IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v. **No. 34, 548**

NORMAN DAVIS,

Defendant-Respondent.

DEFENDANT-RESPONDENT'S ANSWER BRIEF

ON CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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TABLE OF CONTENTS

TRANSCRIPT OF PROCEEDINGS

Counsel cites to the transcript from the suppression hearing as **[Tr. DATE, page number]**. References to the record proper are cited as **[RP ___]** References to the State's Brief-in-Chief are as follows: **[BIC ___]**.

STATEMENT OF COMPLIANCE WITH RULE 12-213 (G) NMRA

The body of the attached brief exceeds the page limits set forth in Rule 12-213 (F) (2) NMRA (brief in chief exceeds 35 pages). As required by Rule 12-213(F)(3) NMRA, undersigned counsel certifies that this brief is printed in proportionally-spaced Times New Roman 14 point type style, and the body of the brief contains 10, 738 words and therefore does not exceed 11,000. This brief was prepared using Microsoft Word.

TABLE OF AUTHORITIES

NEW MEXICO CASES

FEDERAL CASES

OTHER STATE CASES

OTHER AUTHORITIES

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

The New Mexico State Police, utilizing a Black Hawk military helicopter provided by the New Mexico National Guard, swooped down on the residents of Carson, New Mexico and terrorized the people and their animals. Police flew over Norman Davis' home peering into his covered greenhouse. This Orwellian-like helicopter search over Mr. Davis' curtilage was unreasonable, unparticularized, and the marijuana illegally seized should have been suppressed by the trial court. Mr. Davis' consent, furthermore, was not sufficiently attenuated from this illegality and does not validate this unlawful search. The Court of Appeals correctly reversed the trial court in its Opinion. Mr. Davis respectfully requests that this Court affirm the Court of Appeals or quash its Writ of Certiorari.

B. Summary of Facts and Course of Proceedings.

Norman Davis lived in Carson, New Mexico. On August 23, 2006, members of the New Mexico State Police, New Mexico Game and Fish Department, the United States Forest Service, and the New Mexico National Guard swarmed his home. **[Tr. 4/5/07, 44]** This raid followed a helicopter flyover of Carson, New Mexico to search for marijuana grows. The eradication effort was named "Operation Yerba Buena." **[Tr. 4/5/07, 28]** The New Mexico State Police initiated this search after receiving vague, anonymous tips that there was marijuana growing in the vast, rural areas of Carson and Carson Estates. **[Tr. 5/9/07, 284-285]** The

police did not receive any tips specific to Mr. Davis' property. **[Tr. 4/5/07, 36]** When the police flew over Mr. Davis' property, the spotter informed the ground teams that there were "plants" and a "greenhouse with vegetation." **[Tr. 4/5/07, 64, 65]** The spotter did not say that he saw marijuana.

The District Court Judge found it "suspect" that the officers were able to observe marijuana in a greenhouse from 500 feet in the air without the aid of binoculars. **[RP 196]** After the spotter informed ground teams that he saw what he thought to be marijuana, he helped guide the ground team to Mr. Davis' residence. The "plants" in the back of the residence turned out to be corn and sunflowers, not marijuana. **[Tr. 4/5/07, 64-65]** ; **[Stipulation, 2]**

Once at the residence, Sergeant Merrell asked Mr. Davis if he had marijuana growing and if he could search the residence. Mr. Davis admitted he had some marijuana. **[Tr. 4/5/07, 69]** During this confrontation, more than seven officers surrounded the scene, armed with AR-15s, a semiautomatic weapon. **[Tr. 4/5/07, 42, 44, 72]** Sgt. Merrell armed himself with an AR-15 and his hand gun. Mr. Davis saw the officers entering his property and surrounding his greenhouse. **[Tr. 4/5/07, 84]**

Sgt. Merrell's belt tape recorded the confrontation with Mr. Davis. The helicopter continued to hover just above his head, as can be heard on the belt tape. **[Defense Exhibit B]** Sgt. Merrell identified himself and then told Mr. Davis that

the police believe they spotted marijuana from the helicopter on his property. Sgt. Merrell then asked, "would I have permission from you to search your residence for the marijuana plants that we have seen?" Mr. Davis responded, "well um what if I said no?" **[Defense Exhibit B, 10:07-10:25]** Sgt. Merrell told Mr. Davis that he would secure the residence, but that it was up to him. He then said that the officers had seen marijuana and have identified it and knew that it was there. **[Defense Exhibit B, 10:30]**

Sgt. Merrell asked Mr. Davis again if he would give permission to search his property and Mr. Davis said, "sure." Sgt. Merrell then said in a louder voice, "Wait guys, hold on." Mr. Davis responded that "it looks like they are searching anyways." Sgt. Merrell told Mr. Davis that the officers were they for safety and then asked whether there was marijuana in the greenhouse and Mr. Davis answered truthfully that there was. **[Defense Exhibit B, 10:53-10:55, 11:09]**

Sgt. Merrell again told Mr. Davis that police knew that he had marijuana and that he "would need [his] consent . . ." **[Defense Exhibit B, 14:59]** Mr. Davis responded that he told the officers where it was located, and Sgt. Merrell again told Mr. Davis that he would like consent to search and that the officers would be off his property soon. **[Defense Exhibit B, 15:05]**

Mr. Davis asked Sgt. Merrell what would happen if he did not sign the consent form and Sgt. Merrell said that the officers would "go forth and try to

execute a warrant through the district attorney's office." **[Defense Exhibit B, 19:15-19:21]** Mr. Davis asked if that would take a while, and Sgt. Merrell said that it would take about thirty minutes. Mr. Davis then said, "well I guess I don't really have any options here do I?" Sgt. Merrell did not say anything in response. **[Defense Exhibit B, 19:29-19:33]** Mr. Davis ultimately signed a consent form allowing the officers to search his house. **[Tr. 4/5/07, 71]**; **[State Exhibit 1]** During this time, Mr. Davis felt ill and had to lie down. **[Tr. 4/5/07, 74]** Mr. Davis also informed Sgt. Merrell that he grows and uses marijuana to treat his three medical conditions: tremors, osteoarthritis and high blood pressure. **[Defense Exhibit B, 17:52]**

Mr. Davis was charged with Possession of Marijuana and Possession of Drug Paraphernalia. **[RP 9]** His trial attorney filed a *Motion to Quash and Suppress* (and further amended motions) in his case as well as in the case of another Carson resident, Steve Hodge[1]. **[RP 19-22, 76-78, 81-85, 105-115, 116-124]** The court heard the motion to dismiss in a hearing on the two cases.

Mr. Davis testified at the hearing, but the record was lost and had to be reconstructed. The parties filed a stipulation in the Court of Appeals on January 26,

[1] Although Mr. Hodge also consented to the search of his property, the officers still sought a warrant. This was apparently part of their operational plan. **[Tr. 5/9/07, 303]** The district court suppressed the evidence seized in Mr. Hodge's case based on the unconstitutional warrant. **[RP 198]**

2011. Mr. Davis testified that was 72 years old on August 23, 2006, and was in bed and not feeling very well when he heard a helicopter hovering very low, right on top of his house. He described the helicopter as making a considerable racket and he had to get out of bed to see what was going on. When he came out of his house, he was confronted by a police officer near his door holding a rifle and armed with a side arm. There were other officers with weapons on either side of his driveway. They were near buildings on his property and they appeared to be searching or looking in those buildings. Mr. Davis testified that the helicopter was hovering just above his head, about 50 feet above him, and kicking up dust and debris that was swirling all around. The officer then asked Mr. Davis for permission to search his property. Mr. Davis asked what would happen if he said no and the officer said he would get a warrant and he told his officers to hold on. The officers stopped moving through the buildings on his property at that point.

