the Spartan Paving Company, that she gave the person an identification card to fill out, that she put the check into a machine that stamped a number on it, and that she placed the check and the card under the Regiscope and "took a picture of the card, the check and him" by pulling the lever.⁶³ She was able to identify the check and the card by her stamp and initials on each, but she was unable to swear, without reference to the check and the picture, that the picture was an accurate representation of the person who cashed the check.⁶⁴ However, the owner of the Spartan Paving Company identified Mr. Oja in court and testified that he was a former employee, that he left employment without explanation on the day that the check was cashed, that the purported signature on the check was a forgery, and that the Regiscope picture was of Mr. Oja.⁶⁵ Under these circumstances, the appellate court upheld the trial court's admission of the Regiscope photograph, holding that the testimony of these two witnesses was enough to authenticate the photograph and that it was unnecessary to present expert testimony regarding the installation and maintenance of the camera.⁶⁶

Oja relied on *State v. Tatum*,⁶⁷ a Washington case involving the cashing of a legitimate check at a food store by someone who had apparently stolen it from the payee.

As in *Oja*, the store clerk who cashed the check had no recollection of the transaction, but she testified that she recognized the background shown in the picture as that of the food store and that it was the standard practice of the store to photograph each individual who cashed a check with the Regiscope.⁶⁸ The prosecution also offered the testimony of the Regiscope's distributor, who testified about the Regiscope process, though he was not a photographer and did not understand all of the technical details.⁶⁹ Again, between the two witnesses, the Washington appellate court held that the Regiscope photographs were properly admitted.⁷⁰

The Regiscope cases involve photographs that lack witnesses who can attest that the photographs fairly depict an individual who cashed a given check on a given date. A drone-taken photograph of a damaged roof that lacks a witness who can testify that it accurately depicts the condition of the roof as of a given date is no different. Just as the *Tatum* photograph was held to be sufficiently authenticated by testimony that the background accurately depicted the food store and testimony as to how the Regiscope worked, the photograph of roof damage in our example could be authenticated by similar testimony about the surrounding area and how the picture was taken. For instance, if a homeowner used a drone to photograph her own roof, she might testify that the drone is equipped with a camera that takes pictures that can later be downloaded and printed, that the drone was in proper working order when the photograph was taken, and that even though she does not recognize that particular section of the roof, she knows that it is her own roof because she recognizes the property surrounding it as her own. In this manner, a photograph taken by a drone would be properly admitted even though it depicts something that inaccessibility prevents a human from viewing.

B. Audio

The admissibility of purely audio recordings is a more complex matter. As noted above, an audio recording is almost certainly inadmissible if taken in violation of state or federal wiretap or eavesdropping statutes. Beyond that, however, the law has undergone significant changes with respect to the foundation that must be laid for the admission of an audio recording. Traditionally, the courts applied a seven-pronged test, requiring the party admitting the recording to show: (1) that the mechanical transcription device was capable of taking testimony; (2) that the operator of the device was competent to operate the device; (3) that the recording is authentic and correct; (4) that changes, additions, or deletions have not been made; (5) the manner of preservation of the record; (6) the identity of the speakers; and (7) that the testimony elicited was freely and voluntarily made, without any kind of duress.⁷¹

Notwithstanding, there has been a slow drift away from this traditional seven-pronged approach and toward a more reasoned approach that takes each recording's individualized circumstances into account.⁷² Though some cases have "occasionally" suggested lists of requirements to authenticate an audio recording in Florida, there is no definitive list of requirements other than that there is "evidence sufficient to support a finding that the matter in question is what its proponent claims."⁷³ For instance, in *Knight v. State*,⁷⁴ an audio recording of a conversation was held to have been properly authenticated by testimony of one of the participants to the conversation that it was a fair and accurate recording of the conversation.⁷⁵

Similarly, the Eleventh Circuit Court of Appeals has required proponents of audio recordings to show: (1) the competency of the operator of the recording equipment; (2) the fidelity of the recording equipment; (3) the absence of

material deletions, additions, or alterations in the relevant part of the tape; and (4) the identification of the relevant speakers.⁷⁶ Notwithstanding, the Eleventh Circuit has also made

clear that, if a trial judge independently determines that a recording's accuracy is supported by independent evidence or circumstantial proof of reliability, "his discretion to admit the evidence is

not to be sacrificed to a formalistic adherence to the standard"⁷⁷

Audio evidence, then, is generally admissible so long as it is corroborated by evidence showing that the recording is what it purports to be, and we would expect that audio recordings made by a drone would be no different.

