STATE OF NEW MEXICO
EIGHTH JUDICIAL DISTRICT COURT

Chambers of
John M. Paternoster
District Judge - Division I

Colfax County Courthouse, 3rd Floor
200 North Third Street
Raton, New Mexico 87740
Telephone: (505) 445-5584
Fax: (505) 445-2626

July 30, 2007

7425

Jeff McElroy
Deputy District Attorney
920 Salazar Road, Suite A
Taos, NM 87571

Jeffrey Shannon, Esq.
P.O. Box 173
Taos, NM 87571

Re: *State v. Steve Hodge*, Taos County No. CR 2006-130
State v. Norman Davis, Taos County No. CR 2006-168

Dear Counsel:

These cases are consolidated for the purposes of resolution of the search and seizure issues, raised by the defendants' motions to suppress evidence. I have considered your evidentiary submissions, briefs and the authorities in an effort to apprize myself of the prevailing legal view of helicopter surveillance. I have no need of personally viewing the premises searched.

There are two dogmatic poles in this topic: One, as expressed by the United States Supreme Court in *Florida v. Riley*, 488 US 445 (1989) that viewing such as occurred in this case is not a search under the Fourth Amendment, and two, the opinions expressed in Justice Brennan's dissent in *Riley* and the law review article, **Warrantless Satellite Surveillance: Will Our 4th Amendment Privacy Rights be Lost in Space?** 13 *John Marshall J. of Comp. & Info Law* 729 (summer, 1995) that the expansion of technology into space damages the traditional "expectation of privacy" threshold of the Fourth Amendment- perhaps the police will have to obtain a warrant before using high altitude satellite imagery to peer within one's home and curtilage-that the Fourth Amendment cannot be discarded in the face of high end technology in the hands of the police. The issues diverge only that in Mr. Hodge's case, a pure test of a helicopter-backed search warrant is at issue, while in Mr. Davis's case the issue is one of the validity of a consent. The central dilemma, of course, is that if the law requires disqualifying the helicopter inspection, then it follows that the helicopter -based warrant must also fall; and in Mr. Davis's case, the consent is triable standing alone, without reliance on the helicopter flight activity, unless the

helicopter activity were determined to be unlawful, at which point attenuation would have to be studied under the fruit of the poisoned tree doctrine.

So, first, can the police use aerial surveillance to generate probable cause to justify a search warrant? *Riley* and all state courts passing on the issue, including New Mexico's say a resounding "yes". *Riley* is controlling. Therefore, the next step is to determine if the police have complied with *Riley* and *Ciraolo* (*California vs. Ciraolo*, 476 US 207 (1986)) rules regarding aerial surveillance. If the defendants had a reasonable expectation of privacy from aerial surveillance then the Fourth Amendment would require the evidence to be suppressed, if balanced against that reasonable expectation, the police conduct was unreasonable. An unavoidable fact, though, is that in 2007, in the age of cameras in balloons and even kites, and seemingly science fiction satellite and computer imagery, it may be that all persons have a shrinking expectation of privacy against such futuristic surveillance.

The criteria for determining the permissibility of aerial surveillance, given Justice White's caution, in speaking for the *Riley* Court, that, even though the Court was then ratifying such police methods upon the facts specific to *Riley*, an inspection of the curtilage of a house from an aircraft would not always pass muster under the Fourth Amendment [488 US 445,451] , must be applied to each individual case. So, it is reasonable, in the case at bar to test the worthiness of the aerial police activity under the *Riley/Ciraolo* rule. These factors are: Efforts of the surveillee to protect from aerial intrusions, presence in navigable airspace, the extent of physical intrusion, location of the property, altitude and frequency and circumstances around the means of surveillance.

Efforts to protect from aerial surveillance. The type of covering that was employed to shield the greenhouses from public view, but obviously at the same time permit the admission of sufficient sunlight to grow vegetable and flora like marijuana comes into play. The greenhouses were constructed of non-transparent fiberglass, wood and opaque plastic sheeting. It is described at best as translucent, though light and dark may be distinguished, but only as a pattern of shadows and light. "Translucent' is defined most commonly as "letting light pass but diffusing it so that objects on the other side cannot be distinguished" and rarely as "transparent"; while "opaque" is most commonly defined as meaning "not letting light pass through". *Webster's New Universal Unabridged Dictionary, Deluxe 2nd Edition*. So, the expectation of privacy turns on the visibility of the plants from the air, whether at 50 or 500 feet in altitude, and whether with unaided eye or with optical enhancements. The spotting officer has testified that he could make a positive belief that what he saw through the greenhouse enclosures was growing marijuana. I have examined the photographs and noted the testimony of the persons who built or maintained the greenhouses. With 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 greenhouses is improbable. In essence, I am concerned that "Carson" area plus "greenhouse" propelled the

spotting officer to conclude by speculation that behind the walls of the greenhouses were prohibited plants. There is a surreal "profiling" aspect to the police behavior. Reliance on the officer's experience as a narcotics officer isn't any assistance. All the experience available wouldn't give him better vision.

