IN THE
Supreme Court of the United States

October Term 2017

Docket No. 04-422

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,
UNITED STATES OF AMERICA

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QUESTIONS PRESENTED

1. Under the border search exception to the warrant requirement, was the warrantless, cursory search of Ms. Koehler's laptop by border agents at the Eagle City border station a reasonable search?

2. Was law enforcement's limited use of a PNR-1 drone and hand-held Doppler device at the Macklin Manor a warrantless search that violated Ms. Kohler's 4th Amendment rights?

STATEMENT OF THE CASE

1. Statement of Facts

On July 15th, 2016, John, Lisa, and Ralph Ford were kidnapped while walking the school gym for offseason athletic training. R. at 44. Two days later, a ransom note was sent to their father demanding $300,000 in exchange for the Ford children. R. at 2.

In the early hours of August 17th, 2016, U.S. Border Patrol Agent Christopher Dwyer, and his partner, Agent Ashley Ludgate were patrolling the Eagle City border station. R. at. 2. Eagle City is located in the state of Pawndale, directly on the United States-Mexico border. R. at 2. Because there is little traffic flow during the morning shift, Agents Dwyer and Ludgate habitually stop all drivers that pass through the border station. R. at 24. At approximately 3:00 A.M. the agents stopped a car driven by Scott Wyatt. R. at 2. Wyatt appeared agitated and was uncooperative with the agents. R. at 26. He made no eye contact with the agents, and his answers to routine questions were brief. Agents first asked Wyatt if he was carrying $10,000 or more on his person, to which he replied "no". R. at 26. Agents then informed Wyatt the stop was routine and they had a right to search his vehicle. R. at 26. Based on Wyatt's unusual behavior, the agents decided to search his vehicle. R. at 26. They asked Wyatt to step out of the car and open his trunk. R. at 26. Inside the trunk, agents found $10,000 in $20 bills and a laptop with the initials "AK" inscribed on it. R. at 26.

When asked about the laptop Wyatt claimed to share it with his fiancé, Amanda Koehler. R. at 27. Through a database search, the agents discovered Amanda Koehler had multiple felony convictions for several violent crimes. R. at 27. Ms. Koehler was also a person of interest in the Ford children kidnappings. R. at 27. The Eagle City border station had been briefed on the kidnappings, and the agents where aware the kidnappers had recently asked for $10,000 in $20 bills, in exchange for proof the children were alive. R. at 27. Agent Ludgate proceeded to search the laptop, which was not password protected. R. at 28. There were several documents open on the lap top including Mr. Ford's bank statements and personal schedule. R. at 28. Agent Ludgate also found a lease agreement signed by "Laura Pope", a known alias of Amanda Koehler. R. at 28.

The information gathered at the border search was given to detective Perkins of the Eagle City Police Department; lead detective on the Ford kidnapping case. R. at 31. The lease led Det. Perkins to a large estate in Eagle City known as Macklin Manor. R. at 2. Six months prior, the estate had been purchased by a company based in the Cayman Islands, R.A.S., a shell company owned by "Laura Pope". R. at 3. Reluctant to approach the large estate without more information about its layout or occupants, Det. Perkins ordered Officers Kristina Lowe and Nicholas Hoffman to conduct loose surveillance of Macklin Manor around 4:30 A.M. on August 17th, 2016. R. at 3. Officer Hoffman patrolled the area on foot, and Officer Lowe deployed a PNR-1 drone to conduct aerial surveillance. R. at 3. Pawndale PD is the only department in Pawndale to use the PNR-1 drone. R. at 3. The PNR-1 storage capabilities are quite minimal, with the ability to hold only 15 minutes of video and 30 photos. R. at 3. The drone is preprogrammed to fly at 1640 feet, the maximum legal altitude for drone flight in Pawndale, though recent reports indicate that network connectivity issues have caused some drones to fly as high as 2000 feet. R. at 4. Officer Lowe recorded 3 minutes of video and 22 photos of the estate via drone. R. at 4. The surveillance provided a layout of the estate which includes; a main house, a pool approximately 15 feet from the main house; and a pool house roughly 50 feet from the main house. R. at 4. One of the 30 photos showed Ms. Koehler walking from the main house to the pool house. R. at 4.

After discovering Ms. Koehler was on the premises, Det. Perkins became fearful that alerting potential occupants of their presence would endanger the lives of potential hostages and the officers. R. at 4 and 32. To discover potential occupants, Det. Perkins scanned the front of Macklin Manor with a Doppler radar. By recognizing breathing, the Doppler radar can detect movement inside a building within 50 feet. R. at 4. The radar detected one person in the front room of the house. R. at 4 and 33. Det. Perkins then scanned the pool house, which revealed 3 occupants close together and unmoving. R. at 5.