C. Video

Video footage, like a photograph, can be authenticated by the testimony of a person with knowledge that the recording accurately portrays the incidents reflected on it.⁷⁸ This is called the "pictorial testimony" theory of admissibility.⁷⁹ A second theory — the "silent witness" theory — covers the situation where the recording captures an event that no human witness can (or will) testify that she personally perceived. Under the "silent witness" theory of admissibility, a video recording can be authenticated by proof of the reliability of the process that produced the photograph or videotape.⁸⁰

For instance, in *Wagner v. State*, police equipped a vehicle with a hidden video camera and sent an informant to purchase drugs from a suspect, which the informant successfully did.⁸¹ The officer in

charge of the investigation testified as to the position of the camera and microphone, that he had tested the apparatus, and that it was in good working order.⁸² He also testified

that the video was kept in his exclusive possession from the time of the investigation until the trial and that it had not been altered, edited, or tampered with.⁸³ The transaction was recorded

on the video, but the officer did not observe the actual transaction, and the informant was unavailable to testify as a witness at trial.⁸⁴ Under these circumstances, the Fifth District Court of Appeal held that the officer had properly authenticated the video tape by testifying as to the camera's installation and operation, the chain of custody, the absence of tampering or editing, and the date and time that the tape was made, all of which provided the indicia of reliability required to authenticate a video under the "silent witness" theory.⁸⁵

The *Wagner* court then extrapolated this into a rule, holding that video evidence is admissible under the "silent witness" theory where the trial court determines it to be reliable after considering: (1) evidence establishing the time and date of the photographic evidence; (2) any evidence of tampering or editing; (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product; (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and (5) testimony identifying the

relevant participants depicted in the photographic evidence.⁸⁶

Video taken by drone-mounted camera, then, will likely be held admissible if authenticated either under the "pictorial testimony" theory or the "silent witness" theory. The latter should be satisfied by testimony establishing the date and time that the video was taken, the chain of custody and absence of editing, the good operating condition of the equipment when the video was taken, and the circumstances surrounding the recording.

D. Other Data

The vast majority of drone-gathered evidence is going to come in the form of photographs, video, and audio recordings. But, as noted, drones can be equipped with much more sophisticated equipment such as "ladar," thermal-imaging devices, or sensors that gather data about weather, temperature, radiation, etc. Though rare at first, evidence generated by these new technologies will likely be offered in court with increasing frequency.

As with photographs, video, and audio recordings, the courts are more likely to focus on the reliability of the devices involved than the fact that they were mounted to drones. At present, for instance, there are no published cases addressing the admissibility of three-dimensional ladar images, but we would expect the first such case to focus on the reliability of the ladar technology rather than the fact that it was captured by a drone-mounted device. Similarly, we cannot imagine any reason for the courts to treat the readings on scientific instruments any differently because they hitched a ride into the atmosphere on a drone instead of, say, a weather balloon. And, of course, even where the data or image is itself inadmissible, trial courts can permit expert witnesses to present such data to the extent that it forms the basis of their expert opinions.⁸⁷

A picture is a picture, a video a video, and Florida evidentiary law already provides an adequate framework for trial courts to use when ruling on the admissibility of evidence gathered by drones.

Conclusion

When it comes down to it, it shouldn't matter whether an image taken from one hundred feet in the air was taken by a drone-mounted camera, a helicopter passenger holding a camera in her hands, or a person standing on a very tall ladder. A picture is a picture, a video a video, and Florida evidentiary law already provides an adequate framework for trial courts to use when ruling on the admissibility of evidence gathered by drones. As the courts, legislatures, and regulatory bodies become more comfortable with the proliferation of pilotless aircraft, so too will they become more comfortable regarding drone-gathered evidence as no more or less reliable than evidence gathered by any other method.

