No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

—against—

Amanda Koehler,

Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

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ISSUES BEFORE THE COURT

I. Under the border search exception, was a search of a laptop routine when police opened a laptop without password protection and manually looked through only documents that were already open on the laptop? Alternatively, did police have reasonable suspicion to conduct a search of the laptop when the driver of the car nervously fiddled with his hands, gave short responses, avoided eye contact, lied to police about having $10,000 dollars in the car, admitted to sharing a laptop with Defendant, and was driving in the area where a highly publicized kidnapping had occurred with bills matching the exact amount ransomed for proof of life, all of which prompted police to look through a border search database where they learned Defendant had prior convictions for violent crimes and was a suspect in the current kidnapping?

II. Does police's use of an aerial drone comport with the Fourth Amendment when the drone observed only uncovered areas outside the structures and where aircraft were allowed to fly? Additionally, does police's use of a Doppler radar device comply with the Fourth Amendment when many police departments use the device, similar devices can be purchased for $400, officers could gain no information other than a rough estimate of the number of people present in the buildings, and police visually observed Macklin Manor where they anticipated three missing children, a convicted violent felon, and a number of criminal cohorts were within?

STATEMENT OF THE FACTS

I. FACTUAL BACKGROUND

The Kidnapping. On the morning of July 15, 2016, John, Ralph, and Lisa Ford disappeared on their way to school. R. at 44. The children were kidnapped in a ploy to extort money from their father, Timothy Ford. R. at 44. Two days after the kidnaping, Mr. Ford received a ransom note demanding $300,000 to ensure the safe return of his children. R. at 44. Police named Amanda Koehler ("Defendant"), a felon with multiple convictions for crimes of violence, as a person of interest in the kidnapping; both the FBI and Eagle City Police Department believed the Ford children were held captive in Eagle City. R. at 2. After three weeks, the kidnappers agreed to provide proof of life upon payment of $10,000, all in $20 bills. R. at 2.

Trouble at The Border. Four weeks after the kidnapping, Scott Wyatt ("Wyatt") shadily approached the major crossing point for criminals entering the United States: Eagle City. R. at 2. Border Patrol Agents Chris Dwyer ("Agent Dwyer") and Ashley Ludgate ("Agent Ludgate") were on duty when Wyatt arrived at 3:00 A.M. R. at 2. The agents asked Wyatt why he was entering the country. R. at 2. He responded in an extremely agitated and uncooperative manner. R. at 2. When asked if he was transporting $10,000 or more in U.S. Currency, Wyatt lied. R. at 2. The agents then informed Wyatt of their right to search any vehicle entering the country, and they began to search. R. at 2. When the agents opened the trunk, they discovered $10,000 in $20 bills and a laptop bearing the initials "AK" on the outside. R. at 2. Wyatt admitted he shared the laptop with Defendant, a known criminal and his fiancée. R. at 2.

Upon opening the laptop, Agent Ludgate discovered several documents already open on the desktop. R. at 3. Many of the documents included detailed private and personal information about Mr. Ford. R. at 3. Additionally, Agent Ludgate found a lease agreement for an address that

did not belong to Mr. Ford. R. at 3. The address was traced to a large estate purchased by one Laura Pope, one of Defendant's aliases, through a shell company. R. at 3. The estate, known as Macklin Manor, was abandoned after the death of the previous owner in 2015, and no residents had been seen on the property since that time. R. at 3.

Assessing Danger at Macklin Manor. After Eagle City police received news of the break in the kidnapping case, they went to Macklin Manor to safely recover the missing Ford children. R. at 3. Police did not know either the layout of the house or the number of criminals present, so Officer Nicholas Hoffman ("Officer Hoffman") patrolled the area on foot, and Officer Kristina Lowe ("Officer Lowe") conducted aerial surveillance with the department's drone. R. at 3. Officer Lowe deployed the readily available and affordable PNR-1 drone to take a short video and several photographs of the property layout. R. at 4. While conducting her fly-over, Officer Lowe captured a photograph of Defendant walking out in the open. R. at 4. To protect the safety of the Ford children and officers, Detective Perkins and Officer Hoffman used a Doppler radar device that is popular with law enforcement when approaching the front of the house. R. at 4. The scan is not capable of showing the inside of the building, but is helpful in determining the number of people in a structure. R. at 4. Radar scans revealed one individual in the main house, and four individuals in the pool house. R. at 5.

The Arrest. Subsequently, the agents retreated and obtained a search warrant for the entire residence. R. at 5. They detained two individuals in the main house, although the Doppler device had only shown one individual. R. at 5. Police then detained Defendant as she attempted to escape out the back and found a Glock G29 handgun on her person. R. at 5. Officers also arrested a body guard in the pool house and safely rescued the missing Ford children. R. at 5. On October 1, 2016,

a federal grand jury indicted Defendant 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.

