No. 4-422

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

AMANDA KOEHLER,

Respondent.

On Writ of Certiorari
to the United States Court of
Appeals for the Thirteenth Circuit

Brief for Petitioner

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

1. Does the border exception allow the United States Government to protect the nation against outside threats such as terrorism and violent crimes by viewing already opened files on a non-password protected laptop, at a known international border crossing station, as a valid exception to the warrant requirement?

2. Under the Fourth Amendment, is the use of technology to ensure the safety of law enforcement and hostages permitted when probable cause requirements for a warrant were met previously but no warrant was obtained?

STATEMENT OF THE FACTS

On October 1, 2016 a federal grand jury indicted Amanda Koehler (hereinafter "Respondent") on three counts of kidnapping under 18 U.S.C §1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. § 922(g)(1)(5-17).

Recently after a high-profile kidnapping of three teenage children of a billionaire technology company owner, early in the morning of August 17, 2016, a black Honda Civic entered Eagle City border station. Eagle City is a place that has always been a major crossing point for criminals. R. at 2; R. at 25. The driver displayed suspicious activity. R. at 26. The driver was incredibly agitated and uncooperative. R. at 26. He avoided eye contact. R. at 26. His answers were very brief. R. at 26**.** He was fidgeting with the steering wheel with his fingers. R. at 26. He was pale. R. at 26**.** These observations made Agent Ludgate suspicious the driver was hiding something. R. at 2; R. at 26. In accordance with routine practice, U.S. Border Patrol Agent Dwyer and Agent Ludgate stopped this vehicle crossing the border. R. at 2. Agent Ludgate calmly informed the driver of their right to stop and search the vehicle. R. at 2. Agent Ludgate asked the driver if he had $10,000 or more. R. at 2. The driver said he did not. R. at 2. After the driver opened his trunk, Agent Ludgate discovered $10,000 in $20 bills. R. at 2. This matched the exact amount and currency that the kidnappers in a high-profile kidnapping had recently demanded in exchange for proof of life. R at 2; R. at 26; R. at 27. Agent Ludgate recognized the proof of life money because of the briefings and public news of this high-profile kidnapping. R. at 27. Next to this cash, Agent Ludgate also discovered a laptop in the trunk of the driver's vehicle. R. at 2. The laptop had Respondent's initials on it. R. at 2. The driver informed Agent Ludgate that he was Respondent's fiancé. R. at 2. A criminal intelligence and border watch database revealed that Respondent was a felon with multiple convictions for crimes

of violence. R. at 2. Respondent was also the main person of interest in the kidnappings. R. at 31. The money in the trunk that matched the kidnappers' demands in conjunction with the close personal relationship to the main person of interest in the kidnapping case caused Agent Ludgate to suspect the driver of being involved with the kidnappings. R. at 27. The laptop did not have a password. R. at 28. When Agent Ludgate opened the laptop, documents were already open. R. at 3; R. at 28. These open documents contained personal information about the kidnapped children's father, bank statements, personal schedule, and employee's schedules. R. at 28. Agent Ludgate discovered an already open lease agreement under one of Respondent's aliases, which led to the location and the rescue of these kidnapped children. R. at 28; R. at 32; R. at 3. The driver was arrested for failure to declare in excess of $10,000. R. at 3.

The address that Agent Ludgate found at the border was traced to Macklin Manor. R. at 2. At around 4:30 am Detective Perkins assigned Officer Lowe and Officer Hoffman to conduct loose surveillance on Macklin Manor. R. at 2. Officer Hoffman patrolled on foot, while Officer Lowe deployed a PNR-1 drone to fly over the property. R. at 2. The PNR-1 drone is a favorite amongst the drone community because of its availability and price. R. at 2. PNR-1 has a battery life of only thirty-five minutes and a standard DSLR camera that takes high-resolution photographs and video. R. at 2. The PNR-1 drone has minimal digital storage capabilities. R. at 2. The memory card can only hold around thirty photos and fifteen minutes of video. R. at 2. In accordance with the legal altitude limits in Pawndale, the PNR-1 drone has a pre-programmed maximum flight altitude of 1640 feet. R. at 3. Officer Lowe parked his squad car a mere two blocks away from Macklin Manor when she deployed the PNR-1 drone over the property. R. at 4. The drone hovered over Macklin Manor for about fifteen minutes and only took twenty-two photos and three minutes of video. R. at 4. The video provided a general layout of the property

