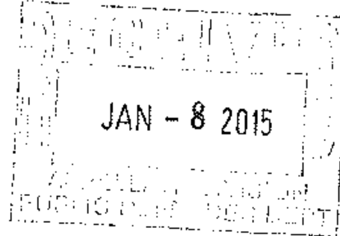
IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 34,548

STATE OF NEW MEXICO,

Plaintiff-Petitioner,



v.

SUPREME COURT OF NEW MEXICO
FILED

JAN - 7 2015

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 REPLY BRIEF

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As required by Rule 12-213(F)(3) NMRA, I certify that this reply brief is proportionally spaced and the body of the brief contains 2,891 words. This brief was prepared using Microsoft Office Word 2003.

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ARGUMENT

I. THE COURT OF APPEALS HELD THAT THE FLYOVER DID NOT VIOLATE THE FOURTH AMENDMENT AND DEFENDANT-RESPONDENT DID NOT SEEK REVIEW OF THIS ISSUE

Defendant claims that the helicopter flyover in this case violated the Fourth Amendment of the United States Constitution because it was not "reasonable." [AB 12-18]. The Court of Appeals disagreed and specifically held that the flyover passed federal constitutional muster. *State v. Davis* (*Davis III*), 2014-NMCA-042, ¶¶ 7-11, 321 P.3d 955. Based on its review of the rationale of *California v. Ciraolo*, 476 U.S. 207 (1986), and *Florida v. Riley*, 488 U.S. 445 (1989), the Court concluded that "Defendant's expectation that the contents of his greenhouse were screened from public aerial view was unreasonable." *Davis III*, ¶ 11.

Defendant did not seek review of this aspect of the Court's decision by way of a petition for writ of certiorari or a conditional cross-petition for certiorari. He cannot therefore seek review of that holding. *See* Rule 12-502(C) and (F) NMRA; *Fikes v. Furst*, 2003-NMSC-033, ¶ 9, 134 N.M. 602 (respondent's failure to seek certiorari review waives the ability to seek review of that portion of the lower court ruling; "[i]f we were to acquiesce in this request to consider any issue addressed by the Court of Appeals, we would work a substantial change on the certiorari process. This would be unfair to the petitioner and inconsistent with our appellate

rules. We thus limit our discussion to those issues raised in the petition for certiorari").

Moreover, the two New Mexico cases that have specifically considered the issue of aerial surveillance/flyovers held that the flights were not unconstitutional under the Fourth Amendment. *See State v. Bigler*, 1983-NMCA-114, 100 N.M. 515, and *State v. Rogers*, 1983-NMCA-115, 100 N.M. 517. Both cases held the defendants had no reasonable expectation of privacy in the observations made by police from the air.

II. THE NEW MEXICO CONSTITUTION DOES NOT FORBID AERIAL SURVEILLANCE WITHOUT A WARRANT

A. The Court of Appeals' Wholesale Prohibition on Warrantless Police Aerial Surveillance is Contrary to Previous Cases Regarding Reasonable Expectations of Privacy

Defendant argues at length that various factors in this case – including the specificity of the tip that precipitated the Yerba Buena operation, the remoteness of the area, the disruption to Defendant, and the altitude of the flights – as compared to the factors in *Bigler* and *Rogers*, show that the flight in this case was unconstitutional. [AB 19-22]. But what Defendant fails to acknowledge is that the Court of Appeals jettisoned consideration of such factors in its holding and held them to be not useful. *Davis III*, ¶ 19. As argued in its opening brief, the State contends that this holding goes too far in prohibiting all types of warrantless police aerial surveillance regardless of the circumstances and the circumstances in this

case showed the police acted reasonably. [BIC 34-39]. The focus of New Mexico's constitutional provision is on reasonableness; as such, a reasoned consideration of the intrusiveness and disruption caused by the aerial surveillance is still a useful exercise. *See State v. Gutierrez*, 1993-NMSC-062, ¶ 16, 116 N.M. 431 ("We reiterate that in exercising our constitutional duty to interpret the organic laws of this state, we independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures").