Activities in navigable airspace. The cases applicable to helicopter surveillance generally recognize that helicopters frequently fly at a much lower level than do fixed wing aircraft, so the definition of "navigable airspace" comprises a larger strike zone. The FAA permits much lower flight by helicopter than by fixed wing. There is no competent evidence that the police were violating flight laws. This factor is found to support the police surveillance.

Extent of physical intrusion. I am troubled by the testimonial descriptions of rotor wash and flying debris. While I believe some of it is overly dramatic and anti-police state rhetoric, I do believe that there is merit to the claim that the police swooped in as if they 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 choose to live in rural areas and divest themselves of a more "cosmopolitan" lifestyle. A greater degree of intrusion is permissible if aerial surveillance is used to confirm facts, rather than flying around generally in an effort to spot greenhouses, then swooping in lower to see what could possibly be seen. Here, the unaided eye surveillance from above was in response to general vague complaints. It was not confirmatory activity. The claims of dust and destruction are negligible, in comparison.

The altitude of the aircraft, claimed to be at 500 feet by the police, or 50 feet or lower by civilians is important. Binoculars were not used. The testimony that naked eye examination from 500 feet revealed marijuana plants is suspect. The flights took up the better part of daylight, and were a general flyover rather than going directly to a specific suspect location. The testimony establishes that the helicopter circled over certain locations then swooped in for closer looks. That itself doesn't shock me, since the spotter was using his naked eye, he probably had to get closer to try to see what he was seeing from afar. This factor does not weigh against the police surveillance, standing alone.

Location of the property. The Carson area is very remote and rural, and overflights by low flying aircraft are rare. There is a small craft municipal airport in the general area of the residences. The area is also near one of the most visually scenic areas of New Mexico-the Rio Grande gorge, often the site of numerous private and commercial balloon and helicopter flights. Major commercial air flight patterns will be at extremely high altitude, because of the remoteness of this area from any major metropolitan airports. It is accessed by poorly maintained dirt roads with few directional signs or markings. These facts enlarge a reasonable expectation of privacy.

Frequency. Here, courts will hold that the greater the frequency of air traffic the lower a reasonable expectation of privacy. So, the question also is, I believe, how likely is helicopter traffic over the subjects' houses in the absence of police surveillance? It is unlikely, even though the range of the helicopter activity is not unreasonable, notwithstanding that some high altitude or occasional flights might be recorded. This fact weighs in favor of the defendants.

Circumstances Around the Means of Surveillance. There was no particular or general information targeting any specific building or location, by name or description. Just tips. At least one officer testified that the operation was generated by "past complaints". But, *Riley* seems to address that, by Justice O'Connor's concurrence stating that the police are not required to avert their eyes when passing by a residence or curtilage. Perhaps she is hinting that flyovers without any basis in reasonable suspicion may be acceptable. The spotter was not using optical enhancements like binoculars. That omission produces two inferences. One, that he needed to be taken to a lower altitude to see better, which presses into the altitude and physical intrusion factors; and two, that the unaided eyeballing of marijuana plants claim is not entirely credible, given the unlikelihood of visibility through the greenhouse covering. The inferences add heft to the defendants' efforts to protect from police scrutiny from above. These 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 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.

All New Mexico cases are distinguishable from the case at bar. *State v. Valdez*, 111 NM 438, 806 P. 2nd 578 Ct. App. (1991) is distinguished because in that case the police helicopter was looking for a specific marijuana plantation. *State v. Rogers*, 100 NM 517, 673 P. 2nd 142 Ct. App. 1983), concerned another specific tip directed at the defendant. The pilot's testimony would be the most supportive of the actual altitudes. In *Rogers* the spotting officers made unaided visual identification of the marijuana plants actually protruding from holes in the building, from above 200 feet altitude, then used binoculars to confirm the identification and came down to as low as 100 feet to further confirm the initial identification. In addition, the proximity of the searched premises to major airports and military airbases further eroded the defendant's expectation of privacy measured against the manner of surveillance used. In the companion case, *State v. Bigler*, 100 NM 515, 673 P.2nd 140 (Ct. App. 1983), the specific tip to police of defendant's growing marijuana was corroborated by an aerial overflight during which the police saw marijuana growing in an open field somewhat hidden from ground level views by other tall vegetables, a ground level view by police of the same plants, and the officer's detection of the smell of green growing marijuana. I believe that the defendants in the instant case had a greater expectation of privacy than did the defendants in the New Mexico cases cited. That does not *ipso facto* make the police activity unreasonable, however. New Mexico cases adjure us to follow *Riley/Ciraolo*.

