No. 4-422

IN THE
SUPREME COURT OF THE UNITED STATES

United States of America**,**
Petitioner,

v.

Amanda Koehler,
Respondent,

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

BRIEF OF THE PETITIONER, UNITED STATES OF AMERICA

Team 25
Counsel for Petitioner
October 20, 2017

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QUESTIONS PRESENTED

I. Was the government's search of Respondent's laptop at a border station a valid search pursuant to the border search exception to the warrant requirement?

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

STATEMENT OF THE CASE

Statement of Facts

On August 17, 2016, U.S. Border Patrol Agents Christopher Dwyer ("Dwyer") and Ashley Ludgate ("Ludgate") were patrolling the Eagle City border station, one of the largest and busiest ports of entry into the United States. R. at 2. At around 3 a.m., Ludgate and Dwyer stopped a car driven by Scott Wyatt ("Wyatt"). R. at 2. When asked why he was crossing into the United States, Wyatt appeared extremely agitated and uncooperative. R. at 2. When asked if he was transporting $10,000 or more in U.S. currency, Wyatt stated he was not. R. at 2. Ludgate informed Wyatt of border patrol's right to conduct a routine search of his vehicle. R. at 2. Dwyer then asked Wyatt to step out of the car and to open his trunk, which revealed $10,000 in $20 bills and a laptop inscribed with the initials "AK." R. at 2. Suspicious of its contents, Ludgate asked Wyatt if the laptop was his. R. at 2. Wyatt stated that he shared the laptop with his fiancé, Amanda Koehler ("Respondent"). R. at 2.

After running Respondent's name in the criminal intelligence border watch database, the agents discovered that Respondent is a felon with multiple violent convictions. R. at 2. Respondent was also named as a person of interest in the recent kidnappings of John, Ralph, and Lisa Ford, the children of billionaire biotech mogul Timothy H. Ford. R. at 2. Recently, the kidnappers agreed to give proof of life (in the form of a phone call) in exchange for $10,000 in $20 bills, due at noon the following day. R. at 2. The FBI and the Eagle City Police Department ("ECPD") have collaborated on the investigation, believing that the Ford children were being held somewhere in Eagle City. R. at 2. Aware of the ongoing investigation, Ludgate began looking through the laptop. R. at 2.

On the laptop, Ludgate found several open documents containing Mr. Ford's personal information. R. at 3. Ludgate also found a lease agreement with the name "Laura Pope" and an address that did not match Mr. Ford's. R. at 3. The agents arrested Wyatt for failure to declare in excess of $10,000 in violation of 31 U.S.C. § 5136. R. at 3. They then contacted Detective Raymond Perkins ("Perkins"), the lead detective in the investigation of the Ford kidnappings, to report their findings. R. at 3.

The address on the lease agreement was traced to Macklin Manor, a large estate atop Mount Partridge on the outskirts of Eagle City. R. at 3. The top of Mount Partridge is usually covered with clouds year round. R. at 3. Due to the perpetual fog, aircraft often avoid Mount Partridge on their way to and from Eagle City. R. at 3. Six months ago, R.A.S., a shell company based in the Cayman Islands and owned by "Laura Pope," bought Macklin Manor. R. at 3. The FBI confirmed that "Laura Pope" is one of Respondent's aliases. R. at 3. Despite the recent purchase, nobody had seen any occupants on the property. R. at 3.

Reluctant to approach the estate without knowing more about its layout and possible occupants, Perkins assigned Officers Kristina Lowe ("Lowe") and Nicholas Hoffman ("Hoffman") to conduct loose surveillance. R. at 3. Lowe, ECPD's technology expert, deployed a PNR-1 drone (the "drone") to fly over the property while Hoffman patrolled on foot. R. at 3.

Recently, the drone has become a favorite amongst drone enthusiasts. R. at 3. The drone comes with a pre-programmed maximum flight altitude of one thousand six hundred forty feet, the legal maximum allowed for drones in Pawndale. R. at 4. Recent network connectivity errors, however, have caused some of these drones to fly as high as two thousand feet. R. at 4.

The drone hovered over the property for fifteen minutes, took twenty-two photos and recorded a three-minute video during that time. R. at 4. The photos and surveillance footage

provided the estate's layout, which included a main house, pool, patio area, and pool house. R. at 4. The main house is directly adjacent to the patio area and about fifteen feet from the pool. R. at 4. The pool house is on the other side of the pool, about fifty feet away from the main house. R. at 4. No gate or fence surrounds the estate. R. at 4. The drone also captured the image of a young female subject, later identified as Respondent, crossing from the main house to the pool house. R. at 4.

After confirming Respondent was on the premises, Perkins became fearful for the safety of any hostages. R. at 4. Perkins approached the main house and without a warrant, scanned the front of the main house with a handheld Doppler radar device (the "Doppler"). R. at 4.

Doppler devices, which are popular among law enforcement agencies, emit a radio wave that can detect movements up to fifty feet away. R. at 4. Often, the Doppler will zero in on a person's breathing, making it almost impossible to hide within fifty feet. R. at 4. While the Doppler device cannot reveal the interior layout of a building, it can determine the number of people inside a house and their rough location. R. at 4.