Mr. Davis agreed to let the officers search the property and signed a consent form. The officer near the door asked Mr. Davis if he had any marijuana on his property and Mr. Davis admitted that he did have marijuana.

Mr. Davis explained his green house was made of opaque material and the helicopter could not have seen the plants in his green house. The only thing someone could have seen on his property from a helicopter was corn, sunflowers and echinacea growing in the back of his house out in the open.

After a while Mr. Davis felt ill and asked the officers for permission to go back inside his house to lie down and they allowed him to do that. The officers stayed near him throughout the entire time of the search. **[Stipulation]**

Many residents of Carson testified that they were scared while the helicopter conducted this flyover. Ms. Merilee Lighty testified that the helicopter "frightened and annoyed me." **[Tr. 5/7/07, 153]** She also testified that she did not have a greenhouse because if she did the police would come on to her property and she believed the searches were not done with specificity, but were random. **[Tr. 5/7/07, 154-155]**

Mr. John Lighty testified that the helicopter flew "very, very low" and that it was "low enough to irritate us a great deal." **[Tr. 5/7/07, 159]** He believed he would have been treated differently if he had a greenhouse on his property. Specifically, "I think probably people would be knocking on my door with M16's and asking to look the place over." **[Tr. 5/7/07, 161]**

Mr. Kelly Rayburn testified that the helicopter flew over his house and his neighbor, Liz Hagerty's house. He testified that the helicopter was "less than 50 feet" high and that the downdraft from the helicopter lifted the solar panel off his roof and blew trash all over his yard. **[Tr. 5/7/07, 192-193]** He explained that the helicopter "didn't make me feel very good" and "[i]t made me feel like my privacy had been invaded" and because of his time in

the service, he said "helicopters still scare the shit out…of me." **[Tr. 5/7/07, 193-194]**

The helicopter also caused damage to some of the residents' property. Mr. William Hecox testified that one of his "4-by-4 beams was broken at the ground and the other one was broken about 3 feet up from the ground." **[Tr. 5/7/07, 200]** He explained that "they weren't broken prior to the helicopter." **[Id.]** He also testified that the helicopter was flying at about "50 feet" and that the officers were acting "like they had just found somebody carrying drugs or something, but all I had was a tree." **[Tr. 5/7/07, 201]** He further said that "[t]he one guy had the gun pointed at me." **[Tr. 5/7/07, 201]** He did not believe what the police did was reasonable and that his animals (goats, chickens, ducks and turkeys) were "definitely upset." **[Tr. 5/7/07, 202]**

Maya Torres submitted an affidavit stating "[t]he helicopters were at tree level…" and she "was unable to work during the time of the attack." She also stated that "for about 4 hours we were terrorized as these invaders pointed sub machine guns at us." **[Defense Exhibit O]**

The Operations Plan called for the helicopter to observe marijuana and then for ground teams to confirm the presence of marijuana. **[Tr. 5/9/07, 333]** Police would then get a warrant. However, Kelly Rayburn and Robert Paul testified that they witnessed Liz Hagerty's home searched by the New Mexico State Police and

the other agencies working with them, yet a search warrant was not sought in that case because no marijuana was found. **[Tr. 5/7/07, 191, 232]**

Alan Maestas, an expert witness for the defense, testified that a helicopter flying at 500 feet would be unable to lift a solar panel off of a roof. **[Tr. 5/7/07, 220]** He explained at "500 feet [in a helicopter] it's hard to distinguish detail. It is particularly difficult if the helicopter is moving because you're getting a different view constantly." **[Tr. 5/7/07, 225]** He thought that it would be more reasonable to have used binoculars when trying to view something on the ground while up in a helicopter. **[Tr. 5/7/07, 226-227]**

The trial court evaluated the testimony and found that "[w]ith the unaided eye it is not likely that anything other than a belief that it was marijuana was possible. The overwhelming volume of testimony is that one could not see into the greenhouses from the ground. Therefore the visibility of 'suspected marijuana' plants inside the greenhouse is improbable." **[RP 195]** The trial court was also "concerned that 'Carson' area plus 'greenhouse' propelled the spotting officer to conclude that behind the walls of the greenhouse were prohibited plants. There is a surreal 'profiling' aspect to the police behavior." **[RP 195-196]**

In addressing the extent of the physical intrusion, the trial court found that some of the testimonial descriptions of rotor wash and flying debris was "overdramatic and anti-police state rhetoric[.]" **[RP 196]** But the court found

"there is merit to the claim that the police swooped in as if there were in a state of war, searching for weapons or terrorist activity. This can be terrifying and intimidating to most normal persons. I remind the police that they are not conducting a war against persons who chose to live in rural areas and divest themselves of a more 'cosmopolitan' lifestyle." **[RP 196]**

Furthermore, the trial court found "[t]he testimony that naked eye examination from 500 feet revealed marijuana plants is suspect." **[RP 196]** The trial court also found that the Carson area is "very remote and rural, and overflights by low flying aircraft are rare." Carson is "accessed by poorly maintained dirt roads with few directional signs or markings." According to the trial court "[t]hese facts enlarge a reasonable expectation of privacy." **[RP 196]** The court made a finding that helicopter flights over this area were unlikely in the absence of police surveillance and"[t]his fact weighs in favor of the defendants." **[RP 197]**

The trial court also evaluated the means of surveillance and found that "[t]here was no particular or general information targeting any specific building or location, by name or description." **[RP 197]** Sgt. Merrell testified that he did not receive any information or tips from any source that Mr. Davis was growing marijuana on his property and Sergeant Vigil testified that Norman Davis was not targeted for a search. **[Tr. 4/5/07, 36, 116]** The trial court also found that "[t]hese were not police officers innocently passing by overhead, as Justice O'Connor

might describe them, but men on a mission. Random investigation, however, weighs against the justification for the surveillance. There is a foreseeable threat here that well into the future annual flyovers of the Carson area by police looking for marijuana plantations, relying on the shopworn 'anonymous complaints'-undocumented, nonspecific and uncorroborated-might become commonplace." **[RP 197)]**

The trial court found the helicopter search "just barely permissible" and found Mr. Davis voluntarily consented to the search, denying the motion. **[RP 198-199]** Mr. Davis entered a conditional plea to one count of possession of marijuana (eight ounces or more). He received a conditional discharge and was placed on unsupervised probation for one year. He reserved the right to appeal the denial of his suppression motion. **[RP 200-204]**

The Court of Appeals initially reversed the denial of Mr. Davis' motion to suppress, holding that his consent was given under duress. ***State v. Davis***, 2011-NMCA-102, ¶ 13, 150 N.M. 611, 263 P.3d 953 (concluding "that although Defendant gave specific and unequivocal consent to a search of his property, the consent was given under duress and coercive circumstances.") This Court reversed the Court of Appeals, holding that his consent was voluntary and remanding to the Court of Appeals to consider the remaining issues. ***State v. Davis***, 2013-NMSC-028, ¶ 35, 304 P.3d 10 (concluding "that there was substantial evidence that

Defendant voluntarily consented to the search[.]"). The Court of Appeals again reversed the denial of the motion to suppress, holding that the helicopter search violated Article II, Section 10 of the New Mexico Constitution and that Mr. Davis' consent was not sufficiently attenuated from the illegal helicopter search. ***State v. Davis***, 2014-NMCA-042, ¶¶ 27, 31, 321 P.3d 955 (holding the helicopter surveillance of constituted a search requiring probable cause and a warrant and there was insufficient attenuation to purge Mr. Davis' consent of the taint resulting from the unconstitutional aerial surveillance.) This Court granted the State's Petition for Writ of Certiorari.

