Team: P23

No. 04-422

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

AMANDA KOEHLER

Respondent.

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

OCTOBER TERM 2017

BRIEF FOR PETITIONER

Counsel for Petitioner
October 20, 2017

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1. Whether Agent Ludgate's search of Respondent's laptop at the Eagle City border station, constituted a valid search pursuant to the border search exception, when the agents conducted a cursory routine search supported by reasonable suspicion that Mr. Wyatt was involved in some sort of criminal activity.

2. Whether Officer Lowe's use of the PNR-1 drone and Detective Perkin's use of the handheld Doppler radar device was an unreasonable search under the Fourth Amendment to warrant the suppression of the evidence when the officer had probable cause prior to the use of the devices and the devices did not unreasonable intrude on Respondent's privacy expectation.

STATEMENT OF THE FACTS

The State of Pawndale is located directly on the United States-Mexico border. R. at 2, 4.[1] Pawndales's capital, Eagle City, is home of one of the largest and busiest ports, Eagle City border station. R. 2, 24. This border station is a prominent station of entry for criminals into the United States and Mexico. R. 2, 24. Because there has been a peek in criminal activity at this border station in the past two to three years, Eagle City border station designates more United States Border Patrol Agents to this border than any other border. R. 2, 24.

On August 17, 2016, United States Border Patrol Agents, Christopher Dwyer ("Agent Dwyer") and Ashley Ludgate[2] (Agent Ludgate"), were patrolling the Eagle City border station at approximately 3:00 A.M.[3] when they stopped Scott Wyatt's ("Mr. Wyatt") vehicle. R. 2, 24-25. Once the agents approached the vehicle, they inquired as to why Mr. Wyatt was crossing the border into the United States. R. 2, 25. Mr. Wyatt seemed "extremely agitated and uncooperative." R. 2, 8. Mr. Wyatt, appearing very pale, avoided eye contact with the agents, was fidgeting the steering wheel with his fingers, and only provided brief responses to the questions asked. R. 26. When questioned by Agent Ludgate, Mr. Wyatt responded that he was not transporting $10,000 or more in United States' currency in the vehicle. R. 2, 26-27.

Thereafter, Agent Ludgate calmly told Mr. Wyatt that she and Agent Dwyer had a right to search the vehicle, as this routine search was conducted on every vehicle passing the

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[1] Citations to the factual record will be represented by the letter R. at [Page #].
[2] Agent Ludgate has been a patrol agent for about seven years and has been assigned to the Eagle City Border station for about a year and a half. R. 24.
[3] The frequency in which Agents conduct stops depends on the amount of traffic at the border and the time of day. R. 24. As Agent Ludgate testified, in the early morning shift, every car gets stopped and every driver is questioned. R. 24.

border. R. 2, 26. Upon Agent Dwyer's request, Mr. Wyatt exited the vehicle and opened the trunk. R. 2, 26. The moment Mr. Wyatt opened the trunk, Agent Dwyer saw $10,000 in $20 bills and a laptop, containing the initials "A.K." engraved on it. R. 2, 8, 12, 26, 31. Finding the substantial amount of money and laptop to be suspicious, Agent Dwyer asked Mr. Wyatt if the laptop belong to him. R. 2, 26. Mr. Wyatt responded that he shared the laptop with his fiancé, Amanda Koehler ("Respondent"). R. 2, 12, 26.

Upon receiving this information from Mr. Wyatt, the agents ran Respondent's name in the criminal intelligence and border watch database, which divulged that Respondent was a felon with multiple convictions of violent crimes. R. 2, 27, 32. Additionally, Respondent was named a person of interest in the kidnapping of three teenage children — John, Ralph, and Lisa Ford ("Ford Children"). R. 2, 27. It was commonly known among the Federal Bureau of Investigation ("FBI") and the Eagle City Police Department ("ECPD") that the Ford Children were kidnaped on their way to school, transported across state lines, and held for ransom in Eagle City. R. 2, 8, 27. The Ford Children kidnappers agreed to give proof of life in exchange for $10,000 in $20 bills, due at 12:00 PM the next day, August 18, 2016. R. 2, 8, 12, 26-27, 31-32.

Because Agent Ludgate suspected that Mr. Wyatt may be involved in the Ford Children's kidnapping, as the money found in his trunk matched the kidnappers demands, she opened the laptop, which was not password protected, and inspected the laptop's desktop. R. 2, 8, 27-28. Agent Ludgate found several documents already displayed on the laptop, containing Timothy H. Ford's, ("Mr. Ford"), the Ford Children's father's, personal information — Mr. Ford's address, bank statements, personal schedule, and employee's schedules. R. 3, 28. Also, Agent Ludgate found a lease agreement already opened on the

laptop's desktop with the name "Laura Pope," as well as an address that did not match Mr. Ford's. R. 3, 12, 28.

Subsequently, Agent Ludgate told Agent Dwyer what she saw displayed on the laptop and placed Mr. Wyatt under arrest for failing to declare an excess of $10,000.[4] R. 3, 27. Agent Ludgate contacted Detective Raymond Perkins ("Detective Perkins"), leader of the detective investigation of the Ford Children's kidnappings, to report their findings. R. 3.

Thereafter, the agents discovered that the address listed a property commonly referred to as Macklin Manor, located in an estate atop Mount Partridge, Eagle City.[5] R. 3, 32. At first glance, R.A.S., a company based in Cayman Islands, appeared to own Macklin Manor. R. 3, 12. However, upon further investigation, information revealed that R.A.S. was a shell company truly owned by Laura Pope. R. 3. Additionally, the FBI confirmed that Laura Pope was one of Respondent's aliases. R. 3, 28.