In this sense, the Freedom From Unwarranted Surveillance Act's all-out prohibition on law enforcement's use of drones is perhaps unnecessarily restrictive. We cannot, for instance, think of a reason why law enforcement can permissibly mount a red-light camera on a pole but not on a drone hovering above an intersection, or why code-enforcement officers can use satellite images from Google Earth but not images taken by a drone-mounted camera. Conversely, requiring private parties to bring a separate civil action for violations of the act, without crafting any limitations on the use of evidence in civil trials, may not be sufficient to deter misuse of new technologies. As the nation gains experience with the use (and abuse) of drones as mechanisms for gathering evidence, the Legislature will likely be called upon to revisit these statutes, and to balance privacy concerns with the need for admissibility of competent, reliable evidence.

¹ Fla. S. Comm. on Criminal Justice, SB 92 (2013) Staff Analysis 1 (January 10, 2013) (noting that drones were utilized as far back as the Vietnam War).

² Janna J. Lewis and Lauren R. Caplan, *Drones to Satellites: Should Commercial Aerial Data Collection Regulations Differ by Altitude?*, The SciTech Lawyer, Summer 2015, at 10, <http://www.americanar.org/>

content/dam/aba/publications/scitec_lawyer/2015/summer/should_commercial_aerial_data_collection_regulations_differ_by_altitude.pdf.

- ³ *Id.*
- ⁴ Richard M. Thompson II, Cong. Research Serv., *Drones In Domestic Surveillance Operations: Fourth Amendment Implications And Legislative Responses 2* (R42701 Apr. 3, 2013) (available at <https://www.fas.org/sgp/crs/natsec/R42701.pdf>).
- ⁵ *Id.*
- ⁶ *Drones vs. Radio-Controlled Aircraft: Operation Oversight*, RCFLIGHTLINE.COM, <https://rcflightline.com/drones-vs-radio-controlled-aircraft-operation-oversight/> (last visited Dec. 28, 2015).
- ⁷ Matthew G. Berard, *The Aircraft Exclusion: How the 'Model or Hobby Aircraft' Exception Affects Insurance Coverage for Unmanned Aircraft*, For the Defense, Aug. 2015, at 28.
- ⁸ Fla. S. Comm. on Community Affairs, SB 766 (2015) Staff Analysis 3 (March 9, 2015) (citation omitted).
- ⁹ *Id.* at 2.
- ¹⁰ Thompson II, *supra* note 4, at 2-3.
- ¹¹ Nabiha Syed and Michael Berry, *Journo-Drones: A Flight over the Legal Landscape*, Comm. Law, June 2014, at 1, 23 available at (http://lskslaw.com/documents/CL_Jun14_v30n4_SyedBerry.pdf).
- ¹² Ch. 2013-33, Laws of Florida, *codified at* § 934.50, Fla. Stat. (2013).
- ¹³ The statute defined "Law enforcement agency" as "a lawfully established state or local public agency that is responsible for the prevention and detection of crime, local government code enforcement, and the enforcement of penal, traffic, regulatory, game, or controlled substance laws." § 934.50(2)(d), Fla. Stat. (2013).
- ¹⁴ § 934.50(3)(a), Fla. Stat. (2013).
- ¹⁵ § 934.50(4)(a), Fla. Stat. (2013).
- ¹⁶ § 934.50(4)(b), Fla. Stat. (2013).
- ¹⁷ § 934.50(4)(c), Fla. Stat. (2013).
- ¹⁸ § 934.50(5), Fla. Stat. (2013).
- ¹⁹ § 934.50(6), Fla. Stat. (2013).
- ²⁰ Ch. 2015-26, Laws of Florida.
- ²¹ § 934.50(3)(b), Fla. Stat. (2015).
- ²² § 934.50(3)(b), Fla. Stat. (2015).
- ²³ § 934.50(4)(e), Fla. Stat. (2015).
- ²⁴ § 934.50(4)(f), Fla. Stat. (2015).
- ²⁵ § 934.50(4)(d), Fla. Stat. (2015).
- ²⁶ *Id.* Though beyond the scope of this article, the 2015 amendments leave the courts to sort through various licensed businesses or professions and activities to ascertain which of them fall within the statute's exceptions.
- ²⁷ This is, of course, assuming that the courts will not interpret the statute to prohibit the use of drone-gathered evidence in a criminal prosecution even where law enforcement did not gather the evidence itself. Given that the statute bars admissibility of evidence "obtained or gathered" in violation of the act, see section 934.50(6), Florida Statutes (2015), evidence that was "obtained or gathered" by a civilian under circumstances that do not violate the statute would likely be admissible in a criminal prosecution, even if it would not have been admissible if "obtained or gathered" by law enforcement.
- ²⁸ § 934.50(3), Fla. Stat. (2015).
- ²⁹ § 934.50(6), Fla. Stat. (2015).