The Doppler detected one individual in the front of the house, a few feet from the door. R. at 5. The officers then conducted a second scan on the pool house. R. at 5. The second scan revealed three individuals, close together, breathing, but unmoving, while a fourth individual paced around as if standing guard. R. at 5.

The officers retreated and obtained a search warrant for the entire residence. R. at 5. The officers returned with a SWAT team and, as permitted by the warrant, conducted a no-knock and notice upon entering the estate. R. at 5. The officers detained two individuals in the main house. R. at 5. Respondent, meanwhile escaped out the backdoor. R. at 5. When the officers caught up to and detained Respondent, they found a handgun on her person. R. at 5. The officers then

entered the pool house and detained the individual standing guard. R. at 5. John, Ralph, and Lisa Ford were found inside, restrained, but otherwise unharmed. R. at 5.

Procedural History

On October 1, 2016, a federal grand jury indicted Respondent on three counts of kidnapping under 18 U.S.C § 1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. § 922(g)(1). R. at 5. Respondent filed a motion to suppress the evidence found on the day of her arrest, claiming that her Fourth Amendment Rights had been violated when law enforcement searched her laptop and used the drone and Doppler to search her estate. R. at 5.

On November 25, 2016, the United States District Court for the Southern District of Pawndale denied Respondent's motion to suppress. R. at 1. Respondent appealed and the United States Court of Appeals for the Thirteenth Circuit heard arguments on January 7, 2017. R. at 14. On July 10, 2017, the Thirteenth Circuit issued their opinion and reversed the lower court's decision, granting Respondent's motion to suppress. R. at 15.

The United States appealed, and this Court granted certiorari. R. at 22.

SUMMARY OF ARGUMENT

Under *Cotterman* and the majority of post-*Riley* decisions governing digital border searches, the preliminary search of Respondent's laptop was valid pursuant the border search exception to the warrant requirement. The cursory search of Respondent's laptop qualified as a routine border search requiring no justification. However, even if this Court held the search here to be non-routine, Ludgate still had the requisite reasonable suspicion to justify the search. Lastly, the lower court erred in suggesting that *Riley* applies here. While *Riley* delved into the privacy concerns implicated in digital searches incident to arrest, it did not undercut or modify the border search exception to the warrant requirement.

In addition, under *Ciraolo* and *Riley*, the use of the drone did not constitute a search because the area observed by the drone did not constitute curtilage. Even if this Court finds that the area constituted curtilage, Respondent knowingly exposed the area to observation from navigable airspace, fully accessible to the public. Further, under *Kyllo*, the use of the Doppler did not constitute a search. The information could have otherwise been obtained without physical intrusion into the home and the Doppler is a device in general public use. Lastly, Respondent fails to show any "fruits" resulting from the searches. Probable cause for a search warrant existed independent of the use of the drone and the Doppler.

OPINION BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit, *United States of America v. Amanda Koehler*, No. 125-1-7-721 (July 10, 2017), is viewable at pages fourteen through twenty-one of the Record.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

The decision of the United States Court of Appeals for the Thirteenth Circuit as to the constitutionality of searches under the Fourth Amendment is reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (noting that questions of law are reviewed de novo).

ARGUMENT

I. LUDGATE'S PRELIMINARY SEARCH OF THE DOCUMENTS ON RESPONDENT'S LAPTOP WAS A VALID AND ROUTINE SEARCH PURSUANT TO THE BORDER SEARCH EXCEPTION TO THE WARRANT REQUIREMENT.

The Fourth Amendment provides, "[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." U.S. Const. amend. IV. The Fourth Amendment is "enforceable against the States through the Due Process Clause" of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), overruled on other grounds by *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Herring v. United States*, 555 U.S. 135 (2009), and *Mapp v. Ohio*, 367 U.S. 643 (1961). Warrantless searches are per se unreasonable – subject only to a few specifically established exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). The reasonableness of a search is assessed by balancing the government's interest in the intrusion against the invasion of privacy, regardless of whether an exception to the warrant requirement applies. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Under the border search exception to the warrant requirement, the Fourth Amendment balance of reasonableness is "qualitatively different." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Pursuant to the long-standing right of the sovereign to protect its territorial integrity, searches of persons and property crossing the border are deemed reasonable "simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 615 (1977). Furthermore, because "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith" at the border, the reasonableness balance between the government's interests and individual privacy is struck much more favorably to the government. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004); *Montoya de*

Hernandez, 473 U.S. at 539. As a result, the border search exception allows government agents to conduct warrantless, suspicion-less searches of individuals, their vehicles, and personal effects when passing through a border station, airport, or any port of entry into the United States. *Flores-Montano*, 541 U.S. at 152; *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

The border search exception, however, does not mean "anything goes" when entering the United States. *United States v. Seljan*, 547 F.3d 993, 1000 (9th Cir. 2008). Even at the border, individual privacy rights are balanced against the government's interests. *Montoya de Hernandez*, 437 U.S. at 538. As a result, certain border searches, designated as non-routine searches, are distinguished from routine searches in that they require reasonable suspicion. Invasive searches of the person that implicate profound dignity and privacy concerns - such as strip searches and cavity searches - are considered non-routine. *Flores-Montano*, 541 U.S. at 152. Additionally, this Court has suggested that searches of property could be considered non-routine if carried out in a manner that is "particularly offensive or overly intrusive." *Id*. So far, this Court has left open the question of when a "particularly offensive" search fails the reasonableness test. *United States v. Cotterman*, 709 F.3d 952, 963 (9th Cir. 2013).