Detective Perkins, being aware of Respondent's history of violent felony convictions, was concerned for the safety of his officers. R. 11, 32. Thus, he was hesitant about approaching the estate without having further information of its layout or possible occupants. R. 3, 32. Detective Perkins assigned Officer Kristina Lowe ("Officer Lowe") and Officer Nicholas Hoffman ("Officer Hoffman") to loosely survey Macklin Manor. R. 3, 32. Officer Hoffman was to patrol the area on foot, and Officer Lowe was to fly a PNR-1 drone[6] ("Drone") over the property. R. 3, 32.

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[4] 31 U.S.C. § 5136 (2016).

[5] During this time of the year, the area above Mount Partridge is particularly cloudy and foggy. R. 3, 42. Due to the weather, planes and other aircrafts do not usually flyer over Mount Partridge when going to and from Eagle City to obtain a better visual. R. 3.

[6] Generally, the prices of the drones range from as low as $10.00 to $250,000, with the PNR-1 drone being one of the most affordable drones at a price range of $4,000. R. 3, 38-39. The PNR-1 drone is known to be widely available to drone enthusiasts. R. 3, 38. The PNR-1 drone has a battery life of approximately thirty-five minutes and a camera, which is capable of taking both photos and videos. R. 3. Nevertheless, the digital storage on the PNR-1 drone is minimal, as the

Officer Lowe parked her squad car and began to fly the Drone. R. 4. The Drone took approximately seven minutes to arrive at Macklin Manor, hovered over Macklin Manor for about fifteen more minutes, and flew back to Officer Lowe's car for another seven minutes. R. 4, 10. Before reaching the ground, the Drone illustrated a total of twenty-two photos and recorded about a three-minute video. R. 4. The photos and video illustrated a layout of Macklin Manor, such as that the area contained a large main house, an open pool and patio area, and a single room pool house. R. 4, 9-10, 32-33. The single room pool house is located adjacent to the main house, approximately fifteen feet from the main house. R. 4, 9-10, 32-33. Also, Macklin Manor is not surrounded by a gate or a fence. R. 4, 9. Lastly, the Drone also illustrated an image of a female, who Detective Perkins later confirmed was Respondent, walking from the main house to the pool. R. 4, 33.

Because Detective Perkins feared endangering the lives of any potential hostages and being out-numbered without obtaining further information, Detective Perkins and Officer Hoffman carefully approached the front of the main house with a handheld Doppler radar device[7]. R. 4, 33. The radar indicated that there may be an individual inside the house, a few feet away from the door. R. 5, 11, 34. Later, Detective Perkins and Officer Hoffman walked towards the pool house and conducted another scan, which revealed what appeared to be three unmoving individuals. R. 5, 34. The scan also revealed that there was another individual in the pool house, presumably as a guard. R. 5, 34.

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memory card may solely hold thirty photos and fifteen minutes of video. R. 3. Likewise, the PNR-1 drone carries a pre-programed maximum flight altitude of 1640 feet, which is the legal maximum permitted for drones in Pawndale. R. 4, 39-40. Yet, some connectivity problems have indicated that some PNR-1 drones may be capable of flying at an altitude of 2000 feet. R. 4, 19, 40-41.

[7] Handheld Doppler radar devices may detect movement up to fifty feet away from the individual holding the device. R. 4, 33. The Doppler radar device is not able to reveal what is inside of a building or how the building looks inside, it may only determine how many individuals are present inside a house and roughly where the individuals are located. R. 4, 33.

At that moment, Detective Perkins, Officer Hoffman, and Officer Lowe retreated and obtained a search warrant for the entire estate. R. 5. The next day, Detective Perkins, Officer Hoffman, and Officer Lowe returned with a S.W.A.T. team and conducted a search of the premises pursuant to the warrant. R. 5. The officers entered and detained two individuals in the living room at the main house, Sebastian Little and Dennis Stein, while a third individual, Respondent, escaped through the back door. R. 5, 35. Officer Lowe and Officer Hoffman chased Respondent and successfully detained her, finding a Glock G29 handgun on her person. R. 5, 34. Subsequently, the officers entered into the pool house and detained the standing guard, Jamison Erich, and found the Ford Children inside the pool house restrained to chairs. R. 5, 34.

On October 1, 2016, a federal grand jury indicted Respondent with three counts of kidnapping and one count of a felon in possession of a handgun.[8] R. 1, 5. Respondent filed a motion to suppress the evidence found the day of her arrest. R. 1, 5. Respondent alleges that the search of the laptop, at Eagle City border station, and the use of the Drone and Doppler radar device constituted a violation of the Fourth Amendment. R. 1, 5. The United States' District Court of the Southern District of Pawndale ("District Court") denied Respondent's motion to suppress. R. 13. Thereafter, Respondent appealed the District Court's judgment to the United States Court of Appeal for the Thirteenth Circuit ("Thirteenth Circuit") where the Thirteenth Circuit reversed and remanded the case for further proceedings. R. 21. The United States of America petitioned for writ of certiorari, and this Court granted the petition. R. 22.

[8] 18 U.S.C. §§ 1201(a) (2016), 922(g)(1) (2016).