³⁰ § 934.06, Fla. Stat. (2015).

³¹ See, e.g., Ind. Code § 35-33-5-10(2) (2015).

³² See *Horning-Keating v. State*, 777 So. 2d 438, 447-48 (Fla. 5th DCA 2001).

³³ § 934.50(6), Fla. Stat. (2015).

³⁴ *People v. Kezerian*, 379 N.E.2d 1246, 1249-54 (Ill. Ct. App. 1978), *rev'd on other grounds*, 395 N.E.2d 551 (Ill. 1979).

³⁵ Fla. S. Comm. on Judiciary, SB 92 (2013) Staff Analysis 8 (March 13, 2013).

³⁶ § 934.03(2), Fla. Stat. (2015).

³⁷ "Intercept" is defined very broadly as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." § 934.02(3), Fla. Stat. (2015).

³⁸ The statute defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . ." § 943.02(2), Fla. Stat. (2015). It has been argued forcefully that the statute does not prohibit the use of hidden recorders by one party to a face-to-face conversation because the definition of "oral communication" excludes communications in which one's expectation of privacy is not reasonable, and it is not reasonable to expect that the other party to the conversation will not disclose it to others. Thomas R. Julin et al., *You Can Use Hidden Recorders in Florida*, 37 Hastings Comm. & Ent. L.J. 79 (2015). The Florida Supreme Court, however, did not accept the argument, see *McDade v. State*, 154 So. 3d 292 (Fla. 2014), nor do the authors of this article. Were the argument correct, the statute would be meaningless *vis à vis* oral communications inasmuch as every communication has at least two participants, one of whom might disclose it, so no oral communication could ever fall within the statutory definition of "oral communication." Such a construction of the statute is untenable.

³⁹ See generally § 934.03, Fla. Stat. (2015).

⁴⁰ § 934.06, Fla. Stat. (2015). A federal statute, 18 U.S.C. § 2515, likewise prohibits both state and federal courts from receiving evidence the disclosure of which would violate federal wiretap statutes, although the statute's applicability in Florida would be limited to situations involving a federal nexus such as interstate commerce or persons acting under color of law. See *Hutton v. Woodall*, 70 F. Supp. 3d 1235, 1240 (D. Colo. 2014).

⁴¹ *Atkins v. State*, 930 So. 2d 678, 682 (Fla. 4th DCA 2006).

⁴² See *State v. Garcia*, 547 So. 2d 628 (Fla. 1989).

⁴³ See *Atkins v. State*, 930 So. 2d 678 (Fla. 4th DCA 2006).

⁴⁴ See Michael E. Allen, *Criminal Practice & Procedure* § 5:13 (2015 ed.).

⁴⁵ § 934.09(10)(a), Fla. Stat. (2015). This provision is nearly identical to its federal analogue. Compare 18 U.S.C. § 2518(10)(a) (2015).

⁴⁶ *Otero v. Otero*, 736 So. 2d 771, 772 (Fla. 3d DCA 1999).

⁴⁷ § 934.03(2)(c), Fla. Stat. (2015).

