No. 4-422

IN THE

Supreme Court of the United States

United States of America,

Petitioner,

v.

Amanda Koehler.

Respondent.

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

BRIEF FOR PETITIONER

Counsel for Petitioner
Team #31

Questions Presented:

1. Whether the government's search of Respondent's laptop at a border station is a valid search pursuant to the border search exception to the warrant requirement;

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases Page(s)

United States Federal Circuit Court Cases

Statutes

United States Constitution

STATEMENT OF THE CASE

A. Statement of the Facts

In late July 2016, all local law enforcement in Eagle City and surrounding border stations were made aware that three children had been recently kidnapped and were likely being held in Eagle City. R. at 2. In August 2016, local law enforcement was told the kidnappers had agreed to provide proof of life in exchange for $10,000 in $20 bills, to be received by noon on August 18, 2017. R. at 2. On August 17, 2016, at approximately 3:00 a.m., U.S. Border Patrol Agents Christopher Dwyer and Ashley Ludgate, were on patrol at the Eagle City border station, located between the State of Pawndale and Mexico, when they stopped a car driven by Scott Wyatt. R. at 2. Upon his vehicle being approached Wyatt began to display unusual characteristics; he was pale, fidgety, brief in answering questions, and refused to make eye contact with either agent. R. at 26. In light of this agitated and uncooperative behavior agents conducted a search of his vehicle and discovered $10,000 in $20 bills and a laptop with the initials "AK" inscribed on it. R. at 2. Upon being questioned, Wyatt stated that the laptop was shared by he and his fiancé, Amanda Koehler ("Respondent"). R. at 2.

Knowing the money located in Wyatt's car matched that which was requested by kidnappers, the agents ran the name Amanda Koehler through a border watch database. R. at 2. The database search revealed that Respondent – a felon with multiple convictions for crimes of violence – was a named person of interest in the recent kidnapping. R. at 2. Subsequently, Agent Ludgate opened the laptop, and on the computer desktop were several opened documents containing private information regarding the father of the kidnapped children; including bank information and the schedules of he and his staff. R. at 3, 28. Furthermore, there was a lease agreement for a location in Eagle City known as Macklin Manor. Macklin Manor was located atop

Mount Partridge which, weather permitting, typically permitted overhead air traffic. R. at 3. According to the lease, this property was now being leased through a shell company based in the Cayman Islands, under Respondent's alias "Laura Pope." R. at 3.

Based on information provided by border patrol to Eagle City Police Department, Detective Perkins, was reluctant to approach the manor without more information on its layout and possible occupants. R. at 3. Approximately an hour and a half after the stop at the border, Detective Perkins, Officer Hoffman, and Officer Lowe began surveillance of Macklin Manor. While Officer Hoffman patrolled on foot, Officer Lowe deployed a PNR-1 drone, a popular aerial drone, to conduct aerial surveillance. R. at 3. The PNR-1 drone, which was preprogrammed to fly at a specific altitude for a maximum of 35 minutes, was able to capture images of the layout of the estate and a photo identifying Respondent traveling outside from the main house to the pool house. R. at 4.

Armed with the knowledge that Respondent a person of interest in an ongoing kidnapping with a history of violent crime, was on the premises, Detective Perkins became fearful that without discretely obtaining further information the lives and safety of any potential hostages would be in danger. R. at 4. Detective Perkins and Officer Hoffman approached both the main and pool houses and used Doppler radar, which emits a radio wave that can detect movement inside a building, to determine the number of individuals on the premises to ensure optimal safety. R. at 4. The scan revealed a number of people both in the main house and the pool house. R. at 5. More specifically, what appeared to be three individuals, close together, with another individual pacing near them, presumably standing guard, in the pool house. R. at 5. Within a few short hours, officers returned with SWAT and a warrant and entered the estate. Inside Ms. Koehler and two others were arrested and the three kidnapped children and weapons were recovered. R. at 5.

B. 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. R. at 5.

The district court properly denied Respondent's motion to suppress, finding the border search exception provided the necessary authority to conduct the border search on Wyatt's vehicle and was not a violation of Respondent's Fourth Amendment rights. R. at 6, 13. Further, the district court found that the use of the PNR-1 drone and the Doppler radar device was not an unreasonable search, based on a person's reasonable expectation of privacy in light of technological advances, and therefore not a violation of Respondent's Fourth Amendment rights. R. at 6.

On appeal, the Thirteenth Circuit erroneously reversed the ruling of the district court, based on a lack of reasonable suspicion to conduct the border search and the use of "highly intrusive" devices violating Respondent's Fourth Amendment right to privacy. R. at 18-19, 21. Petitioner's writ of *certiorari* to the United States Supreme Court was granted. R. at 22.