SUMMARY OF THE ARGUMENT

This Court should reverse the Thirteenth Circuit's finding that the search of Respondent's laptop conducted at the border did not fall within the border search exception and was therefore, unconstitutional. The search was nothing more than a routine search supported by reasonable suspicion. This Court has long recognized that searches of property conducted at the border are reasonable simply for taking place at the border. Nevertheless, the Thirteenth Circuit erred at the outset in categorizing the laptop search as non-routine. This Court has only referred to intrusive searches of the person as non-routine and the concept has never been applied to searches of property.

The Thirteenth Circuit overlooked the fact that Agent Ludgate's search of the laptop was reasonable *simply* for taking place at the border. Additionally, the court failed to recognize that the storage capacity of the device is not dispositive in determining the intrusiveness of a search, and therefore, incomparable to the search of a person. Finally, the Thirteenth Circuit also overlooked that the agents in this case had more than enough facts to suspect that Mr. Wyatt was involved in the Ford Children's kidnaping. Therefore, they had reasonable suspicion and acted reasonably in believing that more information would be discovered in Respondent's laptop.

This Court should also reverse the Thirteenth Circuit finding that the use of the Drone and handheld Doppler radar device constituted an intrusion in Respondent's Fourth Amendment rights. Officer Lowe's use of the Drone did not constitute an unreasonable search because the Drone was navigating in legal airspace and observing an area that did not contain obstructions to divert the public's view. Also, the area the Drone was navigating in constituted an open field, which is void of Fourth Amendment protections. Moreover, Detective Perkins properly used the handheld Doppler radar device because Respondent does not have a reasonable expectation of

privacy in non-content information because these observations are readily observable to the general public.

Lastly, the officers properly established probable cause to search Respondent's residence before approaching. Detective Perkins only decided to use the Drone and the handheld Doppler radar device to learn more information about the estate and to assure the safe and prepared execution of the search warrant. Officers should be able to use these devices to assure the safety of officers in high risk and uncertain circumstances, such as a probable kidnapping and when dealing with suspects with a history of violent felony convictions. Therefore, the evidence does not constitute a "fruit of the poisonous tree" and should not be suppressed.

STANDARD OF REVIEW

The appropriate standard of review for the lower court's legal conclusions or questions of law is de novo. *See Ornelas v. United States*, 517 U.S. 690, 697-698 (1996); *United States v. Branch,* 537 F.3d 328, 337 (4th Cir. 2008). Therefore, this Court should review such conclusions by the Thirteenth Circuit de novo. *See United States v. Kearney*, 672 F.3d 81, 91 (1st Cir. 2012).

ARGUMENT

I. THE THIRTEENTH CIRCUIT'S HOLDING SHOULD BE REVERSED BECAUSE AGENT LUDGATE'S SEARCH OF RESPONDENT'S LAPTOP CONSTITUTED A REASONABLE SEARCH, PURSUANT TO THE BORDER SEARCH EXCEPTION.

The Thirteen Circuit Court improperly reversed the District Court's finding that the search of Respondent's laptop was not in violation of her Fourth Amendment rights. Instead, Agent Ludgate's laptop search merely constitutes a routine search under the border search exception. The cursory inspection of the laptop conducted by Agent Ludgate did not require reasonable suspicion because the search of the computer is indistinguishable from other routine

suspicionless border searches. Therefore, the routine versus non-routine analysis was unnecessary.

The Fourth Amendment provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no Warrants shall issue but upon probable cause." U.S. Const. amend. IV. A "search" within the meaning of the Fourth Amendment occurs when government actions invade an individual's subjective expectation of privacy, which society is prepared to recognize as objectively reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967). Even though searches conducted without a warrant are "per se unreasonable," there are well-delineated exceptions to the warrant requirement. *Katz,* 389 U.S. at 357. Border searches constitute one of these exceptions with a history "as old as the [F]ourth [A]mendment itself." *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

Under the border search exception, searches conducted at the border are reasonable "simply by virtue of the fact that they occur at the border." *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004). Such rationale is predicated upon "[t]he government's interest in preventing the entry of unwanted persons and effects" and the nation's long standing right to protect its citizens. *See id*; *Ramsey*, 431 U.S. at 616. Generally, custom officers, under the border search exception, have "plenary authority" to conduct routine searches of individuals and their belongings without probable cause or a warrant. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). This authority was granted to officers by the First Congress in 1789, which has been supplemented by statute and this Court's precedent. *See Ramsey*, 431 U.S. at 616;

Montoya de Hernandez, 473 U.S. at 538, n. 4; s*ee also* 8 U.S.C. § 1357 (2016); 19 U.S.C. §§ 1461, 1496, 1499 (2016); 19 C.F.R § 162.6 (2016).[9]

A. THE SEARCH OF RESPONDENT'S LAPTOP CONSTITUTED A VALID ROUTINE SEARCH THAT FELL WITHIN THE BORDER SEARCH EXCEPTION.

This Court and other courts have established that border searches fall into two categories: "routine" and "non-routine." *See Montoya de Hernandez*, 473 U.S. at 588; *see also United States v. Cotterman*, 709 F.3d 952, 975 (9th Cir. 2013); *United States v. Roberts*, 274 F.3d 1007, 1011 (5th Cir. 2001). Although this Court has not provided a clear-cut definition of what constitutes a "routine" search, its precedent suggests that "routine" searches are those that do not pose a serious invasion of privacy and therefore, do not require reasonable suspicion. *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993). While this Court has generally deemed searches of property to be "routine," not requiring reasonable suspicion, this Court has imposed a more stringent standard on invasive searches of the body,[10] finding them to be "non-routine." *See Flores- Montano*, 541 U.S. at 155; *Montoya de Hernandez*, 473 U.S. at 541. At the same time, this Court in *Flores-Montano*, left open the possibility that certain searches of property may be so "destructive" or "offensive" as to require reasonable suspicion. 541 U.S. at 156; n. 2; *Ramsey*, 431 U.S. at 618. In *Flores-Montano*, however, this Court cautioned that the term "routine" was merely descriptive and not intended to be the source of a test requiring a heightened level of suspicion. 541 U.S. at 152.