II. THE HELICOPTER SEARCH VIOLATED THE FOURTH AMENDMENT.

In response to the State's discussion of Fourth Amendment precedent **[AB 17-25]**, Mr. Davis asserts that the search also violated his rights under the federal constitution. In its discussion of Article II, Section 10, the State also includes a survey of recent Fourth Amendment cases. Therefore, Mr. Davis responds with this argument on the legality of the helicopter search under the Fourth Amendment.

The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." ***Katz v. United States***, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). ***Katz*** posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in

the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?

A. Standard of Review

"The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party." ***State v. Lopez,*** 2005-NMSC-018, ¶ 9, 138 N.M. 9, 116 P.3d 80 (quoted authority omitted). The appellate court reviews the district court's "purely factual assessments to determine if the fact-finder's conclusion is supported in the record by substantial evidence." ***State v. Attaway***, 1994-NMSC-011, ¶ 5, 117 N.M. 141, 870 P.2d 103. Then, while "[d]eferring to the trial court with respect to factual findings and indulging all reasonable inferences in support of the trial court's decision ... we review the constitutional question of the reasonableness of a search and seizure de novo." ***State v. Johnson***, 2006-NMSC-049, ¶ 9, 140 N.M. 653, 146 P.3d 298.

B. Federal Aerial Surveillance Cases

The United States Supreme Court has decided two main cases on aerial surveillance. In ***California v. Ciraolo***, 476 U.S. 207 (1986), Santa Clara Police received an anonymous telephone tip that marijuana was growing in the defendant's backyard. Police were unable to observe the yard from ground level because two tall fences completely enclosed the yard. Police secured a private

plane and flew over the defendant's house at an altitude of 1,000 feet. This altitude was within navigable airspace. The officers in the airplane, trained in marijuana identification, recognized marijuana plants 8 feet to 10 feet tall growing in a 15- by 25-foot plot in back yard. The officers photographed the area with a standard camera. ***Id***. at 209.

In addressing the ***Katz*** test, the Court found that by placing a tall fence around his property the defendant in ***Ciraolo*** "took normal precautions to maintain his privacy." 476 U.S. at 211 (quoting ***Rawlings v. Kentucky***, 448 U.S. 98, 105 (1980)). This demonstrated his own subjective intent and desire to maintain his privacy in his backyard. ***Ciraolo*** at 211.

The Court then moved on to the second part of the ***Katz*** inquiry—whether this expectation is reasonable. The Court framed the question as "whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable." ***Ciraolo*** at 213. The Court noted that the observations 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." ***Id***. (internal citation omitted) (emphasis added.) The Court found significant the fact that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." ***Id***. at 213-214. Therefore, the Court

concluded that the defendant'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 214.

In ***Florida v. Riley***, 488 U.S. 445 (1989), the defendant lived in a mobile home located on five acres of rural property. A greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were concealed from view by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some translucent and some opaque. Two of the panels were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a "DO NOT ENTER" sign. ***Id***. at 448. The Pasco County Sheriff's office received an anonymous tip that marijuana was growing on the property. The investigating officer could not see the contents of the greenhouse from the road, so he circled twice over the property in a helicopter at the height of 400 feet. With his naked eye, he was able to identify what he thought was marijuana growing in the greenhouse. ***Id***.

The Court applied the same analysis it used in ***Ciraolo*** and held that the defendant demonstrated a subjective expectation of privacy. However, the Court held that because the sides and roof of his greenhouse were left partially open, what was growing in the greenhouse was subject to viewing from the air. ***Riley***,

488 U.S. at 450. Therefore, the defendant "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft." ***Riley***, 488 U.S. at 451.

The ***Riley*** Court found "of obvious importance" that the helicopter was not violating the law and that there was nothing in the record "to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude." ***Id.*** at 451-452. Furthermore, there was no evidence that the helicopter interfered with the defendant's "normal use of the greenhouse or of other parts of the curtilage." ***Id***. at 452. More specifically, the Court held "there was no undue noise, and no wind, dust, or threat of injury." ***Id***. Therefore, the helicopter flyover did not violate the Fourth Amendment.

A couple of key factors emerge from these cases. First, through the application of ***Ciraolo***, ***Riley*** noted "[a]s a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be,'" 488 U.S at 449 (quoting ***Ciraolo***, 476 U.S. at 213.)[2] Second, both cases hold that police conducted the aerial surveillance in a way that was not bothersome. ***Ciraolo*** described that flight as conducted in a "physically nonintrusive manner." 476 U.S.

[2] As argued below, New Mexico has directly rejected this line of reasoning.

at 213. The Court in ***Riley*** noted that "there was no undue noise, and no wind, dust, or threat of injury." 488 U.S at 452. The aerial surveillance in this case differs significantly from that of both ***Riley*** and ***Ciraolo*** given the low altitude, dust, wind, and physically *intrusive* manner of the helicopter search. Furthermore, a factor the Court found significant in ***Riley*** was that there was no evidence that overhead flights were uncommon in that area to support the defendant's claim that he had a reasonable expectation of privacy. In this case, the district court found that "overhead flights by low flying aircraft are rare." **[RP 196]** Based on these key differences, Mr. Davis asserts that his case is distinguishable from the federal aerial surveillance cases and that the search in this case violated the Fourth Amendment.

Furthermore, the Supreme Court has recently narrowed the principle that simply because the police conducted a search from a lawful vantage point that the search was lawful. In ***Kyllo v. United States***, 533 U.S. 27, 29 (2001), police used a thermal imager to scan the duplex where the defendant lived, suspecting him of using heat lamps to grow marijuana inside. The scan only took a few minutes and the officer conducted it from across the street. ***Id***. at 30. Based partially on the results of the scan, police obtained a warrant to search the house. ***Id***. Although the officer obtained the information from a lawful vantage point, the Court found the search violated the Fourth Amendment. The Court held 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." ***Id***. at 34 (internal citation and quotation marks omitted.)

In ***Florida v. Jardines***, 133 S.Ct. 1409 (2013), police received an unverified tip that the defendant was growing marijuana. The officers were unable to see inside the house because the blinds were closed. The officers took a drug dog up to the house and the dog alerted for marijuana. Police then obtained a warrant to search the house. ***Id***. at 1413. The Court held that the search took place in a constitutionally protected area, the curtilage of the home. ***Id***. at 1414 (regarding "the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'") (citing ***Oliver v. United States***, 466 U.S. 170, 180 (1984)). The Court then turned to the question of whether the police investigation was "accomplished through an unlicensed physical intrusion." ***Jardines***, 133 S.Ct. at 1415. The Court looked to the terms of traditional invitation and held "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that." ***Id***. at 1416. Because "the officers learned what they learned only by physically intruding

on Jardines' property to gather evidence is enough to establish that a search occurred[,]" the Court did have to decide whether the investigation violated the defendant's expectation of privacy. 133 S.Ct. at 1417.