II. PROCEDURAL HISTORY

Defendant Moves to Suppress Evidence. The District Court denied Defendant's Motion to Suppress, finding that the border agents had reasonable suspicion to search Defendant's laptop. The District Court also held the police lawfully used technology under the Fourth Amendment.

Defendant Appeals Motion to Suppress. The Court of Appeals reversed the District Court's denial of the Motion to Suppress. The court held the border patrol agent's search was non-routine, lacked reasonable suspicion, and violated Defendant's Fourth Amendment rights. The court also held the technology used by law enforcement violated Defendant's Fourth Amendment rights and that law enforcement used fruits of the poisonous tree to secure the search warrant for Defendant's property.

Petition for Certiorari Granted. The Court granted certiorari was granted to determine whether the government's search of Defendant's laptop was valid under the border search exception and if use of a PNR-1 drone and handheld Doppler device were constitutional.

SUMMARY OF THE ARGUMENT

I. BORDER SEARCH EXCEPTION

Police lawfully searched Defendant's laptop under the border search exception. The balance of interests at the border weigh heavily in favor of the government, and defendants have limited expectations of privacy. Police have the authority to conduct routine searches without suspicion when the search does not offend a reasonable traveler or seriously interfere with privacy. Searches of laptops are like searches of other property; police have the authority to conduct a cursory, manual search without reasonable suspicion. Here, police engaged in a limited search, looking only through documents that were already open on the unprotected laptop. Thus, the police conducted a routine search.

However, even if police needed reasonable suspicion to search the laptop, the circumstances at the border stop provided the officers with reasonable suspicion. Officers have reasonable suspicion when they have a specific reason for believing the defendant has committed a crime. This determination is flexible and is generally satisfied when the defendant is a current suspect in an ongoing crime and other criminal evidence is found while police conduct a routine search. Here, police found undeclared money during a border search and discovered the laptop was shared with a current suspect in a criminal investigation. Therefore, police had reasonable suspicion to believe evidence of a crime was on the laptop.

Further, privacy concerns which require a warrant for searching smart phones are limited to searches incident to arrest inside the border, particularly where the defendant shows a privacy interest. That is not the case here. Defendant ceded her privacy interests by leaving the laptop with another person and eschewing password protection. As a result, police lawfully searched the laptop, which provided probable cause to get a warrant for Macklin Manor.

II. TECHNOLOGY COMPLIANCE

Police lawfully conducted observations of Macklin Manor with the drone and the radar device. Defendant did not possess a reasonable expectation of privacy, and at no point did the actions of law enforcement put that expectation of privacy at risk. Furthermore, even if Defendant had some expectation of privacy, society would fail to recognize that expectation of privacy as reasonable.

The drone used to fly above the property and conduct surveillance of the property did not constitute a search. Law enforcement is allowed to observe from aerial vantage points without invoking any Fourth Amendment privacy concerns. Additionally, the drone flight did not encroach upon the curtilage of the home located at Macklin Manor because of the open fields doctrine. Specifically, as Defendant walked across the yard, she was photographed outside the curtilage of the home in an area where anyone passing by could have seen her.

The use of a radar device is also permissible because it only gleaned details police could have learned through visual observation. Officers were acting in a manner to facilitate the safety of the law enforcement team, as well as the well-being of the kidnapped Ford children. The radar device only provided the number of criminals located at Macklin Manor, which officers could have learned in another manner that did not involve use of the radar. Specifically, the officer on foot patrol or the drone flying overhead could have shed light on how many individuals were present at the property.

Finally, police did not rely on fruit of the poisonous tree to get the search warrant for the property. The facts of this case and the totality of the circumstances clearly show there was ample information available giving the officers probable cause to receive a search warrant. For these reasons and the details set forth herein, we ask this Court to deny the Motion to Suppress.

STANDARD OF REVIEW

This Court reviews applications of law to fact *de novo*. *Ornelas v. United States*, 517 U.S. 690, 691 (1996). The Fourth Amendment issues in this case are applications of law to fact. When reviewing a motion to suppress, this Court reviews findings of fact for clear error and applies the *de novo* standard to legal conclusions. *United States v. Rodriguez*, 356 F.3d 254, 257 (2004). Therefore, this Court reviews each issue without any deference to the lower court's legal determinations.

ARGUMENT

The Thirteenth Circuit improperly reversed the trial court's denial of the Motion to Suppress because police lawfully searched the laptop under the border search exception and police's use of technology complied with the Fourth Amendment. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures." U.S. CONST. amend. IV (emphasis added). The Fourth Amendment only protects against government action, not private parties. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Reasonableness is the touchstone of the Fourth Amendment, since a defendant's subjective expectation of privacy is only protected if society is prepared to recognize it as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Courts balance the nature and quality of the intrusion against the government's interests in the intrusion. *Jacobsen*, 466 U.S. at 125. Although a search generally requires a warrant, there are many exceptions.

The Motion to Suppress should be denied because (1) police acted on broad authority to search the laptop at the border, and (2) police's use of technology merely mimicked what an officer could observe with his own eyes.