Following this rationale, circuit courts have determined that border searches of property are routine, including the search of electronic devises. *United States v. Arnold*, 533 F.3d 1003, 1009-10 (9th Cir. 2008) (determining that the search of a laptop was permissible, even without

[9] (stating that "[a]ll persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search of a Customs officer").

[10] Such searches include body cavity searches, strip searches, and x-ray examinations.

reasonable suspicion); *see also United States v. Ickes*, 393 F.3d 501, 507-08 (4th Cir. 2005); *United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006); *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006). Nonetheless, the Thirteenth Circuit erroneously equated the search of Respondent's laptop to those intrusive "searches of the person" and searches conducted in a "particularly offensive manner," as described in *Montoya de Hernandez* and *Flores-Montano*. R. 16-17. The Thirteenth Circuit relied on this Court's decision in *Riley v. California* and *Montoya de Hernandez* to determine that because of the "immense storage capacity of a digital device" and the type of information stored on a computer device, Agent Ludgate's search was "non-routine." *Riley*, 134 S. Ct. 2473, 2489 (2014); R.16-17.

In *Riley,* this Court held that officers must secure a search warrant before searching information contained in an arrestee's cell phone during a search incident to arrest. 134 S. Ct. at 2494-95. The rationale in *Riley* is based on a balance of the governmental interests against the individual's expectation of privacy. *Id.* at 2491-92. When looking at the government's interest, this Court reasoned that the underlying principles behind the search incident to arrest exceptions are "officer safety" and "evidence preservation." *Id.* at 2484. This Court acknowledged the importance of these interests, but ultimately, found that the cell phone data itself does not pose a threat to law enforcement officers and that there are other ways to secure a phone to prevent the destruction of evidence. *Id.* at 2486-88. Although this Court noted that the search incident to arrest did not apply to the content of cellphones, "other case-specific exceptions may still justify a warrantless search of a particular phone." *Id.* at 2494. These circumstances include: "a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a *child abductor who may have information about the child's location on his cell phone*." *Id*. at. 2494 (emphasis added).

In *Montoya de Hernandez,* the defendant, who was at the border, was suspected of concealing contraband in her alimentary canal. 473 U.S. at 532-35. Because of this suspicion, custom officers detained the defendant for sixteen hours and subjected to the defendant to rectal and x-ray examinations. *Id.* This Court once again balanced the government's interest against the privacy rights of the individual, but noted that the balance of reasonableness "is qualitatively different at the international border." *Id.* at 538. At the border, this interest is struck much more favorably to the government's side. *Id.* at 539-40. (noting that due to the existence of the border search exception and fact that the individual "present[] [themselves] at the border and [] "subject[] [themselves] to the criminal enforcement powers of the Federal Government," individuals have a diminished expectation of privacy). With this interest in mind, this Court also evaluated the individual's interest during a physical examination and determined that the search did not fall within the definition of a "routine" search. *Id.* at 544. Nevertheless, this Court held the officers had reasonable suspicion and therefore, the search was reasonable. *Id.*

Similar to *Riley*, the search of Respondent's laptop involved a devise with the capacity to store a vast amount of personal files and information. Nonetheless, there are two major differences between the search that took place in *Riley* and the search that took place here. First, the search of Respondent's laptop took place at the Eagle City border station, a "major crossing point for criminals entering both the U.S. and Mexico," R. 2, 24. Second, the search was not intrusive as it was nothing more than a cursory inspection of files that were already opened. R. 3, 28.

Turning to the first point, the fact that the search of Respondent's laptop took place at the border is significant because, as a general principle, the search is reasonable *simply* for taking place at the border. *Flores-Montano*, 541 U.S. at 153-154. (citing *Ramsey*, 431 U.S. at 616)

(emphasis added). In contrast, the search in *Riley* did not involve a border search nor the search of a computer device. While the search incident to arrest exception is concerned about the preservation of evidence and safety of police officers, the border search exception is concerned about the safety of the entire nation. *Flores-Montano,* 541 U.S. at 154.

Furthermore, this Court in *Riley* recognized that there are circumstances in which officers would still have the ability to search an electronic device without a warrant. *Riley*, 134 S. Ct. at 2494. In this case, the officers were engaged in the same case-specific scenario that this Court recognized in *Riley* — the investigation of a person related to a suspected child abductor who may have had, and in fact had, information of the children's location in a computer. Here, the FBI and the ECPD were aware of the ongoing kidnapping investigation of three children and suspected that they could be, and in fact were, in Eagle City. R. 2, 8, 27. Thus, when Agent Dwyer saw the laptop with the initials "A.K.," matching the initials of the primary suspect of the kidnapping, and confirmed her relation to Mr. Wyatt, the officers had ample reason to believe that the laptop contained information of the Ford Children. R. 2, 26.