that consisted of a main house, an open and uncovered pool and patio area, and a pool house. R. at 4. The main house is separated from the pool house by about fifty feet. R. at 4. Macklin Manor does not have a surrounding gate or fence R. at 4. The drone captured an image of a young female walking outside to the pool house R. at 4. Detective Perkins confirmed that the female was the convicted felon, Respondent. R. at 4. Although he believed he had already met the requirements for probable cause, Detective Perkins was fearful that alerting the occupants without more information would endanger the lives and safety of the hostages and police officers. R. at 4. Detective Perkins and Officer Hoffman cautiously approached the front of the main house and scanned the area with a handheld Doppler radar. R. at 4. Handheld Doppler radars are popular amongst law enforcement agencies. R. at 4. The Doppler radar can only determine roughly how many people are inside and generally where they are located and does not have the capability to reveal what the inside of a building looks like. R. at 4.

The officers used the Doppler radar to scan the pool house. R. at 5. The officers obtained a no-knock and notice search warrant for the whole residence. R. at 5. During the execution of the warrant, officers detained Respondent after she escaped out the back door but before she could make it off the property. R. at 5. The officers found a G29 Glock handgun on Respondent. R. at 5. The officers entered the pool house and detained the person standing guard. R. at 5. John, Ralph, and Lisa Ford were found inside the pool house restrained to chairs and unable to move. R. at 5. On October 1, 2016 a federal grand jury indicted Respondent on three counts of kidnapping under 18 U.S.C §1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. § 922(g)(1). R. at 5.

SUMMARY OF THE ARGUMENT

The United States Government did not violate Respondent's Fourth Amendment rights when Agent Ludgate viewed already opened documents on an unsecured laptop in the course of conducting a routine border search. Border searches can be traced back to the same Congress who penned the language of the Fourth Amendment and have historically been held as reasonable simply by the mere fact that they occur at the border where the balanced interests are drastically different than traditional domestic searches. The government has a heightened interest in public safety of the nation at the border by protecting against terrorism, violence, crime, and kidnappings. Whereas an individual has a diminished interest in privacy to help further the government's interest of protecting the nation because the individual is aware of this heightened risk.

While the Supreme Court has not delineated a test to distinguish routine searches from non-routine searches, the Supreme Court has suggested that non-routine analysis is only appropriate when the search highly intrudes upon the person's dignity but does not extend this analysis to a person's effects. A laptop may be validly searched as an exception to the warrant requirement because it is an effect and not a person. The lower courts have taken it upon themselves to distinguish between routine searches and non-routine searches and have required reasonable suspicion when conducting a non-routine search. Even if looking at already opened documents on an unsecured laptop that leads to the rescue of kidnapped children, were to be deemed as a non-routine search, the government met the requisite requirement of reasonable suspicion. When viewing the totality of circumstances, reasonable suspicion existed because the driver displayed suspicious activity, failed to declare $10,000 in cash, which matched the amount in a recent kidnapping, a laptop was found having the initials of Respondent who has a history of

violent crimes and was the main person of interest in the recent kidnapping of three children, and has a close personal relationship with the driver. Therefore, the search was valid and did not violate the Fourth Amendment.

The warrantless use of the PNR-1 drone and the handheld Doppler radar to aid in the rescue of three innocent children who were kidnapped is permissible under the Fourth Amendment. The Fourth Amendment only provides protection to certain areas that are intimately tied to the home. The Supreme Court has laid out four factors to determine whether an area is protected by the Fourth Amendment. The Fourth Amendment does not protect against law enforcement officers making observations from a public place where they have a legal right to be. Law enforcement cannot use sense enhancing technology to gain evidence about the inside of a home that could not have been obtained without entering the house. Exigent circumstances allow law enforcement to overcome the warrant requirement in certain emergency situations where death or serious bodily injury is imminent.