I. POLICE CONDUCTED A LAWFUL BORDER SEARCH OF THE LAPTOP

This Court should find that police lawfully searched Defendant's laptop under the border search exception. The border search exception is a "longstanding recognition that searches at [the] border[] without probable cause and without a warrant are nonetheless 'reasonable' . . . as old as the Fourth Amendment itself." *United States v. Ramsey*, 431 U.S. 606, 619 (1987). The government, "as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004).

Ultimately, the "[g]overnment's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Id*. at 152. Police actions that are impermissible in the interior may become valid at the border, where the expectation of privacy is less. *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). The balance of rights against the sovereign's interest is "qualitatively different" and "struck much more favorably to the government." *Id*. at 538, 540. Therefore, searches are "reasonable simply by virtue of the fact that they occur at the border." *Ramsey*, 431 U.S. at 616.

a. Police Had Authority To Search The Laptop Without Reasonable Suspicion

Police lawfully searched the laptop because the search was a routine border search. Officers "have plenary authority to conduct *routine* searches and seizures at the border." *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993). Police have authority to "graduate their response to the demands of any particular situation." *United States v. Place*, 462 U.S. 696, 709 n.10 (1983). A search is routine when it does "not pose a serious invasion of privacy and [does] not embarrass or offend the average traveler." *Johnson*, 991 F.2d at 1291. The inquiry is fact-intensive. *United States v. Braks*, 842 F.2d 509, 513 (1st Cir. 1998). Searching personal effects is routine, but strip searching or searching a body cavity is not. *Johnson*, 991 F.2d at 1291-92. Courts balance the interests of privacy and security to determine what is reasonable in the circumstances as they existed. *Montoya de Hernandez*, 473 U.S. at 537.

A digital search is routine when conducted at the border because the equipment is property, requiring no suspicion to search. *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2007); *United State v. Arnold*, 523 F.3d 941, 945 (9th Cir. 2008). In *Cotterman*, police had authority to conduct a search of the defendant's laptop when the search took place at the border. 709 F.3d at 961. The officer "*turned on* the devices and *opened* and *viewed* image files," which is "reasonable

even without particularized suspicion." *Id*. at 960-61 (emphasis added). The court found that "the legitimacy of the initial search of [the defendant's] electronic devices at the border is not in doubt." *Id*. at 960. By drawing a stark line, the court emphasized the difference between using "computer software to analyze a hard drive," which requires reasonable suspicion, and "a manual review of files on an electronic device," which requires no suspicion. *Id*. at 967. The court "ha[d] confidence in the ability of law enforcement to distinguish" between the two. *Id*.

Officers may take a quick or minimally intrusive look through a laptop at the border. *Arnold*, 523 F.3d 941 at 946. In *Arnold*, police had authority to search the defendant's laptop, USB drive, and CDs without any suspicion because searching the devices was not particularly offensive. *Id*. The Ninth Circuit, interpreting this Court's precedent, determined that only body searches required reasonable suspicion at the border. *Id*. at 945, 947. Further, searching a laptop does not fall into this category of offensive searches, despite the storage capacity of the device. *Id*. The court reasoned that a search of an object is not the same as the search of a person, which implicates "interests in human dignity" aimed to preserve the bodily integrity of a defendant. *Id*. at 945 (quoting *Schmerber v. California*, 384 U.S. 757 (1966)).

An electronic device's storage capacity does not transform a routine search into one requiring reasonable suspicion. *Arnold*, 523 F.3d at 947. The court relied on this Court's precedent to analogize a laptop's storage capacity to a mobile home's storage capacity, which officers could legally comb through on a search. *Id*. (citing *California v. Carney*, 471 U.S. 386 (1985)). Due to its mobile nature, the trailer home did not receive the protection of a traditional home under the Fourth Amendment; instead it was treated as a vehicle. *Id*. (citing *Carney*, 471 U.S. 386). The Ninth Circuit reasoned that a laptop was similar in its mobile nature, preventing it from falling into the home category. *Id*. Overall, the search was unintrusive because officers simply looked at what

the laptop had inside. *Id*. at 947. As a result, the court held that "reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border." *Id*. at 946.

Here, police conducted a manual search of the laptop in a minimally invasive manner. R. at 3; *see Cotterman*, 709 F.3d at 960. Officer Ludgate conducted a less intrusive search than the initial routine search in *Cotterman*: she only searched through open documents. R. at 28. *Cf. Cotterman*, 709 F.3d at 960. Clearly, police conducted a simple "manual review of files on an electronic device," which required no suspicion. *See Cotterman*, 709 F.3d at 967.