After using the Doppler, the officers retreated an obtained a warrant to search the entire estate, and returned around 8:00 A.M. R. at 5. Officers apprehended Ms. Koehler and two other individuals, and successfully rescued the Ford children trapped inside the pool house. R. at 5.

2. Procedural History

Amanda Koehler was indicted by federal grand jury on October 1st, 2016 with three counts of kidnapping and one count of being a felon in possession of a gun. R. at 1. Ms. Koehler filed a motion to suppress the evidence seized on the date of her initial arrest, August 17th, 2016. R. at 1. The District Court denied the motion to suppress, holding the evidence was not obtained in a violation of the 4th Amendment. Ms. Koehler appealed to the Thirteenth Circuit, where the District Court decision was reversed. The United States now appeals the decision of the Thirteenth Circuit.

SUMMARY OF ARGUMENT

Petitioner, asks this Court to reverse the Appellate Court decision, thereby denying the Respondent's motion to suppress. This Court should reverse because Ms. Koehler's Fourth Amendment rights were not violated by the border agents nor the Eagle City police during the two searches: (1) the search of the laptop computer during the border stop was a permissible routine digital search, and regardless, Agents Ludgate and Dwyer had reasonable suspicion of on-going criminal activity to search the laptop; (2) the officer's use of the PNR-1 drone and handheld Doppler device at the Macklin Manor did not constitute a search that violated Ms. Koehler's Fourth Amendment rights because she had no reasonable expectation of privacy in the estate.

Regarding the first issue, the border search exception to the warrant requirement is a long-standing and broad principal, created to insure that the government interest in preventing criminal activity from entering the country is protected. This exception allows border agents to conduct warrantless and suspicion-less routine searches upon potential-entrants into the country, and allows nonroutine and more invasive searches to be conducted with reasonable suspicion of on-going criminal activity.

Here, Agents Ludgate and Dwyer conducted a routine search of both a vehicle and laptop computer directly implicating Mr. Wyatt and Ms. Koehler in the recent Ford Kidnappings. While the agents did have reasonable suspicion of criminal activity, the laptop search itself was not an invasive forensic search, and instead was a limited cursory search that took only a few minutes. Additionally, the Appellate Court's application of *Riley v. California*, 134 S.Ct. 2473 (2014), in this case, is misplaced.

Regarding the second issue, Ms. Koehler had no reasonable expectation of privacy in the Macklin Manor Estate and therefore, the use of the PNR-1 drone and handheld Doppler devices by law enforcement did not constitute a search of a home. Ms. Koehler's use of the Macklin Manor was for criminal rather than legitimate purposes, and in the six months after her purchase of the estate through a shell-company, she did not engage in any conduct to affirmatively indicate any expectation of privacy in the property. The use of both the drone and the Doppler device were not

searches under the Fourth Amendment, and did not provide any "intimate details" of the estate to the officers. Additionally, if the court does find Ms. Koehler to have a reasonable expectation of privacy in the Macklin Manor, the evidence obtained via the officers who executed the search warrant was obtained in good faith and the evidence obtained to establish probable cause was obtained wholly independent from the information obtained at Macklin Manor.

STANDARD OF REVIEW

Before this court are two disputes of the Circuit Court's findings of law. The first issue addresses whether the laptop search conducted at the Eagle City border station, between Mexico and the United States, was a permissible search under the border search exception to the warrant requirement. The second issue addresses whether the officer use of a PNR-1 drone and handheld Doppler radar device outside of the Macklin Manor was a search in violation of Ms. Koehler's Fourth Amendment rights. Both issues arose from a motion to suppress, brought by Ms. Koehler. Therefore, the Court will review the case de novo. *United States v. Ruiz,* 428 F.3d 877, 880 (9th Cir. 2005). As such, the Court will review the case from the same position as the district court. *See Lewis v. United States*, 641 F.3d 1174, 1176 (9th Cir. 2011). This Court considers the matter as if no decision previously had been rendered. *See Freeman v. DirecTV, Inc*., 457 F.3d 1001, 1004 (9th Cir. 2006).

ARGUMENT

I. THE GOVERNMENT'S SEARCH OF RESPONDENT'S LAPTOP FOUND IN THE TRUNK OF THE SEARCHED VEHICLE AT THE BORDER STATION WAS A LAWFUL SEARCH UNDER THE "BORDER SEARCH" EXCEPTION TO THE WARRANT REQUIREMENT.

