RESPONDENT 16

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 Supreme Court

The University of San Diego School of Law

29th Annual Criminal Procedure Tournament November 10-12, 2017

San Diego, CA

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II. Did the use of a PNR-1 drone and handheld Doppler radar device constitute a search in violation of Respondent's 4th Amendment right

STATEMENT OF FACTS

In the early morning hours of August 17, 2016, Eagle City border agents stopped a vehicle driven by Christopher Wyatt attempting to enter the U.S. from Mexico. *Id.* Upon being asked his purpose for entering the U.S., Mr. Wyatt appeared agitated and uncooperative. *Id.* One of the agents, Ashley Ludgate, asked if he was transporting $10,000 or more. *Id.* Mr. Wyatt said he was not. *Id.* Agent Ludgate informed Mr. Wyatt of her right to conduct a routine search on every vehicle. *Id.* A second agent, Christopher Dwyer, then asked Mr. Wyatt to exit the vehicle and open the trunk. *Id*. Upon opening the trunk, $10,000 (in $20 bills) and a laptop inscribed with the initial "AK" were discovered. *Id*.

Suspicious of the contents, agent Ludgate asked Mr. Wyatt if the laptop was his. *Id.* Mr. Wyatt responded he shared the laptop with his fiancé, Respondent Amanda Koehler. *Id*. The agents then ran Respondent's name through a criminal database. *Id*. The results revealed Respondent's multiple convictions for crimes of violence. *Id*. It also listed her as a person of interest in the recent kidnapping of billionaire Timothy Ford's three children. *Id*. The FBI and the Eagle City Police Department (ECPD), in a joint investigation, believed these children were moved across state lines and being held in Eagle City. *Id*. Recently, the kidnappers agreed to give proof the children were alive in exchange for a $10,000 payment in $20 bills, to be paid on August 18. *Id*.

Aware of the kidnapping and the investigation, agent Ludgate opened the laptop. *Id.* She looked through the laptop's desktop. *Id.* Several documents were already open. R. at 3. Many of them contained Mr. Ford's personal information, such as his address, his meetings and appointments, and the names of his staff. *Id.* Agent Ludgate continued to search. *Id.* She found a lease agreement under the name "Laura Pope." *Id*. The agreement's address did not match Mr.

Ford's. *Id*. Mr. Wyatt was placed under arrest for failing to declare in excess of $10,000, a violation of 31 U.S.C. § 5136. Agent Ludgate contacted detective Perkins, lead investigator in the Ford case, to report her findings. *Id*.

The address on the lease agreement was traced to an estate on the outskirts of Eagle City, Macklin Manor. *Id.* Macklin Manor sits atop the perennially foggy and cloudy Mount Partridge. *Id.* This constant fogginess often causes planes to avoid the mountain due to low visibility. *Id*. Macklin manor originally belonged to the old police chief of Eagle City until his death in 2015. *Id*. After a period of abandonment ending about 6 months ago, Respondent purchased Macklin Manor through a shell company using the alias 'Laura Pope." *Id.* However, no one has seen residents at the property. *Id*.

Reluctant to approach the estate without more knowledge of its layout and residents, officer Perkins ordered loose surveillance by foot patrol and the deployment of a PNR-1 drone to fly over the property at dawn. *Id.* Although limited in its digital storage capabilities, the PNR-1 is a favorite amongst enthusiasts for its price and availability, although ECPD is the only department in the state to use it. *Id*. It has a 35-minute battery life and a high-resolution camera that can store about 30 photos and 15 minutes of video. *Id*. It's pre-programmed to fly at the legal maximum of 1640 feet, though due to network errors some drones have flown as high as 2000 feet. R. at. 4. From about two blocks away, officer Ashley Lowe deployed the drone over Macklin Manor. *Id*. The PNR-1 took 7 minutes to reach Macklin Manor. *Id*. It hovered above the estate for 15 minutes and took 22 photos and 3 minutes of video before returning to Officer Lowe 7 minutes later. *Id.* The photos and video showed the estate's layout: a main house, an open pool and patio area, and a single-room pool house. *Id.* 15 feet separate the main house from the pool; 50 feet separate the pool house from the main house. *Id*. The estate is not surrounded by a gate. *Id*. The

drone also captured a picture of a female later confirmed to be Respondent crossing the pool house to the main house. *Id*.

Knowing only that Respondent was present at the estate, officer Perkins feared that alerting the occupants would endanger the life and safety of any hostages. *Id.* He furtively approached the front door of the main house before scanning the "front door area" with a handheld Doppler radar. *Id.* These devices, recently popular with law enforcement, emit a radio wave capable of detecting movements within 50 feet. *Id.* Usually, the Doppler's frequency changes if movement is detected; however the device often keys to a person's breathing, making it impossible to hide within 50 feet. *Id.* Doppler radars cannot reveal what the inside of a building looks like, only the number of people inside and roughly where they are located. *Id*. The Doppler device detected what appeared to be a person in the front room, a few feet from the door. R at 5. Officers then conducted a second Doppler scan on the pool house which revealed three breathing individuals, close together but not moving, and what appeared to be someone standing guard. *Id.* Both Doppler searches were conducted without a warrant. R at 4-5.