Courts have found a border search requires reasonable suspicion when the search degraded the defendant's bodily integrity or sense of intimacy. *Cotterman*, 709 F.3d at 962. In *Cotterman*, police needed reasonable suspicion to conduct a forensic search of the defendant's laptop because the search far exceeded what a real officer could physically search. *Id*. at 967. The comprehensive and intrusive nature of the search triggered the requirement for reasonable suspicion. *Id*. at 962. Police went beyond a routine search of the laptop when they copied the computer hard drive, used software to unlock password-protected files, and recovered deleted data from the laptop. *Id*. at 966. The court noted that using passwords is ubiquitous and evinces an expectation of privacy. *Id*. at 969. However, even this extensive search could be conducted in compliance with the Fourth Amendment because the police had reasonable suspicion. *Id*. at 970.

This Court has established a very narrow exception where reasonable suspicion is required. *Montoya de Hernandez*, 473 U.S. at 541. In *Montoya de Hernandez*, police exceeded the bounds of a routine search when they searched inside the defendant's alimentary canal. *Id*. at 540. The defendant swallowed drug balloons before crossing the border. *Id*. at 535. This Court found that such an intimate search required reasonable suspicion. *Id*. at 541. Holding that the standard was

appropriate, this Court found the signs of alimentary smuggling are often difficult to see without a body search. *Id*.

Contrastingly in this case, police did not conduct a body search. *Cf. Montoya de Hernandez*, 473 U.S. at 535. No "interests in human dignity" were implicated. *Arnold*, 523 F.3d at 945. Neither did police conduct a forensic examination of the laptop. *Cf. Cotterman*, 709 F.3d at 962. Police opened the laptop and did not need to sign in. R. at 28. The desktop was already open. *Id*. Defendant relinquished her privacy when she decided not to protect the laptop with a password. *Cf. Cotterman*, 709 F.3d at 964-65. The digital capacity of the device is unimportant because police searched in a pointed, minimally intrusive way, and the device was mobile. *See Arnold*, 523 F.3d at 947; R. at 28. Thus, the laptop contents are admissible as fruits of a routine border search.

b. Police Had Reasonable Suspicion To Search The Laptop

Even if the search was not routine, police lawfully searched the laptop because they had reasonable suspicion. Police have the authority to conduct non-routine searches so long as they possess reasonable suspicion. *Cotterman*, 709 F.3d at 968. Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014). Meeting the standard is easier than probable cause. *Id*. Courts look to the totality of the circumstances when determining whether officers had reasonable suspicion at the time of the search. Factors that individually seem innocent, may cumulatively provide reasonable suspicion. *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007). It is a "modest, workable standard" that does "not impede law enforcement's ability to monitor and secure our borders or to conduct appropriate searches of electronic devices." *Cotterman*, 709 F.3d at 965.

Police have reasonable suspicion when they believe the defendant is linked to a current crime and find other evidence of illegal conduct with the defendant. *United States v. Irving*, 452 F.3d 110, 124 (2d. Cir. 2006). In *Irving*, police had reasonable suspicion to search the defendant's film and computer diskettes at the border when the defendant was a person of interest in an on-going investigation. *Id*. In its analysis, the court considered four factors: (1) the defendant exhibited unusual or nervous conduct, (2) police discovered incriminating matter during a routine search, (3) computerized information showed the defendant's propensity to commit relevant crimes, and (4) the defendant had a suspicious itinerary. *Id*. The court found reasonable suspicion because the defendant had a previous criminal conviction, "was the subject of a criminal investigation," was returning from a trip to a suspicious location, and had luggage containing items pointing to the suspected crime's occurrence. *Id*. Upon finding reasonable suspicion, the court did not engage in an analysis of whether searching electronics is routine. *Id*.

Creating a circuit split, the Ninth Circuit found that forensically searching a laptop required reasonable suspicion. *Cotterman*, 709 F.3d at 962; *see United States v. Ickes*, 393 F.3d 501, 507 (4th Cir. 2005); *see also United States v. Linarez-Delgado*, 259 Fed. Appx. 506, 508 (3d Cir. 2007). In *Cotterman*, police had reasonable suspicion to conduct the forensic search because the defendant was flagged as potentially involved in current criminal activity. 709 F.3d at 968-69. The court found reasonable suspicion based on the defendant's fifteen-year-old criminal conviction, an alert that targeted the defendant as a potential criminal suspect, the location from which the defendant was returning, the defendant was carrying electronic equipment, and the defendant's history of frequent travels. *Id*. at 969.

Police acted on reasonable suspicion when they searched Defendant's laptop because they found evidence of criminal activity on their initial search and Defendant was suspected in an

ongoing investigation in the area. *See Cotterman*, 709 F.3d at 969. Wyatt was nervous when officers questioned him. *See Irving*, 452 F.3d at 124; R. at 26. His face was pale and he avoided eye contact, while fidgeting with his hands. R. at 26. He also exhibited unusual conduct, providing very brief answers. *Id*.; *see Irving*, 452 F.3d at 124. While conducting a routine search of Wyatt's car, police found ten-thousand dollars, all in twenty-dollar bills, which Wyatt lied about and was required to declare. R. at 26; *see Irving*, 452 F.3d at 124. Still conducting the routine search, police also found the laptop with Defendant's initials on it, and Wyatt revealed he shared the laptop with Defendant, his fiancée. R. at 2.