This Court should uphold the district court decision because the government's search of Ms. Koehler's laptop was a reasonable search under the border search exception to the warrant requirement and did not unreasonably infringe upon Ms. Koehler's diminished expectation of privacy. United States citizens are entitled to be "secure in their persons, houses, papers, and effects against unreasonable searches by the government." U.S. Const. amend. IV. "All warrantless searches are presumed unreasonable, unless the government can show that an established exception applies," such as the border search exception. *Katz v. United States*, 389 U.S. 347, 357 (1967). While all searches and seizures must be reasonable under the Fourth Amendment, any search and seizure conducted at the border "as a general principle" "[is] reasonable simply by virtue of the fact that [it] occur[s] at the border." *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993). This exception to the warrant requirement is a well-established principle that courts have been remiss to exert specific limitations upon, recognizing the government interest in protecting the nation's borders and preventing criminal contraband from entering the country. *Id.*

Under the border search exception, the government may conduct *routine*, suspicion-less and warrantless searches of potential-entrants to the United States at the border without a search warrant; as long as those searches remain "reasonable" they are permissible. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (4th Cir. 2005); *United States v. Florez-Montano*, 541 U.S. 149, 152 (2004) (Supreme Court recognizing that searches of property that result in significant damage may be unreasonable and require reasonable suspicion to justify the search); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005). Additionally, government agents may conduct *nonroutine* searches that reach a higher level of intrusiveness (e.g. body cavity searches, strip searches of the person, forensic digital searches of devices). This requires the agents to have

reasonable suspicion that the searched individual is engaged in criminal activity. *Montoya de Hernandez*, 473 U.S. 531 at 541; *Johnson*, 991 F.2d 1287 at 1291.

A. The Search of the Laptop, was a Permissible Border Search Because It Did Not Amount to a Forensic Digital Search.

While the District and Appellate Courts did not reach a conclusion regarding the routine or non-routineness of the laptop search, the facts in this case show that Agent Ludgate's cursory search was a routine border search, and therefore permissible. Alternatively, if the Supreme Court finds the search of the laptop nonroutine or too invasive, Agents Ludgate and Dwyer had reasonable suspicion of on-going criminal activity to justify the search of the laptop.

1. This Was a Routine Border Search that Did Not Require Reasonable Suspicion Because the Level of Intrusion into Ms. Koehler's Privacy was Limited.

This was a lawful routine search conducted at a border station. Cursory searches of a person's outer garments, wallet, purse, luggage, and even their electronic devices are routine searches, because they "do not pose a serious invasion of privacy and [. . .] do not embarrass or offend the average traveler." *Irving*, 452 F.3d 110 at 123 (2d Cir. 2006); *Johnson*, 991 F.2d 1287 at 1291. With the rise of technology, Courts have acknowledged that electronic devices do hold large quantities of personal, sensitive data and may enhance an expectation of privacy in that device. However, *cursory* searches of these devices are within the parameters of routine border searches. *See United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008) (permissible search of laptop computer); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) (permissible search of video camera and laptop computer).

While most electronic searches are considered to be routine, various Circuits have held that "forensic" digital searches conducted at the border are nonroutine because of their intrusiveness and require reasonable suspicion. *See United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (Ninth Circuit found reasonable suspicion necessary to conduct a forensic digital search of a

computer hard drive as part of a search that began as a cursory review at the border); *United States v. Kim*, 103 F.Supp.3d 32 (D.D.C. 2015) (found the forensic examination of the defendant's laptop unreasonable and impermissible because there were no particularized facts establishing reasonable suspicion of on-going criminal activity while the defendant was stopped at LAX, waiting to leave the country). In a 9th Circuit case, the Court in *United States v. Cotterman* explained it's concern about these particular types of searches: forensic examinations of electronic devices use "powerful tool[s] capable of unlocking password-protected files, restoring deleted material, and retrieving images viewed on web sites" and often include the ability to copy "the hard drive [of the device] and then analyze it in its entirety." 709 F.3d 952 at 957, 962. In order to justify this level of invasion, agents must have reasonable suspicion of criminal activity. *Id*. The particularly sensitive nature of the private data on a laptop and hard drive heightened the *Cotterman* Court's examination of the reasonableness of the border search. The copying of the hard drive and the forensic examination of the entire device using special software was a "substantial intrusion upon the personal privacy and dignity" of the defendant, and therefore required a showing of reasonable suspicion. 709 F.3d 952 at 966, 968 (9th Cir. 2013).