This question is especially salient in the context of digital border searches, particularly in light of *Riley v. California*. 134 S. Ct. 2473 (2014). Without a precise definition of a reasonable border search, courts have developed diverging approaches in assessing the validity of digital border searches in the wake of *Riley*. Specifically, courts have diverged in determining whether digital searches require reasonable suspicion and in distinguishing routine digital searches from non-routine digital searches. Eunice Park, *The Elephant in the Room: What is a "Nonroutine" Border Search, Anyway? Digital Device Searches Post*-Riley, 44 Hastings Const. L.Q. 277 (2017). For instance, some courts do not address the routine and non-routine distinction in

digital searches and, instead, require no justification for conducting any digital border searches. *See e.g.*, *United States v. Feiten*, No. 15-20631, 2016 WL 894452, at *6 (E.D. Mich. Mar. 2016). In contrast, the court in *United States v. Kim* assessed the validity of a digital border search by balancing national security interests against the traveler's privacy interests. 103 F. Supp. 3d 32, 59 (D.D.C. 2015). The majority of post-*Riley* courts, however, follow the approach outlined by the Ninth Circuit in *Cotterman*, which requires reasonable suspicion to justify non-routine, forensic digital searches. 709 F.3d at 963.

This Court should adopt the approach outlined in *Cotterman* and require reasonable suspicion to justify non-routine digital border searches. Since digital content is essential for determining an individual's intentions for entering or leaving the United States,[1] this approach gives law enforcement the necessary discretion for protecting national security while heeding the privacy concerns highlighted in *Riley*.

Under the *Cotterman* approach, it is clear that Ludgate's brief search of Respondent's laptop was a routine search pursuant to the border search exception and required no justification. However, even if this Court held the search here to be non-routine, Ludgate still had the requisite reasonable suspicion to justify the search. Finally, because the border search exception is based on governmental interests different from the search incident to arrest exception to the warrant requirement, the Thirteenth Circuit Court of Appeals erred in suggesting that *Riley* is applicable to the case at Bar.

[1] From the United States Customs and Border Protection's statistics on electronic device searches, available at https://www.cbp.gov/newsroom/national-media-release/cbp-releases-statistics-electronic-device-searches-0.

A. The Search of Respondent's Laptop Was a Routine Search Under the Border Search Exception Because it Was a Cursory and Non-Forensic Digital Border Search.

Routine border searches do not "pose a serious invasion of privacy and do not embarrass or offend the average traveler." *United States v. Johnson*, 991 F.2d 1287, 1291-92 (7th Cir. 1993). Searches of a traveler's luggage and personal effects - such as suitcases, purses, backpacks, and overcoats - are classic examples of routine searches and are not "sufficiently intrusive to be considered non-routine." *Id.* But more invasive border searches have been held to be routine as well. *See United States v. Beras*, 183 F.3d 22, 26 (1st Cir. 1999) (pat-down searches of outgoing travelers); *United States v. Kelly*, 302 F.3d 291, 294 (5th Cir. 2002) (close up sniffing by a trained narcotics-detection dog); *United States v. Lawson*, 461 F.3d 697, 701 (6th Cir. 2001) (x-raying and drilling holes in luggage).

Flores-Montano, a seminal case on routine border searches, demonstrates the tremendous leeway given to law enforcement to investigate personal property at the border. After stopping a Ford Taurus at the California-Mexico border, customs agents removed and disassembled the vehicle's gas tank with no justification and discovered marijuana bricks. 541 U.S. at 151. This Court upheld the constitutionality of the search, noting that the government's need to protect border integrity outweighed the driver's privacy interest in his gas tank. *Id*. at 153-54. This Court added that overly intrusive or "particularly offensive" searches should be categorized as non-routine searches requiring reasonable suspicion. *Id.* at 152. However, because the search in *Flores-Montano* did not result in damaged property, the search was not "particularly offensive" and qualified as routine. *Id*. at 154.

Intrusive searches of persons at the border, however, may implicate dignity and privacy interests absent in the search of personal property in *Flores-Montano*. *Montoya de Hernandez*,

473 U.S. at 541-42. Suspected of smuggling cocaine-filled balloons in her alimentary canal, federal agents detained Montoya de Hernandez at LAX international airport and subjected her to a strip search. *Montoya de Hernandez*, 473 U.S at 533. When the search confirmed these suspicions, agents asked Montoya de Hernandez to submit to an x-ray, which she refused. *Id.* at 534. The agents then prolonged her detention until she passed cocaine-filled balloons during a supervised bowel movement some sixteen hours later. *Id.* at 534-36. Though the invasiveness of the strip search and the lengthy, humiliating nature of the confinement qualified Montoya de Hernandez's ordeal as non-routine, the Court held that the agents' actions were constitutional because reasonable suspicion existed to justify the search and detention. *Id.* at 541-42.

Despite acknowledging the unique privacy concerns associated with digital searches, some courts since *Riley* still look to *Montoya de Hernandez* and *Flores-Montano* in holding that digital searches should not be approached any differently than searches of physical property under the border search exception. *See e.g.*, *Feiten*, No. 15-20631, 2016 WL 894452, at *6. For the most part, however, courts interpret *Riley* to indicate that digital searches have the potential to be overly intrusive or "particularly offensive […] so as to require reasonable suspicion." *Flores-Montano*, 541 U.S. at 152. As a result, courts have focused primarily on delineating routine and non-routine digital border searches in assessing their validity.