STANDARD OF REVIEW

In reviewing the judgement entered by the United States Court of Appeals of the Thirteenth Circuit, this court should reject the Thirteenth Circuit's finding of law because there is clear error. "In evaluating the denial of a motion to suppress evidence, [the Court] reviews the district court's factual findings for clear error and its conclusions of law *de novo." United States v. Levy, 803 F.3d 120 (2015) (quoting United States v. Foreste,* 780 F.3d 518, 523 n. 3 (2d Cir.2015)). In reviewing the judgement entered by the United States Court of Appeals for the Thirteenth Circuit, this court

should review the application of law to fact *de novo* and affirm the district court's finding of the law and reject the Thirteenth Circuit's findings because there is clear error.

SUMMARY OF ARGUMENT

The border search conducted on Wyatt's vehicle was permitted through the border search exception which allows, routine and non-routine, searches at international borders or their equivalent. This exception extends to digital searches of electronic devices. The digital search of Respondent's shared laptop with Wyatt did not amount to an exhaustive forensic search, however if it had, Border Patrol Agents possessed the requisite reasonable suspicion based on Wyatt's behavior to conduct such examination. Absent application of the border search exception Wyatt consented to the search of the shared laptop in his possession.

Operating on information obtained through the border search Eagle City Police Department conducted routine surveillance of Respondent's home through the use of a PNR-1 drone in navigable airspace. After receiving confirmation through the use of the drone that Respondent, a convicted violent felon and person of interest in the kidnapping, was on the premises officers used the handheld Doppler radar device under the exigent circumstances exception to the Fourth Amendment. The use of the Doppler radar on the pool house, located outside of the curtilage of the home, provided officers with the knowledge necessary to ensure optimal safety for both the children being held hostage and the officers present. Neither device was used to establish probable cause which had already been established through the lawful border search. Ultimately, the border search and the use of both devices on Respondent's home were lawfully conducted within the parameters of the Fourth Amendment.

ARGUMENT

I. THE BORDER SEARCH EXCEPTION PERMITS FEDERAL AGENTS TO CONDUCT ROUTINE AND NON-ROUTINE SEARCHES AT THE INTERNATIONAL BORDER OR ITS FUNCTIONAL EQUIVALENT AND THIS EXCEPTION EXTENDS TO DIGITAL SEARCHES OF ELECTRONIC DEVICES

A. Customs and Border Patrol Agents Conducted a Routine Search of the Laptop Computer Within the Scope of the Border Search Exception

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, and no warrants shall issue, but upon probable cause." *U.S. Const. Amend. IV*. Thus, "warrantless searches and seizures are *per se* unreasonable unless they fall within a few narrowly defined exceptions." *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993). Border searches constitute one recognized exception. *United States v. Garcia,* 905 F.2d 557, 559-60 (1st Cir.1990)

The border search exception allows government agents to conduct warrantless, suspicion-less, routine searches of individuals, their vehicles, and their effects when passing through a border station. *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). Border searches are deemed reasonable because "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Flores-Montano*, 541 U.S. at 152. Historically, border searches "have been considered 'reasonable' by the single fact that the person or item in question ha[s] entered [the United States] from [the] outside." *United States v. Ramsey,* 431 U.S. 606, 619 (1977). This Court stated, "[i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *Flores-Montano*, 541 U.S. at 152.

Thus, Federal Customs officers have the authority to perform routine and non-routine searches to review a traveler's documents and other items at the border when they reasonably

suspect that the traveler is engaged in criminal activity, even if the crime falls outside the primary scope of their official duties. *Levy*, 803 F.3d at 120. Routine border searches do not "embarrass or offend the average traveler" and thus do not seriously invade an individual's right to privacy. *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993)

Customs and Border Officials are subject to a "no suspicion" standard when conducting routine border searches. *United States v. Braks*, 842 F.2d 509 (1st Cir. 1988). Indeed, this Court pointed out, "[. . .] automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-563 (1976). In determining whether an inspection made at the border is routine, this Court and several Circuits have highlighted six factors[1] to aid courts in this determination, and from these concluded "the only types of border searches that have been consistently held to be non-routine are strip searches and body-cavity searches." *Braks*, 842 F.2d at513.

Respondent erroneously claims the search of the laptop computer conducted by Agent Ludgate amounted to a non-routine search requiring reasonable suspicion. R. at 17. This assertion misunderstands the application of the law. A laptop is a piece of property and does not implicate the "same dignity and privacy concerns as a highly intrusive search of [a] person." *Flores-Montano*, 541 U.S. at 152. Although Respondent contends the laptop computer contained "hundreds, if not thousands of personal files and information the government should not be privy

[1] "(i) [W]hether the search results in the exposure of intimate body parts or requires the suspect to disrobe; (ii) whether physical contact between Customs officials and the suspect occurs during the search; (iii) whether force is used to effect the search; (iv) whether the type of search exposes the suspect to pain or danger; (v) the overall manner in which the search is conducted; and (vi) whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search." *United States v Braks*, 842 F.2d 509, 512 (1st Cir. 1988).

to," a manual digital search of an electronic device is a routine border search. *United States v. Ickes,* 393 F.3d 501 (4th Cir.2005).