The police in Mr. Davis' case intruded into the constitutionally protected curtilage of his home and their investigation was "accomplished through an unlicensed physical intrusion." ***Jardines***, 133 S.Ct. at 1415. ***Jardines*** noted that "[i]n permitting, for example, visual observation of the home from 'public navigable airspace' [the Court was] careful to note that it was done 'in a physically nonintrusive manner.'" 133, S.Ct. at 1415 (citing ***Ciraolo***, 476 U.S. at 213.) The helicopter flyover in this case was done in a physically *intrusive* manner and therefore constitutes an unlicensed physical intrusion.

The touchstone of Fourth Amendment analysis has always focused the reasonableness of the governmental invasion of a citizen's personal security. *See* ***Terry v. Ohio***, 392 U.S. 1, 12 (1968). The helicopter flyover in this case was not reasonable and therefore was unconstitutional.

C. New Mexico Aerial Surveillance Cases Applying the Fourth Amendment.

New Mexico specifically addressed aerial surveillance twice, in 1983, applying Fourth Amendment analysis because New Mexico had not yet departed from federal precedent. *See* ***State v. Garcia***, 2009–NMSC–046, ¶ 28, 147 N.M.

134, 217 P.3d 1032 (stating that our Supreme Court diverged from Fourth Amendment analysis for the first time in 1989).

In ***State v. Bigler***, 1983-NMCA-114, 100 N.M. 515, 674 P.2d 140, police received a tip from an informant that the defendant was growing marijuana in a field. Based on this tip police flew an airplane over and spotted marijuana growing surrounded by corn. Police then drove by and saw and smelled marijuana and sought a warrant. ***Id***. ¶ 2-3. The defendant's property was situated within two to three miles of a municipal airport and crop dusters regularly flew over. ***Id***. ¶ 8. The court held that these facts tended to show that the defendant had no reasonable expectation of privacy in his field to the extent of visibility from the air. ***Id***. ¶ 9.

Mr. Davis' case is distinguishable because the police were not acting on the basis of a specific tip, but rather conducted a general flyover of the area. In this case, the flyover was over the curtilage of the home, and not over an open field. Also, Mr. Davis lives in an area where overhead flights are not common, thus increasing his reasonable expectation of privacy in the airspace over his home and curtilage.

In ***State v. Rogers***, 1983-NMCA-115, 100 N.M. 517, 673 P.2d 142, two police officers flew a helicopter over the defendant's property. One officer observed marijuana poking through the roof of a greenhouse. The officer initially saw the marijuana with the naked eye and then used field glasses to get a better

look. Based on that information the officer sought a warrant, searched the property and seized marijuana. ***Id***. ¶ 2. The Court noted that the area was near Fort Bliss, White Sands Missile Range and Alamogordo, and therefore air traffic was not uncommon. ***Id***. ¶ 6. The Court held that the defendant did not have a reasonable expectation of privacy in the air space over his greenhouse. ***Id***. ¶ 7.

Rogers is distinct from Mr. Davis' case in two ways. First, in Mr. Davis' case, the officers were not working off of a specific tip. Second, Mr. Davis lives in a very remote and rural area where, as the trial court found, air traffic is not common. **[RP 197]**

The police officer in ***Rogers*** testified that he flew over the defendant's property because he had received a tip from an informant that defendant was growing marijuana in his greenhouse. 1983-NMCA-115, ¶ 10. The ***Rogers*** court found "the fact that the police officer had independent information about defendant's property as one factor which tends to justify the surveillance." ***Id***.

In this case there was no justification for concentrating the surveillance on the area where Mr. Davis resides, other than as the district court characterized it, "the shopworn 'anonymous complaints'-undocumented, nonspecific and uncorroborated[.]" **[RP 197]** Rather, contrary to the State's assertion that "the State action in this case was not a mere fishing expedition in which the State hoped to ferret out criminal activity" **[BIC 38]**, this was a "random investigation to

discover criminal activity," ***United States v. Allen***, 675 F.2d 1373, 1381 (9th Cir.1980). Sgt. Merrell testified that he did not receive any information or tips from any source that Mr. Davis was growing marijuana on his property **[Tr. 4/5/07, 36]** and Sgt. Matthew Vigil testified that Norman Davis was not targeted for a search. **[Tr. 4/5/07, 116]**. Sgt. Adrian Vigil also testified that no specific names or addresses were given to the police for the search and that it was because of these complaints (which were vague, general, non-specific) that this area was focused on for helicopter surveillance. **[Tr. 5/9/07, 285, 288]**

Rogers also considered the following factors in assessing police overflights: "altitude of the aircraft, use of equipment to enhance the observation, frequency of other flights and intensity of the surveillance." ***Rogers***, 1983-NMCA-115, ¶ 9. In this case, there was testimony that the helicopter was not flying at 500 feet, but rather was much lower, around 50 feet. The expert also testified that it was unlikely that the helicopter was flying at 500 feet, because at that altitude it is unlikely for it to have lifted a solar panel off a roof. **[Tr. 5/7/07, 220]** The district court found it "suspect" that the officers were able to see marijuana with the naked eye, therefore leading to the inference that the helicopter was flying lower, and/or that the officers were using equipment to enhance the observation. **[RP 196]** The area where Mr. Davis lives is not frequented by other flights, particularly at low-flying altitudes. Furthermore, the testimony of the residents shows that the

surveillance was intense and that they were very annoyed and frightened by it. **[Tr. 5/7/07, 153, 159, 193]**

The Court in ***Rogers*** also noted "that unlike the situation in ***State v. Bigler*** which involved surveillance of an open field, police here surveilled a building within the defendant's curtilage." ***Rogers***, 1983-NMCA-115, ¶ 9. Police conducted the same surveillance here. The police were not flying over an open field, but rather were flying directly over the protected curtilage of Mr. Davis' home.

In ***Rogers***, police acted on a specific tip from an informant that marijuana was growing on the property. The search was not a random search of a huge area, as was the case with "Operation Yerba Buena." But rather, the aerial surveillance was specific and targeted to one property, not miles and miles of vast, rural space. *See* **[Tr. 5/9/07, 286--**Sgt. Adrian Vigil testified that the location targeted for the helicopter search was a "vast area."**]** ***Rogers*** held that "the facts of this case teeter dangerously close to exceeding the limitations implicit in the Fourth Amendment." 1983-NMCA-115, ¶ 13. If the police activity in ***Rogers*** was close, then the more egregious police activity in Mr. Davis' case has certainly gone over the edge and violated the Fourth Amendment.