A quick search of the border watch database revealed that Defendant "was the subject of a criminal investigation" for kidnapping the Ford children. *Irving*, 452 F.3d at 124; *see Cotterman*, 709 F.3d at 968-69;R. at . It also showed that Defendant had several felony convictions for similar 'crimes against the person'. *See Cotterman*, 709 F.3d at 968; *Irving*, 452 F.3d at 124;R. at 2. Wyatt's suspicious itinerary placed him in the area of the kidnapping with the exact amount of money demanded by the kidnappers in the correct denominations. *See Cotterman*, 709 F.3d at 968-69; *Irving*, 452 F.3d at 124; R. at 2. All four of the Irving factors weigh in favor of reasonable suspicion to search the laptop. Consequently, even if police needed reasonable suspicion to conduct a simple search of the laptop, they complied with the Fourth Amendment, and the laptop contents are admissible.

c. *Riley* Is Confined To Searches In The United States Interior

The lower court erred in placing this case within the holding of *Riley v. California*, 134 S. Ct. 2473 (2014). In *Riley*, police needed a warrant to search the defendants' smart cell phones after the defendants were arrested. 134 S. Ct. at 2485. Although officers "remain free to examine the physical aspects of a phone," the Court limited officers' ability to search the digital contents of a

phone in certain circumstances. *Id*. at 2485. The Court strictly limited the holding to searches incident to an arrest. *Id*. at 2489 n.1. "[O]ther case-specific exceptions may still justify a warrantless search of a particular phone." *Id*. at 2494. *Riley* took place in the United States interior. *Id*. at 2480-81. Applying the holding of *Riley* to border searches, would "erode [the] clarity" between searches at the border and those in the interior. *Ickes*, 393 F.3d at 503 (commenting on *Riley*).

Further, Defendant in this case did not display the same expectations of privacy that *Riley* was concerned with protecting. "Technology has the dual and conflicting capability to decrease privacy and augment the expectation of privacy." *Cotterman*, 709 F.3d at 965. However, Defendant's privacy expectations must be reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Defendant failed to take simple actions to protect her privacy interests, so she abandoned any privacy expectation that technology would grant her. *See Cotterman*, 709 F.3d. at 966, 969.

Deciding to share a device and refusing to listen to common wisdom to password protect it are Defendant's two critical errors in asserting a reasonable expectation of privacy. "[T]here is one relatively simple thing [people] can do [when crossing the border] to protect their privacy[:] . . . password-protect the computer login and any sensitive files." Michael Price, *National Security Watch*, 34-MAR Champion 51, 52 (March 2010). Defendant declined to do so. R. at 28. Despite password use being "ubiquitous" and encouraged while traveling internationally, Defendant failed to protect her privacy. *See Cotterman,* 709 F.3d at 969. Further, she shared her computer with another user and allowed him to control the laptop while she was not there. R. at 2. This eviscerates Defendant's expectation of privacy. *See Cotterman*, 709 F.3d at 969. Defendant ran the risk that anyone that happened upon her laptop would open it, uncover her plans, and run straight to the

police. Where Defendant willfully discloses electronic data, her expectation of privacy is undercut. Id. at 964 n.11. Whether Defendant carried in the device her entire life is virtually irrelevant if she is willing to share it with any luddite who happens by.

Defendant has abandoned her privacy interests, making the search reasonable. Therefore, the laptop contents are admissible, and the contents provided police with probable cause to search Macklin Manor.

II. POLICE LAWFULLY USED TECHNOLOGY AT MACKLIN MANOR

This Court should admit the evidence lawfully obtained by Eagle City police in the course of rescuing the missing children. The drone images did not capture any areas where defendant had a reasonable expectation of privacy. *See Katz* 389 U.S. at 361 (Harlan, J., concurring);. Additionally, the drone did not encroach on the curtilage of Defendant's property. *United States v. Dunn*, 480 U.S. 294, 300-01 (1987). Similarly, even though certain observations involved the house located on Macklin Manor's property, the police's use of the Doppler radar device did not infringe on Defendant's privacy expectations in any way because the basic information that was gathered could also be acquired by exterior observation. *See Kyllo v. U.S.*, 533 U.S. 27, 34 (2001). Police had probable cause to obtain a warrant after the initial border search given the totality of the circumstances. *See Florida v. Harris*, 568 U.S. 237, 240 (2013). Thus, law enforcement did not rely on any fruit of the poisonous tree when receiving the search warrant.

a. Police Conducted A Reasonable Aerial Search With The Drone

The Fourth Amendment aims to protect privacy, but not for any and all purposes. "[T]he Fourth Amendment protects people, not places," and Eagle City Police Department acted lawfully in seeking and apprehending a dangerous criminal who had placed the lives of three innocent children at risk. *See Katz,* 389 U.S. at 361 (Harlan, J., concurring); R. at 5. To be sure, to garner

protection form the Fourth Amendment, Defendant must first "have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one which society is prepared to recognize as 'reasonable.'" *Id.* Neither requirement has been satisfied; thus, this Court must admit the improperly suppressed evidence from the drone.