In *Ickes*, the defendant was stopped by Customs agents as he attempted to drive his van from Canada into the United States. *Id.* at 502. A cursory search of the vehicle revealed a video camera containing a tape of a tennis match "focusing excessively on a young ball boy" and photograph albums depicting provocatively-posed prepubescent boys, prompting agents to continue searching the van. *Id*. at 502-03. Agents discovered, searched, and seized a computer and approximately seventy-five disks and manually investigated their contents by accessing their content in the same way a typical user would do without conducting a sophisticated forensic analysis of the contents of the computer or disks. *Id.* The Fourth Circuit held "the manual digital border search of the computer and disks was routine, and therefore did not require any level of suspicion." *Id.* at 505–06. Ultimately finding the manual review of computer files to be "no different" than a manual review of papers contained in luggage. *Id.* at 505–06.

In *United States v. Arnold*, 553 F.3d 941, 947 (9th Cir. 2008), the Ninth Circuit, persuaded by *Ickes*, concluded a routine border search occurred when Customs agents inspected defendant's luggage containing a laptop computer, a hard drive, a computer memory stick, and six compact discs. *Id*. at 943. Agents instructed defendant to turn on his computer and examined defendant's computer and equipment, which resulted in numerous images depicting child pornography. *Id.* The Ninth Circuit, relying on the non-offensive manner of the search, denied defendant's motion to suppress the evidence concluding "reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border." *Id*.

Respondent asserts labeling the August 17, 2016, border search "routine" would not serve to protect the privacy of any individual crossing the border with a phone or laptop." R. at 17.

However, that view is strained as the classification of routine searches pertaining to the manual search of electronic devices has been upheld in order to identify and stop dangerous, criminal behavior, similar to this case, and to protect the safety of the United States and its citizens. Respondent fails to recognize the heightened security interest of the United States in protecting citizens from the unwanted entry of persons or effects. *Florez-Montano*, 541 U.S. at 149. The search conducted by Agent Ludgate was akin to the searches in *Ickes* and *Arnold* in that it was conducted after initial circumstances yielded questions of criminal activity. Wyatt was connected to an individual identified as a person of interest in a kidnapping case involving multiple children and was found in possession of the exact denominations of proof of life ransom money identified in the kidnapping investigation. R. at 2.

Agents did not need reasonable suspicion to search the laptop or other personal electronic storage devices at the Eagle City Border Station. Agent Ludgate, did no more than a manual review when she, opened Respondent's shared laptop computer and found several documents already open, thus classifying this as a routine search. R. at 3. The resulting incriminating evidence is permissible and the search did not violate Respondent's Fourth Amendment Rights. Respondent and her fiancé, similar to any traveler entering the United States from the outside, "may be [. . .] stopped in crossing because of national self-protection [. . .]." *Johnson*, 991 F.2d at 1291. This inclusion of routine digital searches mitigates the very type of criminal behavior before the court in this case.

B. The Digital Search of the Laptop Did Not Amount to an Exhaustive Forensic Examination, However if it had, Federal Customs and Border Patrol Agents Possessed the Requisite Reasonable Suspicion

The Supreme Court has reserved the label "non-routine" for intrusive border searches of a person, and not their belongings or vehicles. *Braks*, 842 F.2d at 511. It is well established "that,

for inbound traffic, Customs Agents may conduct non-routine searches at the border or its functional equivalent provided they have [reasonable suspicion]." *United States v. Roberts*, 274 F.3d 1007 (5th Cir.2001). Forensic digital searches are considered non-routine border searches because "the uniquely sensitive nature of data on electronic devices carries with it a significant expectation of privacy, and thus renders an exhaustive exploratory search more intrusive than with other forms of property." *United States v. Cotterman*, 709 F.3d 952 (2013)

The routine search of the laptop was a manual digital search and Respondent inaccurately claims reasonable suspicion was required. Respondent's assertion contravenes the long-standing principle "that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border." *Arnold*, 523 F.3d at 947. Respondent misunderstands that only forensic digital searches require reasonable suspicion and the search conducted here was a manual digital search as agents only accessed documents that were already open on the desktop. R.at 3.

Even assuming the search was a forensic digital search, Agent Ludgate possessed the requisite reasonable suspicion. In *Irving*, 425 F.3d at 124, the Second Circuit held searches of computer diskettes and undeveloped photographic film found during a routine search of defendant's luggage upon his return to United States, were supported by reasonable suspicion. The court found reasonable suspicion was established because inspectors knew defendant was a convicted pedophile returning to the United States from Mexico after visiting an orphanage.

"Reasonable suspicion must be based upon specific facts which, taken together with rational inferences [. . .] reasonably warrant intrusion." *Roberts*, 274 F.3d at 1014. Specifically, reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id*. This assessment is made in light of "the totality of the

circumstances," and "[e]ach case ultimately turns on its own facts." *Cotterman*, 709 F.3d at 968; s*ee also Roberts*, 274 F.3d at 1014. When making this determination, courts consider (1) the unusual conduct of the defendant; (2) discovery of incriminating matter during routine searches; (3) computerized information showing propensity to commit relevant crimes; or (4) a suspicious itinerary. *Irving*, 452 F.3d at 110. "Even when factors considered in isolation from each other are susceptible to an innocent explanation, they may collectively amount to reasonable suspicion." *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007).