⁴⁸ § 90.402, Fla. Stat. (2015).

⁴⁹ *Clark v. Illinois Cent. R. Co.*, No. 2003-CA-

- 00094-COA (¶28), 872 So. 2d 773, 782 (Miss. Ct. App. 2004).
- ⁵⁰ See *Corsi v. Town of Bedford*, 868 N.Y.S.2d 258, 261 (2008).
- ⁵¹ See generally John E. Theuman, *Admissibility of Evidence of Aerial Photographs*, 85 A.L.R.5th 671 § 2 (Originally published in 2001).
- ⁵² See *Corsi v. Town of Bedford*, 868 N.Y.S.2d 258, 261 (2008).
- ⁵³ See *McLemore v. Alabama Power Co.*, 228 So. 2d 780, 790 (Ala. 1969).
- ⁵⁴ See *Matter of Johnson's Will*, 233 S.E.2d 643, 644 (N.C. Ct. App. 1977).
- ⁵⁵ *Corsi v. Town of Bedford*, 868 N.Y.S.2d 258, 260 (2008).
- ⁵⁶ *Id.*
- ⁵⁷ *Id.* at 229.
- ⁵⁸ *Id.* at 232.
- ⁵⁹ *Id.*
- ⁶⁰ *Dillon v. Reid*, 717 S.E.2d 542, 549 (Ga. Ct. App. 2011).
- ⁶¹ *State v. Tatum*, 360 P.2d 754, 755 (Wash. 1961).
- ⁶² 292 So. 2d 71 (Fla. 2d DCA 1974).
- ⁶³ *Id.* at 72.
- ⁶⁴ *Id.*
- ⁶⁵ *Id.* at 72-73.
- ⁶⁶ *Id.* at 73.
- ⁶⁷ 360 P.2d 754 (Wash. 1961).
- ⁶⁸ *Id.* at 756.
- ⁶⁹ *Id.*
- ⁷⁰ *Id.*
- ⁷¹ *Steve M. Solomon, Jr., Inc. v. Edgar*, 88 S.E.2d 167, 171 (Ga. Ct. App. 1955).
- ⁷² Jordan S. Gruber, *Foundation for Audio Recordings as Evidence*, 23 Am. Jur. Proof of Facts 3d 315 § 34 (Originally published in 1993).
- ⁷³ § 90.901, Fla. Stat. (2015); *Knight v. State*, 20 So. 3d 451, 452 (Fla. 5th DCA 2009) (citing Charles Ehrhardt, *Florida Evidence* § 401.4 n.2 (2008 ed.)).
- ⁷⁴ 20 So. 3d 451 (Fla. 5th DCA 2009).
- ⁷⁵ *Id.* at 452.
- ⁷⁶ *United States v. Sarro*, 742 F.2d 1286, 1292 (11th Cir.1984) (citing *United States v. Biggins*, 55 F.2d 64, 66 (5th Cir. 2002)).
- ⁷⁷ *United States v. Stephens*, 202 F. Supp. 2d 1361, 1367 (N.D. Ga. 2002).
- ⁷⁸ *Wagner v. State*, 707 So. 2d 827, 829 (Fla. 1st DCA 1998).
- ⁷⁹ *Id.*
- ⁸⁰ *Id.* (quoting John Henry Wigmore, 3 *Evidence in Trials at Common Law*, § 790, at 219-20 (Chadbourn rev. 1970)).
- ⁸¹ *Id.* at 829.
- ⁸² *Id.*
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ *Id.* at 831. It should be noted that the trial court admitted the video tape with the audio removed. *Id.* at 829. Though the appellate court did not address the issue of whether this was necessary, the holding in *Wagner* strongly suggests that the appellate court would have upheld the admission of the video with the audio intact.
- ⁸⁶ *Id.* at 831.
- ⁸⁷ See *Kloster Cruise, Ltd. v. Rentz*, 733 So. 2d 1102, 1103 (Fla. 3d DCA 1999) (holding that it was not an abuse of discretion to permit an expert to present weather data as the basis for his expert opinion even if the data itself would not have been independently admissible).