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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 34,548

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

NORMAN DAVIS,

Defendant-Respondent.

ON CERTIORARI TO THE NEW MEXICO COURT OF APPEALS
Original Appeal from the Eighth Judicial District Court, Taos County
The Honorable John M. Paternoster, District Judge

PLAINTIFF-PETITIONER STATE OF NEW MEXICO'S BRIEF-IN-CHIEF

ORAL ARGUMENT IS REQUESTED

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STATEMENT REGARDING CITATIONS TO THE RECORD

The motion to suppress is contained in three separate volumes of transcript dated April 5, 2007, May 7, 2007, and May 9, 2007. Citations to the transcripts are to the date of the hearing and the page number – e.g. [4-5-07 Tr. 56]. Citations to the record proper are denoted by "RP" followed by the page number – e.g. [RP 89]. The exhibits are marked with the stickers from the hearing below and are contained in a large manila envelope and are referred to by those stickers.

STATEMENT OF COMPLIANCE

As required by Rule 12-213(F)(3) NMRA, I certify that this brief is proportionally spaced and the body of the brief contains 10,255 words. This brief was prepared using Microsoft Office Word 2003.

TABLE OF AUTHORITIES

New Mexico Cases

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NATURE OF THE CASE

This is the State's opening brief on this Court's grant of its petition for writ of certiorari to review the Court of Appeals' opinion in *State v. Norman Davis* (*Davis III*), 2014-NMCA-042, 321 P.3d 955. The two questions for review are: (1) whether aerial surveillance, of any kind, is a violation of the Article II, Section 10 of the New Mexico Constitution; and (2) did the Court of Appeals err in holding that Defendant's consent was not sufficiently attenuated from the helicopter flight over his property?

This case can be decided on the narrower ground that, even assuming the helicopter flight was illegal, Defendant's subsequent consent was attenuated from any earlier illegality. If this Court does reach the broader constitutional issue, the Court of Appeals' holding is unnecessarily broad in its ban on warrantless aerial surveillance, without any consideration of the degree of intrusiveness or the suspect's reasonable expectation of privacy.

SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

Defendant was indicted on possession of marijuana of eight ounces or more, a fourth degree felony and possession of drug paraphernalia, a misdemeanor. [RP 9-10]. Defendant filed a motion to quash all evidence seized on the grounds that his consent for the search was not voluntary and that his constitutional rights were violated before his consent was given. [RP 19-22]. He then filed a motion to

suppress on the grounds that the police helicopter surveillance was unreasonable. [RP 76-78]. Defendant filed another motion to suppress evidence from the aerial view of his property and filed affidavits in support from various residents of the area. [RP 116-124; 125-132]. The State filed a response arguing that Defendant's consent was properly obtained and not tainted. [RP 133-137]. Defendant filed a written reply to the State's response. [RP 138-146].

A. The Motion to Suppress Hearing

The New Mexico State Police, assisted by New Mexico Game and Fish officers and the New Mexico National Guard, conducted an operation known as "Yerba Buena 2006" in August of that year. The purpose of the operation was "marijuana plantation eradication" in the remote area of Carson Estates in Taos County and the operation utilized two army helicopters and two ground teams. [Defendant's Exhibit A].

Police officers had received anonymous telephone calls from a number of residents reporting that marijuana was being grown in the area. None of the callers gave the names or specific residences of the people growing marijuana because of the danger of retaliation and the remoteness of the area. [4-5-07 Tr. 37; 123; 5-9-07 Tr. 284-285]. The officers were able to narrow down the area to Carson Estates/Twin Peaks which contained about fifty residences. [4-5-07 Tr. 38]. The area is very remote with few roads; this inaccessibility is one of the reasons the

police brought in the helicopters. [5-9-07 Tr. 331]. The helicopters were intended to spot possible marijuana plantations from the air, to guide the ground teams into the area to confirm or deny what was seen from the air, and to provide cover and safety for the ground teams. [Defendant's Exhibit A; 4-5-07 Tr. 46-47, 55, 85]. The street signs in the area are minimal and the residences are very spread out. [4-5-07 Tr. 85]. Most of the roads are unimproved and undeveloped. [4-5-07 Tr. 122, 5-9-07 Tr. 285]. The two helicopters worked independently due to the large geographical area and there was a ground team assigned to each helicopter. [5-9-07 Tr. 283-284, 286].

The trial court held an extensive three-day evidentiary hearing on the matter. Officer Bill Merrell of the New Mexico State Police was part of a ground team and was told by their helicopter spotter of a possible marijuana grow. [4-5-07 Tr. 32-33]. He was not given a specific name or address and was only told of the area. The spotter guided his team into the area. The recording of Officer Merrell's contact with the helicopter and his subsequent personal contact with Defendant was recorded on his digital recorder. That recording is contained on a CD marked as Defendant's Exhibit B. It was played for the trial court. [*Id.* 33-35].

Five officers approached Defendant's residence on Caveman Way. Caveman Way is marked as a private road. [4-5-07 Tr. 40; Defendant's Exhibit C]. The officers were in uniform and armed with their service weapons. [4-5-07

Tr. 41-42]. Officer Merrell approached Defendant, who was standing outside his residence. [4-5-07 Tr. 43]. Officer Merrell advised Defendant that they had located marijuana on his property and asked if there was marijuana in his greenhouse. Defendant said that there was and the officer asked for permission to search. Defendant agreed and Officer Merrell retrieved a consent to search form which Defendant signed. Officer Merrell testified that his conversation with Defendant was "pretty direct" and "real clear", as well as recorded. [4-5-07 Tr. 69-70; Defendant's Exhibit B]. Defendant was very cooperative and readily admitted that he had marijuana growing. [4-5-07 Tr. 71].

After obtaining Defendant's written and oral consent [4-5-07 Tr. 78-80; State's Exhibit 1], the officers observed Defendant's greenhouse which was located east of Defendant's residence. [4-5-07 Tr. 73]. There was a plastic cover over the top and the plants filled the entire greenhouse and were pressing up against the ceiling of it. [4-5-07 Tr. 57-58; Defendant's Exhibit D, E, and F (photographs of Defendant's greenhouse taken by Officer Merrell)]. The officers found fourteen marijuana plants as well as some additional marijuana and drug paraphernalia inside Defendant's residence. [4-5-07 Tr. 73-74; State's Exhibit 2 (inventory from search)]. Although other officers were on the scene for protection when Officer Merrell first approached Defendant, no officer searched any of

Defendant's property until the consent to search was obtained. [4-5-07 Tr. 77-80; 84-85].