A warrant was finally obtained that morning. R. at 5. Upon executing the warrant on the main house, two individuals were detained in the living room. *Id.* Respondent was detained attempting to escape. *Id.* She was found with a Glock. *Id.* Officers then forced their way into the pool house, detained the guard, and discovered the three kidnapped children. *Id*.

On October 1, 2016 a grand jury indicted Respondent on three counts of kidnapping, 18 U.S.C. § 1201(a), and one count of being a felon in possession of a handgun, 18 U.S.C. § 922(g)(1). *Id*. On August 17, 2016 Respondent filed a motion to suppress the fruits of the searches. R. at 1. On November 25, 2016 The United States District Court, Southern District of Pawndale, denied the motion. Respondent was convicted on all charges. R. at 15. On February 1,

2017 Respondent filed an appeal with the United States Court of Appeals for the Thirteenth Circuit. R. at 14. The Thirteenth Circuit reversed and remanded for a new trial. R. at 21. The United States filed an appeal with this Curt and it granted certiorari. R. at 22.

ARGUMENT SUMMARY

This is an easy case guided by well-worn principles. The Fourth Amendment protects against unreasonable searches and seizures. Irrespective of the place of search (the border), or the type of search (Drone, radar), the test of whether a particular law enforcement practice is justified has always been reasonableness. In light of this principle, the Court should decline Petitioner's invitation to revisit this case. This brief consists of four arguments.

First. The suspicionless search of Respondent's laptop violated the Fourth Amendment. The search did not fall within the border search exception because the security concerns upon which the exception is based are not present in the search of a digital device. The government's interest in inspecting fruits, livestock, and the baggage of entrants does not support a search of sensitive information stored on a laptop. It's apples and oranges.

Second. Even if the border search exception applies, the search here was highly offensive and therefore unreasonable. Laptops are unique devices capable of giving rise to privacy concerns that demand a quantum of suspicion before they are searched. Petitioner did not have reasonable suspicion to conduct such a search.

Third. The Aerial surveillance was unreasonable. The area *around* Macklin manor was intimately connected *to* Macklin Manor. It was reasonably expected to be private. To claim otherwise in this case is an unfounded distinction. Actually, this Court has provided four clear factors addressing the very issue presented here. This case is beneath the Court's concern.

Fourth. The Doppler device. This was plainly a search. The rule is simple: but for the Doppler, the number of people in the house would not have been revealed. Nor was the search reasonable. The Doppler was not in common usage; the people in Macklin Manor were not visible to the naked eye; and there was a violation of positive law.

STANDARD OF REVIEW

This Court reviews legal findings *de novo* and only sets aside findings of fact if clearly erroneous. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 388-93 (1990).

ARGUMENT

I. THE SEARCH OF RESPONDENT'S LAPTOP DID NOT FALL WITHIN THE BORDER EXCEPTION TO THE WARRANT REQUIREMENT.

The border search is an exception to the [1]Fourth Amendment's warrant requirement. *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). It allows the government to conduct *routine* searches of persons and effects at the border with no individualized suspicion. *Id.* at 538. Routine searches don't offend the Fourth Amendment because they are rooted in interests of security, sovereignty, and customs enforcement. *U.S. v. Ramsey*, 431 U.S. 606, 616 (1977). Searches at the border are often reasonable simply "by virtue of the fact that they occur at the border." *Id.* Yet the government's border power is not limitless. *Montoya de Hernandez*, 473 U.S. at 539 ("Having presented herself at the border for admission, Respondent was entitled to be free from unreasonable searches and seizures."). While the sovereign's interests at the border strike a qualitatively different balance than in the interior, the touchstone of whether a search is lawful remains reasonableness, as balanced between the level of the government's intrusion weighed against the need for that intrusion. *Id.* at 537.

Non-routine searches are "highly intrusive border searches" made for "purposes *other* than a

[1] U.S. Const. amend. IV ("The Right of the People to be Secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated.")

routine border search." *See Montoya de Hernandez*, 473 U.S. at 540; *United States v. Braks*, 842 F.2d 509, 511 (1st circ. 1988). Non-routine searches require reasonable suspicion because they implicate privacy and dignity interests. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). The Court has provided one example of a non-routine search: the probing of a passenger's alimentary canal. *Montoya de Hernandez*, 473 U.S. at 536. Routine searches do not implicate these interests. *See Flores-Montano*, 541 U.S. at 152. For example, the dismantling of a vehicle's gas tank at the border is reasonable because the interests of dignity and privacy "simply do not carry over to vehicles." *Id.* Additionally, the Court has left open the possibility that "some searches of property are so destructive, particularly offensive, or overly intrusive in the manner in which they are carried out as to require individualized suspicion." *Flores-Montano*, 541 U.S. at 154, n. 2.

Several Circuit Courts have addressed the issue between routine and non-routine searches. The First Circuit fashioned a test in which a search is routine if "invasive or intrusive," including whether the suspect's reasonable expectation of privacy has been abrogated." *Braks*, 842 F.2d 509, 511 (1st circ. 1988). Additionally, "notwithstanding a traveler's diminished expectation of privacy at the border," the reasonableness of a search depends on "its nature and scope." *United States v. Cotterman*, 709 F.3d 952, 963 (9th Cir. 2013).