Technology has helped law enforcement save lives and prevent crimes although sometimes there is a risk of infringing on a person's expectation of privacy. A drone may be used to get a layout of a property were hostages may be held in order to protect the Officers conducting the rescue operation as well as protect the lives of the kidnapping victims. Identification of a known felon walking outside during a non-intrusive aerial observation is not protected under the Fourth Amendment. The subject did not take any measures to ensure the property was shielded from the public's view and was spotted outside on Macklin Manor while walking away from the main house. Law enforcement flew the drone in legal airspace from a place they had a legal right to view from. The use of the Doppler radar to prevent any further harm to the victims was also permitted under the Fourth Amendment. The information that was

obtained by the handheld Doppler radar could have been collected by officers who had simply looked through windows of the house or waited around long enough to observe people walking in and out of the home. Even if the use of the technology is found to be an unreasonable search, both searches will fall under the exigent circumstances emergency aid exception because imminent action was needed in an inherently dangerous kidnapping by a convicted felon that could have resulted in death or serious bodily harm to three innocent children. Therefore, using technology to ensure the safety of law enforcement and three innocent children before conducting an emergency rescue does not violate the Fourth Amendment.

STANDARD OF REVIEW

The Supreme Court reviews constitutional challenges and legal finding de novo. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The Supreme Court only sets aside findings of fact upon clear error, therefore, deference should be given to factual findings made by the United States District Court Southern District of Pawndale. *Id.*

ARGUMENT

I. VIEWING A KIDNAPPER'S ALREADY OPEN FILES ON AN UNSECURED LAPTOP AT AN INTERNATIONAL BORDER IS AN EXCEPTION TO THE WARRANT REQUIREMENT BECAUSE THE CONSTITUTION HAS HISTORICALLY TREATED SEARCHES AT THE INTERNATIONAL BORDER AS SUBSTANTIALLY DIFFERENT THAN DOMESTIC SEARCHES.

The Constitution historically treats searches at the international border as substantially different than domestic searches and requires different considerations and rules of constitutional law. See *United States v. Ramsey*, 431 U.S. 606 (1987). “The Constitution gives Congress broad, comprehensive powers [t]o regulate Commerce with foreign Nations.” *Id*. at 627; citing US Constitution article 1 Section 8 cl. 3 internal quotes omitted. Pursuant to this power, it was “the

[same] Congress which proposed the Bill of Rights, including the Fourth Amendment, … [that] had, ... enacted the first customs statute…" *Id*. at 626. This customs statute set forth a different standard to be applied in border searches by granting "customs officials 'full power and authority' to enter and search 'any ship or vessel, in which they … have reason to suspect any[thing] subject to duty [is] concealed.'" *Id.* In addition to being an "acknowledgement of plenary customs powers," the standard applied to this form of border searches was differentiated from searching a particular home "where a warrant upon 'cause to suspect' was required." *Id.*

The Supreme Court reaffirmed this different standard applied to border searches when it said, "Consistent … with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985). The Supreme Court further explained "time and again, … searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004) internal quotes omitted. Therefore, it is justified that "travelers may be … stopped [when] crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify … his belongings as effects which may be lawfully brought in." *Montoya De Hernandez*, 473 U.S. at 539, citing *Carroll v. United States*, 267 U.S. 132, 154 (1925). This is why "border searches, … from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable

cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself."" *Ramsey*, 431 U.S. at 619. This "interpretation, that border searches were not subject to the warrant provisions of the Fourth Amendment and were 'reasonable' within the meaning of that Amendment, has been faithfully adhered to by this Court. *Id.* at 618; referencing, *Carroll*, 267 U.S. 132 (1925). Therefore, "routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Montoya De Hernandez*, 473 U.S. at 538.

A. By virtue of occurring at the border, there is no level of suspicion required prior to viewing already opened files on a laptop because searching a laptop at an international border constitutes a routine search.

The courts have grouped border searches into two categories: routine and non-routine. While the Supreme Court has not defined the distinction between these categories of searches, the Supreme Court has however suggested that complex balancing tests would only be appropriate when dealing with more intrusive searches of a person. See *Flores-Montano*, 541 U.S. at 152. The lower circuits have read into the language of "routine" from *Montoya de Hernandez* to adopt their own definitions and distinctions between routine and non-routine. *Flores-Montano*, 541 U.S. at 152. The Supreme Court refused to label personal vehicle searches as non-routine, because "the reasons that *might* support a requirement of some level of suspicion in the case of highly intrusive searches of the person--dignity and privacy interests of the person being searched--simply do not carry over to vehicles. Complex balancing tests to determine what is a "routine" search … as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles" *Id.* (emphasis added). Here, if a laptop is determined to be an effect, no heightened level of suspicion would be required to conduct a routine search because routine

searches of a person's effects entering through a border station are not subjected to any heightened level of suspicion. See *Montoya De Hernandez*, 473 U.S. 531.