Turning to the second point, the storage capacity of the device is not dispositive in determining the intrusiveness of a search. While this Court has not determined whether a computer is significantly different from other devises, it has highlighted that the "nature of a container" and the quantity of the information stored in a device have no significance on the degree of protections afforded by the Fourth Amendment. *Robbins v. California*, 453 U.S. 420, 426 (1981) (holding that there is no distinction between containers containing "personal" versus "impersonal" information), *overruled by United States v. Ross*, 456 U.S. 798 (2008) (overruling *Robbins* on other grounds, specifically finding if probable cause authorizes the search of a vehicle, it also authorizes the search of every part of the vehicle and its contents); *California v.*

Carney, 471 U.S. 386, 393-94 (1985) (rejecting the distinction between a motor home and an ordinary car for purposes of a search under the automobile exception).

Stated differently, size does not matter. It did not matter in 1789 when Congress granted border officials the blanket authority to inspect any vessel, it did not matter when this Court recognized it in *Carney*, nor does it matter today. *See Carney*, 471 U.S. at 395; *see also Kyllo v. United States*, 533 U.S. 27, 41 (2001) (Stevens, J., dissenting) (explaining that Fourth Amendment exceptions and distinctions based on technology are "unwise"). As an illustration, today, staggering amounts of cargo can be carried in merchant ships in enormous containers, yet custom officials are allowed to conduct a search in each and every single one of these containers, regardless of the size, without reasonable suspicion. *United States v. Villamonte-Marquez*, 462 U.S. 579, 585-89 (1983). Under this rationale, if the storage capacity of a ship container is irrelevant, so is the storage capacity of an electronic devise.

Moreover, despite the Thirteenth Circuit's reasoning that due to the "hundreds, if not thousands" of files contained in a computer, causing the search to be "just as intrusive as the search of a person," Respondent's laptop search is not comparable to a search of the body. *Montoya de Hernandez*, 473 U.S. at 544 ("Respondent's detention was long, uncomfortable, indeed, humiliating; but both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country"). Unlike *Montoya Hernandez*, which involved an extended detention of an individual, followed by multiple strip searches, the search in this case was limited to the search of property, a laptop that was not even password protected. R. 28. Thus, nothing in the record supports the conclusion that the search of the laptop involved any significantly private material, nor that Respondent had any privacy interest in the

information that was discovered, as most of this information was personal information about Mr. Ford, not Respondent's. R. 3, 28.

Therefore, Agent Ludgate's actions did not constitute a violation the Fourth Amendment because the search was merely a routine search conducted at the border. Thus, because the capacity of the not dispositive in determining the intrusiveness of the search, the search was reasonable.

B. Even if this Court determines that the laptop search cannot be considered routine, the search was not conducted in violation of the Fourth Amendment because the officers had reasonable suspicion to conduct a warrantless search.

The Thirteenth Circuit's finding that there was no reasonable suspicion is not supported by the record. Under a totality of the circumstances analysis, there were enough facts for Agent Ludgate to reasonably suspect that Mr. Wyatt was involved in criminal activity. As such, the warrantless search of the computer was not conducted in violation of Respondent's Fourth Amendment rights.

Reasonable suspicion has been defined by this Court as "a particularized and objective basis for suspecting [that] [a] particular person" is involved in criminal activity. *Montoya de Hernandez*, 473 U.S. at 541. The level of suspicion must be more than a hunch and must be supported by "specific and articulable facts, which taken together" reasonably warrant "further investigation." *Terry v. Ohio,* 392 U.S. 1, 21 (1968). This Court must look at the totality of the circumstance to determine whether an officer possessed the adequate reasonable suspicion to conduct a search in a particular case. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002). Under the totality of the circumstances analysis, this Court must evaluate the facts in the manner presented to the officer before the search was conducted. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000). "[The] process allows officers to draw on their own experience and specialized training

to make inferences from and deductions about the cumulative information available to them [.]" *Arvizu*, 534 U.S. at 265.

While this court has not established a set list of factors to determine whether an officer has reasonable suspicion, at least four circuit courts have taken the following into account — "[the officer's experience,] the unusual conduct of the defendant, discovery of incriminating matter during routine searches, computerized information showing propensity to commit relevant crimes or a suspicious itinerary." *United State v. Carter*, 592 F.2d 402, 407 (7th Cir. 1979); *Irving*, 452 F.3d 110 (2006) (quoting *United States v. Asbury*, 586 F.2d 973, 976-77 (2d Cir. 1978)); *United State v. Young*, No. 12-CR-00210 2013 WL 885288, *2 (E.D.N.Y. Dec. 16, 2015).

In this case, the agents had more than enough facts to suspect that Mr. Wyatt was engaged in some sort of criminal activity, as the District Court correctly determined. R. 8. First, Agent Ludgate was an experienced agent that had been working with the United States Border Patrol for about seven years. R. 28. Second, Mr. Wyatt's conduct amounted to what would be deemed unusual conduct. Mr. Wyatt seemed "extremely agitated and uncooperative," appeared very pale, avoided eye contact with the agents, kept using his fingers to fidget the steering wheel, and only provided brief answers to the questions asked. R. 2, 8, 26.

Third, the agents discovered incriminating matter. Upon searching Mr. Wyatt's vehicle, Agent Ludgate found a computer that Mr. Wyatt himself admitted belonged to his fiancé, Respondent. R. 2, 12, 26. Not only did Respondent have "multiple felony convictions for a variety of violent crimes," but she was also was listed as a person of interest in the kidnapping of the Ford Children. R. 2, 27, 32. More importantly, Agent Ludgate discovered $10,000 cash in $20 bills, an amount that Mr. Wyatt had previously denied having. R. 2, 8, 12, 26, 31. The cash

and bill denominations were particularly important because the agents were notified that the Ford Children kidnappers had demanded the ransom in those specific denominations. R. 2, 8, 12, 27, 32. Finally, Mr. Wyatt was in the same city, Eagle City, where the FBI and the ECPD investigators believed the Ford Children were. R. 2, 8, 27. Because the agents properly believed that Mr. Wyatt may be involved in the Ford Children kidnapping and the computer belonged to a person of interest in the case, Respondent, the agents acted reasonably in suspecting that more information would be discovered in in the laptop.