To make this distinction, post-*Riley* courts generally look to the Ninth Circuit's decision in *Cotterman*. *Cotterman* involved a search at the United States-Mexico border where, during a routine inspection, the Treasury Enforcement Communications System ("TECS") returned a hit for Cotterman as a registered sex offender. 709 F.3d at 957. Agents then seized and conducted a cursory search of the laptops found in Cotterman's car, which revealed several password-protected files. *Id*. at 957-58. After questioning, agents delivered Cotterman's laptops to an

Immigration and Customs Enforcement ("ICE") office, one hundred seventy miles away from the border in Tucson, Arizona. *Cotterman*, 709 F.3d at 958. For several days, ICE agents ran forensic programs to copy and thoroughly examine the laptop hard drives, which eventually revealed hundreds of images of child pornography. *Id*. at 959. The court upheld both the initial search of the laptops at the border and the subsequent forensic search in Tucson. *Id.* at 966. The court held that the cursory search at the border station was routine and required no justification while the subsequent forensic examination was justified by the requisite reasonable suspicion. *Id*. In requiring a higher standard of justification for an exhaustive forensic search, the court pointed to the invasiveness of digital searches, stating that laptops and iPads are "simultaneously offices and personal diaries." *Id*. at 965. Because the search in *Cotterman* was "essentially a computer strip search," the court held that forensic examinations must be justified by the highest level of suspicion under the border search exception: reasonable suspicion. *Id*. at 966. Thus, under *Cotterman*, cursory searches of laptops and cell phones are routine while forensic searches are non-routine and require reasonable suspicion. *Id*. at 968.

Post-*Riley* courts have consistently followed *Cotterman* and further delineated routine, cursory searches and non-routine, forensic searches under the border search exception. In holding that border agents had reasonable suspicion to further inspect a traveler's laptop, the court in *Abidor v. Nopalitano* defined a cursory search as one that an officer "may perform manually" by viewing a laptop's contents "simply by clicking through various folders." 990 F. Supp. 2d 260, 269-70 (E.D.N.Y. 2013). In contrast, a forensic examination "involves an exhaustive search of a computer's entire hard drive," including "a hard drive's unallocated space." *Cotterman*, 709 F.3d at 960. Courts consistently point to *Cotterman* in holding cursory searches as defined in *Nopalitano* to be routine. *See United States v. Caballero*, 178 F. Supp. 3d

1008, 1011 (S.D. Cal. 2016); *see also United States v. Saboonchi*, 990 F. Supp. 2d 536, 547 (D. Md. 2014) (holding that, unlike forensic examinations, "conventional" digital searches do not require reasonable suspicion). Additionally, courts have repeatedly held that forensic searches may be conducted with reasonable suspicion. *See e.g.*, *United States v. Hassanshahi*, 75 F. Supp. 3d 101, 118 (2014). For example, the court in *United States v. Kolsuz* held that "the manual inspection of text messages and recent calls" on a traveler's iPhone was "clearly a routine border search" while the forensic search of the traveler's iPhone was non-routine and required reasonable suspicion. 185 F. Supp. 3d 843, 854, 858 (S.D. Cal. 2016).

The search of Respondent's laptop is indistinguishable from the cursory searches conducted in *Cotterman* and *Kolsuz*. Here, Ludgate opened Respondent's non-password protected laptop and manually perused several documents already displayed on the desktop. R. at 3. There is no indication that Ludgate seized the laptop for an extended period of time, nor is there any indication that special forensic tools were used. Rather, Ludgate manually clicked through the documents as any lay person would. R. at 3. Because the search here was clearly a cursory search akin to the preliminary laptop search in *Cotterman*, no justification was necessary. Thus, Ludgate's search of Respondent's laptop was valid under the border search exception to the warrant requirement of the Fourth Amendment.

B. Even if This Court Were to Hold That All Digital Border Searches Are Non-Routine, Ludgate Still Had the Requisite Reasonable Suspicion to Justify the Search.

Determining the reasonableness of any search involves a twofold inquiry: (1) whether the search was justified at its inception, and (2) whether the search was reasonably related in scope to the circumstances, which justified the intrusion in the first place. *New Jersey v. T.L.O*, 469 U.S. 325, 341 (1985) (citing *Terry*, 392 U.S. at 20).

The search of Respondent's laptop satisfied both inquiries, and therefore, was reasonable. First, the totality of the circumstances surrounding Wyatt's stop at the border amounted to the necessary reasonable suspicion to justify the search in the first place. Second, the search of Respondent's laptop did not exceed the scope of the justification for the initial intrusion.

i. Based on the totality of the circumstances, Ludgate had the requisite reasonable suspicion to initiate the cursory search of Respondent's laptop.

Reasonable suspicion is defined as a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981). Although an officer's reliance on a mere hunch is insufficient, the likelihood of criminal activity need not rise to the level required for probable cause. *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Courts must look at the totality of the circumstances when determining if an officer had a "particularized and objective basis" for suspecting legal wrongdoing. *Cortez*, 449 U.S. at 417. When considering the totality of the circumstances, courts should "recognize the validity of permitting an officer to assess the facts in light of his past experience." *Id*.