A stipulation of Defendant's testimony from the motion to suppress hearing was filed with the Court of Appeals January 26, 2011, and is now part of the appellate record. The stipulation states that Defendant testified he was at home in bed and feeling unwell when he heard a helicopter hovering low over his house. It was making a "considerable racket" so he got out of bed to see what was going on. He was confronted with officers with weapons on either side of his driveway and near the building on his property. This officer asked Defendant for permission to search his property and Defendant asked what if he said no. The officer responded he would get a warrant. The officer told the other officers "to hold on" and they stopped moving through the buildings at that point. Defendant "agreed to let the officers search my property and signed a consent provided to me by the officer near my door." Defendant admitted he had marijuana on the property when asked. He later felt ill and went back inside while the officers searched his green house and inside his residence. [1-26-11 Norman Davis Stipulation].

Also of note is Officer Merrell's belt recording. [Defendant's Exhibit B]. Officer Merrell is heard introducing himself to Defendant and telling him that the helicopter saw some marijuana plants at his residence. Merrell asks Defendant for permission to search his residence and Defendant replies, "Well, uh, what if I said

no." Merrell responds, "Well, then we will secure the residence. It's up to you – I'm going to leave that up to you." Defendant says, "Do you guys enjoy this – just messing with people minding their own business?" to which Merrell responds that it is part of his job. Merrell again asks if Defendant will give permission to search and Defendant says "sure." Merrell orders his officers to hold off and Defendant admits there are marijuana plants in his greenhouse. Merrell then asks Defendant for some identifying information including his date of birth and social security number. Defendant tells Merrell there are about thirteen to fourteen marijuana plants in his greenhouse and Merrell tells him they will be off his property soon. Merrell fills out the consent to search form and presents it for Defendant's signature. Defendant says he does not know if he should sign it and Merrell responds "that is strictly up to you, sir." Defendant asks what difference it would make if he signs it and Merrell says it would show his cooperation and would allow the police to seize the plants without a warrant. Defendant says "all right" and asks if it is in his best interest to sign the consent. Merrell responds that he can only inform the District Attorney's office of his cooperation but cannot determine what Defendant might be charged with as that will depend on the amount of marijuana found. Defendant asks again what would happen if he does not sign and Merrell tells him the police would try to execute a warrant through the District Attorney's office and that process would take about thirty minutes. Defendant

says, "Well, I guess I don't really have any options, do I" and Merrell does not respond. [Exhibit B].

Later in the recording, after Merrell and Defendant have stopped speaking and the search is presumably taking place, Merrell comes back to Defendant and tells him he will put a report together and send it to the District Attorney. Merrell says they will be in contact with Defendant but that he would not be arrested due to his cooperation. Merrell details with Defendant the items seized by police and asks Defendant to sign a copy of the inventory. Merrell again mentions Defendant's cooperation and that he will mention it in his report. Defendant responds, "You've been wonderful." Merrell and Defendant's conversation ends with Merrell again saying he appreciates Defendant's cooperation and asking if Defendant has any questions. Defendant says the marijuana was for his personal use for his medical conditions. [Defendant's Exhibit B].

Merrell's tone with Defendant throughout the conversation is respectful, low-key, and mild. He consistently refers to Defendant as "sir." At no time does Merrell raise his voice or threaten the Defendant in any manner. Defendant's responses are equally mild and conversational. The entire recording, from Merrell's initial encounter with Defendant to his departure, is approximately one hour. [Defendant's Exhibit B].

Sergeant Matthew Vigil was one of the commanders in charge of Operation Yerba Buena. [Defendant's Exhibit A at 1; 4-5-07 Tr. 88]. He had specialized training and experience in the identification of marijuana and marijuana plantations and was the spotter for the other helicopter. [4-5-07 Tr. at 119-120]. Sergeant Vigil was aware that his agency had received information of marijuana grows in that area. [4-5-07 Tr. 115]. Vigil was not involved in the spotting of Defendant's property but did testify that marijuana can be seen from the air because it has a distinctive lime green color that is different from other vegetation in the area. [4-5-07 Tr. 120]. Vigil testified that it was easy to spot the marijuana on co-defendant Hodge's property from the helicopter. [4-5-07 Tr. 120]. The helicopter was initially at 500 feet but went down to 400 feet for about ten seconds to view Hodge's greenhouse. [4-5-07 Tr. 121]. The helicopter never went down to 100 feet or lower as the pilots were very strict on their altitude guidelines. [4-5-07 Tr. 125].

Sergeant Adrian Vigil was one of the ground officers who was directed by that helicopter to co-defendant's Hodge's property. Although he was not at Defendant's property, he testified that the helicopter did not fly so low as to create dust or a draft for the officers on the ground and that it would drop in altitude only to confirm a sighting. [5-9-07 Tr. 290, 296].

Defendant presented testimony from other residents in the general area. None of these residents had any direct knowledge about the helicopter flight over the Defendant's property. Among these witnesses was Merilee Lighty. She testified that she was frightened and annoyed by the helicopter coming and going over her property for about fifteen minutes. The helicopter appeared to be engaged in a random and general search for greenhouses. [5-7-07 Tr. 153-155]. She knew Defendant but his property was a ten minute drive away. She thought she would be able to see a helicopter if it was over Defendant's property but did not recall seeing one as she was mostly inside that day. [*Id.* 156-157].

John Lighty testified that the helicopter was flying very low and greatly disturbed him. He would be reluctant to install a greenhouse for fear that he would be subjected to that kind of noise and invasion of privacy. [5-7-07 Tr. 159-161]. Kelly Rayburn testified that he saw the helicopter flying low over the property of his neighbor Liz Hagerty and that he then saw officers go onto her property although she was not home. [5-7-07 Tr. 190-192]. He also testified that the helicopter flew over his house at 30 to 50 feet and the draft lifted a solar panel off his roof. [5-7-07 Tr. 192]. He had no direct knowledge about a helicopter at Defendant's property and did not know where Defendant lived. [*Id.* 195]. William Hecox testified that he also saw a helicopter and could see the officers inside with guns pointing at him. He believed the helicopter broke one of his 4 x 4 beams and

estimated the helicopter was flying at 50 feet. He believed the police singled him out because of he was a "hippie" with long hair and a garden. [*Id.* 202]. He knew where Defendant lived, but it was fifteen miles away and he would not be able to see if a helicopter was there. [*Id.* at 205].

Alan Maestas, a defense attorney, testified regarding his military experience with helicopters. He opined that a solar panel would not be lifted up by a helicopter flying at 500 feet and the helicopter would have to be flying much lower to cause such damage. Mr. Maestas also questioned whether one could see marijuana with the naked eye from 500 feet as it would be hard to distinguish detail at that altitude. [5-7-07 Tr. 211-228].