A. THE SEARCH OF RESPONDENT'S LAPTOP WAS NON-ROUTINE AND REQUIRES REASONABLE SUSPICION.

This Court has never addressed—much less rejected—a case involving a border laptop search. The Court has specifically left open the question as to "whether, and under what circumstances, a border search might be deemed unreasonable because of the particularly offensive manner in which it was carried out." *Flores-Montano*, 541 U.S. at 154, n. 2. As noted by the court below, this case falls squarely under *Riley*.

Riley specifically held that, incident to an arrest, law enforcement officers must obtain a warrant before searching a cell phone. *Riley v. California*, 134 S. Ct 2473, 2495 (2014). In reaching this conclusion, the Court resolved the same question it faces today: whether a historically rooted exception to the Fourth Amendment's warrant requirement is applicable to modern technology. *Id.* at 2484. The *Riley* Court declined to extend the search incident to arrest exception based on principles that translate directly to this case.

The Border Exception's Rationale Does Not Justify Suspicionless Searches Of Digital Devices

Riley counsels that for the border search exception to apply to digital contents it must be for the purposes of security, national sovereign, and customs enforcement. *Riley*, 134 S. Ct. 2473 at 2485. *Riley* is an example of a warrant exception being applied to technology: the search incident to arrest exception to cell phones. In determining whether the exception reached the phone, the court provided two guideposts.

First, The Court identified the principle rationales behind the search incident to arrest exception: officer safety and to prevent the destruction of evidence. *Id*. at 2484. Second, The Court asked if those concerns were present at the time of the cell phone search. *See Id*. at 2486. The Court concluded they were not. The extension of the exception was therefore inappropriate, as concerns for officer safety and prevention of destruction of evidence are not present in the search of a cell phone. *Id.* To the contrary, a phone "could not be used a weapon," nor was it feasible that an arrestee would "conceal or destroy" evidence on his phone. *Id.* at 2478, 2486.

In view of *Riley*, the border search exception cannot extend to the contents of Respondent's laptop. First, the rationale. In examining the border exception we find the purpose is to prevent the entry of illicit goods, and national security. *Ramsey*, 431 U.S. 606 at 619. Notably, these concerns render the act of entry into the country grounds for a suspicionless search. *Id.* at 616.

Having identified the rationale behind the border search exception, *Riley* then requires those concerns be present during a border search of digital content. If those distinct concerns are *absent* during searches of digital contents at the border, the exception cannot be extended, and a reasonable suspicion is required. *See Riley*, 134 S. Ct. 2473 at 2485. These concerns are not present for several reasons.

Respondent's laptop does not threaten to bring anything harmful *into* the country. The laptop contained documents with Mr. Ford's personal information. This included a schedule of appointments and the names of his employees. These documents are distinct from the concerns justifying customs enforcement—policing who and what enters the country. *Ramsey*, 431 U.S. 606 at 618. This search did not uncover a diseased piece of meat, or a tubercular entrant capable of introducing a harmful agent into the interior. *Montoya de Hernandez*, 473 U.S. 531 at 544. It's difficult to see how a schedule, a list of employee names, and a lease agreement implicate interests of national security and sovereignty. In *Montoya de Hernandez*, the entrant was detained for almost 24 hours as agents waited for her to dispel cocaine hidden in her alimentary canal. *Id.* at 532. The detention was held reasonable because custom enforcement concerns were present. *Id.* at 544. The smuggler entrant was likened to a tuberculosis carrier because "both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent *into* the country." *Id.* The analogy makes a clear point. Searches *not* based on the need to protect the border's integrity from harmful objects are unreasonable.

Respondent's laptop did not contain harmful material. It did not contain evidence of violence. The laptop did not contain a communicable disease, organic or technological. That the laptop contained evidence later linking Respondent to a crime does not address the question. The inquiry under *Riley* is not whether suspicion existed to believe Respondent's laptop would yield

evidence of crime; it is whether a historical exception to the warrant requirement can justifiably be extended to the digital contents of a laptop. *Riley,* 134 S. Ct. 2473 at 2480. Here it cannot. Because extending the exception would "untether the rule from the justifications underlying the exception, the search was unlawful. *Id.* at 2485. Just as the defendant's interest in his gas tank in *Flores-Montano* did not present concerns "beyond the scope" of a routine search, in our case the government's interests in customs enforcement were not present during the search of Respondent's laptop. *Flores-Montano,* 541 U.S. 149 at 152. Accordingly, the search was not justified as routine and required reasonable suspicion.

A Reasonable Suspicious Is Needed To Search A Digital Device

The Court of Appeals found Respondent's laptop search "unique," and that it amounted to a non-routine search requiring reasonable suspicion. *Riley* stands for the proposition that digital devices "differ both quantitatively and qualitatively" from other objects. *Riley,* 134 S. Ct. 2473 at 2489. As applied to the border, a laptop's unique nature raises distinct privacy concerns which, on balance, require at least a quantum of suspicion before being searched.