In *Roberts*, 274 F.3d at 1014, the Fifth Circuit affirmed the denial of a motion to suppress evidence of child pornography. The court held Customs Agents had reasonable suspicion to justify an initial jet-way search, based on defendant's evasive behavior and the receipt of verified "information of requisite detail from a confidential source." *Id.* at 1014-15.

Moreover in *Levy*, 803 F.3d at 123, the Second Circuit held the search and copying of defendant's notebook by a Customs Officer at an international airport was justified by reasonable suspicion. The Customs Officer was aware, based upon information provided by a DEA task force, of defendant's ongoing criminal participation in securities fraud schemes prior to his arrival at the airport. *Id.* The court reasoned the Customs and Border Patrol Officers were entitled to rely on information provided by another federal law enforcement agency stating, "[o]fficial interagency collaboration, even (and perhaps especially) at the border, is to be commended, not condemned. Whether a Customs official's reasonable suspicion arises entirely from her own investigation or is promoted by another federal agency is irrelevant to the validity of a border search." *Id*.

Similar to both *Roberts* and *Levy,* Agent Ludgate possessed the requisite reasonable suspicion to conduct a forensic examination, based on Wyatt's behavior and her knowledge of the kidnapping investigation with the FBI. R. at 3. As in *Levy*, the Eagle City Police Department, FBI,

and Eagle City Border Patrol had all been working together and exchanging information in an effort to catch the individuals responsible for the kidnapping. R. at 3. In fact, prior to stopping Wyatt, the kidnappings were broadcast all over the news and agents at the Eagle City Border Station had been briefed on the case. R. at 27. Consequently, Agent Ludgate was aware the kidnappers had asked for the exact amount and denomination of money found in Wyatt's car in exchange for proof of life for the kidnapped children. R. at 27.

Additionally, like *Roberts*, Wyatt appeared extremely agitated and uncooperative after he was stopped at a major crossing point for criminals entering both the United States and Mexico. R. at 2. Wyatt was pale, fidgety, brief in answering questions, and refused to make eye contact with either agent. R. at 26. Additionally, Agent Ludgate became aware Respondent was a prior violent felon and person of interest in the high-profile kidnapping after Wyatt admitted to having a close personal relationship with her. R. at 2, 26-27. The totality of these circumstances sufficiently established reasonable suspicion as outlined by the courts in both *Roberts* and *Levy*.

Respondent's contention that there was no reason to search the laptop or reason to believe that there would be any further evidence of crime or wrongdoing on the laptop is nonsensical. Respondent is asking this court and federal law enforcement officers to ignore evidence and fruits of a crime. If the Court agrees, it would be asking law enforcement to ignore the very function of their position – ensuring safety and protecting the integrity of this nation and its citizens.

C. Even Absent the Border Search Exception, Respondent's Fiancé Consented to the Search of the Shared Laptop Computer and *Riley v. California* is Inapplicable to the Present Case

Consent "can be implied from silence or failure to object if it follows a police officer's explicit or implicit request for consent." *United States v. Cooper,* 43 F.3d 140, 148 (5th Cir. 1995) (finding "clear cooperation" when defendant "produced his ticket when requested" and "stood up

voluntarily prior to the pat-down"); *see also United States v. Zapata,* 18 F.3d 971, 977 (1st Cir. 1994) ("[I]t is settled law that the act of handing over one's car keys, if un-coerced, may in itself support an inference of consent to search the vehicle."). To determine whether a person's consent is voluntary, the Court considers six factors: "(1) the voluntariness of the suspect's custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect's cooperation; (4) the suspect's awareness of his right to refuse consent; (5) the suspect's education and intelligence; and (6) the suspect's belief that no incriminating evidence will be found." *United States v. Macias*, 658 F.3d 509, 523 (5th Cir. 2011). Courts measure the scope of a person's consent by what is objectively reasonable: "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno,* 500 U.S. 248, 251 (1991). "Thus, it is 'important to take account of any express or implied limitations [. . .] attending the consent which establishes the permissible scope of the search in terms of [. . .] time, duration, area, or intensity.'" *United States v. Cotton*, 722 F.3d 271, 275 (5th Cir. 2013) (internal citation omitted).

Further, when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to [. . .] the effects sought to be inspected. *United States v. Matlock*, 415 U.S. 164 (1974) For purposes of the validity of consent to search by one who possesses common authority over effects with one or more persons, "common authority is not implied from a mere property interest, but rests on mutual use of the property by persons generally having joint access or control for most purposes, so that each has right to permit inspection in his own right and so that the others have assumed the risks thereof." *Id*.

When asked by Agent Ludgate if the laptop was his, "Wyatt stated that he shared the laptop with his fiancé, Amanda Koehler." R. at 2. The facts of this case further indicate Wyatt consented to the search of the laptop computer he shared with Respondent. As a result, the fruits from that search do not violate Respondent's Fourth Amendment rights. Since Respondent shared the laptop with Wyatt, he had sufficient authority over it to consent to the search.