B. The Trial Court's Ruling

The trial court denied the motion to suppress as to Defendant Davis [RP 193] and attached a lengthy letter opinion specifying its factual and legal findings. [RP 194-199]. The trial court found: (1) police may use aerial surveillance to generate probable cause to justify a search warrant; (2) with the "unaided eye" from the helicopter, it was unlikely that the spotting officer would have been able to see marijuana in the greenhouse at the altitude of 500 feet but there was no "competent evidence" that the police were violating flight laws or that they were operating outside navigable airspace; (3) there was some merit to the claims that the police's activities were "terrifying and intimidating" to citizens in the area

although some of this testimony was "overly dramatic and anti-police state rhetoric" ; (4) the Carson area is remote and such flights by low flying aircraft are rare; these facts "enlarge[d]" the reasonable expectation of privacy for its residents; (5) under all the circumstances, the police's use of the helicopter was not unreasonable yet "barely permissible"; and (6) Defendant's consent was valid and voluntary. [RP 194-199].

After this ruling, Defendant entered into a conditional plea to the possession of marijuana and the State dismissed the possession of drug paraphernalia charge. Defendant reserved his right to appeal the ruling on his motion to suppress. [RP 200-204]. Defendant was given a conditional discharge at sentencing. [RP 205-206].

C. The Appeals

The Court of Appeals reversed finding that Defendant's consent was the product of duress. *State v. Davis* (*Davis I*), 2011-NMCA-102, 150 N.M. 611. The State petitioned for certiorari review and this Court reversed and upheld the trial court's finding of voluntary consent. *State v. Davis* (*Davis II*), 2013 NMSC-028, 304 P.3d 10. This Court remanded the case to the Court of Appeals to consider the remaining issues. *Id.* ¶ 35.

On remand, the Court of Appeals held the aerial surveillance of Defendant's property did not violate the Fourth Amendment because an observation from

navigable airspace (i.e. a legal vantage point) is not a search. *Davis III*, 2014-NMCA-042, ¶¶ 7-11. The helicopter flyover in this case passed muster because "there is nothing in the record suggesting that this altitude was outside the range of navigable air space, nor is there any evidence that the helicopter interfered with Defendant's normal use of his residence or greenhouse." *Id.* ¶ 11. The testimony also established that Defendant's greenhouse covering was "somewhat clear" and that marijuana is discernible due to its color. *Id.*

However, as to the New Mexico Constitution, the Court of Appeals held that it protects citizens against governmental intrusions rather than intrusions from members of the general public. *Id.* ¶ 17 (quoting *State v. Granville*, 2006-NMCA-098, ¶ 29, 140 N.M. 345). Thus, "police flying over a residence strictly in order to discover evidence of crime, without a warrant, 'does not comport with the distinctive New Mexico protection against unreasonable searches and seizures.'" *Id.* (quoting *State v. Garcia*, 2009-NMSC-046, ¶ 27, 147 N.M. 134).

Thus, the Court held that "if law enforcement personnel, via targeted aerial surveillance, have the purpose to intrude and attempt to obtain information from a protected area, such as the home or its curtilage . . . that aerial surveillance constitutes a search for the purposes of Article II, Section 10." *Id.* ¶ 20. The Court relied upon *Kyllo v. United States*, 533 U.S. 27 (2001), a case which the United States Supreme Court held the use of a thermal-imaging device to detect unusual

heat levels inside the home was a search. *Id.* ¶ 21. The Court of Appeals found this holding to be in "harmony" with New Mexico's Article II, Section 10 jurisprudence given the "strong preference for warrants in order to preserve the value of privacy and sanctity of the home." *Id.* ¶ 23 (quoting *Granville*, 2006-NMCA-098, ¶ 24).

Lastly, the Court held that Defendant's consent was not sufficiently attenuated from the illegality of the aerial search. *Id.* ¶¶ 28-31.

The State again filed a petition for writ of certiorari which this Court granted.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT DEFENDANT'S CONSENT WAS NOT SUFFICIENTLY ATTENUATED FROM THE HELICOPTER FLIGHT OVER HIS PROPERTY

A. Standard of Review

"The determination of whether a search is constitutionally reasonable involves mixed questions of law and fact. . . . Therefore, when we review a district court's ruling on a motion to suppress, we defer to the district court's findings of fact to the extent that they are supported by substantial evidence." *State v. Monteleone*, 2005-NMCA-129, ¶ 8, 138 N.M. 544.

B. Defendant's Consent Was Sufficiently Attenuated from Any Alleged Illegality of the Helicopter Flight

Because the Defendant consented to a search of his property, the officers did not seek a search warrant and did not use the information from the helicopter as the basis for a warrant. Thus, the constitutionality of the helicopter flight need not be reached by this Court because it was not necessary to the trial court's holding, and this Court's subsequent affirmance, that Defendant voluntarily consented to the search. *See Baca v. New Mexico Dept. of Public Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282 (""[I]t is a proper exercise of judicial restraint for courts ... to decide constitutional attacks on the narrowest possible grounds and to avoid reaching unnecessary constitutional issues.") (internal citation omitted).

This Court has already held on this record that "was no evidence that the helicopter influenced Defendant's consent. In fact, the only testimony on record regarding Defendant's feelings about the helicopter was that he was bothered by the noise and had to get out of bed." *Davis II*, 2013-NMSC-028, ¶ 31. "Therefore, substantial evidence does not exist to show that Defendant's will was overborne by any exertion of coercion by the officers to justify overturning the trial court's decision." *Id.* ¶ 34.

There is no new testimony that would compel a different conclusion. Although the attenuation analysis is slightly different from determining if the consent was voluntary, this Court has already reviewed this record and concluded that the consent was voluntary and not coerced by the helicopter or the police

officers. This Court can decide this case on this narrower and dispositive ground. "It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so. We have repeatedly declined to decide constitutional questions unless necessary to the disposition of the case." *Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 (internal citation and quotation marks omitted).

In order to determine "'whether there was 'sufficient attenuation,' [from the initial illegality] we consider the temporal proximity of the arrest and the consent, the presence of intervening circumstances, and the flagrancy of the official misconduct.'" *Monteleone*, 2005-NMCA-129, ¶ 16 (internal citations omitted). *See also State v. Lowe*, 2004-NMCA-054, ¶ 19, 135 N.M. 520 ("Involved in this inquiry is whether the 'evidence was obtained as a result of the exploitation of [the misconduct].'") (citing to *State v. Hernandez*, 1997-NMCA-006, ¶ 36, 122 N.M. 809).