When examining the actions of Eagle City law enforcement, it is clear that Defendant had no reasonable expectation of privacy from vantage points above Mount Partridge. *See* R. at 3-4. Even if there were some expectation of privacy, society does not recognize any such expectations as reasonable. This Court has repeatedly affirmed that the key inquiry in Fourth Amendment cases is whether the defendant has some type of "constitutionally protected reasonable expectation of privacy." *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz*, 389 U.S. at 360). The subsequent analysis of the two-part *Katz* test is further proof Defendant in this case manifested no reasonable expectation of privacy, and that society would never recognize the privacy Defendant desired as reasonable. *See Katz*, 389 U.S. 360.

Often, there is little question that a defendant has tried to obstruct the public's view of illicit activities; however, in this case Defendant did nothing to bolster the privacy at Macklin Manor. *See* R. at 4. Since the *Katz* decision, this Court has replaced the traditional analysis of "actual physical invasion of the house or curtilage," with a two-part analysis of the defendant's expectations of privacy. *United States v. Broadhurst*, 805 F.2d 849, 853 (9th Cir. 1986) (citing *Olmstead v. United States*, 277 U.S. 438, 466 (1928)). The first requirement of the *Katz* analysis is met when a defendant shields the property with fences, shrubbery, or another structure to increase privacy and conceal criminal actions. *See Ciraolo*, 476 U.S. at 211; *Florida v. Riley*, 488 U.S. 445, 445-46 (1989); *Dunn*, 480 U.S. at 316. For example, in *Ciraolo*, this Court noted the defendant's action of erecting a six-foot outer fence and a ten-foot privacy fence to conceal

marijuana plants "met the test of manifesting his own subjective intent and desire to maintain privacy." *See* 476 U.S. at 211. Setting up fences established the defendant "took normal precautions to maintain his privacy" from the view of individuals passing by the area. *Id.*

This Court found a defendant's Fourth Amendment rights were not violated when police observed the property from a helicopter above after the defendant had placed a wire fence with a "DO NOT ENTER" sign and built a greenhouse behind a mobile home. *Riley*, 488 U.S. 448. Some circuit courts have also found the first prong of the *Katz* analysis satisfied, but nevertheless, the defendant failed to establish a Fourth Amendment violation because the second prong could not be satisfied. *See Broadhurst*, 805 F.2d at 850; *United States v. Breza*, 308 F.3d 430, 432 (4th Cir. 2002). Both *Broadhurst* and *Breza* involved aerial observations of property that had been modified by the defendants in an effort to conceal illicit activities. *Broadhurst*, 805 F.2d at 850; *Breza*, 308 F.3d at 432. Nonetheless, the Fourth Amendment was not violated. In *Broadhurst*, law enforcement agents flew over the defendant's property multiple times at an altitude of at least one thousand feet, and repeatedly circled the greenhouse in question to observe from a multitude of angles. 805 F.2d at 850. During the flights, law enforcement agents saw both a barbed wire fence and "no trespassing" signs. *Id.* Despite these manifestations of privacy on the ground, the Ninth Circuit found officer's repeated fly-overs "did not amount to a "search"" because the defendant did not exhibit an expectation of privacy from an aerial search. *Id.* at 856.

In stark contrast to the precedent of this Court, there were no fences or gates on any portion of the Macklin Manor property. R. at 4. There were also no privacy screens or signs warning of trespassing. R. at 4. The estate was located on top of a mountain for all passersby to see. *Id.* Defendant and her criminal associates took none of the "normal precautions to maintain privacy" described in *Ciraolo*. *See* 476 U.S. at 211. Defendant's meager attempt at maintaining a sliver of

privacy came only in the form of a false name. *See* R. at 3; *Broadhurst*, 805 F.2d at 854 (noting defendants had used aliases to purchase property where illegal activity occurred). By failing to satisfy the first inquiry from *Katz*, Defendant cannot take refuge under the Fourth Amendment rights were violated in any way.

Nonetheless, even if this Court finds the first *Katz* inquiry satisfied, Defendant still fails to establish that society would ever recognize her outlandish expectation of privacy as reasonable. *See Ciraolo*, 476 U.S. at 211 (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979)). The point of contention in *Ciraolo* was whether "a subjective expectation of privacy from *all* observations of his backyard" had been established with fences designed to block only the views of pedestrians passing by. *See Ciraolo*, 476 U.S. at 212. This Court ultimately found the defendant's Fourth Amendment rights were not violated when a warrantless aerial observation "within the curtilage of the home" occurred at 1,000 feet above the property. *Id.* at 209. Similarly, in *Riley*, a plurality of this Court again determined aerial observations complied with the Fourth Amendment s even when police observed areas within the curtilage of a house. *See Riley*, 488 U.S. at 450. Additionally, this Court has found that "the warrantless taking of aerial photographs of the open areas . . . from an aircraft lawfully in public navigable airspace was not a 'search.'" *Broadhurst*, 805 F.2d at 854 (citing *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986)).