Prior to the search of the laptop, Agent Ludgate "calmly informed [Wyatt] of [agent's] right to search his vehicle and that it was a routine search." R. at 2. At no time did Wyatt object when agents opened the computer and began conducting the manual digital search. Any reasonable person in that situation would recognize their property was being searched, especially when they were told a search was underway. R. at 2. Not only was Wyatt aware of the search, but he did object in any way. R. at 28-27. Consequently, the evidence resulting from that search is proper and admissible.

Lastly, Respondent improperly asserts that an analysis under *Riley v. California*, 134 S.Ct 24473, 2489 (2014), reveals a violation of her rights. *Riley v. California* is inapplicable and that argument is misleading. In *Riley v. California*, 134 S.Ct 2473 at 2491, this Court refused to allow a search of a suspect's cell phone as part of a search incident to arrest, and rejected treating a cell phone like a searchable container, because in cloud computing "[. . .] the analogy crumbles entirely when a cell phone is used to access data located elsewhere at the tap of a screen." This Court held the interest in protecting officers' safety, as well as, the interest in preventing destruction of evidence did not justify dispensing with warrant requirement for searches of cell phone data. The facts in *Riley v. California* are incompatible with the present case and Respondent improperly applies its holding. *Riley v. California* concerned a search incident to a drive-by shooting and the

search did not occur at an international border or its functional equivalent. Thus, *Riley* is antithetical and ineffective.

II. USE OF THE PNR-1 DRONE AND THE DOPPLER RADER DEVICE DID NOT VIOLATE RESPONDENT'S FOURTH AMENDMENT RIGHTS

A. The PNR-1 Drone, Operating in Navigable Airspace Fully Accessible to the Public, Made General Observations Strictly for Purposes of Officer and Public Safety

This Court stated in *Katz v. United States,* 389 U.S. 347, 350 (1967), that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" The Fourth Amendment instead "turns on whether a person has a reasonable expectation of privacy," and further that such "subjective expectation of privacy [need] be one that society is prepared to recognize." *Id.* at 360. In applying this standard, the courts have further determined that the "Amendment cannot turn upon the presence of a physical intrusion." *Id.* at 353. Thus, when Mr. Katz closed the door of his phone booth he was "entitled to assume that the words he utter[ed]… [would] not be broadcast to the world." *Id.* at 352. However, such action only excluded the "uninvited ear" and not the "intruding eye." *Id.* Respondent was not observed on her property by the PNR-1 drone until she entered the plain view of her backyard and availed herself to the "intruding eye," thus negating any reasonable expectation of privacy under *Katz*. R. at 4.

Further, the courts have tailored and molded the interpretation of the Fourth Amendment to a multitude of situations, establishing restrictions and exceptions along the way. As technology has evolved, so too has the interpretation and application of the Fourth Amendment. In *California v. Ciraolo*, 476 U.S. 207, 207 (1986), the courts analyzed whether an individuals' Fourth Amendment rights were violated when "police secured a private plane and flew over respondent's house at an altitude of 1,000 feet" while taking pictures of the home and surrounding area. Although the Court acknowledged that the observations were made within the curtilage of the

man's home, it found "the curtilage does not itself bar all police observation." *Id.* at 213. It further stated, "the Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Id.

As in *Ciraolo*, the police flew an aircraft over Respondent's home at an altitude exceeding 1,000 feet. R. at 4. The PNR-1 drone was navigated through airspace that was fully accessible to public aircraft traffic. R. at 3. Additionally, Respondent was crossing from the main house to the pool house when an image of her was captured by the PNR-1 drone. *Id.* Therefore, *Ciraolo* dictates that the PNR-1 drone's photograph did not run afoul of the Fourth Amendment.

Courts weigh three factors to determine whether the use of aircraft by law enforcement, for surveillance, qualifies as a search infringing upon an individual's Fourth Amendment rights: (1) whether the use violates the law; (2) whether the use is "sufficiently rare" that one would reasonably anticipate their actions are not subject to observation; (3) whether the use interfered with respondent's normal use of their home and surrounding curtilage (i.e. creation of extreme wind, noise, or physical contact). *Florida v. Riley*, 488 U.S. 445, 446 (1989)

Applying *Riley* to this case, the use of a PNR-1 drone did not violate any of Pawndale's specific laws regulating drone usage, as it was specifically pre-programmed to fly within the legal limits of those regulations. R. at 4.

Second, the PNR-1 drone was not rare at all, let alone "sufficiently rare," as it was a "favorite among enthusiasts," implying that its use was likely quite common. R. at 3. The city's having devised specific regulations on the use of these drones lends further implication that they were in sufficient use to require such regulations. R. at 4.