To be sure, border entrants have a reduced expectation of privacy. *Montoya de Hernandez,* 473 U.S. 531 at 560. This reduction strikes a "qualitatively different" balance of reasonableness in favor of the government. *Id.* at 538. But a reduced expectation of privacy does not mean the Fourth Amendment has nothing to say about the reasonableness of a suspicionless border search on a digital device conducted for a criminal purpose. The touchstone remains reasonableness. *Id.* at 539. *Riley* dealt with the search incident to arrest exception. Even though the defendant had been arrested and his expectation of privacy reduced, the phone still required a warrant before it could be searched. *Riley,* 124 S. Ct. 2473 at 2495. That is, the unique nature of the digital device required a showing of probable cause. Although the exception historically gave access to both

the arrestee's person and his belongings within reach, the *Riley* Court drew a line in the sand at his digital device because "privacy concerns far beyond those implicated" by ordinary objects were present. *Id.* at 2488. A cell phone is not a cigarette pack, a wallet, or a purse, but a device capable of "exposing to the government far more than the most exhaustive search of a house." *Id.* at 2491. This potential for the government to invade privacy, particular to digital devices, was of special importance to the *Riley* Court. Analogously here, while Respondent concedes a border entrant has a reduced expectation of privacy, the unique nature of a laptop's digital content as established by *Riley* raises privacy interest sufficient to require a quantum of suspicion when searching contents of a laptop.

First, digital devices are quantitatively different from other objects. In terms of privacy, the potential for invasion is great. Before the advent of the digital device the scope of a border search was limited. Routine border searches of mail, a boot, or a purse constituted a narrow invasion because limited in what would be revealed. *See Id.* at 2489. Therefore no individualized suspicion was needed. A laptop, on the other hand, potentially reveals millions of files. They hold gigabytes of information capable of storing the "sum of an individual's private life." *Id.* These files contain dates, names, locations, and descriptions. A categorical rule allowing suspicionless searches of items like mail, a boot, or a wallet does not fit searches of unique objects like laptops. Laptops are not "containers." A container holds "one object in another" while a laptop contains millions of files, i.e. data located elsewhere, in the cloud, available at the tap of a button. *Id.* at 2491.

Additionally, a laptop's contents are qualitatively unique *Id.* at 2478. Digital devices "retain sensitive information far beyond the perceived point of erasure. *Cotterman,* 709 F.3d 952, 965 (9th Cir. 2013). A potential entrant into the country is not free to choose what she will bring

into the country. Unlike a suitcase, which allows one to pack and unpack according to what one desires to bring, removing files from a laptop is impractical, and in some cases, impossible. *Id.* The inability to make a meaningful decision in what information to digitally carry gives rise to privacy interests requiring suspicion before that information can be reasonably searched.

Riley expressly acknowledged a digital device's unique nature. This nature was real enough to overcome the fact of custody and impose a warrant requirement on police seeking to search a cell phone's contents incident to arrest. Here, the fact that the search occurred at the border, though important, is not dispositive. The question is one of reasonableness. On balance, the privacy interests of a digital device acknowledged in *Riley* requires some suspicion when the attempted search does not implicate the justifications behind the border search exception.

Search Of Respondent's Laptop Was Particularly Offensive And Therefore Unreasonable

The Court of Appeals found the search of Respondent's laptop "highly intrusive," and thus non-routine, because of the agents' ability to access sensitive information. Petitioner contends This Court's precedents stand for an express rule that only searches of *people* qualify as non-routine. This argument is misplaced. Such a rule has never been established.

The question is open as to "whether, and under what circumstances, a border search might be deemed unreasonable because of the particularly offensive manner in which it has been carried out." *Flores-Montano*, 541 U.S. at 154, n. 2. This language marks no distinction between people and property. Two Circuit Courts agree, noting the routine non-routine distinction does not turn on the nature of the thing searched— whether it's persons or property. *Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013); *Braks*, 842 F.2d 509, n. 5 (1st circ. 1988). The relevant inquiry under the Fourth Amendment is reasonableness. What is reasonable must *account* for difference in *property*, not ignore them. As demonstrated, a laptop is neither a container nor a wallet. To

allow suspicionless searches of digital devices because the device is not a "person" pays lip service to the recognized privacy interest held in *Riley* to exist in digital devices. The fact the search was of Respondent's laptop, and not her person, is not dispositive.

Nor does the Court's reasoning support such a rule. There is no precedent restricting the requirement of reasonable suspicion at the border to cases involving the person. *Ramsey* enunciated the principle that searches are reasonable "simply by virtue of the fact that they occur at the border." *Ramsey,* 431 U.S. 606 at 616. There, the facts specifically involved the search of property—international mail. 8 years later, in *Montoya De Hernandez*, the Court applied *Ramsey's* rationale to searches of the *person*. *Montoya De Hernandez* involved the search of a suspected smuggler's alimentary canal. The border search exception has therefore never been cabined by a property-person distinction. The language in *Montoya De Hernandez's* respecting routine searches as dealing with people "was not directly affected by whether the precise object of the routine search in question is an individual's person, or instead is his luggage and effects, his automobile, ect." *Braks*, 842 F.2d 509, n. 5. Rather, the test of whether a search goes "beyond the scope of routine" is, according to the straight forward language of the court's opinions, whether it is "particularly offensive." In this case it was. Although the "balance is struck" in the government's favor, the demonstrated privacy interests acknowledged in *Riley* puts the balance in favor of a reasonable suspicion requirement. First, the search was offensive because the potential for intrusion was great. Second, the type of data on the laptop, as distinct from what might be carried in a "container," also renders the search particularly offensive. Third, the Laptop's ability to store information regarding locations, personal interests, and finances makes the search offensive. Fourth, the search did not implicate the traditional concerns of the border exception, custom enforcement and national self-protection.