Defendant also asserted that recent network connectivity problems may have caused the drone to fly above 1640 feet. R. at 39. These concerns are unfounded because there is no evidence in the record that the drone ever went above the municipal code limit, and after six separate tests, the Eagle City Police Department's drone had not malfunctioned at all. R. at 41. In a Fourth Circuit decision, the court held that even a helicopter flight beyond FAA regulation altitudes agrees with the Fourth Amendment because "the operation [was] conducted without hazard to persons or

property on the surface." *Giancola v. W. Va. Dep't of Pub. Safety*, 830 F.2d 547, 551 (4th Cir. 1987) (internal citations omitted). Here, the drone posed no threat to persons or property because a malfunction would have sent the drone higher, not closer to the ground. *See* R. at 39. Officers were in a place where they could view what a normal citizen would view, despite weather concerns, because Mount Partridge is not *always* cloudy and the drone was able to find a viewing location without clouds. R. at 4. This Court's precedent does not limit aerial views to those observed from planes. In this case, Defendant has abandoned her expectation of privacy in any view from a higher vantage point. Further, though not a regular occurrence, there is no prohibition on aircraft flying near Mount Partridge. R. at 3. Society will not recognize as reasonable the presence of clouds substantiating a legitimate expectation of privacy.

In the present case, society places a lower bar on any inkling of an expectation of privacy. Unlike *Broadhurst* and *Riley*, which involved greenhouses designed to conceal illegal activities, Defendant took no measures to protect passersby from seeing onto the premises. *See* R. at 4; *Broadhurst*, 805 F.2d at 854; *Riley*, 488 U.S. at 450. Defendant was photographed and subsequently identified as she walked in the middle of open land. *See* R. at 4. Society cannot and *should not* recognize any reasonable expectation of privacy for walking across land that is open, uncovered, and not marked with signs, which provides no other minutia of privacy in the surrounding area. *See* R. at 4; *see also Katz*, 389 U.S. 360.

Despite the fact that Defendant cannot satisfy either prong of the *Katz* test, Defendant may erroneously attempt to argue that the drone capturing images of the property somehow constitutes a physical intrusion on Macklin Manor. *See Florida v. Jardines*, 569 U.S. 1, 5 (2013). This argument is futile because this Court's precedence affirms the use of technology in assisting law enforcement personnel, particularly when aerial observations are involved. *See Ciraolo*, 476 U.S.

at 211; *Riley*, 488 U.S. at 445-46; *Broadhurst*, 805 F.2d at 850; *Breza*, 308 F.3d at 432.Ever important concerns for allowing police to efficiently and safely enforce the law require that "law enforcement officers need not shield their eyes when passing by the home on public thoroughfares." *Jardines*, 569 U.S. at 7 (quoting *Ciraolo*, 476 U.S. at 213) (internal quotations omitted). At no point in time did the drone, and by extension police officers, physically land on the ground at Macklin Manor. The use of the drone by law enforcement did not constitute a physical intrusion because the only information that was gathered occurred in permissible airspace and is equivalent to observations that could have been made from a different vantage point by the public. *See* R. at 4; *see also Ciraolo*, 476 U.S. at 211; *Broadhurst*, 805 F.2d at 850.

Based on precedent of this Court, Defendant was beyond the curtilage of the home when the photograph was taken. *See Oliver v. United States*, 466 U.S. 170, 180 (1984); *Dunn*, 480 U.S. at 300-01; *United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013. When analyzing curtilage and the somewhat outdated property-based understanding of the Fourth Amendment this Court considers four factors: (1) "the proximity of the area to the home," (2) "whether the area is within an enclosure surrounding the home," (3) "the nature and uses to which the area is put," and (4) "the steps taken by the resident to protect the area from observation by passersby." *Dunn*, 480 U.S. at 300-01. In applying the factors, this Court found that a building located fifty yards away from a fence surrounding the main house was separate and not a part of the curtilage. *See* 480 U.S. at 300.

A brief review of the facts indicates none of the *Dunn* factors can be satisfied for the area where Defendant was walking when photographed outside the main house. *See* R. at 4. Defendant was photographed near the pool house, placing her outside of the proximity of the home's curtilage. R. at 32-33. While the fifty foot distance is shorter than in *Dunn*, there are no fences or other enclosures that extended the curtilage of the home beyond the four walls. *See* 480 U.S. at

301; R. at 4. The nature and use of the property also do not weigh in favor of Defendant. The estate had been abandoned until purchased to house the kidnapped children and no one had seen residents at the property since the death of the former owner. R. at 3-5. Finally, and fatal to Defendant's case, Defendant did not take any steps to prevent Macklin Manor from being observed by passersby. *See* R. 3-5. Extending the intimate protections of the home to an unprotected and impersonal tract of land stretches the purpose of curtilage to the breaking point. Thus, there was no trespass on the curtilage. Further, the undisturbed legacy of *Riley and Ciraolo*, protects aerial observations under the Fourth Amendment. *Riley*, 488 U.S. at 445-46; *Ciraolo*, 476 U.S. at 211. As a result, police officer's drone usage was permissible and should be admitted as evidence.