"The very backbone of our role in a tripartite system of government is to give vitality to the organic laws of this state by construing constitutional guarantees in the context of the exigencies and the needs of everyday life." *Id.* ¶ 55. The Court of Appeals failed to do this in simply banning all forms of warrantless police aerial surveillance, regardless of the circumstances either of the police conduct or the individual's circumstances. As this Court recently stated, "[w]ithout considering whether the facts in a particular case support an individual's actual expectation of privacy, there would be nothing to measure society's recognition of reasonableness against." *State v. Crane*, 2014-NMSC-026, ¶ 19, 329 P.3d 689.

B. Areas Exposed to the Public Are Not Constitutionally Protected as There is No Reasonable Expectation of Privacy to Such Areas

Defendant argues that the federal analysis on aerial surveillance is flawed and cites to the Court of Appeals' holding in *State v. Granville*, 2006-NMCA-098, ¶ 29, 140 N.M. 345, that Article II, Section 10 protects citizens "from governmental intrusions, not intrusions from members of the general public, the [garbage] collector, or nearby wildlife." *Id.* ¶ 29. [AB 25-26]. In the present case, the Court of Appeals also relied upon the dissent in *California v. Ciraolo* that there is a "qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air[ ] space for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards." *Davis III*, ¶ 17 (quoting *California v. Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting)). Thus, holds the Court of Appeals, "we conclude 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 *State v. Garcia*, 2009-NMSC-046, ¶ 27, 147 N.M. 134).

With all due respect, this is the flawed analysis. There is no doubt that Article II, Section 10 applies to government actions and acts as a limit to such actions. But this does not logically translate into the premise that New Mexico citizens therefore have expectations of privacy as only against the government.

Notably, the Court of Appeals does not explicitly hold that a person has a general reasonable expectation of privacy from aerial surveillance but only that a person has a reasonable expectation of privacy as against *targeted police* aerial surveillance. Accidental police surveillance is fine under this analysis but the rule is different if the government's intent is to "intrude." *Davis III*, ¶ 24. The Court's reasoning on this point is a tautology – "A better means of protecting against government intrusion – and one that is consistent with Article II, Section 10 jurisprudence – is the addition of a requirement that the goal of government personnel is to intrude." *Id.*

But the government's goal should be to "learn something about the target." *Id.* (internal citation and quotation marks omitted). As in this case, the police would hardly go to the time, trouble, and expense of a targeted helicopter operation without some legitimate law enforcement goal in mind. According to the Court of Appeals, this goal invalidates the constitutionality of the government's actions. This is not a workable rule. Police departments are meant to investigate and weed out crime and not simply hope to inadvertently discover illegal activity.

Moreover, this distinction is somehow wedded to the reasonable expectation of privacy inquiry. Under this analysis, an individual has no reasonable expectation of privacy if law enforcement somehow inadvertently discovers evidence but does have an expectation of privacy if the government finds evidence

on purpose. Such a rule has no relation to an actual expectation of privacy that society would find reasonable. It also seemingly rewards incompetent police work with no concomitant protection of individual rights. What difference would it make to the individual if the evidence was discovered inadvertently or not? How does the subjective knowledge or competency of the police change whether an individual possesses a reasonable expectation of privacy? The Court of Appeals has apparently created a *conditional* reasonable expectation of privacy which is logically suspect. Either a person has a reasonable expectation of privacy or one does not. Although the inquiry can change based upon an individual's manifested subjective expectation of privacy in the object or place, it should not change based upon who intrudes into that privacy or whether the intrusion is subjectively purposeful. If a person's backyard is exposed, it is exposed to anyone flying overhead.

The recent decisions from New Mexico appellate courts on the heightened expectations of privacy enjoyed by New Mexico citizens are distinguishable in that both involved personal property which was *concealed from public view*. *Granville*, 2006-NMCA-098, ¶ 27 ("We believe that when an individual places garbage in a garbage can or an opaque bag, he keeps personal items from plain view and thereby exhibits an expectation of privacy that is not unreasonable"); *Crane*, 2014-NMSC-026, ¶ 27 ("[a]lthough garbage bags are placed in areas accessible to the

public, the *contents* are not exposed to the public.") (internal citations and quotation marks omitted). Here, the greenhouse was visible to the officers flying overhead. It was exposed to public view and therefore Defendant did not have a reasonable expectation of privacy to its visible contents.