Outside of searches that highly intrude the dignity and privacy of the person themself, courts have been reluctant to label searches as non-routine and have accepted a broad spectrum of what is routine. For example, the Ninth Circuit has held the reviewing of computer files found on a laptop during a border search was routine. *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013), see also *United States v. Arnold,* CR 213-26, 2014 WL 28635, at *3 (S.D. Ga. Jan. 2, 2014). The Fourth Circuit reached the same decision when it held that searching laptops and computer disks were routine. *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005). And the Seventh Circuit held photocopying a personal notebook as routine. *United States v. Johnson*, 991 F.2d 1287 (7th Cir. 1993). The Fifth Circuit has even held that searching personal correspondence did not rise to the level of highly intrusive to a person's privacy and therefore was routine. *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998). The searching of luggage by using an X-ray and probe was found to be routine because it did not require force and did not create risk to the owner of the luggage nor harm the luggage itself. *United States v. Okafor*, 285 F.3d 842 (9th Cir. 2002). The Sixth Circuit reached a similar conclusion in *United States v. Lawson*, 461 F.3d 697, 701 (6th Cir. 2006). The Eleventh Circuit has held that the government's search of a defendant's cabin in a foreign cargo vessel by a government team did not invade the person's privacy interest and therefore was routine. *United States v. Alfaro-Moncada*, 607 F.3d 720 (11th Cir. 2010). And the First Circuit has even held that asking a woman to partially expose herself in a private room by raising up her skirt did not invade the dignity of a person to rise to the level of requiring suspicion and therefore was routine. *United States v. Braks*, 842 F.2d 509 (1st Cir. 1988).

Here, the search of the laptop was routine because the laptop is an effect and not a person. The laptop was not password protected. R. at 28. Mr. Wyatt did not object to Agent Ludgate opening the laptop. R. at 28. Documents were already open when the laptop was opened. R. at 2. These documents contained information relating to the kidnappings. R. at 3. There are no allegations that this brief viewing of the already open files damaged the laptop or created a safety concern for the user. Following the majority circuits view, as an effect, a laptop would not be subject to requiring any level of suspicion to view the already open files during a border search because no highly intrusive search of the person occurred. As such, the long history of case law and the statutes penned by the same Congress which created the Fourth Amendment and consistent with the Supreme Court's decisions in *Flores-Montano*, *Montoya de Herndandez*, *Ramsey*, *Carroll*, *Boyd*, and *Almeida-Sanchez*, the viewing of the already open files on this laptop was valid pursuant to the border exception and did not require any level of suspicion.

B. Even if the viewing of already open files on a laptop in the course of a border search were deemed non-routine, there was a sufficient level of suspicion to justify the search.

The Supreme Court has only suggested a few specific conditions where the invasion to the person is so great that it could require a level of suspicion to justify the intrusion which includes: strip searches, body-cavity searches, or involuntary x-ray searches. See Flores-Montano, 541 U.S. at 151. However, the Supreme Court also declined to delineate "what level of suspicion, *if any*, is required for [these] non-routine border searches." Id. at 152 (emphasis added). This leaves open the possibility that no level of suspicion is required.

Even though the Supreme Court has not determined the standard applied to non-routine searches, courts like the Fifth Circuit in *United States v. Roberts* and the Ninth Circuit in

Cotterman apply a standard of reasonable suspicion only when the search is non-routine. When looking at the totality of circumstances, reasonable suspicion is "a particularized and objective basis for suspecting the particular person" of a wrongdoing. *Montoya De Hernandez*, 473 U.S. at 541. When analyzing reasonable suspicion, "specific and articulable facts are taken together with rational inferences from those facts. *Terry v. Ohio*, 392 U.S. 1 (1968)(internal citations omitted). "Reasonable suspicion is more than an inchoate and unparticularized suspicion or hunch." *Montoya De Hernandez*, 473 U.S. at 541 (quoting *Terry v. Ohio*, 392 U.S. 1 at 21.). "Reasonable suspicion can be found from a common-sense conclusion about human behavior' upon which practical people including government officials are entitled to rely" (*Montoya De Hernandez*, 473 U.S. at 541, (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337-342 (1985)) (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Here, the government had reasonable suspicion to search the laptop because when viewed in the totality of circumstances the government was able to point to specific and articulable facts taken together with rational inferences that led to a particularized and objective basis to suspect that the laptop would further help discover Mr. Ford's kidnapped children. The driver displayed suspicious activity. R. at 26. The driver was incredibly agitated and uncooperative. R. at 26. He avoided eye contact. R. at 26. His answers were very brief. R. at 26. He was fidgeting with the steering wheel with his fingers. R. at 26. He was pale. R. at 26. The manner in which the driver acted raised Agent Ludgate' suspicion that the driver was hiding something. R. at 26. Finding the $10,000 in $20 dollar bills which matched the exact amount and currency of the proof of life ransom which recently occurred, furthered the suspicion of having a connection to the kidnapping. R. at 27. Taken in conjunction with the fact that the driver had lied about this money which is a crime in and of itself, and the close personal relationship to Respondent who was the