As already found by this Court, there is nothing to suggest on this record that the officers exploited any fright or surprise the Defendant may have experienced due the presence of the helicopter. By contrast, in *State v. Monteleone*, the police made an illegal and warrantless entry of defendant's apartment when he was still asleep. The defendant's subsequent consent was tainted by the police's exploitation of their illegal entry in that they roused the defendant from his

vulnerable position of sleep, demanded him to show his hands, and told him of the suspected methamphetamine laboratory. The officers used tactics that were designed to "cause surprise, fright, and confusion." *Monteleone*, 2005-NMCA-129, ¶ 19. No such tactics were used here. Defendant was calmly standing outside his property when the officers approached during daylight hours.

Moreover, there was a break in the causal chain in that the officers who approached Defendant came from the ground, not from the helicopter. The helicopter pilot simply guided the ground officers to the location and the ground officers approached Defendant at his residence door. *See e.g. United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990) ("A policeman may lawfully go to a person's home to interview him" and "[i]n doing so, he obviously can go up to the door"); *Scott v. State*, 67 S.W.3d 567, 575-76 (Ark. 2002) (police may approach a defendant's residence for purposes of a criminal investigation and are permitted to knock on the door and seek consent to search for drugs). A New Mexico peace officer is required to investigate all violations of the law of which he is aware and his failure to do so subjects him to removal from office. NMSA 1978, Section 29-1-1 (1979). In executing this duty, an officer who enters onto the property as part of a criminal investigation commits no trespass. *See Romero v. Sanchez*, 1995-NMCA-028, ¶ 11, 119 N.M. 690 (claim of trespass was properly denied on summary judgment as a matter of law where officer was investigating the report of

a dispute on the property). Taint is not shown on this record and the consent was valid. The issue as to the constitutionality of the helicopter flight need not be reached.

II. THE HELICOPTER FLIGHT WAS NOT ILLEGAL UNDER THE NEW MEXICO CONSTITUTION

A. Standard of Review

Questions of constitutional law are reviewed de novo. *State v. Crane*, 2014-NMSC-026, ¶ 11, ___ P.3d ___.

B. Federal Jurisprudence on Aerial Surveillance; the *Katz* Test

As held by the United States Supreme Court, "[t]he Court has developed a relatively straightforward test for determining what expectations of privacy are protected by the Fourth Amendment with respect to the possession of personal property. If personal property is in the plain view of the public, the possession of the property is in no sense 'private' and hence is unprotected: 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *United States v. Karo*, 468 U.S. 705, 730 (1984) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). "[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to

understandings that are recognized and permitted by society." *Minnesota v. Carter,* 525 U.S. 83, 88 (1998) (internal quotation marks omitted).

Since *Katz* was decided, the issue of whether governmental conduct is a search for Fourth Amendment purposes shifted from traditional property considerations to a consideration of whether the governmental conduct intruded on a constitutionally protected expectation of privacy. *See e.g. Smith v. Maryland,* 442 U.S. 735, 739-40 (1979). Under the familiar *Katz* test, the defendant's ability to challenge a search turns on two inquiries: (1) whether he had an actual, subjective expectation of privacy in the premises searched; and (2) whether this subjective expectation is one that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). "The touchstone of search and seizure analysis is whether a person has a constitutionally recognized expectation of privacy." *State v. Ryan*, 2006-NMCA-044, ¶ 23, 139 N.M. 354 (citing to *California v. Ciraolo*, 476 U.S. 207, 211 (1986)).

In *California v. Ciraolo*, the Supreme Court considered whether a naked eye aerial observation of the defendant's backyard was a Fourth Amendment violation. The police had received an anonymous tip that defendant was growing marijuana in his backyard but were unable to confirm this tip from driving by his residence. *Ciraolo*, 476 U.S. at 209. The officers secured a private plane and flew over the area at 1,000 feet within navigable airspace. From that height the officers, who

were trained in marijuana identification, could readily identify marijuana growing in the yard. *Ciraolo id.*[1] They subsequently secured a warrant and seized marijuana plants. *Id.*

The Supreme Court relied on *Katz*. *Ciraolo*, 476 U.S. at 211. There was no dispute that the defendant had manifested a subjective intent to maintain the privacy of his backyard from any street-level views because the defendant had erected a 6-foot outer fence and a 10-foot inner fence completely enclosing his yard. *Id.* at 209, 211. Thus, the case turned on whether or not society was prepared to recognize this expectation as reasonable. The Court concluded that the intrusion was not unconstitutional:

> The observations by [the officers] in this case took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observations from aircraft were directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

Id. at 213-14. Further, "[i]n an age where private and commercial flight is the public airways is routine, it is unreasonable for respondent to expect that his

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[1] Like the officer in this case, the officer in *Ciraolo* testified that he could see the identifying color of the marijuana plants with the naked eye. *Ciraolo*, 476 U.S. at 213, n. 1.

marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant to order to observe what is visible to the naked eye." *Id.* at 215. *See also Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (decided the same day as *Ciraolo*, the Court found that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace did not require a warrant under the Fourth Amendment).

Three years later, the Court decided the helicopter case of *Florida v. Riley*, 488 U.S. 445 (1989). In *Riley*, the sheriff's office received an anonymous tip that marijuana was being grown on the respondent's property. The respondent lived in a mobile home on five acres of rural property. *Id.* at 448. A greenhouse was located ten to twenty feet behind the home and two sides of it were enclosed. The other two sides were not enclosed but were obscured from view by surrounding trees and shrubs. The roof of the greenhouse was covered with corrugated panels, some of which were translucent and some which were opaque. Two of these panels, comprising approximately ten percent of the roof, were missing. The respondent had a wire fence enclosing his property with a "DO NOT ENTER" sign posted. *Id.* The investigating officer realized he could not confirm the anonymous tip from the road and twice circled the property in a helicopter at the height of 400

feet. *Id.* With his naked eye, he was able to see through the openings in the greenhouse and observe what he thought was marijuana growing inside. He sought and procured a search warrant based on these observations and marijuana plants were seized. *Id.* at 449.