This Court in *Montoya de Hernandez* relied heavily on the customs agents' knowledge and past experience in assessing whether reasonable suspicion justified a secondary inspection and strip search. 473 U.S. at 541. From her passport, agents noticed Montoya de Hernandez traveled frequently between Bogotá, Colombia and Miami or Los Angeles. *Id.* at 533. Questioning revealed that Montoya de Hernandez had no family or friends in the United States and no reservations for accommodations. *Id*. When agents found $5,000 in cash, Montoya de Hernandez explained that she was there to purchase goods for her husband's store in Bogotá, yet she had made no appointments with merchandise vendors. *Id*. Having reprehended dozens of "balloon swallowers" on Avianca Airline flights from Bogotá, agents suspected Montoya de Hernandez of smuggling narcotics in her alimentary canal. *Id*. at 534. Based on the totality of

the circumstances, particularly the suspect's implausible story and the customs agents' experience with alimentary canal smugglers, reasonable suspicion existed for the secondary inspection. *Montoya de Hernandez*, 473 U.S. at 542.

The totality of the objective facts presented in *Cotterman* also amounted to the requisite reasonable suspicion to justify the forensic search. 709 F.3d at 968. The TECS hit during primary inspection resulted from Operation Angel Watch, which revealed Cotterman's prior felony conviction for child molestation, and due to his potential involvement in sex tourism, alerted officials to look for laptops and paraphernalia of child pornography. *Id.* Additionally, Cotterman's passport revealed frequent trips to Mexico, a country associated with sex tourism. *Id*. at 969. Finally, the court took into account the number of electronic devices Cotterman carried with him and the numerous password-protected files on his laptops. *Id.* Collectively, these facts gave rise to reasonable suspicion of criminal activity. *Id*.

Likewise, the facts here collectively give rise to reasonable suspicion of criminal activity. First, the Eagle City border station has always been a major crossing point for criminals entering and exiting the United States. As a result, U.S. border patrol prioritized its security by assigning more agents to Eagle City than any other border station in the United States. R. at 2. Also, during initial questioning, Wyatt's "extremely agitated and uncooperative" demeanor raised the agents' suspicions. Wyatt denied carrying $10,000 or more in U.S. currency, yet a routine search of his car revealed $10,000 in $20 bills. This further raised Ludgate's suspicions since the Ford kidnappers agreed to give proof of life in exchange for $10,000 in $20 bills, the exact amount and denomination found in Wyatt's trunk. R. at 2. Like in *Cotterman*, a search in the criminal intelligence and border watch database for Respondent resulted in a hit, showing she is a convicted felon with a violent criminal history. Respondent was also named as a person of

interest in the high-profile Ford kidnappings, which had been publicized in the *Eagle City Tribune*. R. at 2, 44. Like the agents in *Montoya de Hernandez*, Ludgate relied on her own knowledge of the ongoing investigation into the Ford kidnappings in suspecting Wyatt of criminal activity. R. at 2. Collectively, Wyatt's behavior upon questioning, his close connection with Respondent, the discovery of $10,000 in cash, and Ludgate's awareness of the ongoing investigation into the high-profile kidnappings amounted to reasonable suspicion to initiate the search.

ii. Ludgate's search of Respondent's laptop was reasonably related in scope to the circumstances, which justified the search in the first place.

The scope of a search must be "strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19. When conducting this analysis, however, courts are cautioned against "unrealistic second guessing." *United States v. Sharpe*, 470 U.S. 575, 686 (1985). "The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable." *Id*. at 687. Law enforcement must be allowed "to graduate their response to the demands of any particular situation." *United States v. Place*, 462 U.S. 696, 709, n.10. (1983). In sum, "common sense and ordinary human experience must govern over rigid criteria" when assessing the reasonableness of a detention or search. *Sharpe*, 470 U.S. at 685.

Considering the unique difficulties in preventing alimentary canal smuggling, this Court in *Montoya de Hernandez* held that custom agents reasonably graduated their response to the demands of the situation. 473 U.S. at 544. Unlike most illegal activity, alimentary canal smuggling cannot be detected in a brief *Terry*-type stop. *Id*. at 543. Suspicions of alimentary canal smuggling can only be confirmed with an x-ray or a bowel movement. Since she refused the former, agents were forced to obtain a court order while Montoya de Hernandez stubbornly

resisted the call of nature in a holding cell for sixteen hours. *Montoya de Hernandez*, 473 U.S. at 543. This Court held that, considering the totality of the circumstances, the detention was reasonable. *Id*. at 544. Given the difficulty of detecting and apprehending alimentary canal smugglers, agents appropriately graduated their response to the demands of the situation. *Id*. This Court also refused to charge the agents with a delay caused by the suspect's evasive actions and the magistrate's slow response in issuing a court order. *Id.*

The court in *Cotterman* also held that the prolonged forensic examination was partially attributable to the suspect's evasive actions. 709 F.3d at 970. After Cotterman failed to provide passwords to the protected files and fled the country, it took agents days to override the computer security and open the files of child pornography. *Id.* The court also pointed to the difficulty of laptop searches, noting that, because it is unlikely that child pornography will be stored in a clearly labeled folder, law enforcement must search every file on the computer for incriminating material. *Id*. Due to the nature of laptop searches and the suspect's evasive actions, the court held the forensic searches of the laptops in *Cotterman* were reasonably related in scope to the initial justification. *Id*.