main person of interest in the kidnapping investigation, Agent Ludgate suspected the driver of involvement with the kidnapping crimes. R. at 2. R. at 7. The laptop was found in close proximity to this ransom money. R. at 26. The laptop had Respondent's initials on it and the driver identified these initials and gave information that he shared access to this laptop with Respondent. R. at 2 R. at 26. Respondent was known to be a felon with multiple convictions for crimes of violence. R. at 2. Respondent was also the "main person of interest" in the recent kidnappings of Mr. Ford's children, who was a billionaire owner of a technology company. R. at 28; R. at 31. A ransom note was sent to Mr. Ford's personal address. R. at 44. The fact that the laptop is owned by someone who is known to have committed several violent crimes would be enough suspicion to search the laptop. Taken together in the totality of the circumstances, the above particularized facts and rational inferences rise to the level of reasonable suspicion that the laptop would help lead to the kidnapped children and was likely used in the furtherance of that crime. Therefore, even if this were a non-routine search, the government possessed the requisite suspicion to view already open files on a laptop during a border search as permissible.

II. THE WARRANTLESS USE OF THE PNR-1 DRONE AND HANDHELD DOPPLER RADAR DEVICE TO ENSURE THE SAFETY OF MULTIPLE LIVES DURING THIS DANGEROUS KIDNAPPING DOES NOT VIOLATE THE FOURTH AMENDMENT BECAUSE THE USE OF THIS TECHNOLOGY WAS NOT A SEARCH AND FALLS UNDER THE JUDICIALLY RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

The Fourth Amendment is "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. 4. The benchmark of Fourth Amendment analysis is whether a person has a reasonable expectation of privacy in the area that the search occurred. *Oliver v. United States*, 466 U.S. 170

(U.S., 1984). The Supreme Court of the United States outlined a two prong test. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). First, whether the person has a subjective expectation of privacy and second, whether the expectation of privacy is one that society is willing to recognize as reasonable. *Id.* Some areas in particular are more protected by the Fourth Amendment than others. *United States v. Dunn*, 480 U.S. 294 (1987). The Fourth Amendment only protects a person's subjective expectation of privacy that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361. In order to determine whether the area qualifies as curtilage and thus is protected under the Fourth Amendment, the Supreme Court looks to four factors. *Dunn*, 480 U.S. at 294, 301. The ultimate question being "is the area in question so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protections." *Id.* Twice, the Supreme Court has addressed the question of whether aerial surveillance over a person's property infringes on a expectation of privacy that society is prepared to recognize as reasonable. See *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986). The Supreme Court stated that "a law enforcement officer's observations from a public vantage point where he has a right to be and from which the activities or objects he observes are clearly visible do not constitute a search within the meaning of the Fourth Amendment." *United States v. Taylor,* 90 F.3d 903, 908 (4th Cir.1996). Even though the Supreme Court has held that the use of technology to collect information regarding the interior of the home that could not have been retrieved without actually entering the house is prohibited, if the technology is in common use the reasonable expectation of privacy is lowered. *Kyllo v. United States*, 533 U.S. 27, 43 (2001). Additionally, there are several exceptions to the warrant requirement which make a warrantless search reasonable. *Katz*, 389 U.S. at 357.

A. The Warrantless use of the PNR-1 drone to protect the officer's safety and the safety of the victims does not violate Fourth Amendment because the drone does not qualify as a search since the drone observed Respondent outside from a lawful vantage point.

If a person knowingly exposes something to the public, even in their own home, the exposed activity does not fall under Fourth Amendment protections. *Id.* at 347-51. The question is whether the expectation of privacy was one society is ready to deem reasonable, given the extent of public observation of the back yard from navigable airspace. *Riley*, 488 U.S. at 454. Searches that are conducted in navigable airspace and are carried out in a non-intrusive manner, from an area that is fully accessible to the public, do not require a warrant and are reasonable. *Ciraolo*, 476 U.S. at 222.