The Court found that respondent's actions evinced his intent that his property would not be open to public inspection from the road. However, because the greenhouse roof was partially exposed, its contents were subject to aerial viewing. *Id* at 450. Thus, under *Ciraolo*, the respondents "could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower limit of the navigable airspace for such an aircraft." *Id.* The fact that the helicopter was flying at 400 feet did not change the analysis because "helicopters are not bound by the lower limits of the navigable airspace allowed to other craft" and any member of the public could have legally flown over the property at that altitude and observed the marijuana. *Id* at 451.[2] Moreover, there was no indication that "intimate details" of respondent's property or curtilage were observed or that there was "undue" noise, dust, or threat of injury. *Id* at 452. *See*

[2] *See* 14 CFR § 91.119 (1994) (helicopters may be operated lower than the minimum altitudes "if the operation is conducted without hazard to persons or property on the surface.").

also United States v. Eight Firearms, 881 F.Supp. 1074 (S.D. W. Va. 1995) (aerial surveillance from a helicopter flying as low as 100 feet did not violate the subject's Fourth Amendment rights); *United States v. Boyster*, 436 F.3d 986 (8th Cir. 2006) (defendant had no reasonable expectation of privacy in marijuana plants that were observed by aerial surveillance done at 100 feet because any member of the public could have legally flown over the area in a helicopter); *United States v. Seidel*, 794 F.Supp. 1098 (S.D. Fla. 1992) (aerial viewing from navigable airspace was not a search). *Cf. United States v. Jackson*, 213 F.3d 1269, 1281 (10th Cir. 2000) (defendant had no reasonable expectation of privacy in activity videotaped by police who used cameras installed on telephone poles overlooking his residence; the cameras did not intrude inside the house and recorded "only what any passerby would easily have been able to observe"); *United States v. Houston*, 965 F.Supp.2d 855, 895-96 (E.D. Tenn. 2013) (officers used a video camera mounted on a utility pole in front of defendant's home to view her curtilage for a period of three weeks; the court found it was permissible in terms of the location of the camera under the Fourth Amendment but that the duration of three weeks was unreasonable).

As stated by the Supreme Court over sixty years ago, "It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe - Cujus est solum ejus est usque ad coelum. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared.

Were that not true, every transcontinental flight would subject the operator to countless trespass suits." *United States v. Causby*, 328 U.S. 256, 261 (1946).

C. New Mexico Jurisprudence on Aerial Surveillance

The *Katz* test has been consistently applied in New Mexico to various items and places. *See e.g.*, *Crane*, 2014-NMSC-026 (sealed garbage bags left for collection in a motel dumpster); *Ryan*, 2006-NMCA-044, ¶¶ 19-27 (bunkhouse that defendant shared with a co-worker); *State v. Zamora*, 2005-NMCA-039, ¶ 10-14, 137 N.M. 301 (motel room); *State v. Esguerra*, 1991-NMCA-147, ¶¶ 11-12, 113 N.M. 310 (hotel room, automobile, and knapsack); *State v. Sutton*, 1991-NMCA-073, 112 N.M. 449 (marijuana plots in fields 100 yards from defendant's cabin); *State v. Chort*, 1978-NMCA-027, 91 N.M. 584 (marijuana fields).

Three New Mexico cases have specifically considered the issue of aerial surveillance without a warrant. In *State v. Bigler*, 1983-NMCA-114, 100 N.M. 515, decided before *Ciraolo*, the Portales police received a tip from an informant that the defendant was growing marijuana in a field. The police rented an airplane and flew over the property early in the morning and were able to see with the naked eye what appeared to be marijuana growing among rows of cotton and corn. The police then approached the property from the road to confirm their observations. The police obtained a search warrant and seized over five thousand pounds of marijuana plants. *Id.* ¶¶ 2-3.

On appeal, the defendant claimed that the aerial surveillance was a violation of his rights under the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution. The Court of Appeals applied the two-part test from *Katz* and determined that although defendant may have had some expectation of privacy at ground level, he had no reasonable expectation as to the air. The Court also considered the facts that his property was a few miles from a municipal airport and that crop dusters flew in the area to find that he had no reasonable expectation of privacy from the air. The Court also noted that the defendant did not challenge the altitude or speed of the plane as inappropriate and concluded that there was no Fourth Amendment violation of his rights. *Id.* ¶¶ 5-9.

The Court of Appeals decided *State v. Rogers*, 1983-NMCA-115, 100 N.M. 517, on the same day as *Bigler*. In *Rogers*, the police flew a helicopter over the defendant's property and observed marijuana plants poking through holes in the roof of the defendant's greenhouse. *Id.* ¶ 2. The officer first saw the marijuana with his naked eye and then was able to see it more clearly using field glasses. Based on these observations, the police procured a warrant for the property and seized marijuana plants. *Id.* The property was ten to twenty miles from Fort Bliss and White Sands Missile Range and air traffic, including helicopters, was not uncommon in the area. *Id.* ¶ 6. The Court thus concluded that the defendant did not have a reasonable expectation of privacy regarding his marijuana plants visible

from the air. *Id.* ¶ 7. This Court separately considered the "form and degree" of the police surveillance including the "altitude of the aircraft, use of equipment to enhance the observation, frequency of other flights and intensity of the surveillance." *Id.* ¶ 9. The Court noted that the fact that the officer had received a tip that defendant was growing marijuana contributed to the justification for the surveillance because it was not simply a "'random investigation to discover criminal activity. ...'" *Id.* ¶ 10 (internal citation omitted). Nor was the altitude or length of the flight was not unreasonable. The officer made three passes over the property lasting only about thirty seconds. His lowest altitude was 100 to 200 feet and about 500 feet away from the greenhouse. The defendant and his neighbors testified that the helicopter hovered at only thirty feet, but the Court accepted the pilot's testimony and found that the defendant did not have constitutional protection in his greenhouse from the helicopter flight. *Id* ¶ 12. *See also State v. Valdez*, 1990-NMCA-134, 111 N.M. 438 (although the officers were found to have violated the warrant requirement in their ground search of defendant's property, the Court held that the initial view of the marijuana growing in a greenhouse with opaque roofing from a helicopter flying at 500 feet was permissible under *Riley*).

D. The Helicopter Flight Did Not Violate the State Constitution

Under the interstitial approach, the court may diverge from federal precedent if: (1) the federal analysis is flawed; (2) structural differences exist between the

state and federal government, or (3) distinctive state characteristics exist. *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777.

As recently reiterated by this Court, "the foremost distinct state characteristic upon which this Court has elaborated New Mexico's search and seizure jurisprudence under Article II, Section 10 is a 'strong preference for warrants.'" *Crane*, 2014-NMSC- P.3d-026, ¶ 16 (quoting *Gomez*, ¶ 36).

New Mexico precedent has interpreted Article II, Section 10 of our state constitution more broadly. However, there are also permutations of the state constitutional search and seizure provision which have explicitly been held to *not* afford greater protection than the Fourth Amendment. *See State v. Baca*, 2004-NMCA-049, 135 N.M. 490 (warrantless search of a probationer's residence); *State v. Paul T.*, 1999-NMSC-037, 128 N.M. 360 (search of juvenile during investigative stop); *State v. Cline*, 1998-NMCA-154, 126 N.M. 77 (spousal consent to a search), *cert. denied*, 526 U.S. 1041 (1999); *State v. Jimmy R.*, 1997-NMCA-107, 124 N.M. 45 (investigative detention of juvenile suspected of carrying a gun).