III. THE HELICOPTER SEARCH VIOLATED ARTICLE II, SECTION 10 OF THE NEW MEXICO STATE CONSTITUTION.

A. Standard of Review and Preservation

"Article II, Section 10 is calibrated slightly differently than the Fourth Amendment. It is a foundation of both personal privacy and the integrity of the criminal justice system, as well as the ultimate regulator of police conduct." ***Garcia***, 2009-NMSC-046, ¶ 31. New Mexico courts independently analyze "state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees." ***State v. Gutierrez***, 1993-NMSC-062, ¶ 32,116 N.M. 431, 863 P.2d 1052. Generally, our state constitution protects the fundamental premise that each person in this state should be free from unwarranted intrusions by the government. ***Id***. ¶ 46. Specifically, Article II, Section 10, provides greater protections for privacy. ***State v. Rodarte***, 2005–NMCA–141, ¶ 1, 138 N.M. 668, 125 P.3d 647; *see* ***Attaway***, 1994-NMSC-011, ¶ 24 ("Article II, Section 10[,] embodies the disparate values of privacy, sanctity of the home, occupant safety, and police expedience and safety.")

When interpreting Article II, Section 10, this Court has emphasized its strong belief in the protection of individual privacy. ***Attaway***, 1994-NMSC-011, ¶ 22 n. 6. It has also recognized New Mexico's strong, corresponding preference for the warrant requirement. ***Campos v. State***, 1994-NMSC-012, ¶ 14, 117 N.M. 155, 870 P.2d 117; *see* ***State v. Gomez***, 1997–NMSC–006, ¶ 36, 122 N.M. 777, 932

P.2d 1. In interpreting our state constitution, the court may part ways with federal precedent for three reasons: flawed federal analysis, structural differences between the state and the federal provision, or distinctive state characteristics. ***Id***. ¶ 19.

Trial counsel for Mr. Davis also argued that the New Mexico State Constitution affords residents greater privacy protections than the federal constitution. **[Tr. 5/7/07, 147, 148]**; **[RP 19, 76, 81, 105, 116]** The district court did not properly apply the New Mexico state constitution. Although the letter opinion discusses the New Mexico aerial surveillance cases, the holdings in those cases were based on the Fourth Amendment. The letter opinion erroneously finds that "New Mexico cases adjure us to follow *Riley/Ciraolo.*" **[RP 197]** This is simply not true. New Mexico does not have to, and often rejects Fourth Amendment precedent. The Court of Appeals agreed and found the helicopter search violated Article II, Section 10 of the New Mexico constitution. ***Davis***, 2014-NMCA-042, ¶ 27.

B. Flawed Federal Analysis

The first alternative prong under ***Gomez***' interstitial analysis addresses whether the federal decisions apply a flawed analysis. As reasoned by the dissents in both ***Ciraolo*** and ***Riley***, the majority opinions rely on a misapplication of the law. In ***Ciraolo***, the dissent criticized the majority opinion for its reliance on the *manner* of police surveillance as "directly contrary to the standard of ***Katz,*** which

identifies a constitutionally protected privacy right by focusing on the interests of the individual and of a free society." 476 U.S. at 223. The dissent explained that since ***Katz***, the Court has "consistently held that the presence or absence of physical trespass by police is ***constitutionally irrelevant*** to the question whether society is prepared to recognize an asserted privacy interest as reasonable." ***Id***. (emphasis added.) ***Ciraolo***'s dissent posits that the majority opinion's holding "must rest solely on the fact that members of the public fly in planes and may look down at homes as they fly over them." ***Id***. New Mexico already rejects this justification under our state constitution. *See* ***State v. Granville***, 2006-NMCA-098, ¶ 29, 140 N.M. 345, 142 P.3d 933 (holding Article II, Section 10, protects citizens from governmental intrusions, not intrusions from members of the general public.)

The federal analysis is flawed because "the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a ***fleeting, anonymous, and nondiscriminating*** glimpse of the landscape and buildings over which they pass." ***Ciraolo***, 476 U.S. at 223 (Powell, J., dissenting) (emphasis added.) Therefore, as the dissent concludes "people do not knowingly expose their residential yards to the public merely by failing to build barriers that prevent aerial surveillance." ***Id***. at 224 (alteration, quotation

marks, and citation omitted.) The State's argument to the contrary is unavailing. **[BIC 41]**

The federal analysis applied in ***Riley*** was also flawed, as demonstrated by its badly fractured opinion. Justice O'Connor's concurrence explained that "[i]n determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after ***Ciraolo*** is ***not whether the helicopter was where it had a right to be*** under FAA regulations." 488 U.S. at 454 (emphasis added.) Rather, under ***Katz***, the Court must consider "whether the helicopter was in the public airways at an altitude at which members of the public travel with ***sufficient regularity*** that Riley's expectation of privacy from aerial observation was not "one that society is prepared to recognize as 'reasonable.' " ***Id***. (emphasis added) (citing ***Katz***, 389 U.S. at 361.) According to the concurrence, the proper consideration is: "If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view." ***Riley***, 488 U.S. at 455 (citation omitted).

In applying these principles that New Mexico already follows, *see* ***Granville***, 2006-NMCA-098, to the facts found by the district court in Mr. Davis' case, the conclusion must follow that because overhead flights in general and particularly at a low altitude are rare over Mr. Davis' property in Carson, New

Mexico, he did not "knowingly expose" his green house to public view. Members of the public do not travel with "sufficient regularity" over Carson. Therefore, Mr. Davis' expectation of privacy is one that society is prepared to recognize as reasonable. Other states have decided helicopter surveillance, particularly when low-flying, is unconstitutional. *See* ***State v. Bryant***, 950 A.2d 467, 481-482 (Vt. 2008) (holding a helicopter flying over defendant's property at a low altitude violated Vermont's state constitution.); ***People v. Pollock***, 796 P.2d 63, 64-65 (Colo. App. 1990) (in holding a helicopter flying over defendant's property violated the Fourth Amendment the Court focused on the fact that helicopter flights at that altitude were rare for that area and the helicopter caused a great deal of disturbance to the residents.); *Cf.* ***State v. Wilson***, 988 P.2d 463, 465 (Wash. App. 1999) ("But aerial surveillance may be intrusive and require a warrant if the vantage point is unlawful or the method of viewing is intrusive.")

In dissenting in ***Riley***, Justice Brennan found it "puzzling why it should be the helicopter's noise, wind, and dust that provides the measure of whether this constitutional safeguard has been infringed." 488 U.S. at 462. The dissent "[i]magine[s] a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all-and, for good measure, without posing any threat of injury." ***Id***. This is exactly what the Court of Appeals Opinion addresses. The Court held the "privacy interest protected by Article II,

Section 10 is not limited to one's interest in a quiet and dust-free environment. It also includes an interest in freedom from visual intrusion from targeted, warrantless police aerial surveillance, no matter how quietly or cleanly the intrusion is performed. Indeed, it is likely that ultra-quiet drones will soon be used commercially and, possibly, for domestic surveillance." ***Davis***, 2014-NMCA-042, ¶ 19. In rejecting traditional "use" analysis, the Court of Appeals applies our current state constitutional jurisprudence to these ideas suggested by Justice Brennan's dissent. *See* ***Riley***, 463 (Brennan, J., dissenting) ("Yet that is the logical consequence of the plurality's rule that, so long as the police are where they have a right to be under air traffic regulations, the Fourth Amendment is offended only if the aerial surveillance interferes with the use of the backyard as a garden spot."); ***Davis***, 2014-NMCA-042, ¶ 17 (holding "that 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.'") (quoting ***Garcia***, 2009–NMSC–046, ¶ 27.)