b. Doppler Radar Use Is Not A Search

Police's use of the Doppler radar device complied with the Fourth Amendment because the information could have been obtained by other means. Despite limited discussion by the courts regarding technology similar to Doppler radar, concerns about Fourth Amendment violations are misplaced. *See Kyllo v. United States*, 533 U.S. 27, 34 (2001). The two-part test this Court set forth in *Kyllo* guides the analysis of emerging technologies not previously considered by this Court. First, the information must be able to be gathered "without physical intrusion," and second, the device must be "in general public use." *Id.* at 40; *see Jardines,* 569 U.S. at 11. (internal citations omitted).

The record indicates that neither of the concerns from *Kyllo* indicate the police were behaving inappropriately with regard to Defendant's expectation of privacy. *See Kyllo*, 533 U.S. at 34; R. at 3. Rather, while the Doppler device did provide the officers with an estimate of the number of individuals they were dealing with, Officer Hoffman was also conducting ground patrol in the area, and law enforcement utilized the constitutionally permissible drone as well. R. at 3.

Either one of the alternative and permissible types of surveillance would have discovered the same general information the radar device provided given more time. R. at 3. Further, the device did not provide an invasive look into the house so as to determine "at what hour each night the lady of the house takes her daily sauna and bath." *Kyllo*, 533 U.S. at 38. Instead, the scan only showed one person close to the door, yet there was another person in the house. R. at 4. Officers only used the radar to ensure the safe return of the children and officers conducting the time-sensitive rescue. R. at 3. The actions of law enforcement in this case respect the Fourth Amendment.

The District Court correctly concluded that Doppler radar devices are regularly used by law enforcement and are "without doubt . . . in common use." R. at 11. The Doppler is "popular amongst . . . different law enforcement agencies." R. at 33. This type of technology can easily be purchased by a citizen for only four hundred dollars. R. at 35. Therefore, the information could have been discovered by the officer on patrol or by the drone flying over the property. *See* 533 U.S. at 38; *Jardines,* 569 U.S. at 11; R. at 3.

c. Police Did Not Rely On Fruit Of A Poisonous Tree To Get The Search Warrant

Police had probable cause for the warrant to be issued absent the use of technology by Eagle City law enforcement. The lower court incorrectly applied the "flexible, common sense standard" this Court has created for determining probable cause. *Harris*, 568 U.S. at 240 (citing *Illinois v. Gates*, 462 U.S. 213, 239 (1983). When determining whether there was probable cause for a search, this Court has "consistently looked to the totality of the circumstances." *Harris*, 568 U.S. 237 at 244. Additionally, the inquiry is "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Harris*, 568 U.S. at 244 (citing *Gates*, 462 U.S. at 232). In this case, the "particular

factual context" provides more than enough for officers to establish the probable cause necessary for a search after Wyatt's initial border stop. *Id.*

As the District Court noted, Wyatt was crossing the border at a known criminal crossing point, interacted with the border agents in an "agitated and uncooperative" manner, and was carrying the exact amount of cash in the specific denominations requested the previous day by the Ford children kidnappers. R. at 12. Additionally, the border agents found a laptop bearing Defendant's initials, and Wyatt told the agents he shared the laptop with Defendant. R. at 12. The lower court glaringly failed to mention the laptop had multiple documents with detailed personal information about the father of the kidnapped children. R. at 20. This information, when combined with Defendant's status as a person of interest in the case, more than satisfies the basic requirements of probable cause that "is the kind of fair probability on which reasonable and prudent [people,] not legal technicians, act". *Harris*, 568 U.S. at 243.

In this case, the lives of three innocent children were at risk, and as a result, law enforcement had to move quickly and safely in order to ensure the safe return of the children. *See* R. at 5. This Court should not unnecessarily punish law enforcement for acting legally, legitimately, and swiftly. The factual circumstances overwhelmingly show the officers had probable cause after the border search. As a result, there are no fruits of the poisonous tree in this case that can legitimately be suppressed as evidence, so the evidence seized under the search warrant must be admissible.

CONCLUSION

Police conducted a lawful border search of Defendant's laptop because the manual search was minimally intrusive, and police had reason to believe the laptop contained evidence of a crime. Police's use of technology to search Defendant's home complied with the Fourth Amendment because police observed what they could otherwise see with the naked eye from beyond the curtilage, and the devices were used by many people. Further, police had sufficient evidence for a search warrant from the laptop contents alone. As a result, the laptop and evidence discovered from the search warrant are admissible, and this Court must reverse the lower court's granting of the Motion to Suppress Evidence.

Respectfully Submitted,

Counsel for Petitioner