Other state courts that have considered the issue have not found that their state constitutions require additional protection beyond that afforded by the federal constitution in the realm of aerial surveillance. *See State v. Ainsworth*, 801 P.2d 749, 751 (Or. 1990) (a helicopter flight to confirm that defendant was growing marijuana was not a search under the Oregon constitution – "a police officer at a

lawful vantage point who observes contraband or illegal conduct has not conducted a search in the constitutional sense" and the police's mode of transportation to attain that lawful vantage point "is of no constitutional significance"); *Commonwealth v. One 1985 Ford Thunderbird Automobile*, 624 N.E.2d 547, 551 (Mass. 1993) (Massachusetts constitution was not violated by police's helicopter surveillance of defendant's backyard where the officers observed potted marijuana plants); *State v. Wilson*, 988 P.2d 463 (Wash. App. 1999) (aerial surveillance at an altitude of 500 feet, during which growing marijuana was seen on defendant's rooftop, was not a violation of the Washington constitution); *People v. Reynolds*, 71 N.Y.2d 552, 523 N.E.2d 291 (1988) (helicopter flight over defendant's large property was permissible without a warrant under the state constitution; the police were in navigable airspace and the defendant had no expectation of privacy in the greenhouse); *State v. Stachler*, 570 P.2d 1323, 1329 (Haw. 1977) ("Our holding above that defendant had no reasonable expectation of privacy as to his open marijuana patch viewed from a helicopter operated at a legal and reasonable height, disposes of defendant's contention that the observation was an undue government inquiry into his life. The marijuana patch was open to the view of any member of the public who happened to be flying over defendant's property. There was no search or 'inquiry' in the instant case and there has been no showing that sophisticated electronic surveillance techniques were employed"). *But see*, *People*

v. Cook, 41 Cal.3d 373, 710 P.2d 299 (1985) (intensive and focused aerial inspection of an individual enclosed backyard required a warrant under the California constitution).

This Court recently considered the reach of privacy expectations of New Mexico citizens in *Crane*. However, the result in *Crane* does not invalidate the ability of law enforcement to use warrantless aerial surveillance, when reasonable, to ferret out criminal activity. One of the key points in *Crane* was the trash was in an opaque bag and not discernible to passersby; "[a]lthough garbage bags are placed in areas accessible to the public, the *contents* are not exposed to the public." *Id.* ¶ 27 (internal citations and quotation marks omitted). Thus, "[w]hat is important [in determining one's expectation of privacy in garbage] is whether one conceals it from plain view." *Id.* ¶ 30. A person's trash can contain any number of personal and intimate details of one's life and "[s]crutiny of another's trash is contrary to commonly accepted notions of civilized behavior." *Crane*, ¶ 22 (quoting *California v. Greenwood*, 486 U.S. 35, 45 (1988) (Brennan, J., dissenting). *See also Granville*, 2006-NMCA-098, ¶ 25 ("A search of one's garbage can reveal eating, reading, and recreational habits; sexual and personal hygiene practices; information about one's health, finances, and professional status; details regarding political preferences and romantic and other personal

relationships; and a person's own private thoughts, activities, beliefs, and associations").

Here, by contrast, the common principle in aerial flyover cases is that one's curtilage or backyard can be openly observed by passersby (or rather flyers-by) and the idea of someone being able to look into someone's else backyard from the air is not contrary to "accepted notions of civilized behavior." It happens every day in every state in this country. If something is exposed, it can be viewed by strangers. Moreover, a single flyover will not reveal the breadth and wealth of information that could be revealed by a trash search.

Such aerial flyovers can, however, see the distinctive shape and/or color of growing marijuana plants. The officers in *Ciraolo* were flying at 1,000 feet, twice as high as the officers in this case, and could readily identify marijuana from that altitude. *Id.* at 209. *See also Riley*, 488 U .S. at 448 (officers could identify marijuana with the naked eye at an altitude of 400 feet); *Bigler*, 1983-NMCA-114, ¶ 2 (police could identify marijuana from an airplane with the naked eye); *United States v. Broadhurst*, 805 F.2d 849, 850 (9th Cir. 1986) (during a helicopter pass of not less than 1,000 feet officers could discern tall plants in a greenhouse that had "shadows, shapes of plants, and shades of green" consistent with marijuana); *Blalock v. State*, 483 N.E.2d 439 (Ind. 1985) (no expectation of privacy in greenhouse with translucent roof through which color of plants resembling

marijuana was visible); *One 1985 Ford Thunderbird Automobile*, 624 N.E.2d at 548-49 (officers in helicopter varying in altitude between 700 and 1500 feet could see with naked eye potted marijuana plants in an empty swimming pool).

The Court of Appeals relied on *Kyllo* for its holding that such aerial flyovers violate our constitution. *Davis III*, ¶¶ 22-24. But *Kyllo* itself distinguished *Ciraolo* as a case in which the "lawfulness of warrantless visual surveillance" was preserved. *Kyllo*, 533 U.S. at 32. The difference in *Kyllo* was that the thermal-imaging technology effected a physical intrusion into the petitioner's house and "the Fourth Amendment draws 'a firm line at the entrance to the house.'" *Id.* at 40 (internal quotation omitted). But, "the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private." *Id.* at 33 (citing to *Ciraolo* at 215).

> We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," [ ] constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

Kyllo at 34-35 (internal citation omitted).

In *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409 (2013), the Supreme Court held, using property and trespass concepts, that officers' use of a drug-

sniffing dog on the front porch of a home was a search under the Fourth Amendment. Justice Kagan likened the situation to a stranger coming to your front door with a pair of high-powered binoculars to "learn details of your life you disclose to no one." *Id.* at 1418 (Kagan, J., concurring). *Jardines* was the same case because "police officers came to [defendant's] door with a super-sensitive instrument, which they deployed to detect things inside that they could not perceive unassisted." *Id.* Justice Kagan also opined that *Kyllo* and its "firm" and "bright" line at the "entrance to the house" resolved the case. *Id.* at 1419 (Kagan, J., concurring) (citing to *Kyllo*, 533 U.S. at 40).

In *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012), the Supreme Court held that placing a Global Positioning Device (GPS) tracker on a vehicle and monitoring the vehicle's movements on public roadways was a search under the Fourth Amendment. Because the defendant's vehicle was an "effect" as that term in used in the Fourth Amendment, the physical placement of the GPS device on the vehicle was an intrusion and therefore an illegal search. However, the Court stated that "[t]his Court has to date not deviated from the understanding that mere visual observation does not constitute a search." *Id.* at 953. *Jones* and *Jardines* are notable because the Court revived the trespass on property view of the Fourth Amendment; "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." *Id.* at 952. This argument

was used to defeat the government's argument that Jones had no reasonable expectation of privacy because he was driving on public roadways. *Id.* at 950. *See also United States v. Alabi*, 943 F.Supp.2d 1201 (D.N.M. 2013) (relying on both *Katz* and the trespass theory of privacy to find that officers did not conduct a Fourth Amendment search in digitally scanning the magnetic strips on debit and credit cards found in defendants' possession).