In contrast to *Montoya de Hernandez* and *Cotterman*, the search here did not involve a prolonged detention or a forensic examination. Rather, Ludgate conducted a cursory search of the laptop by glancing at the documents already opened on the desktop. R. at 3. The fact that Ludgate had time to get a warrant does not suddenly render the search unreasonable. *See Sharpe*, 470 U.S at 687. Given Wyatt's connection to Respondent, and thus, the likelihood of his involvement in the Ford kidnappings, Ludgate appropriately graduated her response to the demands of the situation by conducting a cursory search of the laptop - the only way to verify her suspicions. Since reasonable suspicion existed to justify the search at its inception and its scope

was reasonably related to the circumstances, the laptop search here met the requirements of the two-fold inquiry.

C. *Riley* is Inapplicable Because it Did Not Modify or Undercut the Border Search Exception and Does Not Provide a Workable Standard for Digital Border Searches.

Riley held that, as a general rule, police must obtain a warrant before searching the digital information on an arrestee's cell phone. 134 S.Ct. at 2495. To reach this conclusion, the *Riley* Court balanced individual privacy concerns implicated in cell phone searches incident to arrest with the governmental interests justifying the exception – specifically, preventing the destruction of evidence and ensuring officer safety. *Id*. at 2484-85. Given the sensitive information stored on cell phones and their immense storage capacity, cell phone searches incident to arrest posed a significant threat to privacy without furthering the governmental interests underlying the exception. *Id*. at 2489.

While the privacy concerns and governmental interests in digital searches incident to arrest were thoroughly analyzed, *Riley* did not modify or undercut the paradigmatic border search exception. *United States v. Ramos*, 190 F. Supp. 3d 992, 998 (S.D. Cal. 2016). Aside from exigent circumstances, *Riley* made no reference to any other case specific exceptions to the warrant requirement, suggesting that the holding was limited to the search incident to arrest exception. *Riley*, 134 S.Ct. at 2494. The governmental interests in the border search exception - specifically, preventing unwanted persons and effects from entering the United States - differ significantly from the governmental interests underlying searches incident to arrest. Since *Riley* did not address the unique governmental interests underlying the border search exception to the warrant requirement, *Riley* is inapplicable to the case at bar.

Furthermore, the vast majority of these courts interpret *Riley* according to *Cotterman*, holding that no justification is needed to perform cursory, digital searches at the border while more invasive searches require reasonable suspicion. *See Cotterman*, 709 F.3d at 952; *Ramos*, 190 F. Supp. 3d at 998; *Kolsuz*, 185 F. Supp. 3d at 854-55; *Caballero*, 178 F. Supp. 3d at 1012; *Saboonchi*, 48 F. Supp. 3d at 819; *Hassanshahi*, 75 F. Supp. 3d at 118. This standard allows custom officials to predictably do their jobs while offering a heightened level of privacy suggested in *Riley*. *Ramos*, 190 F. Supp. 3d at 1003.

Because *Riley* is inapplicable to digital border searches, this Court should adopt the predominant approach articulated in *Cotterman*. Under *Cotterman*, Ludgate's search of Respondent's laptop was valid because it was a routine and cursory search requiring no justification. However, even if this Court were to decide that the search here was non-routine, reasonable suspicion existed to justify the intrusion. Regardless, Ludgate's search of Respondent's laptop was valid under the border search exception to the warrant requirement.

II. THE OFFICERS' USE OF TECHNOLOGY DID NOT VIOLATE RESPONDENT'S FOURTH AMENDMENT RIGHTS.

The Fourth Amendment applies only to "unreasonable searches." U.S. Const. amend. IV. In *Katz*, this Court laid out a two-part test to determine if a government action constitutes a "search." 389 U.S. 347 (Harlan, J., concurring). Under *Katz*, the government has intruded upon an individual's reasonable expectation of privacy if: (1) the person has exhibited a subjective expectation of privacy and (2) society is prepared to objectively recognize that expectation as reasonable. *Id.* at 361. Unless both prongs are satisfied, a search has not occurred and an individual's Fourth Amendment rights have not been violated.

A. Officer Lowe's Use of the PNR-1 Drone Did Not Constitute a Search Under the Fourth Amendment.

In *Katz,* this Court stated that, "the Fourth Amendment protects people, not places." *Id.* at 351. However, affording such protections usually requires reference to a "place." *Id.* at 361. It is well established that the Fourth Amendment protects the home, though its protections do not extend to certain areas. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("when it comes to the Fourth Amendment, the home is first among equals"); *but see Hester v. United States*, 265 U.S. 57 (1924) (declining to extend Fourth Amendment protection to open fields); *see also Oliver v. United States*, 466 U.S. 170, 178 (1984). The ultimate inquiry is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987).

In contrast to the "open fields doctrine" set forth in *Hester* and *Oliver*, areas known as "curtilage" are protected under the Fourth Amendment. Curtilage is the area near the home "to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." *Oliver*, 466 U.S. at 180 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); *accord Jardines*, 569 U.S. 1. This Court, in *Dunn*, set out four-factors to help determine whether an area constitutes curtilage. The four factors are:

> [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included in an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the areas from observation by people passing by.