The traditional ***Katz*** test has also been criticized for its circular reasoning. *See* ***Kyllo***, 533 U.S. at 34 (recognizing the ***Katz*** test "has often been criticized as circular, and hence subjective and unpredictable."); Joel Celso, ***DRONING ON ABOUT THE FOURTH AMENDMENT: ADOPTING A REASONABLE FOURTH AMENDMENT JURISPRUDENCE TO PREVENT***

UNREASONABLE SEARCHES BY UNMANNED AIRCRAFT SYSTEMS, 43 U. Balt. L. Rev. 461, 494 (2014) (observing that once the surveillance "become[s] routine, the expectation of privacy is no longer reasonable and its protection is removed. The result becomes a paradoxical situation in which law enforcement overreach is legitimized once it becomes routinized.") (internal quotation marks and citation omitted.)

Traditional Fourth Amendment analysis struggles to keep up with rapidly-changing technology. *See* ***Kyllo***, 533 U.S. at 35-36 (recognizing the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development" and to do otherwise would "leave the homeowner at the mercy of advancing technology."); Michael Adler, Note, ***Cyberspace, General Searches, and Digital Contraband: the Fourth Amendment and the Net-Wide Search***, 105 YALE L.J. 1093 (1996) (arguing that current Fourth Amendment doctrine gives the government too much power to use new technologies in ways that erode privacy, and that the doctrine should be reevaluated to better protect privacy); Marc Jonathan Blitz, ***Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Trades Image and Identity***, 82 Texas L. Rev. 1349, 1363 (2004) (contending that the scope of the Fourth Amendment protection "needs rethinking if constitutional privacy protections are to work well in twenty-first century conditions."). ***Kyllo*** addressed the impact of

technology on privacy stating that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." 533 U.S at 33-34. The key question the Court needed to answer was "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." ***Id.*** at 34.

The Court of Appeals opinion addresses that very concern. ***Davis***, 2014-NMCA-042, ¶ 23(holding "police should be required to secure a warrant before attempting to obtain, through flight, information from a home or its curtilage that they would not otherwise be able to obtain without physical intrusion.") Its adoption of a test that will accommodate future technology is a realistic, pragmatic, and workable solution to an issue that will quickly become a reality. *See* ***Davis***, 2014-NMCA-042, ¶ 26 ("surveillance constitutes a search under Article II, Section 10 if (1) the government agent(s) involved intend to obtain information from a target or targets through aerial surveillance, and (2) if the information to be obtained through aerial surveillance could not otherwise be obtained without physical intrusion into the target's home or curtilage."); Celso, 43 U. Balt. L. Rev. at 485 (noting that in 2015 drones are expected to become commonplace in United States airspace.)

The State's contention that the Court of Appeals opinion adopted "a rule forbidding any form of aerial surveillance used as a police tool" **[BIC 41]** and

"bann[ed] all forms of targeted aerial surveillance in anticipation of drone use is a precipitate and overly broad response" **[BIC 42]**, misinterprets the holding in ***Davis***. The Court of Appeals did not ban all form of aerial surveillance; instead police must simply get a warrant first. *Cf.* ***California v. Riley***, 134 S.Ct. 2473, 2494, 573 U.S. __ (2014) ("Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search[.]")

C. Distinctive State Characteristics

New Mexico vigorously protects its citizens' privacy and personal security by holding the line against unwarranted and arbitrary governmental intrusions. New Mexico often departs from federal precedent. *See* ***Granville***, 2006–NMCA–098, ¶ 14 (collecting cases in which Article II, Section 10 has been construed as providing broader protections than the Fourth Amendment.) Under ***Gomez***, this requirement is a distinctive state characteristic. "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." ***State v. Crane***, 2014-NMSC-026, ¶ 16, 329 P.3d 689 (citation omitted.) "New Mexico courts have long held that Article II, Section 10 provides greater protection of individual privacy than the Fourth Amendment." ***Id***. (citing ***Granville***, 2006-NMCA-098, ¶ 19 ("When interpreting Article II, Section 10, the

New Mexico Supreme Court has emphasized its strong belief in the protection of individual privacy.”))

New Mexicans have stronger ideas about privacy than the rest of the country. The Court of Appeals recognized that “differences in custom and terrain gave rise to particular expectations of privacy” in New Mexico. ***State v. Sutton***, 1991-NMCA-073, ¶ 24, 112 N.M. 449, 816 P.2d 518. This recognition is particularly apropos in this case. The terrain where the search took place was isolated, rural, and in the harsh Northern New Mexican desert. It was not an area accustomed to overhead flights, particularly at low altitudes, except when done by police. **[RP 197]** The district court specifically found that these facts “enlarge a reasonable expectation of privacy.” **[RP 196]** If the facts in ***Rogers***, 1983-NMCA-115, ¶ 13, “teeter[ed] dangerously close to exceeding the limitations implicit in the Fourth Amendment[,]” then the facts of this case clearly violate the greater protections provided by Article II, Section 10, particularly given the rural, isolated area where Mr. Davis lives.

Furthermore, the federal cases are distinct from Mr. Davis’ case. In ***Ciraolo*** and ***Riley*** the defendants lived in areas that were far more metropolitan than where Mr. Davis lives. In ***Ciraolo***, the Court described that area as “suburban.” ***Id***. at 213. In ***Riley*** the court noted that although the property was located in a rural area, there was no evidence to suggest that overhead flights were not unheard of. ***Id***. at 450.

New Mexico should depart from these federal cases because of the distinct rural nature of parts of our state. Santa Clara, California, where the defendant in ***Ciraolo*** resided and Pasco County, Florida, where the defendant in ***Riley*** resided are very different from Carson, New Mexico and thus demand a different result.

D. The Helicopter Search Violated Current Article II, Section 10 Jurisprudence.

Even if this Court decides that the Court of Appeals' Opinion went too far, the search still violated the New Mexico Constitution under current Article II, Section 10 jurisprudence. The State's argument that "[v]isual observation by officers in a place where they are lawfully allowed to be is not a search under the New Mexico Constitution" **[BIC 34]** does not correctly apply New Mexico constitutional law.

In ***Granville***, 2006-NMCA-098, the Court addressed whether the privacy rights of Article II, Section 10, protect an individual's privacy right in the individual's garbage set out for collection. ***Id***. ¶ 19. Police in that case seized garbage bags set out for collection behind the defendant's brother's residence. After searching the bags, police found items related to drug trafficking. ***Id***. ¶ 3. Police sought a search warrant for the residence relying in part on items found in the garbage bags. ***Id***. ¶ 4.

In considering case law from various jurisdictions, the Court noted that of the jurisdictions that upheld searches and seizures of garbage bags, those

jurisdictions held that "it is unreasonable to have an expectation of privacy in garbage when it is readily accessible to any member of the public." ***Id***. ¶ 21. This is the same reasoning relied on by the federal aerial surveillance cases discussed above.

New Mexico found more convincing the reasoning from jurisdictions that held the opposite, based on the "personal, private affairs that can be found in an individual's garbage." ***Id***. ¶ 22. The Court "conclude[d] that New Mexico's strong preference for warrants supports the protection of an individual's expectation of privacy in his refuse and ensures that any governmental invasion of inarguably private affairs is reasonable." ***Id***. ¶ 24. The same principle applies to Mr. Davis' case. Police flew over the curtilage of his home, an area given as great a level of privacy protection as the home itself. *See* ***State v. Hamilton***, 2012–NMCA–115, ¶ 16, 290 P.3d 271 (holding the curtilage enjoys the same privacy protections of the home itself.) The fact that police were flying in navigable airspace is immaterial, because as reasoned in ***Granville*** "Article II, Section 10, protects citizens from ***governmental intrusions, not intrusions from members of the general public***, the trash collector, or nearby wildlife." 2006-NMCA-098, ¶ 29 (emphasis added). The fact that the general public could fly over Mr. Davis' greenhouse is constitutionally irrelevant.