Most recently, the Court was unanimous in finding that officers cannot search the contents of a cell phone when it is seized pursuant to search incident to arrest. *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473 (2014). "Cell phones differ in both a quantitative and qualitative sense from other objects that might be kept on an arrestee's person" and have an "immense storage capacity." *Id.* at 2489. Thus, whereas a traditional search incident to arrest would not garner an immense amount of information and would be only a narrow intrusion on privacy the search of a cell phone's contents could reveal most everything about a person's private life. *Id. See also Jones*, 132 S. Ct. at 955-56 (observing that GPS trackers reveal more about a person's intimate associations than do "lawful conventional surveillance techniques") (Sotomayor, J., concurring).

The concerns regarding burgeoning technology and its effect on both the privacy of our country's citizens and the ability of law enforcement to combat crime focuses on the vast amount of information that can be obtained by new

technology such as GPS trackers, cell phones, and sophisticated video cameras. *See also United States v. Anderson-Bagshaw*, 509 Fed.Appx. 396, 404 (6th Cir. 2012), *cert. denied*, ___U.S. ___, 133 S. Ct. 2012 (2013) (law enforcement installed a video camera from a utility pole to stream a live image of defendant's outside curtilage to agents over a three-week period; although it was not a search under *Ciraolo*, the court expressed its "misgivings about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant[,]"); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) ("*Ciraolo* teaches us that a fly-over by a plane at 1,000 feet does not intrude upon the daily existence of most people; we must now determine whether a camera monitoring all of a person's backyard activities does. This type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state").

Airplanes and helicopters cannot capture vast amounts of private information or conduct sustained surveillance for weeks at a time. *See e.g. Jones* ("at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" *Id.* at 955 (Sotomayor, J., concurring) (internal citation omitted). Although there may be circumstances when a helicopter or aerial flight is too low and too intrusive, the evidence here did not suggest that and the district court did not find that. There was no physical trespass,

no accumulation of private information, and no sustained surveillance. The concerns expressed by this Court and the federal courts on the encroachment of privacy rights are absent here. There was no reasonable expectation of privacy to exposed curtilage. Visual observations by officers in a place where they are lawfully allowed to be is not a search under the New Mexico Constitution.

E. The Police Acted Reasonably and in a Sufficiently Non-Intrusive Manner

Under the federal constitution, helicopter flights may pass constitutional muster if they do not violate flight laws or are otherwise not unduly intrusive. *Riley*, 488 U.S. at 451-52. The New Mexico case law of *Rogers* and *Bigler* also held that such flights should be within navigable airspace and not unduly disruptive. *Rogers*, 1983-NMCA-115, ¶¶ 4-12; *Bigler*, 1983-NMCA-114, ¶¶ 8-9. The Court of Appeals applied various factors to balance the needs of law enforcement with the need for citizens to remain unmolested in their homes and curtilage.

Other courts have similarly considered various factors relating to the intrusiveness of such flyovers to determine if law enforcement acted reasonably. In *Giancola v. State of West Virginia Dept. of Public Safety*, 830 F.2d 547 (4th Cir. 1987), the court formulated several factors: (1) the total number of instances of surveillance; (2) the frequency of surveillance; (3) the length of each surveillance; (4) the altitude of the aircraft; (5) the number of aircraft; (6) the degree of

disruption to legitimate activities on the ground; and (7) whether any flight regulations were violated by the surveillance. *Id.* at 550-51. Two helicopters flew over the plaintiff's property for ten to twenty minutes at an altitude of 100 feet. The plaintiffs acknowledged that nothing on the ground was disturbed by the helicopter rotors and the helicopters were not close enough to them to distinguish their occupants. *Id.* at 548. The Fourth Circuit concluded that the surveillance was not unreasonable and did not violate the Fourth Amendment. *Id.* at 551.

One commentator suggested five more factors to complete the *Giancola* analysis: (1) whether the police had a reasonable suspicion that a crime was being committed at the location; (2) the time of day of the surveillance; (3) the noise generated by the surveillance; (4) whether the area is near an airport; and (5) whether the type of overflight is a common occurrence in the area. John D. Williams, *Helicopter Observations: When Do They Constitute a Search?*, 24 Cal. W. L. Rev. 379, 395 (1987/1988). "The application of *all* of these factors will ensure a proper balancing between the individual's right to privacy and the legitimate needs of society and its law enforcement agencies, whose duty is to protect and serve society." *Id.*

Here, one helicopter flew over Defendant's property one time for just a few minutes during daylight hours. There was no sustained surveillance or multiple aircrafts. Although Defendant was somewhat disturbed by the noise, there was no

testimony that the flight was particularly disruptive to his activities on the ground. Although Judge Paternoster did find that the infrequency of flights over this remote area was a factor in favor of the inhabitants' right to privacy, that is only one factor that can be considered.

Judge Paternoster also found that the pilots were flying in navigable airspace. Although there was testimony from other residents in the area that the helicopter was flying very low, Judge Paternoster dismissed some of this testimony as "overly dramatic" and found that there was "no competent testimony" that the police in the helicopters violated flight laws. [RP 196]. *See Riley*, 488 U.S. at 451-52 (helicopter surveillance of partially covered greenhouse at 400 feet); *see also id.* at 451 n. 3 ("Federal Aviation Administration (FAA) regulations permit fixed-wing aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas...."). Thus, the helicopter was in a position where it was lawfully entitled to be. *See Ciraolo*, 476 U.S. at 213-14. As noted by one federal court:

> *Katz* rightly warned of the dangers created by technological advances by which the police conduct surveillance. Yet the result today can hardly be said to approve of intrusive technological surveillance where the police could see no more than a casual observer. In this case, no more sophisticated technology was used than a single-engine fixed-wing aircraft ... and no more intrusive techniques were sued than to fly in navigable airspace, on three separate occasions, near defendants' greenhouse.

Broadhurst, 805 F.2d at 856. *Compare State v. Sneed*, 32 Cal.App.3d 535, 108 Cal. Rptr. 146 (1973) (although defendant had no reasonable expectation of privacy from observations by aircraft at lawful altitudes, his privacy was invaded by a helicopter positioned at 20 to 25 feet above his backyard). *But see Riley*, 488 U.S. at 452 ("In my view, the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'") (O'Connor, J., concurring).

Another factor, rejected by the Court of Appeals in its opinion in *Davis III*, is whether the police were on a fishing expedition or were focused on reasonable suspicion or a tip. In *Rogers*, the Court of Appeals relied upon *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981), to find that the officer's tip from an informant that the defendant was growing marijuana in a greenhouse was "one factor" that tended to justify the surveillance. *Rogers*, ¶ 10.