The Supreme Court looks to four factors when determining whether an area is considered curtilage and thus protected by the Fourth Amendment. *Dunn*, 480 U.S. at 301. First, the Court looks to the proximity of the area to the dwelling. *Id*. The Supreme Court determined that the proximity of the area to the home was not conclusive in itself. *Id.* For example, the Court determined "a distance of 50-60 yards was an "inconclusive" factor on its own. See *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 598-99 (6th Cir.1998). Additionally, the Court held that, "observing an 82-foot distance was of "no decisive help" in curtilage determination." *United States v. Diehl*, 276 F.3d 32, 39 (Me. Ct. App. 2002). Second, the Court looks at whether there are enclosures surrounding the area. *Dunn*, 480 U.S. at 301. Although enclosures are not conclusive on their own, fences or enclosures are important factors to consider when defining curtilage. *Id.* Third, the Court looks to how the area is used. *Id.* The Court found it important that the area was not used for "intimate activities of the home". *Id.* Fourth, the Court looks to what steps the defendant has taken to shield the area from public observation. *Id. at* 294,301.

In *Ciraolo,* law enforcement investigated an anonymous tip that the defendant was growing marijuana in the backyard. 476 U.S. at 207. The property was surrounded by two fences, a six-foot fence, and a ten-foot fence that obstructed the view of the back yard from the street at ground level. *Id.* at 209. Law enforcement conducted an aerial observation from a plane 1000 feet in the air above the defendant's property when they saw a field of marijuana plants growing in defendant's backyard. *Id.* at 207. Although the defendant took extreme measures to protect his backyard from the public view from the ground, he failed to take any measures to protect from aerial surveillance. *Id.* at 210. The Court also determined that airplanes are permitted for aerial surveillance and referred to airplanes as "products of modern technology". *Id.* The Court held that aerial observation of the defendant's property from 1000 feet in an airplane did not violate a reasonable expectation of privacy because the surveillance occurred from a lawful vantage point, the plane was flying in public airspace, and the surveillance was carried out in a physically nonintrusive manner when law enforcement looked into the defendant's backyard. *Id.* at 217.

In *Riley*, the Court also stated that the defendant's Fourth Amendment rights were not violated when law enforcement, in a helicopter hovering over the property at 400 feet, spotted marijuana plants from a partially covered greenhouse. 488 U.S. at 445.

Here, a flying drone is analogous to the helicopter in *Riley* and the airplane in *Ciraolo*. When Respondent was walking outside and was spotted by the drone, there would not be an expectation of privacy that the public is willing to recognize as reasonable. Similar to the facts in *Ciraolo*, Macklin Manor had nothing protecting the property from an aerial view. 476 U.S. at 210. Additionally, like in *Ciraolo* planes still fly over Macklin Manor and would be able to observe someone walking on the patio. *Id.* Thus, a person living there could not reasonably

expect to never be viewed from above. Like in *Ciraolo*, the drone was flying in legally navigable airspace, while the officers were standing on a public road where they had every right to be. *Id.*

In *Riley,* a helicopter hovering over a property at 400 feet was not found to be intrusive, like is the case here, where a quiet and small drone did not interfere with the defendant's use of the property and made no physical intrusion. 488 U.S. at 449. Like in *Ciraolo,* the drone was flying in legal airspace. 476 U.S. at 207. Although the altitude limits on the drone were having some glitches, there are no facts to substantiate an allegation that the drone was not flying in legal airspace. R. at 39.

The Fourth Amendment protects individuals from unreasonable intrusive searches. U.S. Const. Amend. 4. This drone took a mere twenty-two pictures and three minutes of video and had a flight time of only fifteen minutes over Macklin Manor at an altitude that did not cause any disturbance on the ground. R. at 4. The drone's capabilities in itself could not be deemed intrusive due to its limited storage capacity and camera capabilities. R. at 40

In *Dunn*, the court held that a barn that was fifty yards away from the home was not protected curtilage, even though there were several fences and barbed wire designed to keep intruders out. 480 U.S. at 294-95. DEA agents were permitted to cross these fences and walk on the defendant's property to make observations of suspected criminal activity. *Id.* at 297. The Court ruled that the actions of the DEA agents did not violate the defendant's Fourth Amendment rights. *Id.*