The State argues that "the common principle in aerial flyover cases is that

one's curtilage or backyard can be openly observed by passersby and the idea of someone being able to look into someone else's backyard from the air is not contrary to 'accepted notions of civilized behavior.' " [**BIC 29]** However, as the dissent in ***Ciraolo***, 476 U.S.at 225 explained, there is a "qualitative difference between police surveillance and other uses made of the airspace." The general public uses airspace for travel, "not for the purpose of observing activities taking place within residential yards." ***Id***. Police surveillance at a low altitude is done "solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant." ***Id***. New Mexico rejects the State's proposed "common principle."

More recently, in ***Crane***, 2014-NMSC-026, this Court considered whether under Article II, Section 10, the defendant had a reasonable expectation of privacy in garbage left out for collection in a motel dumpster. ***Id***. ¶ 1. In ***Crane***, police received an anonymous tip reporting a strong chemical odor coming from a particular hotel room. Police learned that Mr. Kidd rented that room. An officer saw Mr. Kidd dump a box into the garbage dumpster at the motel. The officer retrieved the box and hid behind a wall. He heard someone place two more items into the dumpster. The officer also retrieved these bags, which contained supplies for making methamphetamine. ***Id***. ¶ 3-5.

This Court again elaborated on our state's strong preference for warrants and held "that Article II, Section 10 provides greater protection than the Fourth Amendment of the right to privacy in garbage which is sealed from plain view and placed out for collection." ***Id***. ¶ 16.

Crane applied the traditional ***Katz*** test and held that because the defendant placed the trash in opaque bags and was sealed from plain view, the defendant demonstrated "an actual expectation that the contents of the garbage bags would remain private from inspection by others." 2014-NMSC-026, ¶ 20. This satisfies the first prong of the ***Katz*** test. In evaluating the second prong, whether this expectation of privacy was reasonable, this Court reasoned that "[t]he contents of one's trash reveal the most personal details and nuances of one's life." ***Id***. In this case, similar to ***Crane***, Mr. Davis took steps to protect the privacy of his greenhouse. It was covered in translucent plastic and the district court found that the "overwhelming volume of testimony is that one could not see into the greenhouse from the ground." **[RP 195]** The State's argument to the contrary is misplaced. **[BIC 41]** ("The point in this case is that marijuana plants which are in plain view from a lawful vantage point are not so protected.") This is not an open fields case.

This Court in ***Crane*** agreed that "the mere possibility of [greater] access by the public does not negate a person's reasonable expectation of privacy and the

expectation that the garbage will be free from governmental intrusion before it is removed by a garbage truck and disposed of." 2014-NMSC-026,¶ 27 (citation omitted). ***Crane*** reiterated the principle articulated in ***Granville*** that "Article II, Section 10, protects citizens from governmental intrusions, not intrusions from members of the general public[.]"***Id***. ¶ 27 (citing ***Granville***, 2006–NMCA–098, ¶ 29). Therefore, based on this state constitutional principle, the mere possibility that the public may flyover the greenhouse does not negate Mr. Davis' reasonable expectation of privacy and the expectation that the greenhouse located in his curtilage will be free from *governmental intrusion*.

The dissent in ***Crane*** upheld this primary principal; therefore Mr. Davis' greenhouse, which is located in the curtilage of his residence, is protected. *See* 2014-NMSC-026, ¶ 36 (J. Maes, dissenting) (suggesting "there is a difference in one's reasonable expectation of privacy on commercial property versus residential property."). Contrary to the State's contention that Mr. Davis had "no reasonable expectation of privacy to exposed curtilage" [**AB 34]**, the curtilage is an extension of his home and given the same level of privacy protection as the home. *See* ***Hamilton***, 2012–NMCA–115, ¶ 16 (holding the curtilage enjoys the same privacy protections of the home itself.)

New Mexico does not allow police to conduct a warrantless search of garbage left for collection in an opaque container, despite the fact that the general

public can rummage through the trash of another. New Mexico should not allow the warrantless search of a greenhouse in the curtilage of a residence in Carson, New Mexico, despite the fact that the general public can also fly overhead. The Court of Appeals correctly held the helicopter search over Mr. Davis' residence violated our state constitution.

IV. MR. DAVIS' CONSENT WAS NOT SUFFICIENTLY ATTENUATED FROM THE PRIOR ILLEGALITY.

It is established law that evidence discovered as a result of the exploitation of an illegal seizure must be suppressed unless it has been purged of its primary taint. *See* ***Garcia***, 2009–NMSC–046, ¶¶ 14, 23 (reciting the fruit of the poisonous tree doctrine set forth in ***Wong Sun v. United States***, 371 U.S. 471 (1963)). "To determine whether the evidence discovered by the officers' search should have been suppressed under the fruit of the poisonous tree doctrine, we determine whether the officers obtained [the d]efendant's consent by means sufficiently distinguishable to be purged of the primary taint." ***State v. Monteleone***, 2005–NMCA–129, ¶ 17, 138 N.M. 544, 123 P.3d 777 (internal quotation marks and citation omitted). "In order for evidence obtained after an illegality, ***but with the voluntary consent of the defendant***, to be admissible, there must be a break in the causal chain from the illegality to the search." ***State v. Taylor***, 1999–NMCA–022, ¶ 28, 126 N.M. 569, 973 P.2d 246 (emphasis added) (alterations omitted) (internal quotation marks and citation omitted). "In deciding whether the consent is

sufficiently attenuated from the ... violation, we consider the temporal proximity of the illegal act and the consent, the presence or absence of intervening circumstances, and the purpose and flagrancy of the official misconduct." ***Id***.

Although the State recognized that "the attenuation analysis is slightly different from determining that the consent was voluntary" it asserts that "this Court has already reviewed this record and concluded that the consent was voluntary and not coerced by the helicopter or the police officers." **[AB 14]** However, the "fruit of the poisonous tree" doctrine "bar[s] the admission of legally obtained evidence derived from past police illegalities." ***State v. Bedolla***, 1991-NMCA-002, ¶ 27, 111 N.M. 448, 806 P.2d 588; *see* 4 Wayne R. LaFave, ***Search and Seizure: A Treatise on the Fourth Amendment*** § 8.2(d), at 77 (4th ed.2004) (noting that "the fruit of the poisonous tree doctrine also extends to invalidate consents which are voluntary"). Therefore, "the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was both voluntary and not an exploitation of the prior illegality." 4 LaFave, *supra*, § 8.2(d), at 76; *see* ***State v. Prince***, 2004–NMCA–127, ¶ 20, 136 N.M. 521, 101 P.3d 332 (holding that "[f]or evidence to be admissible, consent must be both voluntary and purged of all taint from a prior illegality").