Allen was decided before either *Ciraolo* or *Riley*. *Allen* held that the defendants did not have a reasonable expectation of privacy that certain characteristics of their property would not be noticed and recorded by a Coast Guard helicopter. *Id.* at 1380-81. The court found that the government was justified in concentrating their surveillance on the property "as opposed to random

investigation to discover criminal activity." *Id.* at 1382. In *Ciraolo*, the state court initially found that the helicopter flight was unconstitutional in part because it was focused on a particular home rather than part of a "routine patrol." *Id.* at 214, n. 2. The United States Supreme Court, however, found this distinction to be irrelevant because "we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes" and noted that there was no authority for this proposition. *Ciraolo id. See also Broadhurst*, 805 F.2d at 855 (the court's conclusion that the police observation of what appeared to be marijuana from the air was permissible was not altered by the fact that the observation was focused on the defendant's greenhouse rather than routine and unfocused).

Here, the State's action in this case was not a mere fishing expedition in which the State hoped to ferret out criminal activity. On the contrary, the officers testified that they had received numerous anonymous complaints of marijuana grows in the area. The officers all testified that the callers were reluctant to name any names or specific addresses, due to the remote area in which they lived and their fear of retaliation. [4-5-07 Tr. 37; 123; 5-9-07 Tr. 284-285]. The officers' response was reasonable and concentrated the helicopter flights in the identified area. The officers did not have a tip which named a particular individual and/or a

particular piece of property but acted to confirm or dispel the suspicion they did have. The search was sufficiently narrow in that it was concentrated in a specific area with the purpose of observing the specific criminal activity of marijuana plantations. This method of investigation was less intrusive than sending officers to contact all the residents in the area.

It was primarily because of the rural and unimproved nature of the Carson area that the police undertook aerial surveillance. They had numerous and repeated complaints of marijuana cultivation in the area and aerial surveillance was the least intrusive way of confirming or dispelling suspicion. Other courts have recognized that the remoteness of the region and terrain may justify aerial surveillance as the least intrusive manner of confirming suspicions. *See United States v. DeBacker*, 493 F.Supp. 1078, 1081 (W.D. Mich. 1980) (aerial surveillance at an altitude between 50 and 200 feet over defendant's remote property in a sparsely populated area was not a violation of the Fourth Amendment; "[t]he police here did not regularly view defendant's property in the hopes of happening upon a crime. Instead, the police, acting upon an anonymous telephone tip, merely sought to verify it in as non-obtrusive a way as possible"); *People v. Mayoff*, 42 Cal.3d 1302, 729 P.2d 166, 169, 175 (1986) (upholding aerial surveillance over remote area believed to contain marijuana crops; "[a]erial surveillance of these remote, inaccessible, and dangerous areas may be the only

feasible means of confronting this extraordinary law enforcement problem [and] [a]erial surveillance also seem the least intrusive way of doing so. ..."); *People v. Romo*, 198 Cal.App.3d 581, 243 Cal.Rptr. 801, 805 (1988) (helicopter overflight at 500 feet, based on anonymous reports of heavy foot traffic at defendant's residence, was not a Fourth Amendment search as the marijuana plants could be viewed without no visual aids and this particular helicopter flight was not unduly intrusive).

F. The Concern about Drones

Lastly, the Court of Appeals held it would not consider any factors relating to the intrusiveness of a particular flight because such factors have "diminished relevance" due to the technological advances including drones. *Davis III*, ¶ 19.

Drones can perform highly sophisticated surveillance in a completely non-intrusive manner. Ajoke Oyegunle, *Drones in the Homeland; A Potential Privacy Obstruction Under the Fourth Amendment and the Common Law Trespass Doctrine*, 21 CommLaw Conspectus 365, 370-71 (2013). They can "range in size from a few inches to hundreds of feet and have any number of uses, including intercepting telecommunications by eavesdropping on cellular phone calls, accessing text messages, and intercepting Wi-Fi communications." Oyegunle, *supra*, at 371.

There is no doubt that the increased availability of drones is a subject of concern to legal commentators. *See* Robert Molko, *THE DRONES ARE COMING! Will the Fourth Amendment Stop Their Threat to Our Privacy?*, 78 Brook. L. Rev. 1279 (Summer, 2013); Oyegunle, *supra*; Andrew B. Talai, *Drones and Jones: The Fourth Amendment and Police Discretion in the Digital Age*, 102 Cal. L. Rev. 729 (June, 2014). The FAA Modernization and Reform Act of 2012 requires the FAA to "expedite the process of authorizing both public and private use of drones in the national navigable airspace." Molko, *supra*, at 1283 (citing to Pub. L. No. 112-95, 126 Stat. 11). The issue then becomes whether our current privacy law is sufficient to protect citizens from this new type of drone surveillance.

But this is not a drone case. Our case law protects reasonable expectations of privacy and zealously protects that which our citizens seek to conceal from the public. The point in this case is that marijuana plants which are in plain view from a lawful vantage point are not so protected. If a drone flyover garnered information from the interior of one's home, or intercepted one's phone calls or any other private communication, our current case law would protect the affected citizen. But a rule forbidding any form of aerial surveillance used as a police tool is premature. The above commentators speculate as to what the United States Supreme Court might do in response to drone surveillance, but this Court remains free to interpret the New Mexico Constitution in a broader manner to protect our

citizens if the use of drones becomes a reality in New Mexico and if such use impinges on the values articulated in *Crane* and other cases delineating the privacy rights of our citizens.

Legislatures are also attuned to the issue and the vast majority of states have proposed or adopted drone legislation. *See* 2013 Unmanned Aircraft Systems (UAS) Legislation, Nat'l Conf. St. Legislatures, available at http://www.ncsl.org/issues-research/justice/unmanned-aerial-vehicles.aspx . Such legislation was proposed in New Mexico in 2013 seeking to ban drone surveillance in the absence of a warrant unless exigent circumstances exist. *See* S.B. 556, 51st Leg., 1st Sess. (N.M. 2013), *available at* http://www.nmlegis.gov/Sessions/13%20Regular/bills/senate/SB0556.pdf.

But banning all forms of targeted aerial surveillance in anticipation of drone use is a precipitate and overly broad response. The Court of Appeals' holding in *Davis III* fails to provide "a workable accommodation of interests between the needs of law enforcement and the interests protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 181 (1984).

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to reverse the Court of Appeals' opinion in *Davis III* and affirm the trial court's ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by placing it in the Public Defender's box located in the Clerk's Office of this Court for:
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on this 31st day of July, 2014.

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