I characterize the facts in this case just as Judge Bivens characterized the facts in *State v. Rogers*; "The facts in this case teeter dangerously close to exceeding the limitations implicit in the Fourth Amendment"; nevertheless, I do not believe that the limitations have been exceeded in this case, even though I have serious reservations about the ramifications of high end technology on the Fourth Amendment. Those factors that weigh in the defendants' side of the equation do not outweigh the factors that support the police side. That brings us to an analysis of the search warrant of Mr. Hodge and the consent of Mr. Davis.

The search warrant affidavit. The Fourth Amendment to the *United States Constitution* and *Article II, § 10* of the *New Mexico Constitution* require probable cause to believe that a crime is occurring or seizable evidence exists at a particular location to justify issuance of a search warrant. Probable cause is not subject to bright line hard and fast rules, but is a fact based determination made case by case. Any search warrant whose affidavit is lacking probable cause is not reasonable. The test is one of objective reasonableness. In the Hodge affidavit, the affiant failed to include the fact that Mr. Hodge consented to a search. But even more troubling is the cookie-cutter descriptive language "such a growing operation" used on half-a-dozen identical affidavits, introduced into evidence. Identical except for the different locations or descriptions of property to be searched. The mission of the police this day was to "spot possible marijuana growing operations from the air..." Affidavit, ¶ 5. The totality of the descriptive circumstance, upon which the detached magistrate is to determine that probable cause exists to believe either a crime is in progress or seizable evidence is present was: "such a growing operation had been spotted" [by an officer other than the affiant], *id.* There is no mention of greenhouses, growing accessories within the curtilage, what evidence of marijuana growing the officer actually saw, numbers of plants, size of plants, location of plants within the curtilage. The description is insufficient to justify a lawful search. To permit a search upon the basis of "such a growing operation" is to render meaningless the particularity requirement of the Fourth Amendment. Such broad language creates the specter of a general warrant. What are the elements or components of "a marijuana growing operation? The totality of the circumstances are too vague, thin and imprecise to make the search reasonable. The spotting officer, and more importantly, the affiant had nothing more than speculation that a marijuana growing operation was under way at Mr. Hodge's home, under a totality of the circumstances. Speculation, no matter how rational based on the officer's experience is insufficient probable cause. *Wong Sun vs. United States*, 371 US 471 (1963). The police here made just the kind of mental leap that was proscribed in *State v. Nyce*, 139 NM 647, 137 P. 3rd 587 (2006). The fruits of the Hodge search will be suppressed for a lack of probable cause on the affidavit.

Mr. Davis's consent. There was a helicopter search activity as described herein. While I find the helicopter search just barely permissible, I must turn to the examination of the consent that the helicopter produced. What is the core issue in consent cases? It is the question of ratification of the waiver of a fundamental constitutional right. An examination of the state of mind of both participants to the exchange is often helpful. The officer may reasonably believe and so act that

it was permissible to request consent, but even so, the issue would turn on whether the suspect was of sufficient mental capacity to consent. On the other hand, what if the suspect were fully competent to consent, but the factual analysis yields a conclusion that the suspect merely acquiesced in a show of force, or claim of authority? The evidence in this matter is that Mr. Davis was thoroughly cooperative, civil and peaceful. Mr. Davis is an intelligent man with a greater than average storehouse of knowledge. The testimony recites that Mr. Davis was approached by officers shortly after the helicopter overflights. An imperfect audiotape was made, and there were slight differences between the testimony of the officers and Mr. Davis, but I can develop this picture: The officers told Mr. Davis that marijuana had been identified growing in his greenhouse from the air. The officers asked Mr. Davis if there were indeed marijuana plants growing in the green house. Mr. Davis answered in the affirmative. Officer Merrill asked him if he would consent to a search of the greenhouse. Mr. Davis asked Officer Merrill what if I say no? Officer Merrill replied that the police would obtain a search warrant. According to the testimony, then Mr. Davis said sure search, okay. This is not a case like *Bumper v. North Carolina*, 391 US 543 (1968) where the police claimed to have had a search warrant in hand at the time of requesting consent-but did not. It is more like *State v. Shaulis-Powell*, 127 NM 667, 986 P 2nd 463 (Ct. App. 1999) which held that answering a suspect's question about the consequences of refusal of consent was merely a reasonable explanation of the process that would be followed. A comprehension of the *Shaulis-Powell* case gives great discretion to the police in the kinds of things that can be said to a suspect based on the officer's good faith beliefs. It does not constitute duress to give clear legal choices to suspects in Mr. Davis's position.

The motions to suppress evidence in Mr. Hodge's case will be granted and the motion in Mr. Davis's case will be denied. Mr. McElroy will prepare an order fulfilling my decision expressed herein. Thank you for your illuminating presentations on this interesting subject.

Very Truly Yours,

JOHN M PATERNOSTER
DISTRICT JUDGE

JMP:mh