Giving the government even a cursory look at a laptop's contents without a reason to suspect wrongdoing is unreasonable in light of *Riley's* command that digital devices are inherently different from other effects.

B. THE SEARCH OF RESPONDENT'S LAPTOP LACKED REASONABLE SUSPICION.

Because the search of Respondent's laptop was non-routine reasonable suspicion was required. The Court of Appeals concluded the agents had "no reason to believe that there would be any further evidence of crime or wrongdoing" in Respondent's laptop. The Court should not disturb this analysis.

Reasonable suspicion is a "particularized and objective basis for suspecting the particular person stopped for criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981).

Before agents searched Respondent's laptop they were aware of the following: that Mr. Wyatt appeared agitated and uncooperative; that he was personally involved with Respondent; and that his vehicle contained $10,000 in the trunk. As the lower court held, and we reinforce, these facts raise a suspicion on the *car* not the *laptop*. A grumpy driver personally involved with person of interest in a kidnapping case does not raise a suspicion that the digital contents of a *laptop* contained evidence of a crime. The laptop's information is not implicated under these facts. No evidence exists from which to conclude the laptop was connected to the kidnapping or would yield incriminating evidence. Because this was a non-routine search conducted without "articulable facts" connecting the laptop with a crime, the search here violated the Fourth Amendment.

II. **PETITIONER'S UTILIZATION OF DRONE SURVEILLANCE AND DOPPLER SCANNING OF MACKLIN MANOR IS UNREASONABLE IN VIOLATION OF THE FOURTH AMENDMENT.**

The Fourth Amendment of the Constitution protects against unreasonable searches and seizures conducted by the government. The paramount principle driving the Fourth Amendment is a reasonable expectation of privacy against government intrusion that infringes upon personal and society values. Oliver v. United States, 466 U.S. 170, 182, 183 (1984). The touchstone of this maxim is the reasonableness of the search and seizure. *Katz v. United States*, 389 U.S. 347, 361 (1967). A reasonable expectation of privacy exists when a person has manifested a reasonable expectation of privacy and society is prepared to honor that expectation as reasonable. *California v. Ciraolo*, 476 U.S. 207, 214 (1986).

Petitioner has violated the Fourth Amendment and the following analysis will clearly demonstrate why. The analysis is divided into two sections, A and B. Section A will outline why Macklin Manor and the surrounding area should be considered curtilage and be protected under the Fourth Amendment. Section B will explain in detail why the PNR-1 drone surveillance and the handheld Doppler scanning searches were unreasonable and in violation of the Fourth Amendment.

A. THE PROPERTY SEARCHED IN MACKLIN MANOR IS CURTILAGE AND IS PROTECTED BY THE FOURTH AMENDMENT.

Petitioner contends the protections of the Fourth Amendment are not implicated because no unreasonable search occurred under the Open Fields Doctrine. Contrary to Petitioner's contention, the surveillance of Macklin Manor falls squarely under the Curtilage Doctrine which affords Respondent Fourth Amendment protections.

In effect, the Curtilage Doctrine is the opposite of the Open Fields Doctrine. Curtilage is property defined as so intimately connected to the home or dwelling as to be considered part of the home itself. *Oliver v. United States*, 466 U.S. 170, 180 (1984). Moreover, a person's home is the archetypical structure the Fourth Amendment seeks to protect, and by extension, curtilage of property deserves the same protection from government intrusion. *Payton v. New York*, 445 U.S. 573, 587 (1980). The U.S. Supreme Court has provided four factors to consider if property is in fact curtilage, thus falling under the umbrella of Fourth Amendment protection. *United States v. Dunn*, 480 U.S. 294, 301 (1987)

The *Dunn* factors are 1) proximity of the area to the home; 2) whether the area is within an enclosure surrounding the home; 3) nature and uses to which the area is utilized; and 4) steps taken by the resident to protect the area from observation by a passerby. *Id.* These factors express the underlining principle of a reasonable expectation to privacy existing in an area immediately surrounding the home as the activity in this area equates with a person's sanctity of their home and privacies of life. (See *United States v. Dunn).*

First factor: The pool house and the surrounding area of the main house in Macklin Manor are close in proximity to the main house and qualifies as curtilage. The PNR-1 drone flying over Macklin Manor captured photos of the layout of the home. The layout included the main house, the pool, patio area directly adjacent to the main house, and the single-room pool house that was within fifty feet or closer to the main house.

In *U.S. v. Dunn*, the Court concluded that a barn found to be fifty or sixty yards away from the home was not considered curtilage. *Id.* at 302. Our facts are significantly different as the shot taken by the PNR-1 drone show the pool house being at most fifty feet away from the main house and the patio and pool being even closer to the main house. The patio, pool, and pool

house were at least *one third* closer than the barn in *Dunn*. Therefore, the facts in our present case clearly indicate that the surveyed area of Macklin Manor were close enough in proximity to the home to be considered curtilage.