In *Breza*, the Fourth Circuit of Court Appeals applied the ruling in *Dunn* and determined that aerial surveillance by law enforcement in a helicopter flying at an altitude of 200 feet over the defendant's farm, did not violate the defendant's Fourth Amendment rights when police

discovered a marijuana garden on the property. *U.S. v. Breza*, 308 F.3d at 434-35 (4th Cir. 2002). The court explained that although *Breza* chose to live in an isolated location and the area in question was close to his house (fifty feet away), both of these factors were outweighed by the other *Dunn* factors when taken as a whole. *Id.*

Here, Respondent was not within the area so intimately tied to the home and therefore is not protected by the Fourth Amendment. *Dunn*, 480 U.S. at 294. Respondent was observed by the drone while she was outside walking to the pool house, which is a completely separate and unattached building from the home. R. at 4. The pool house was fifty feet away from the main house and is separated by a patio and pool area. R. at 9. Although fifty feet is close to the main house, this factor is outweighed by the nature of the use of the area and lack of enclosures. *Dunn*, 480 U.S. at 301. R. at 4. Macklin Manor completely lacked a fence of any kind surrounding the home or the property, further demonstrating that the outdoor patio area is not curtilage. R. at 4. In *Breza*, the court looked to the size of the building, and the fact the building was being used to grow drugs to determine the area was not being used for the type of protected intimate activities of the home. 308 F.3d at 436. Similarly, Macklin Manor was being used as a hostage hideout and thus not for the activities that were meant to be protected by the Fourth Amendment. R. at 5. Furthermore, the fact that Respondent took no additional steps to protect Macklin Manor from observation, leaving the area completely unprotected, diminishes Respondent's expectation of privacy. *Dunn*, 480 U.S. at 304. For example, there were no fences, signs, awnings, or shading to shield the area from public observation whatsoever. R. at 9. Natural weather conditions like clouds or low visibility in the area that might make the area hard to observe are not protections that were taken by Respondent to protect her own privacy, they are weather conditions that can change day to day. R. at 10. Therefore, Respondent had no reasonable expectation of privacy in

the patio area where she was observed outside on Macklin Manor and thus, no search occurred. R. at 4.

B. The information obtained by the Doppler radar does not constitute a search that would require a warrant because the Doppler radar is in "common use" and was used for the safety of the kidnapping victims and the officers and not used to meet the probable cause requirements.

Even though the Supreme Court held in *Kyllo* that using technology to collect information about the inside of the home that could have not been recovered without actually going inside is prohibited by the Fourth Amendment, if, the technology is in common use the expectation of privacy is lowered. 533 U.S. 27 at 40.

A warrantless search is found to be reasonable if it meets one of the exceptions to the warrant requirement of the Fourth Amendment. *Katz*, 389 U.S. at 357. "Police officers are supposed to prevent violence, not just help victims of [past violence]". *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). For example, "an emergency effort to save a victims' life justified a warrantless search for the victims or evidence of their location." *Chaney v. State*, 612 P.2d 269, 276 (Okla. Crim. App. 1980).

Most courts decide that when police officers receive a kidnapping report there is a "per se need for speedy action which permits use of the emergency doctrine" because of the characteristically threatening conditions which surround a kidnapping. *State v. Fields*, 2005 WL 35184 (Tenn. Crim. App., 2005). In *Kyllo*, law enforcement used an uncommon thermal imaging device to gather information which was relied upon to obtain a warrant based on probable cause for growing marijuana in a home. 533 U.S. at 27. The Court ruled in *Kyllo* that because the information from the thermal imaging device could not have been obtained without entering the home, it was an unreasonable search and thus the evidence should be suppressed. *Id.* at 43.

However, the Court also stated that at least in this case where the technology is not in common use, information gathered using the thermal imaging device constitutes a search. *Id.*

Unlike in *Kyllo*, the Doppler radar was not used to gain any information that aided in meeting the probable cause requirements. R. at 11. Instead, the Doppler radar was merely used for the safety of the kidnapping victims and the safety of officers during a rescue mission. R. at 11. Unlike the facts in *Kyllo*, where a thermal imaging device was not found to be in common use, a Doppler radar is commonly used in sports, for speeding tickets, meteorology, aviation, and even by expecting parents which lowers a person's reasonable expectation of privacy because the radar is commonly used by the public and thus, the public would not recognize Respondent's expectation of privacy as reasonable. *Id.* R. at 11.