Dunn, 480 U.S. at 301. While informative, the factors are an analytical tool, not a firm test. *Id.*

In *California v. Ciraolo*, this Court addressed the issue of aerial surveillance in the Fourth Amendment context. 476 U.S. 207 (1986). There, law enforcement officers flew over Ciraolo's house in a private plane, at an altitude of one thousand feet. *Id.* at 209. The officers identified

marijuana growing in the backyard and photographed the area. *Ciraolo*, 476 U.S. at 209. The area was immediately adjacent to the home and surrounded by high fences. *Id.* at 213. This Court concluded that the garden constituted curtilage. *Id.* However, this Court did not stop its analysis there.

"That the area is within the curtilage does not itself bar all police observation." *Id.* "What a person knowingly exposes to the public, even in his own home," is not protected under the Fourth Amendment. *Katz*, 347 U.S. at 351. Thus, plain sight observation by law enforcement, "from a public vantage point where [they have] a right to be" does not constitute a search. *Ciraolo*, 476 U.S. at 213. Law enforcement has never been required "to shield their eyes when passing by a home on public thoroughfares." *Id.* This principle extends to non-intrusive searches in navigable airspace, fully accessible to the public. *Id*. While this Court established that Ciraolo had a subjective expectation of privacy, it ultimately concluded that objectively, his "expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." *Id.* at 214. This Court reasoned that Ciraolo had knowingly exposed the garden to aerial observation and that the observations lawfully "took place within public navigable airspace, [in a] physically nonintrusive manner."[2] *Id.* at 213.

This Court addressed the same issue in *Florida v. Riley*, 488 U.S. 445 (1989). In *Riley*, law enforcement conducted surveillance on a partially covered greenhouse in Riley's backyard from a helicopter at an altitude of four hundred feet. *Id.* at 447-48. The greenhouse was determined to be within the curtilage of the home because it was located close to the home, partially enclosed, obstructed from view by trees and shrubs, and contained a "DO NOT ENTER" sign. *Id.* at 448. Even though the greenhouse was within the curtilage of the home,

[2] In Dow Chemical Co. v. United States, a companion case to Ciraolo, this Court similarly held that aerial surveillance of an industrial complex from an airplane flying in navigable airspace was not a "search" under the Fourth Amendment. 476 U.S. 227 (1986).

this Court relied on *Ciraolo* and held that Riley's expectation of privacy was unreasonable and not one society was prepared to honor because the greenhouse was partially open and the helicopter was in publically navigable airspace and not violating any law. *Riley*, 488 U.S. at 449.

We can use the *Dunn* factors to help determine if the area that the drone observed constituted curtilage. First, the pool house is an entirely separate building, at least fifty feet away from the main house and separated by both the patio area and the pool itself. R. at 4. Second, there are no enclosures or fences surrounding either the main house or the pool area. R. at 4. Further, there are no awnings, tents or other objects that shield the buildings from aerial observation. R. at 4. Third, the area is presumably unused since nobody is living in the pool house on a permanent basis. R. at 3. Fourth, the area is unprotected from observation. R. at 4. This is evidenced by Detective Perkins' ability to walk up to both the house and pool house without obstruction. R. at 4. Thus, all four factors weigh in favor of finding that the area observed by the drone was not within the curtilage of Macklin Manor, and that Respondent had no reasonable expectation of privacy from aerial surveillance.

Even if the area is deemed to be curtilage, the observations of the drone do not constitute a search. The drone was not violating any laws as it was traversing in navigable airspace, fully accessible to the public. R. at 4. While the Court of Appeals relies on the fact that there had been recent network connectivity problems, there is no actual evidence that the drone flew higher than the one thousand six hundred forty foot altitude limit prescribed by law and preprogrammed into the drone. R. at 19, 41. Further, the search was non-intrusive. The drone flew above Macklin Manor for fifteen minutes and took a few pictures without physically intruding in any manner. R. at 4. Lastly, any member of the public could have flown a drone over Macklin Manor and observed what Officer Lowe did. To say, as the Court of Appeals did, that the use of

the drone is "highly intrusive" because the area is away from a major airport and frequently avoided by oncoming aircraft is non sequitur. R. at 19. Aircraft constantly traverse navigable airspace far from any airport and just because aircraft frequently avoid the area does not mean that they *always* avoid it. Therefore, under *Ciraolo* and *Riley*, the use of the drone to observe the layout of Macklin Manor, an area knowingly exposed to the public, did not constitute a search.

B. Detective Perkins' Use of the Handheld Doppler Radar Device Did Not Constitute a Search Under the Fourth Amendment.

This Court addressed the use of sense-enhancing technology in *Kyllo v. United States*. 533 U.S. 27 (2001). There, law enforcement used a thermal imaging device to detect heat within the defendant's home. *Id.* at 29-30. The officers detected large amounts of heat emanating from the home, supporting their belief that marijuana was being grown inside. *Id.* This Court held that information obtained by sense-enhancing technology "regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search," at least where the technology is not in general public use. *Id.* at 34.