Second factor: Macklin Manor's surveyed property was enclosed enough to be curtilage. An area around the home implies it is sufficiently enclosed within a home. This factor has been articulated by several federal courts stating that, "curtilage is usually, but not always fenced in with the dwelling". *Ciraolo*, 476 U.S. 207 at 221. Furthermore, this Court in *Dunn* provided language that "most homes" will clearly mark their curtilage. *Dunn*, 480 U.S. 294 at 302. This Court further explained that the area around the house is a familiar one easily understood by daily experience. *Id.* Although the area that was surveyed was not fenced in, the patio, pool, and pool house are so commonly understood to be enclosed through experience and common sense that no reasonable person would believe this area was not enclosed within a home.

Third factor: The nature and uses of a pool house, pool, patio and surrounding property are consistent with home activities and so must be considered curtilage. The uses are well known. These include sleeping, swimming, laying in a bathing suit, walking to-and-from the main house, intimate conversations and other daily activities. Petitioner will be hard pressed to deem any of this area as "open fields".

Nor does *Dunn* offer Petitioner support. In D*unn,* this Court held that since law enforcement agents possessed objective data that the barn was not used for intimate activates of the home, the warrantless search fell under the open fields doctrine. *Id.* The agent in our case presented no objective evidence or knowledge that the surveyed area was uninhabitable or not used for home like activity. Also, a pool house has qualities rendering substantially different than a barn. Such inherent qualities include living space and the need for close proximity to the main

house. A reasonable belief is that a pool house, patio, and pool area embrace home-like activities. Typically a barn is not used as a home.

Fourth factor: The area surveyed by the PNR-1 drone was clearly protected from passerby inspection. Macklin Manor is an isolated area located on Mount Partridge in the outskirts of Eagle City. In addition, the aerial vantage point is also very limited as the area is constantly foggy and cloudy year-round. There's no evidence the area surveyed was in plain view or that the area was visible to the public. On the contrary, the area was chosen precisely to be secluded, obscured, and not easily viewable to passersby. This is also corroborated by the fact that the government agent used aerial surveillance in order to obtain pictures of the layout because the area was so protected that the only way to secure an accurate layout of the home was to procure surveillance via the PNR-1 drone.

The *Dunn* factors guide our analysis and support our conclusion that the area surveyed via PNR-1 drone is curtilage and thus protected by the Fourth Amendment. The area surveyed was not "open fields". An analysis on this point need not detain us long.

As enunciated in *Hester v. United States*, and explained in *Oliver v. United States*, only the surrounding area around a home warrants the Fourth Amendment protections. This logically supports a converse proposition: that no expectation of privacy attaches to open fields, or areas of property not so connected to the home. *Hester v. United States*, 265 U.S. 57, 59 (1924); *Oliver v. United States*, 466 U.S. 170, 173 (1984). Simply put, because open fields are easily accessible to the public and to police agents, without the need of consent, unlike homes, offices and commercial structures, there is no reasonable expectation of privacy. *Id.* at 179.

This Court in *Oliver* concluded the farm being used for growing marijuana was so open and easily accessible, obvious, and in plain view, that it was effectively a casual invite for intrusion.

Id. at 174. Our facts are clearly distinguishable that Petitioner cannot assert the open fields doctrine. There are no common attributes between Macklin Manor and the open fields discussed in *Oliver*.

Since the *Dunn* factors indicate the patio, pool, and pool house as being curtilage, the surveyed area of Macklin Manor deserves the protections of the Fourth Amendment as if it were a home. As such, the open fields doctrine does not apply.

B. THE PNR-1DRONE SURVEILLANCE AND USE OF DOPPLER DEVICE ARE UNREASONABLE SEARCHES AND VIOLATE THE FOURTH AMENDMENT.

PNR-1 Drone

As discussed above, the curtilage surveyed via PNR-1 drone is subject to Fourth Amendment scrutiny. All searches without warrants are presumptively unreasonable and in violation of the Fourth Amendment. *United States v. Karo*, 468 U.S. 705, 715 (1984). Privacy of the home deserves the upmost protection as that was the Framer's intent in creating the Fourth Amendment. *Ciraolo*, 476 U.S. 207 at 220.

The PNR-1 drone surveillance violates Respondent's Fourth Amendment right because Respondent has manifested an expectation of privacy prepared to be honored as reasonable by society. *Katz*, 389 U.S. 347 at 354. To understand this notion, we must recount relevant case law established by this Court.

The seminal case laying out our framework is *Katz*. *Id.* The facts dealt with the government eavesdropping on a public telephone conversation. *Id.* at 348. The rule enunciated in *Katz* remains controlling; however, our facts are easily distinguishable. Our case falls squarely under *California v. Ciraolo*.

This case deals with the interplay between Fourth Amendment protection and aerial surveillance of curtilage. *Ciraolo*, 476 U.S. 207 at 209. In *Ciraolo*, a police officer secured a private airplane and flew over private property to find that a citizen was growing marijuana plants. *Id.* This Court ruled the fly-by surveillance, or search, was not unreasonable because the citizen did not manifest a reasonable expectation of privacy. *Id.* at 215. Furthermore, the Court reasoned that society would not recognize that expectation of privacy as reasonable because the officer was within public navigable airspace, surveyed using his naked eye and a standard camera, and that an airplane to survey was of such common practice, there could not be a reasonable expectation of privacy. *Id.* In our case, Respondent held a reasonable expectation of privacy because the home was isolated on top of Mount Partridge, often having foggy and cloudy weather, and knowing that planes often avoided flying over said area.