The government respectfully urges this Court to reverse the Thirteenth Circuit's decision, as it would unreasonably limit the government's ability to conduct a routine search of a laptop. Despite the differences in storage capacity that the Thirteenth Circuit's strongly relied on, laptops and closed containers share one commonality — the ability to conceal evidence of criminal wrongdoing in the form of communications, records, digital media, addresses, etc. By restricting the government's access to computer data, the Thirteenth Circuit's has limited and hindered the government's interest in the effective enforcement of the law. Furthermore, while computer and other electronic devices are more personal than other types of property, such as a vehicles, they still do not involve the same sort of concerns that an intrusive search of the person entails. As this Court noted in *Montoya-Hernandez*, officers at the border have "more than merely an investigative law enforcement role. They are also charge . . . with protecting this Nation [.]" *Montoya de Hermandez*, 473 U.S. at 544.

II. THE THIRTEENTH CIRCUIT'S HOLDING SHOULD BE REVERSED BECAUSE THE USE OF THE PNR-1 DRONE AND HANDHELD DOPPLER RADAR DEVICE TO SEARCH MACKLIN MANOR ARE PERMITTED UNDER THE FOURTH AMENDMENT.

The Thirteen Circuit improperly reversed the District Court's holding because neither the Drone nor the handheld Doppler radar device constituted an unreasonable search. Officer Lowe properly used the Drone to obtain information of Macklin Manor's layout because the Drone was operating in open fields, thus, is not protected under the Fourth Amendment. Also, Detective Perkins properly used the handheld Doppler radar device because the radar device is in common use, the information the device obtained could be discovered from mere observations, and displayed non-content information, which is void of Fourth Amendment protections.

Under the Fourth Amendment, the touchstone of the analysis is whether an individual has a reasonable expectation of privacy that is constitutionally protected. *California v. Ciraolo*, 476 U.S. 207, 211 (1986). The constitutionally protected area solely extends when an individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Thus, "the Fourth Amendment does not, therefore, prevent all investigations conducted on private property." *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

While the area immediately surrounding a home, the curtilage, is given Fourth Amendment protections, an open field is not. *Oliver v. United States*, 466 U.S. 170, 176 (1984); *Hester v. United States*, 265 U.S. 57, 59 (1924). Thus, pursuant to the open fields doctrine, a police officer may enter open fields to search, without a warrant, without violating the Fourth Amendment. *See Oliver*, 466 U.S. at 176.

A. THE USE OF THE PNR-1 DRONE IN AN OPEN FIELD CONSTITUTED A VALID SEARCH UNDER THE FOURTH AMENDMENT.

Whether an area is deemed part of a home's curtilage, protected by the Fourth Amendment, instead of an open field, void of Fourth Amendment protections, depends on the following factors — (1) the proximity of the area alleged to be curtilage is to the home, (2) whether the area is within an enclosure surrounding the home, (3) the nature that the area is used for, and (4) steps taken by the residents of the home to protect the area from passerby observations. *United States v. Dunn*, 480 U.S. 294, 301 (1987). The purpose of the factors is to determine whether the area in question is intimately tied to an individual's private home to prevent improper governmental intrusions. *Id.*; *Boyd v. United States*, 116 U.S. 616, 630 (1886).

The Fourth Amendment does not prevent officers from making observations of an area that is clearly subject to public view when the officer has a legal right to be there. *Ciraolo*, 476 U.S. at 213. Thus, because the officer has a legal right to be there, whether it be on ground-level or in navigable airspace, the officer is not obligated to obtain a warrant to make such observations. *See id.* Furthermore, this Court has also noted that the area in question must be an area accessible to the public and other aircrafts. *See Florida v. Riley*, 488 U.S. 445,451 (1989).

In this case, pursuant to the *Dunn* factors, the area in which the Drone flew over constituted an open field. First, the pool house was not in close proximity to the main house, as they were two completely separate buildings, fifty feet a part, and separated by a both a pool and a patio area. R. 4, 9-10, 32-33. Second, neither the pool area, the patio, nor the main house were surrounded by a gate, a fence, an awning, or shading to shield the area from aerial surveillance. R. 4, 9. Third, it is unreasonable to believe that the nature of the use of the pool house is for living purposes because a reasonable person would conclude that it was only used to store patio equipment or pool furniture. Lastly, in the absence of any form of enclosure, as described above,

or forms of protecting the area from passerby observations, a reasonable person would not deem the owner to posses a reasonable expectation of privacy over the premises.

Based on the totality of the circumstances and the application of the *Dunn* factors, this Court should hold that the area space above Macklin Manor in which the Drone traveled over constitutes an open field. Thus, because the air space above Macklin Manor is an open field, Respondent does not have a reasonable expectation of privacy under the Fourth Amendment. *See Oliver*, 466 U.S. at 179 ("[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from governmental interference or surveillance.").