C. The Concerns Raised by the Amicus Brief Regarding Drones Do Not Apply to This Case

Amicus posits that the State's theory in this case would result in "unbounded" aerial surveillance "without any judicial oversight or limitation." [Amicus Brief at 2]. The State has not advocated such a theory and has only pointed out that while general concern over drones is legitimate, such technology is not at issue in this case. Adopting the Court of Appeals' wholesale prohibition on warrantless aerial surveillance, and essentially jettisoning this Court's jurisprudence applying the *Katz v. United States*, 389 U.S. 347 (1967), test on privacy interests, is both premature and extreme. Moreover, as the State noted in its opening brief, legislation has already been proposed to the New Mexico Legislature to strictly limit the use of drones for surveillance. *See* S.B. 556, 51st Leg., 1st Sess. (N.M. 2013), *available at* http://www.nmlegis.gov/Sessions/13%20Regular/bills/senate/SB0556.pdf.

Much of the Amicus brief is devoted to addressing the future and what will happen if and when drones are routinely available and used by law enforcement. Amicus argues that the United States Supreme Court's analysis from *Florida v.*

Riley and *California v. Ciraolo* presumes that aerial surveillance occurs in navigable airspace and thus does not provide "useful guidance in the future." [Amicus at 3]. But formulating a rule and deciding a case in which a helicopter was used for a naked eye view of Defendant's curtilage based upon future fears of the use of drone technology does not provide useful guidance. Amicus's brief only clarifies that drones involve possible intrusions that were simply not present in this case. [Amicus at 10-13 describing "advanced surveillance devices" available on larger drones]. Amicus describes the impressive recording capabilities of surveillance devices that can be fitted on drones, but no such devices were used in this case. [Amicus at 12-14].

Here, the threshold of Defendant's home was not breached by the helicopter or any other device and the officers only made naked eye observations that any member of the public flying overhead could have made. Amicus's discussion of *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409 (2013), and *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012), fails to make this distinction. [Amicus at 15]. As the State noted, the United States Supreme Court partially revived the property concept in the privacy realm in response to the vast amount of information that can be captured by new technology such as GPS trackers, cell phones, and advanced cameras. [BIC 30-33]. No such technology was involved here.

Amicus also argues that the aerial flight in this case was unconstitutional because the helicopter was hovering only fifty feet above Defendant's house. [Amicus at 15, 17]. Amicus argues that this Court "can also decide this case on property-based grounds because the helicopter was not in the navigable airspace." [Amicus at 19]. Amicus's citation for this fact is *Davis III*, ¶ 11. However, this is not what the district court found or the Court of Appeals held. Defendant's testimony was that he thought the helicopter was flying that low but the Court of Appeals held "there is nothing in the record suggesting that this altitude was outside the range of navigable air space, nor is there evidence that the helicopter interfered with Defendant's normal use of his residence or greenhouse." *Id.* There was conflicting testimony on the altitude of the helicopter and the district court found there was no evidence that the helicopter was outside navigable airspace or violating flight laws and the Court of Appeals adopted this conclusion to find the Fourth Amendment was not violated. [RP 196]; *Davis* ¶ 11.

Amicus revives *United States v. Causby*, 328 U.S. 256 (1946), a sixty-nine year old case, to argue that property owners own the airspace above their property. [Amicus at 19-20]. *Causby* is not a Fourth Amendment case and has not been used to decide cases involving reasonable expectations of privacy. Rather, it dealt with a situation in which the Civil Aeronautics Authority approved a flight path for planes that allowed them to take off and land less than one-hundred feet above the

plaintiffs' property, effectively destroying the property's use as a chicken farm. The Court held that the deprivation of use of the land constituted a compensable taking, for which recovery could be had in the Court of Claims. *Id.* at 260, 263-64.