Another case to help guide our analysis of reasonable expectation of privacy is found in *Florida v. Riley*. 488 U.S. 445 (1989). In this case, an officer received an anonymous tip that Riley was growing marijuana in is his home. *Id.* The officer stopped by the house but could not observe from ground level if Riley was growing marijuana. *Id.* The officer then obtained a helicopter and hovered 400 feet in the air above Riley's home and making naked-eye observations that Riley was growing marijuana plants. *Id.* This Court ruled once again that the helicopter surveillance without a warrant did not violate the Fourth Amendment. *Id.* at 451. The Court reasoned the surveillance did not violate a reasonable expectation of privacy because it was perceived with the naked eye in plain view; flying above in a helicopter did not violate any law; and because there was no evidence that flying a helicopter at that level was sufficiently rare in this country. *Id.* Helicopter flights such as this one are routine enough for individuals to know they lack a reasonable expectation of privacy. *Id.* Accordingly, these factors scaffold our

reasonable expectation of privacy analysis in support that aerial surveillance is unreasonable. Aerial surveillance of private citizens by government officials is not new to this Court or the public. The case at hand, however, differs in that aerial surveillance via drone PN-1 is distinctly more intrusive than all prior cases as discussed below.

The first inquiry we must answer is whether Respondent manifested an expectation of privacy. *Ciraolo*, 476 U.S. 207 at 211.

Of course, Respondent manifested an expectation of privacy when she purchased Macklin Manor perched upon the solitary and six-month abandoned Mount Partridge. Not only was the ground level secure so as to not allow the government agent to scope out the lay of the land, but the aerial vantage point was also obscured by fog and clouds. Furthermore, the record indicates that commercial airlines and aircrafts fly around Macklin Manor as it is too dangerous to fly over. This supports the conclusion that Respondent manifested a reasonable expectation of privacy against surveillance via ground level, and from an aerial point of view.

The second inquiry is whether Respondent's expectation of privacy is recognized by society as reasonable. *Id.*

The facts in our case fit precisely within the framework provided by this Court, although here we reach a different outcome. Petitioner's search via PNR-1 drone is unreasonable and society is ready to forbid such intrusion because there is a reasonable expectation to privacy from drone surveillance.

Petitioner did not use his naked eye to survey the Macklin Manor departing from our guiding analysis found in *Riley v. Florida* and *California v. Ciraolo*. Petitioner used a PNR-1 drone to capture video and photographs of Macklin Manor. It is opposite from what this Court has deemed reasonable: aerial surveillance through the naked eye or a natural vantage point.

Even more so, the camera on this drone captures high-resolution photographs and video, furthering the distinction between then naked eye and Petitioner's surveillance.

Petitioner will not find succor in *Dow Chemical Co. v. U.S. Dow Chem. Co. v. United States*, 476 U.S. 227, 229 (1986) In that case, the Court allowed reasonable search through a standard camera for an industrial complex by the EPA because they had prior legal authorization to inspect premises. *Id.* 239. The *Dow* Court explicated stated that aerial surveillance of an industrial complex requires less Fourth Amendment protection than of a home. *Id.* at 228. Since our facts deal with a home and not an industrial complex; a government official conducting surveillance without prior authorization; and because the PNR-1 drone is not analogous to the naked eye or to a standard camera, this case is unavailing to Petitioner. Therefore, Petitioner's use of the PNR-1 drone is far more intrusive than the naked-eye and strikes the balance towards this search being unreasonable.

Also, Petitioner's drone has the capabilities to fly as high as 2,000 feet, which is past the maximum legal limits for a drone. The record shows that Petitioner lost track of the drone for 4-5 minutes due to a connectivity error. At that time, Petitioner was unable to control the flight altitude of the drone. It is probable the PNR-1 was above legal limits and that photographs and video were taken against the law. This Court has made it clear that an important factor to determine unreasonableness is the legality of the aerial surveillance. *Riley,* 488 U.S. 445 at 453. The facts support that Petitioner's aerial surveillance was unreasonable because the drone was operating at an illegal altitude.

The last factor to consider whether there is a reasonable expectation of privacy is how common is the activity of the government intrusion. *Id*. Drones are not tantamount to navigable aircrafts. The record states that this drone cost four thousand dollars, seem like a lot for a normal

person, mostly drone enthusiasts own this type of drone, the ECPD is the only police department within the state that owns and uses the PNR-1. Furthermore, the ECPD has never deployed the device prior to this instance. These facts again tip the aerial surveillance to an unreasonable search because drones are not in use by the general public and police officers do not customarily use such technology.

Considering the factors set forth by this Court and applying them to our facts, society must recognize the government intrusion – aerial surveillance via PNR-1 drone – as an unreasonable search.

Handheld Doppler Device

The Doppler device is also an unreasonable search albeit for slightly different reasons. We still apply our well-worn iniquiry: does Respondent manifest a reasonable expectation of privacy and does society recognize that expectation as reasonable?