Even if a search had occurred, a warrant would not be required because an exigent exception applies. *Mincey v. Arizona,* 437 U.S. 385, 393 (1978). One exigent circumstance that allows law enforcement to avoid the warrant requirement is the imminent need to aid individuals who are seriously injured or threatened with serious injury. *Id.* The need to protect or save lives or avoid a serious injury is an acceptable justification for what is normally illegal. *Id.*; *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)

Thus, law enforcement officers may enter a home without a warrant to provide emergency help to an injured person or to protect a person from imminent injury. *Mincey,* 437 U.S. at 393. The objective test of the emergency aid exception to the warrant requirement is met when, under the totality of the circumstances, a reasonable person would have believed that there was an immediate need to provide aid to a person due to actual or threatened physical injury, and that immediate entry into the area in which a person had a reasonable expectation of privacy was

unavoidable in order to provide aid. *State v. Boggess*, 340 N.W.2d 516 (Wis. 1983). The emergency doctrine is built on the concept that saving a human life overrides the right of privacy protected by the Fourth Amendment. *Id.* The need to save three innocent teenagers lives is an "acceptable justification" for a minor intrusion of the defendant's privacy. *Mincey,* 437 U.S. at 393. Additionally, the kidnapper asked for a proof of life ransom to be paid which in itself shows the threat of serious bodily harm or death. R. at 27. Three children were restrained to chairs and in the custody of a convicted felon of violent crimes and thus, would make a reasonable officer believe they were in need of help in order to prevent death or serious bodily injury. R. At 34.

C. Even if the drone and radar searches were impermissible warrantless searches, the warrant issued was valid because it relied upon information obtained at the border and did not stem from information gathered by the poisonous drone and radar searches.

There are three known exceptions to the Fourth Amendment exclusionary rule: (1) the inevitable discovery exception; (2) the independent source exception; and (3) the attenuation exception. *United States v. Smith,* 155 F.3d 1051, 1060 (9th Cir. 1998). Under the attenuation exception, whether fruit is "of the poisonous tree" and evidence must be excluded at trial depends on "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the taint imposed upon that evidence by the original illegality." *U.S. v. Crews*, 445 U.S. 463 (1980); *State v. Bailey*, 338 P.3d 702 (Or., 2014).

A search warrant is issued upon a showing of probable cause. *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Probable cause is not a concrete concept, probable cause changes based on the probabilities given the specific circumstances surrounding the event *Id.* at 232. Probable cause is determined by a totality of the circumstances approach. Id. at 230. When determining probable

cause, a court will look at factual and practical concerns of everyday life in which a reasonable and prudent person in the same situation would act. *Brinegar v. United States*, 338 U.S. 160, 176 (1990). The principal components of probable cause are (1) all activities and circumstances leading up to the actual search and (2) if these facts, viewed from the perspective of an objectively reasonable law enforcement officer, results in probable cause. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). In order to prove the fruits of the poisonous tree argument, the knowledge that amounted to probable cause must have been gained from impermissible searches and not obtained at a different point, thus purging it of taint. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

Here, even if the drone and Doppler radar were impermissible searches, the border search results satisfied probable cause prior to the drone and radar searches. R. at 11. Probable cause was met because when viewing the totality of the circumstances, the combination of: Agent Ludgate's knowledge of the ongoing investigation, $10,000 in twenty dollar bills found which matched the proof of life ransom amount, the laptop with Respondent's initials, the already open desktop files revealing information about Mr. Ford (the father of the kidnapped children), including his personal address, and discovering an address to Macklin Manor on a lease agreement under Respondent's alias who was the main person of interest in this kidnapping would lead an objectively reasonable police officer to believe evidence of the kidnapping was at Macklin Manor. R. at 12. Thus, even if the drone and radar search are found to be illegal searches the warrant was still valid and Respondent should not be entitled to relief. R. at 12

CONCLUSION

We respectfully request that this Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit and deny Respondent's motion to suppress evidence in its entirety because the United States Government did not violate the Fourth Amendment when viewing already opened files on a laptop in the course of a routine border search and was not required to obtain a warrant. Nor did the United States Government violate the Fourth Amendment when using a drone and Doppler radar to ensure safety of officers prior to effectuating the rescue of kidnapping victims.

Respectfully submitted,

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