Causby was not relied upon, or even cited, by the Court in *Ciraolo* or *Florida v. Riley*, and is generally cited only in similar cases involving claims of Fifth Amendment takings of property with no just compensation. *See e.g. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (an owner of beachfront property brought an action alleging that application of South Carolina Beachfront Management Act to his property was a taking without just compensation). And as held by the Tenth Circuit:

> The property Petitioners seek to protect is the airspace above their land. Taken to its logical extreme, Petitioners would have the United States military seek consent from every individual or entity owning property over which military planes might fly, and then design its training exercises to utilize only that airspace for which permission was granted, or else risk Third Amendment liability. We simply do not believe the Framers intended the Third Amendment to be used to prevent the military from regulated, lawful use of airspace above private property without the property owners' consent. . . . Fourth Amendment principles do not instruct to the contrary. Petitioners' Fourth Amendment rights would be violated only if society is willing to recognize their subjective expectation of privacy in the airspace above their property as reasonable. *See California v. Ciraolo*, [476 U.S. at 211-12]. It is not reasonable to expect privacy from the lawful operation of military aircraft in public navigable airspace. *See United States v. Causby*, [328 U.S. at 261] (acknowledging that while a Fifth Amendment remedy might exist if flights over private property directly and immediately interfere with the enjoyment and use of the land, Congress has declared "[t]he air is a public highway" and "[c]ommon sense revolts at the idea" that aircraft operators would be subject to trespass suits based on common law notions of property ownership extending to the periphery of the universe).

Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1043-44 (10th Cir. 2001).

Amicus concludes with citing several out-of-state cases which held low-level aerial surveillance to be unconstitutional. What is notable about these cases is that they consider the circumstances of the aerial flight -- the reasonableness of the government conduct as evidenced by the altitude of the flight and the disturbance to activities on the ground – as well as the homeowner's subjective expectation of privacy. [Amicus at 20-24]. As noted above, such factors considered in these cases, and previously relied upon by the Court of Appeals in *Bigler* and *Rogers*, were summarily rejected by the Court of Appeals in *Davis III*.

As to New Mexico's use of drones, Amicus warns that the New Mexico Army National Guard is currently testing the RQ-11 Raven Unmanned Aerial System. [Amicus at 10]. *See* Kenneth A. Nava, Deputy Chief of Staff Planes, Operations, and Training, Memorandum for NGB-72, Departments of the Army and Air Force, *Memorandum for NGB-72, New Mexico National/Guard Airborne Imagery Proper Use Memorandum (PUM) for Title 32 RQ-11 Raven Unmanned Aerial System (UAS) Training, 1 January - 31 December 2013* (Feb. 5, 2013), *available at* https://www.muckrock.com/foi/new-mexico-227/new-mexico-army-national-guard-drone-documents-2501/#805046-j-13-0004. This memorandum from February 5, 2013, refers to training for military operations approving the testing for "domestic incidents." Memorandum ¶ 3. The memorandum mandates

many safeguards including that all personnel handling any captured imagery are subject to intelligence oversight regulations, that all data will be purged and not disseminated or retained, and that "[a]ny personally identifying information unintentionally and incidentally collected about specific U.S. persons will be destroyed and purged. . . ." Memorandum ¶¶ 3, 4, 5. Another paragraph specifies:

> I certify that the intended collection and use of the requested information, materials, and imagery are in support of the congressionally approved programs and not in violation of applicable laws. The request for imagery is not for the purpose of targeting any specific U.S. person, nor is it inconsistent with the Constitution and other legal rights of U.S. persons. Applicable security regulations and guidelines and other restrictions will be followed.

Memorandum ¶ 6. Nothing in this document raises the specter that local law enforcement can "routinely deploy these devices" for surveillance on private homes and nothing of the kind happened in this case. [Amicus at 10].

CONCLUSION

For these reasons, and those stated in more detail in the State's opening brief, 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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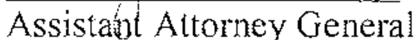

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