Additionally, the facts of this case, although similar to *Riley*, are much less intrusive than *Riley*. In *Riley*, this Court held that an officer properly observed a partially covered greenhouse, while in legal air space, in the defendant's backyard, with his naked eye, from a helicopter four hundred feet above ground, without a warrant. *Riley*, 488 U.S. at 448-49. In this case, the record does not affirmatively establish that the Drone, that is preprogrammed to navigate at an altitude of only 1640 feet, the legal limit in Eagle City, was violating any navigable airway laws while flying above Macklin Manor. R. 4, 10, 39, 41. Additionally, the Drone did not exceedingly intrude on Respondent's expectation of privacy as the Drone was above Macklin Manor for solely a few minutes, since the Drone has a very short life expectancy. R. 3-4, 10. Moreover, the Drone did not intrude on Respondent's land by breaking any structures or by seeing through any walls. Rather, the Drone simply flew over Macklin Manor's legal navigable airspace in the same manner as any other ordinary citizen could have use his or her own drone to navigate over the premise. R. 10.

Currently, drones are a common commodity among ordinary citizens and may be purchased at an affordable price. R. 3, 38-39. Simply because the airway above Macklin Manor

is not perfectly suitable for airplanes to navigate, which carry human life, the presence of drones, which do not carry human life, is not substantially unlikely or rare in this area. Since the weather is not ideal for airplanes to navigate, it is reasonable for individuals to fly drones over this area to cautiously ascertain whether the weather has changed or if one may safely navigate in it. Therefore, the Drone, similar to the helicopter in *Riley*, was in legal navigable airspace observing an area that was completely void of any obstructions to divert the public's view. Overall, not only was the Drone navigating in open fields, but also Officer Lowe's use of the Drone is not an unreasonable search.

B. THE USE OF THE HANDHELD DOPPLER RADAR DEVICE CONSTITUTED A VALID SEARCH UNDER THE FOURTH AMENDMENT BECAUSE THE DEVICE SOLELY DETECTED INFORMATION THAT COULD HAVE BEEN OBSERVED IN PUBLIC VIEW.

In the context of the Fourth Amendment, the Tenth Circuit was the first court to address the use of a handheld Doppler radar device, but the court did not reach a definite decision. *See United States v. Denson*, 775 F.3d 1214, 1218-19 (10th Cir. 2014). Nevertheless, the reasonableness expectation of privacy test under the Fourth Amendment remains the same. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (finding one must have a reasonable expectation of privacy in which society is prepared to recognize as reasonable). Furthermore, the use of technology does not automatically transform an officer's observations into a violation of the Fourth Amendment. *See United States v. Knotts*, 460 U.S. 276, 282 (1983) ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancements as science and technology afforded them . . . ."); *e.g., Smith v. Maryland*, 442 U.S. 735,745-46 (1979) (holding an officer may install a pen register device on an individual's phone); *United States v. Karo*, 468 U.S. 705, 720-721 (1984) (finding the officer's use of a monitoring device of a beeper was constitutional).

In *Knotts*, this Court held that the officer's actions in placing a beeper inside a chloroform container, which was taken inside the defendant's residence, was *not* a search because the officer could see with his naked eye that the container was inside the defendant's residence. 468 U.S. at 720. In contrast, in *Karo*, this Court held that the presence of a beeper inside of a can of ether in the defendant's home, once the officer already knew the can was in the residence, constituted a search. 468 U.S. 720-21. This Court noted that the additional monitoring of the can inside the residence constituted a search because the additional monitoring could not be observed in public view. *Id*.

In this case, unlike *Karo*, the handheld Doppler radar device did not even physically enter Respondent's residence nor did it additionally monitor the residence. R. 5. Instead, the device in this case is similar to the beeper in *Knotts.* Here, the device did not provide Detective Perkins and Officer Hoffman with any information that they could not already see with their naked eyes from a public view, such as through the residence's windows.

Additionally, the Drone also illustrates another manner in which these observations were available in public view. As evident in Officer Lowe's proper use of the Drone, the observation of the female outside of the residence, later confirming to be Respondent, is an observation that is available to all citizens. R. 4, 33. Likewise, the handheld Doppler radar device did not state the exact location where the individual was. R. 33. The device only detected that someone was inside, which is an observation that any ordinary citizen could see with his or her naked eye. R. 5, 11, 34. Thus, the discoveries made by the Detective Perkins using the Doppler radar device do not constitute an intrusively unreasonable search.

Furthermore, this case is unlike the issue this Court faced in *Kyllo*. 533 U.S. at 34. In *Kyllo*, this Court held that an officer's use of a thermal imaging device to detect heat, without a

warrant, constituted an unreasonable search. *Id.* at 40. Unlike the thermal imaging device, the Doppler radar device solely detects movements, not contents of the residence, such as the heat level. Similarly, as stated above, had Detective Perkins or Officer Hoffman peeked through a window, they would have been able to see individuals present inside the residence. At no point could this device detect the intimate details, as *Kyllo* could detect "at what hour each night the lady of the house takes her daily sauna and bath." 533 U.S. at 38. Thus, the use of technology in this case is not substantially intrusive because the observations the device obtained would have been ascertainable by other means as well. *United States v. Sokolow*, 490 U.S. 1, 11 (1989) ("The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.").

Furthermore, the Doppler radar device does not operate like an x-ray device, which is able to see through the residence's walls. Instead, this device simply detects movements, which an individual does not have an expectation of privacy in this non-content form of information. *Contra Berger v. New York*, 388 U.S. 41, 63 (1967) (finding the content of conversations is within the Fourth Amendment protections). Moreover, this Court in *Silverman v. United States*, properly held that when an officer attaches an electronic device to a house, a spike mike, to overhear conversations inside of a residence without a warrant, the officer has violated the Fourth Amendment. 365 U.S. 505, 510 (1961). Unlike the facts in *Silverman*, where the officers specifically overheard contents of conversations as the device "in effect [is] a giant microphone, running through the entire house occupied by appellants," the officers in this case solely detected movements with the device, which is significantly less intrusive. *Id.* at 509.