Third, nowhere in the facts is there any indication the PNR-1 drone interfered with Respondent's use of her home or curtilage. R. at 4. The drone was being flown over 1,500 feet

above Respondent's home, with no heavy production of wind or noise. R. at 4. In fact, there is no implication of knowledge on Respondent's part of the PNR-1's use at all, until trial. R. at 4. Ultimately, the use of the PNR-1 drone by officers to conduct general observations of Macklin Manor does not conflict with any of the three criteria established by *Riley,* and therefore its use does not qualify as an unreasonable search within the context of the Fourth Amendment.

B. The Exigent Circumstances Exception to the Fourth Amendment, Permits the Use of Doppler Radar by Law Enforcement

The Fourth Amendment does not specify when "a search warrant must be obtained," but this Court has stated that "it is a basic principle of Fourth Amendment law […] that searches and seizures inside a home without a warrant are presumptively unreasonable." *Kentucky v. King,* 563 U.S. 452, 459 (2011). However, this Court has acknowledged that this presumption "may be overcome in some circumstances because 'the ultimate touchstone of the Fourth Amendment is reasonableness.'" *Id.* at 459 (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).

One of these "reasonable exceptions" is when the "exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 460 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). There are three major exigent circumstances exceptions: (1) the "emergency aid" exception; (2) the "hot pursuit" exception; and (3) the "imminent destruction of evidence" exception. *Id.* at 460. In the "absence of hot pursuit, there must be at least probable cause to believe that one or more of the other [exigent circumstances] were present," or officers must "assess the risk of danger," under a two-factor analysis. *Minnesota v. Olsen,* 495 U.S. 91, 912 (1990).

1. The two factors required when assessing the risk of danger where met when Respondent, a prior violent felon, became the suspect of a kidnapping

When an officer assesses the risk of danger in a Fourth Amendment context, he/she is able to rely on their experience as an officer and must consider: (1) the "gravity of the crime" and (2) the "likelihood the suspect is armed. *Id.* The court applied these two factors in *Olsen*, where police pursued a suspect that had been the driver of a getaway car involved in a murder. *Id.* In *Olsen*, the murderer had already been apprehended and the murder weapon had already been retrieved. *Id.* The court found that although the "gravity of the crime" was great, there was little likelihood the additional suspect still being pursued was armed. *Id.* Therefore, the court decided there was not sufficient danger to the police or the public to conduct a warrantless search and seizure. *Id.*

Contrary to *Olsen,* Respondent was a "felon with multiple convictions for crimes of violence" and a person of interest in the recent kidnapping of three children. R. at 2. Kidnapping is widely acknowledged as a crime of great gravity, satisfying the first consideration taken when assessing the risk of danger. In evaluating the information that had already been obtained through the border search (i.e. the suspicious denomination of money and the leasing agreement under Respondent's alias), the fact that Respondent was a person of interest in the kidnapping, and the Respondent's history as a violent felon, it was reasonable for the officers to conclude that Respondent was likely armed. R. at 2-4. In fact, the records states that upon the discovery through the PNR-1 drone that Respondent was on the premises, Detective Perkins "became fearful that alerting the occupants without more information would endanger the lives and safety of any potential hostages" and officers. R. at 4. This indicates that, in the heat of the moment, Detective Perkins had assessed the risk of danger and in relying on his experience as an officer had reasonably concluded that a risk of danger was present.

2. It was necessary for officers to use Doppler radar to protect the lives of the victims and the officers dedicated to their rescue

In "risk of danger" cases, such as this one, three elements "determine whether exigent circumstances existed: (1) officers must have reasonable grounds to believe an immediate need to protect the lives or safety of themselves or others exists; (2) the search must not be motivated by an intent to arrest or seize evidence; and (3) officers must have some reasonable basis, approaching probable cause, to associate the emergency with the place to be searched." *United States v. Smith*, 797 F.2d 836, 840 (10th Cir. 1986).

This court has stated that the "emergency aid exception does not depend on the officers' subjective intent or the seriousness of any crime they are investigating." *Michigan v. Fisher*, 558 U.S. 45, 47 (2009). Instead, it only depends on "an objectively reasonable basis for believing… [that] a person within [the house] is in need of immediate aid." *Id.* Further, officers need not demonstrate "ironclad proof of 'a likely serious, [and] life-threatening' injury to invoke the emergency aid exception." *Id.* at 49. In *Fisher*, this court found this exception was met when officers responded to a report of a disturbance and saw an individual throwing things in a house. *Id.* The court reasoned that because the individual could be throwing the items at another person or even injure himself in his rage, the officer's entry was reasonable under the Fourth Amendment. *Id.*

Contrary to *Fisher*, though the officers did not witness Respondent in any particular action that would immediately qualify as a danger to Respondent or other potential occupants, they did have an objectively reasonable basis for believing that the three kidnapped children were on the premises because they saw Respondent on the premises, knew she was a person of interest in the kidnapping, and knew she was a prior violent felon. R. at 1-4.

Additionally, Detective Perkins stated under oath that he used the Doppler radar specifically to ensure that it was "safe" to conduct a search and to avoid "endanger[ing]" the "lives and safety of potential hostages." R. at 4, 33. There was no intent to immediately seize any individuals or evidence when the radar was deployed. Instead, its deployment and use was for purposes of safety and security only. Therefore, the second element establishing exigent circumstances is satisfied.