Two separate inquiries are involved: first, whether the consent itself is voluntary under the Fifth amendment; and second, whether the consent is the fruit

of the poisonous tree under the Fourth Amendment. *See* ***Bedolla***, 1991-NMCA-002, ¶ 30 (the Fifth Amendment voluntariness test is separate from the Fourth Amendment fruit of the poisonous tree analysis). This Court's opinion only addressed the first inquiry. ***State v. Davis***, 2013-NMSC-028, ¶ 34, 304 P.3d 10 (upholding the trial court's finding the consent was voluntary.) A "voluntary act, such as a consent, may pass fifth amendment scrutiny but is ***insufficient, standing alone, to remove the taint of a prior fourth amendment violation***. Instead, consent is but one factor in the calculus required to evaluate the relationship between official misconduct and acquisition of evidence."***Bedolla***, 1991-NMCA-002, ¶ 31 (emphasis added.)

In ***State v. Portillo***, 2011-NMCA-079, 150 N.M. 187, 258 P.3d 466, the defendant was a passenger in a vehicle stopped by police for speeding. He looked nervous and the officer thought there were drugs or weapons in the car. ***Id***. ¶ 4. The officer told driver he was free to leave and as the driver was walking back to the car the officer asked if there were any drugs or weapons in the car. The driver said no. The officer asked and obtained consent to search the car from the driver. ***Id***. ¶ 5. The defendant also gave consent to search the car. ***Id***. ¶ 6. The officer found drugs in the car and the defendant admitted that they belonged to him. ***Id***. ¶ 7.

In addressing the threshold question, the Court of Appeals held "Defendant was detained at the inception of the traffic stop, and he remained subject to

continuing detention thereafter. Although the stop was originally justified, the ensuing expansion of the inquiry into weapons and narcotics was unsupported by reasonable suspicion. We therefore conclude that Defendant was subjected to an illegal detention." ***Id***. ¶ 2.

In ***Portillo***, the Court held "there was no attenuation whatsoever between the improper questioning and the request for consent." 2011-NMCA-079, ¶ 33. The Court explained the officer "asked the improper questions immediately before seeking consent to search, and no other events occurred to separate the consent and the questions. Moreover, the purpose of requesting consent to search was clearly to verify the answers to the improper questions, thereby continuing an investigation that was beyond the scope of reasonable suspicion." ***Id***. ¶ 33.

In this case, Sgt. Merrell's contact and request to search resulted directly from the illegal helicopter search. The officers in the helicopter directed Sgt. Merrell to Mr. Davis' residence and continued to hover overhead. Similar to ***Portillo*** the purpose in requesting consent to search was clearly to verify what officers had illegally observed in the air—Sgt. Merrell stated this to Mr. Davis numerous times—thereby continuing an illegal investigation. There was no attenuation whatsoever between the improper search and the request for consent. That request was a direct result of the illegal search. *See* ***State v. Hernandez***, 1997-NMCA-006, ¶ 35, 122 N.M. 809, 932 P.2d 499 (criticizing the fact that "[t[he

[officers] embarked upon this expedition for evidence in the hope that something might turn up.") (internal quotation marks and citation omitted.)

In ***State v. Figueroa***, 2010-NMCA-048, 148 N.M. 811, 242 P.3d 378, a woman called police to say her brother was harassing her. Police parked 50-75 yards away from the house to observe. A truck arrived and parked at the house. The driver remained inside the truck with the engine running and the defendant, who was a passenger in the truck, went inside the house. The officer asked for identification, ran checks on both men, and nothing came up so they were free to leave. The officer admitted the men were free to leave, but decided he wanted to do a weapons check on the defendant. The defendant consented to a pat down and the officer felt something in his pocket. The defendant allowed the officer to remove the item, and the officer found drugs. ***Id***. ¶¶ 2-5.

In applying the attenuation analysis, the Court considered the fact that the officer's "questioning of Defendant about weapons and drugs occurred immediately after Defendant was told that he was free to go, and there were no intervening circumstances." ***Figueroa***, 2010-NMCA-048, ¶ 35. Furthermore, "the officer did not request permission to ask Defendant a few more questions. Instead, he immediately asked Defendant whether he had anything illegal or weapons. The request to pat Defendant down followed immediately on the heels of [the officer's] improper questions." ***Id***. The Court held that "previous cases dictate that such a

consent is tainted, especially where there is no meaningful break in time, the officer has not asked for permission to ask more questions, and the officer has not explained that the defendant is under no obligation to answer additional questions." ***Id***.

The same is true in this case. The request for consent to search came while the illegality *was still in progress*, as the helicopter hovered overhead. Sgt. Merrell did not inform Mr. Davis that he did not have to consent and there was no meaningful break in time. The State argues that there was a "break in the casual chain in that the officers who approached [Mr. Davis] came from the ground, not from the helicopter." **[AB 16]** The conclusion the State draws from these facts is unsupported. The helicopter continued to hover overhead as officers approached Mr. Davis. The officers surrounded Mr. Davis' house as a direct result of the helicopter flyover. It is unclear how this fact provides support for the argument that there was a break in the casual chain. There was no break in the casual chain whatsoever. Sgt. Merrell agreed that "the consent came when [he] first came onto the property." **[Tr. 4/5/07, 83]** The only reason police surrounded Mr. Davis' home was because of the illegal helicopter search. Just as in ***Taylor*** and ***Figueroa***, the very purpose of seeking consent was to continue an illegal investigation. ***Figueroa***, 2010-NMCA-048, ¶ 35, (citing ***Taylo***r, 1999–NMCA–022, ¶ 29.) Similarly, "the State, therefore, may not rely on Defendant's consent." ***Figueroa***, ¶ 35.

The State, relying on ***Monetleone***, asserts that "[a]s already found by this Court, there is nothing to suggest on this record that the officers exploited any fright or surprise [Mr. Davis] may have experienced due to the presence of the helicopter." **[AB 15]** In ***Monteleone***, the Court held that the defendant was in a vulnerable position when he gave consent. 2005-NMCA-129, ¶ 19. Armed officers entered his bedroom while he was sleeping and demanded to see his hands. They then requested consent to search. The Court held his consent "was not obtained by means sufficiently distinguishable as to be purged of the primary taint." ***Id***. (citation omitted). The State's reliance on ***Monteleone*** is belied by the record. Mr. Davis was also in a vulnerable position, although already awake when officers surrounded property, he was woken by helicopter, and while feeling ill went outside and was surrounded by multiple, armed officers. The Court of Appeals correctly held "there was insufficient attenuation to purge Defendant's consent of the taint resulting from the unconstitutional aerial surveillance." ***Davis***, 2014-NMCA-042, ¶ 31.

V. CONCLUSION

Applying the analysis undertaken by the Supreme Court of the United States here, this helicopter search over Mr. Davis' covered greenhouse in the curtilage of his home in remote Carson, New Mexico violates the Fourth Amendment. The search also runs afoul of New Mexico's strong preference for warrants and protection of individual privacy as evidenced by the distinct line of Article II, Section 10 cases. The helicopter search in this case was unreasonable and unlawful when police conducted it in a disruptive manner and without a warrant. Mr. Davis' consent was not sufficiently attenuated from this illegality. The Court of Appeals correctly held that the search was unconstitutional and Mr. Davis respectfully requests that this Court affirm the Court of Appeals or quash the Writ of Certiorari.

Respectfully submitted,

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I hereby certify that a copy of this pleading was served by hand delivery to the Attorney General's Box in the Supreme Court this 26th day of November, 2014.

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