In balancing an individual's Fourth Amendment protections and an officer's safety concerns in using the Doppler radar, Detective Perkins properly used the device in a reasonable

manner. Officers should be able to use this device to assure the safety of officers in grave circumstances, such as a probable kidnapping and when dealing with suspects with a history of violent felony convictions. Detective Perkin's use of this device is not unreasonable given the advancement of technology, which criminals may easily access to increase their likelihood of success and the dangerousness of the situation. Additionally, the handheld Doppler radar is very similar to a bloodhound, which has historically been used by officer's to find and save innocent individual's in a myriad of places.[11] *See State v. Juarez-Godinez*, 135 Or. App. 591, 610 (Or. App. 1995) (Edmonds, J., dissenting) ("The use of dogs to detect odors of controlled substances began in this country in the 1940's as an "offshoot of the use of tracking dogs to apprehend fugitives and suspected criminals—an accepted practice in many jurisdictions.") (citation omitted). Therefore, Detective Perkins properly used the handheld Doppler radar device because Respondent does not have a reasonable expectation of privacy in the non-content information, as these observations may readily be available even without the use of the device.

C. EVEN IF THIS COURT FINDS THAT THE USE OF THE PNR-1 DRONE AND THE HANDHELD DOPPLER RADAR DEVICE CONSTITUTED IMPERMISSIBLE SEARCHES, DETECTIVE PERKINS HAD PROBABLE CAUSE TO OBTAIN A SEARCH WARRANT WITHOUT THE INFORMATION ACQUIRED BY THE DEVICES.

Detective Perkins properly established probable cause to obtain a search warrant, even in the absence of the information obtained by the Drone and handheld Doppler radar device. Further, the Drone and the handheld Doppler radar device were not used to obtain information to

[11] *See, e.g.*, Samuel G. Chapman, POLICE DOGS IN NORTH AMERICA 4 (1990) ("English soldiers used tracking hounds in the 1620s to follow the trail of highwaymen who fled justice in unsettled parts of the United Kingdom."); Estelle Ross, THE BOOK OF NOBLE DOGS 40 (1922) (noting use of bloodhounds to find an individual, a suspected murder); Edward Topsell, THE HISTORY OF FOUR-FOOTED BEASTS AND SERPENTS AND INSECTS 118, 131 (1658) (reprinted 1967) (describing bloodhounds' ability to discover the presence of humans); J.G. Wood, THE ILLUSTRATED NATURAL HISTORY 278 (1865) (noting how thieves were frequently detected by bloodhounds).

establish probable cause, but to assure the officer's safe and prepared execution of the search warrant.

The protection of the Fourth Amendment is vested in a neutral and detached magistrate, who must require that an officer present sufficient evidence to establish probable cause to obtain a search warrant. *Johnson v. United States*, 333 U.S. 10, 14 (1948). "Probable cause is a fluid concept," which must be evaluated on a case-by-case basis, "because it deals with probabilities and depends on the totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Although a precise definition of probable cause is impossible, this Court has established two principal components to the probable cause determination. *Pringle*, 540 U.S. at 371. The magistrate judge must examine the events leading up to an individual's arrest and whether those facts, viewed from an objective reasonable officer's standpoint, constitute probable cause. *Id.* In the event, that a magistrate judge improperly finds that probable cause is present, the evidence must be suppressed as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 420 (1963).

In this case, even before the officer's used the Drone and the handheld Doppler radar device to obtain further information about Macklin Manor, the officers had sufficient probable cause to obtain a search warrant. When Mr. Wyatt was stopped at the Eagle City border station at 3:00 A.M., Agent Dwyer saw $10,000 in $20 bills, which were the exact denominations the Ford kidnappers demanded for ransom for proof of life of the Ford Children, that Mr. Wyatt had previously denied having. R. 2, 8, 26-27, 31-32. Additionally, Agent Dwyer saw a laptop with the initials A.K., which Mr. Wyatt stated he shared with his fiancé named Amanda Koehler, Respondent. R. 2, 26. Once Agent Ludgate properly opened the laptop, the laptop's desktop already displayed several documents with Mr. Ford's personal information, as well as a lease

agreement, with Respondent's name, of the Macklin Manor estate. R. 3, 12, 28. Upon further investigation, Detective Perkins became aware that Macklin Manor was owned by a shell company, R.A.S., owned by Laura Pope, which is one of Respondent's known aliases. R. 3, 12, 28. Therefore, based on the totality of the circumstances, an neutral magistrate would properly find that the officers had probable cause to search Macklin Manor.

Moreover, although Officer Lowe used the Drone and Detective Perkins used the handheld Doppler radar device before a search warrant was obtained, the information obtained with the devices was neither essential to a finding of probable cause nor relevant because probable cause had already been established. The sole purpose Detective Perkins decision to use the devices was to assure a safe and prepared approach onto the premises. Therefore, this case is void of any "fruits" needing to be suppressed, as the officers already properly established probable cause prior to the use of the devices.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the Thirteenth Circuit's ruling and find that Agent Ludgate's search of the laptop did not constitute a violation of the Fourth Amendment. Further, this Court should also reverse the Thirteenth Circuit's ruling and find Officer Lowe and Detective Perkin's search did not exceed the scope of Fourth Amendment.

Respectfully Submitted,

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Team #P23