Lastly, based on the information obtained at the border search, officers believed that probable cause had already been established prior to the use of the radar device. The purpose of the surveillance of the home through the drone and radar was to learn more about the "layout and possible residents." R. at 3. Additionally, it is important to consider the timeline of events. First, Mr. Wyatt is stopped and searched at the border at 3:00 a.m. R. at 2. Then at approximately 4:30 a.m. officers conduct loose surveillance of Macklin Manor. R. at 3. Finally, by 8:00 a.m. those same officers return with SWAT and a search warrant, which produces illegally possessed firearms the three kidnapped children. R. at 5. The emergency is apparent in the quick action by the officers and the short timeline in which all of these events occurred. That emergency action coupled with the direct connection to the location of Macklin Manor serves to satisfy the final element to establish the exigent circumstance exception.

Therefore, when officers used the Doppler radar device on the home and pool house located at Macklin Manor, their actions were protected under the exigent circumstances exception to the Fourth Amendment. It follows that any information obtained through the use of the radar device was not a violation of Respondent's Fourth Amendment rights.

C. The use of Doppler Radar on the Pool House Located Outside of the Curtilage of the Home is Not a Violation of Respondent's Fourth Amendment Rights

The concept of curtilage "originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law […] as was afforded the house itself" and has since expanded to interpreting the reach of the Fourth Amendment. *United States v. Dunn,* 480 U.S. 294, 300 (1987), *see also Hester v. United States*, 265 U.S. 57, 59 (1924). Ultimately, the Court has found the extension of curtilage "bear[s] upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *Oliver v. United States*, 466 U.S. 170, 180 (1984). Though this Court acknowledges the Fourth Amendment does not extend to open fields or plain view, it has established four criteria to determine if an area falls within the curtilage of a home, thus affording it Fourth Amendment protection: (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passersby. *Dunn*, 480 U.S. at 301.

Applying this four-factor test in *Dunn*, this Court found that a barn which was 50 yards from the home was "standing in isolation" and not an "adjunct of the house." *Id.* at 302. Additionally, the barn was not included in the enclosure of the home and therefore not "clearly marked" as curtilage or an "area around the home to which the activity of the home life extends." *Id.* (quoting *Oliver*, 466 U.S. at 182) Moreover, aerial surveillance had provided the police with data showing the barn was not being used for "intimate activities of the home." *Id.* Lastly, the Court determined that Mr. Dunn had done "little to protect the barn from observations by those standing in the open fields." *Id.* Ultimately, after applying the four-factor test, the court determined that the barn was not within the curtilage of the home and thus not protected under the Fourth Amendment.

Similarly, when applying the *Dunn* factors to the present case, the Court should find that the pool house is not within the curtilage of the home. First, like the barn in *Dunn,* the pool house was approximately 50 feet from the main house, a substantial distance to establish isolation. R. at 4; *see also Dunn*, 480 U.S. at 302. Second, there was no enclosure to the home or the pool house to imply that home life extended to this area of the property. R. at 4. Third, similarly to *Dunn*, police had already acquired photographs through aerial surveillance of Respondent, a violent felon and person of interest in the current kidnapping, on the premises which lead them to believe that the pool house was not being used for "intimate activities of the home." R. at 4; *see also Dunn*, 480 U.S. at 302. Lastly, Officer Hoffman had been conducting foot patrol for an extended period of time and not once did he encounter any barriers and he and Detective Perkins were able to approach the pool house to deploy the Doppler radar with no resistance. R. at 3, 5. This demonstrates that Respondent did nothing to protect the pool house from "observations by those standing in open fields." R. at 5; see also *Dunn*, 480 U.S. at 302. In the end, the pool house does not satisfy the four factors established in *Dunn* and therefore does not fall within the curtilage of the home. Thus, the use of Doppler radar on the pool house is not an unreasonable search in violation of Respondent's Fourth Amendment rights.

D. Neither the PNR-1 Drone nor the Doppler Radar Device were used to Establish Probable Cause and are in General Public Use in Conformity with *Kyllo v. United States*

1. When considering the totality of the circumstances, officers had established probable cause before using the PNR-1 drone and Dopper radar for "loose surveillance"

The Fourth Amendment states, a "warrant may not be issued unless probable cause is properly established." *King*, 563 U.S. at 459. Probable cause "deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). In *United*

States v. Sokolow, 490 U.S. 1, 10 (1989), the court stated that "in making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." An individual may participate in a number of actions that on their own do not amount to illegal conduct. However, when taken as a whole these same actions may provide law enforcement with sufficient probable cause to believe a crime is being committed. *Id.* at 9. In establishing this probable cause, the Court further "recognized that a police officer may draw inferences based on his own experience." *Ornelas v. United States,* 517 U.S. 690, 700 (1996).