We turn to *Kyllo v. U.S* for guidance. *Kyllo v. United States,* 533 U.S. 27, 29 (2001). In *Kyllo,* a government agent used a thermal imager scanner to detect infrared radiation. *Id.* The thermal imager scanner is used to detect infrared radiation consistent with heat used to grow marijuana plants. The officer employed this device without a warrant and found sufficient radiation emitted to detect the house was cultivating marijuana in the garage. *Id.* Justice Scalia opined the Court's reasoning that the device employed was in fact a search and that the search was unreasonable because a device cannot gather intimate details that would not have been obtained but for a physical intrusion in a constitutionally protected area. *Id.* at 40. It is well established that a home has the highest protection under the Fourth Amendment. *Id.* at 31.

The home does not require an express manifestation of an expectation of privacy, as all activity and details inside a home are intimate and all searches without a warrant in the home are

unreasonable. *Id.* at 33. However, the key inquiry is this: whether a search occurred in the first place. The case on point is our tried and true *Kyllo*. *Kyllo* controls because the only way for the government to obtain knowledge that people were inside Macklin Manor other than using the Doppler device was to physically intrude into the home. In *Kyllo*, the government used a device to detect heat; but in our case the Doppler device could pinpoint a person breathing demonstrating the Doppler device is more intrusive than the thermal scanner. *Id.* at 33. Therefore, employing the Doppler device constituted a search and is subject to the Fourth Amendment.

The next inquiry is whether society recognizes this government intrusion as a violation of a reasonable expectation to privacy. The same factors from *Riley* apply to our present case. Of course, a physical intrusion to a person's home without a warrant violates a positive law. This is called trespass to land. The government could not obtain the same information from the Doppler device using the naked eye in plain view. And lastly, the Doppler device is not used by the general public for a person and society to accept their privacy would be violated by this aerial drone. The Doppler radar device is only popular amongst police departments and is not sold publicly. Police departments must order them directly from the manufacturer and no ordinary citizen has yet to be seen using a Doppler radar device.

Therefore, Petitioner has violated the Fourth Amendment protection because Respondent has demonstrated a reasonable expectation of privacy at the Macklin Manor and society is prepared to honor this reasonable expectation of privacy against PNR-1 drone surveillance and the Doppler scanning.

III. **EVIDENCE FROM THE UNREASONABLE SEARCHES MUST BE SUPPRESSED BECAUSE THEY ARE FRUIT OF THE POISONOUS TREE.**

Evidence procured from an unconstitutional search cannot be used against the victim of that unlawful search. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). This is known as the exclusionary rule. *Id.* This rule has traditionally barred physical, tangible evidence from trial obtained during an unlawful invasion. *Id.* Any evidence immediately derived from the illegal search is fruit of the poisonous tree and cannot be used as evidence. *Id*. at 485.

Petitioner will hang its hat on the word "immediately." This Court expanded "immediately" to mean that if the challenged evidence was obtainable through an independent source despite the constitutional violation, or if the illegal search was so attenuated in relation to the evidence obtained, that the exclusionary rule would not apply. *Id.* at 488 In other words, has the taint from the illegal search been purged at the time the evidence was procured, so that the evidence should not be suppressed? *Id.*

The inquiry begins in an understanding of the timeline involved with the search. To reiterate, the use of PNR-1 drone and the Doppler device were unreasonable searches in violation of the Fourth Amendment. Further back in our factual timeline, the search of Respondent's laptop does not fall into the border exception rule because the rationale of the border exception is not present in searching a laptop, and because the laptop's unique nature require the minimum reasonable suspicion. Petitioner lacked reasonable suspicion to search the laptop. Therefore, our timeline leaves petitioner with meager facts upon which assert to assert there was no probable cause despite, and before, the illegal searches. The facts are these: that $10,000.00 was found in the car, that the laptop was labeled "AK," and Respondent had been a person of interest in a kidnapping.

It is clear that prior to the illegal searches, Petitioner did not have probable cause to search Respondent's laptop, or Macklin Manor. A police officer has probable cause when the facts

would warrant a person of reasonable caution that contraband or evidence of a crime is present. *Florida v. Harris*, 568 U.S. 237, 243 (2013). There was no way for Petitioner to suspect that Respondent was connected to the Ford kidnapping under these facts. Furthermore, because it would be nearly impossible for an objective person to untangle actual probable cause with the illegal searches, it cannot be affirmed that the taint has been purged from the illegal searches. Here, the exploitation of the illegal searches must weigh into whether Petitioner had probable cause.

Petitioner cannot purge the taint from the illegal searches, thus probable cause did not exist. Accordingly, all evidence derived from the illegal searches must be suppressed.

CONCLUSION

Petitioner's search of Respondent's laptop at the border was unreasonable because the search does not fall within the border exception rule. The purpose of the border search exception does not apply to our case. Furthermore, a laptop has quantitative and qualitative properties that give rise to distinct privacy interests. Therefore, in order to search a laptop at the border, reasonable suspicious must be present. Petitioner did not have reasonable suspicion to search Respondent's laptop.

Petitioner's search of Respondent's home, Macklin Manor, and the surrounding area constitutes curtilage and is entitled to the same protections as a home under the Fourth Amendment. Moreover, Respondent manifested a reasonable expectation of privacy against drone surveillance and Doppler scanning, and society is prepared to honor that expectation of privacy as reasonable.

Therefore, all evidence including Respondent's laptop and evidence found at the Macklin manor must be suppressed as they are fruits of the poisonous tree from the illegal searches.