Applying *Kyllo*, we must address first, whether the information could have otherwise been obtained without entering the home, and second, whether the Doppler is in general public use. The Doppler cannot reveal details of the inside of a building. R. at 4. Rather, it can only determine how many people are present inside the home (within fifty feet of the device) and roughly where they are located. R. at 4. Here, the Doppler detected one individual in the main home, a few feet from the door. R. at 5. In contrast to *Kyllo, here* it is clear that there were other means by which the officers could have obtained this information. Hoffman, who was conducting loose foot surveillance, was likely to see someone enter or leave the house eventually. Mere observation from across the street would produce this result. Further, the

drone was able to capture Respondent walking from the main house to the pool house. R. at 4. Additional drone surveillance would likely have shown Respondent or another individual enter the main house. Therefore, the information gathered by the Doppler could have otherwise been obtained without physically entering the house.

Turning to the second inquiry under *Kyllo*, we must determine if the Doppler is in general public use. It is undisputed that Doppler devices have become *extremely popular* amongst law enforcement agencies. R. at 4, 33. However, the Court of Appeals concluded that while the devices are in common use by law enforcement and the military, they are not in general public use. R. at 20. The only facts supporting this conclusion are: (1) that the police department orders them directly from the manufacturer, and (2) Detective Perkins' speculation that they are not popular amongst the public because they "are built for law enforcement purposes." R. at 35. However, the Court of Appeals conclusion that the Doppler is not in general public use does not necessarily follow from these facts. In fact, the drone, which is in general public use, exhibits the same characteristics as the Doppler. Not only was the drone "specifically designed for law enforcement," but it is also "shipped directly from the manufacturer" to the customer. R. at. 46. Despite these characteristics, the drone remains a "favorite amongst drone enthusiasts." R. at 3, 40. The assumption that the Doppler is not in general public use cannot be directly drawn from these facts.[3] It is entirely possible that, like the drone, the Doppler has a market amongst enthusiasts of such items. Thus, the use of the Doppler in this case satisfies both inquiries under *Kyllo*, and was therefore not a search in violation of the Fourth Amendment.

[3] This Court in Kyllo listed several technologies not in "general public use." *See* Kyllo v. United States, 533 U.S. 27 (2001) (concluding that a thermal imaging device, a satellite capable of scanning from many miles away, a radar flashlight, and a below-red telescopic night scope were not in general public use).

C. The Officers' Use of the PNR-1 Drone and the Handheld Doppler Radar Device Did Not Produce Any Fruits of the Poisonous Tree.

Even if this Court concludes that the use of the drone and the Doppler constituted illegal searches, Respondent fails to show any "fruits" resulting from those searches. The "fruit of the poisonous tree" doctrine excludes items of evidence illegally obtained by law enforcement, absent an exception. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

One well-established exception is the independent source doctrine, which admits evidence obtained by means independent of the constitutional violation. *Id.* Its purpose is to "[put] the police in the same, not a *worse*, position [then] they would have been in if no police error or misconduct occurred." *Nix v. Williams*, 467 U.S. 431, 443 (1984). Thus, if an independent source of information provides a basis for the evidence, the exception applies.

Here, the inquiry is whether there was enough evidence to establish probable cause for the search warrant, absent the observations of the drone and the Doppler. A showing of probable cause is required for a search warrant to be issued. *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Probable cause is determined by the totality of the circumstances and is a fluid concept that turns on "the assessment of probabilities in particular factual concepts." *Id.* at 230, 232. Therefore, courts look to both the "factual and practical considerations of everyday life on which reasonable and prudent [people] . . . act." *Brinegar v. United States*, 338 U.S. 160, 176 (1990). The principal components of probable cause are: (1) the events leading up the search, and (2) whether these facts, viewed from an objectively reasonable officer, resulted in probable cause. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

Even though the search warrant was obtained after the drone and the Doppler had been deployed, the information acquired was not necessary to establish probable cause. Respondent is a felon with multiple convictions for crimes of violence and is a named person of interest in the

Ford kidnappings. R. at 2. Mr. Wyatt was stopped at the border with $10,000 in $20 bills, the exact amount and denomination that the Ford kidnappers had asked for. R. at 2. In addition, a laptop with Respondent's initials, "AK," was found in the trunk. R. at 2. Mr. Wyatt confirmed that he shared the laptop with Respondent. R. at 2. Further, the open documents on the laptop contained information that linked Respondent to Macklin Manor.[4] R. at 3. These facts in totality, viewed from an objectively reasonable officer, indicate that probable cause existed before the drone and the Doppler were used.

Not only did Detective Perkins already have the requisite probable cause for a search warrant, but he deployed the drone and the Doppler for safety reasons, not for the purpose of establishing probable cause. It is undisputed that "Detective Perkins was reluctant to approach the estate without knowing more about its layout and possible residents" because he feared for the safety of his officers. R. at 3, 32. This reluctance turned to fear of endangering the lives and safety of any hostages once it was confirmed that Respondent was on the premises. R. at 4, 33. Therefore, Respondent fails to show any "fruits" resulting from these particular observations and consequently, is not entitled to any relief.

CONCLUSION

This Court should REVERSE the decision of the Court of Appeals for the Thirteenth Circuit and deny Respondent's motion to suppress evidence.

DATED: Respectfully submitted,

Team 25

COUNSEL FOR PETITIONER

[4] The lease agreement was signed by "Laura Pope," one of Respondent's known aliases. R. at 3.