In considering the totality of the circumstances, prior to the deployment of the PNR-1 drone and use of the Doppler radar, probable cause had been established. Upon executing the border search, border patrol encountered Respondent's suspicious fiancé in possession of the exact amount money, in the exact denomination, that had been demanded by kidnappers for proof of life of the three children. R. at 2. Additionally, border patrol obtained a laptop containing private personal information and schedules of the children's father and his staff. R. at 2. Also contained on the laptop was information about a property recently purchased by Respondent, under an alias, and through a shell company. R. at 2. None of these facts taken alone are illegal in nature.

However, when applying basic common sense and analytic skills to the totality of the circumstances, law enforcement is provided with sufficient probable cause to believe a crime is being committed. There is no alternative rationale to justify why an individual, who is a person of interest in a kidnapping and a violent felon, would be so closely connected to the possession of suspect materials, suspicious monetary denominations, and discreet ownership through an alias of a relatively isolated home, then to conclude the high probability that this person is the kidnapper.

R. at 3. It was based on this existing probable cause that officers possessed that encouraged them to conduct "loose surveillance," via the PNR-1 drone and Doppler radar, of Macklin Manor. R. 3.

2. When technology is in general public use, an individual's expectation of protection against its use by officers is overcome

In *Kyllo v. United States*, 533 U.S. 27, 34 (2001), this court applied a 2-prong test to establish whether the use of "sense-enhancing technology", defined as any item that enhances the senses of a human being, had violated individuals' Fourth Amendment rights. *Id.* The device must be one that (1) "provides details of the home that would previously have been unknown without physical intrusion," and (2) not in "general public use." *Id.* The Court has acknowledged that the "Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Id.* at 37.

In *United States v. Denson*, 775 F.3d 1214, 1216 (10th Cir. 2014), officers used a Doppler radar device to scan the home to determine how many people were present in the home, prior to entering and executing an arrest warrant. *Id.* Similar to the present case, Mr. Denson was a prior felon with a history of violent crime. *Id.* at 1219. Although this device had been used by an estimated 50 law enforcement agencies for as many as two years, knowledge of its use by officers had been relatively non-existent to the courts until this case in 2014.[2] In addressing the use of the radar device, the court was reluctant to discuss it directly on the basis that the court did not feel it had proficient knowledge of the device to make any reliable determinations. *Id.*

Since 2014, the use of this device has expanded to: "(1) use by police and SWAT team members to detect the presence of assailants or hostages in a building; (2) by search and rescue teams to locate injured or stranded people; and (3) by firefighters to determine whether people are

[2] Brittany A. Puckett, Mighty Morphin' Power Range-r: The Intersection of the Fourth Amendment and Evolving Police Technology, 8 ELON L. REV. 555, 559 (2016)

trapped inside of a burning home or building."[3] Additionally, the manufacturer of the device is a product development corporation that sells the device through its website and in multiple countries, implying its availability everywhere.[4]

Similarly, the PNR-1 drone is used in "police departments in 35 states" nationwide. R. at 46. Though, like the Doppler radar device, the PNR-1 drone was "specifically designed for law enforcement," it has become a favorite among "drone enthusiasts" in the general public. Additionally, both devices are available through orders directly from the manufacturer, which may be placed on their respective websites. R. at 46.

Both the PNR-1 drone and the Doppler device provide details of the home that would otherwise not be unavailable without physical intrusion. However, this is not sufficient to qualify as sense enhancing technology that violates an individuals' Fourth Amendment rights. The device must also be one that is not in general public use. Although both devices were initially designed for law enforcement use, their use has expanded far beyond this original intention. Both devices are fully available to the public for purchase through the internet.

Respondent may argue that the high price of the PNR-1 drone and Doppler radar inhibit general public use, but the Court found that despite its $22,000 price tag, a camera used by law enforcement for surveillance qualified as a device in general public use. *Dow Chem. Co. v. United States*, 476 U.S. 227, 243 (1986) Here, the PNR-1 drone is available for $4,000 and the Doppler device for as little as $400. R. at 35, 46. Ultimately, although the exact quantity of general public

---

[3] Id.

[4] *RANGE-R Theory of Operation*, RANGE-R THROUGH THE WALL RADAR, http://www.range-r.com (last visited Oct. 11, 2017).

use of these two devices has not been measured, when considering their expanded functionality and availability to the public for purchase worldwide, their general public use is explicit.

Therefore, since the PNR-1 drone and Doppler radar were not used to establish probable cause and both devices are in general public use, their use by officers was not a violation of Respondent's Fourth Amendment rights.

CONCLUSION

The district court properly denied Respondent's motion to suppress, finding the border search exception provided the necessary authority to conduct the border search and that the use of the PNR-1 drone and the Doppler radar device were not an unreasonable search in violation of Respondent's Fourth Amendment rights. Respondent has failed to establish that, if necessary, Border Patrol Agents lacked reasonable suspicion to conduct the border search and that the use of the devices on Respondent's home were highly intrusive devices violating Respondent's Fourth Amendment rights. For the foregoing reasons the judgment of the United States Supreme Court of Appeals for the Thirteenth Circuit should be reversed.

Respectfully submitted,

_____

Team #31