The case at bar is not the same as the case in *Cotterman* in the fact that there was no forensic examination conducted here. *Id*. Ms. Koehler asserts that the nature and quantity of the information stored on the laptop computer heightens her expectation of privacy within the electronic device, and essentially claims that any search of the laptop is both a nonroutine search and an invasion of her 4th Amendment rights. This argument is not persuasive considering that "the mere fact that a search includes computer files does not transform it [the search] from routine to nonroutine," nor does it automatically violate one's 4th Amendment rights; the degree of intrusion and manner of the search must still be assessed. *United States v. Saboonchi*, 990 F.Supp.2d 536, 546 (D.Md. 2014).

Here, Agents Ludgate and Dwyer conducted a routine search of both the vehicle and the laptop computer. The morning of August 17th, 2016, Agent Ludgate stopped Mr. Wyatt and asked Wyatt routine questions regarding his travel, as she does with every car entering the station. Agents

asked specific questions and admonished Wyatt, specifically if he was traveling with more than $10,000 to which he said he was not. R. at 2. Finding his demeanor suspicious, Agents asked Wyatt to open his trunk, where they found $10,000 in $20 bill increments as well as a laptop computer with "AK" inscribed on it, in violation of 31 U.S.C. section 5136, or a failure to declare in excess of $10,000 in the vehicle. Agent Ludgate then ran a database search on Ms. Koehler and found that she had been convicted of multiple violent felony charges and was a person of interest in the recent Ford children kidnappings. After learning this information, Agent Ludgate opened the laptop computer and quickly looked through the documents that were already open on the screen. She also recovered a lease agreement in one of Koehler's aliases, "Laura Pope," for the Macklin Manor Estate.

Agent Ludgate engaged in a quick and cursory search of the laptop computer which did not damage the laptop or the files contained on the electronic device. She did not engage in a forensic search of the laptop that required special software to search the entire contents of the laptop computer, nor did the search itself take longer than a few minutes. Additionally, the documents themselves did not reveal any sensitive or private information about Ms. Koehler, and instead, implicated both Mr. Wyatt and Ms. Koehler in the Ford children kidnappings, because the documents included private details about Mr. Timothy Ford, the father of the kidnapped children. Ms. Koehler has failed to demonstrate that Agent Ludgate's quick search of her laptop was in any way distinguishable from the routine suspicion-less border searches of traveler's luggage or other items. *Arnold*, 533 F.3d 1003 at 1010. Unlike the situation in *Cotterman*, there was no impermissibly invasive search of the laptop computer in this case. 709 F.3d 952 (2013). Therefore, any information obtained via the routine search should not be suppressed.

2. Alternatively, Agents Ludgate and Dwyer Had Reasonable Suspicion of On-going Criminal Activity that Supported a Nonroutine Search of the Laptop.

If the Court finds that this was a nonroutine search, Agents Ludgate and Dwyer had reasonable suspicion of on-going criminal activity to justify the search of the laptop. Reasonable

suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity," and will be made "in light of the 'totality of the circumstances'." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Several factors may be used to determine whether the agents had reasonable suspicion. These include: (1) unusual conduct of the searched person or defendant, (2) discovery of incriminating matters during routine searches, and (3) computerized information showing propensity to commit relevant crimes or a suspicious itinerary. *Irving*, 452 F.3d 110 at 124.

a. Wyatt Engaged in Unusual Conduct During the Border Search.

Mr. Wyatt demonstrated unusual conduct when he was stopped and searched that morning. Mr. Wyatt was returning from Mexico at 3:00AM and had no other passengers in the vehicle with him. Upon an innocuous and routine question regarding his purpose of crossing the border that morning, Wyatt grew "agitated and uncooperative," refused to make eye contact with the border agents, and began to "fidget with the steering wheel." R. at 26. Additionally, his answers to the agents questions were short and brief. R. at 26. Agent Ludgate also observed that he was "very pale" during the encounter. R. at 26. This short encounter provided enough objective evidence for Officer Ludgate—an agent with seven years' experience in the field—to suspect something wasn't right; at that point she proceeded to give Wyatt the agents' routine questions and admonishments, preparing to search his vehicle under her plenary authority of the border search exception to the warrant requirement. R. at 26.

b. Agents Found Incriminating Matters During the Routine Search of His Vehicle and the Laptop.

Upon the search of Wyatt's vehicle, incriminating matters were uncovered by the agents. While Wyatt stated that he did not have over $10,000 in his vehicle at the time of the border crossing, the search uncovered evidence otherwise: Mr. Wyatt was transporting $10,000 in $20 bill increments as well as a laptop computer with the letters "AK" inscribed on it. Wyatt stated that

"AK" stood for his fiancée's name, Amanda Koehler. R. at 26 and 2. Upon learning the name of Wyatt's fiancée, agents conducted a database search to determine if Koehler had any prior convictions. The database search revealed that Koehler had multiple felony convictions for a variety of violent crimes, as well as being a person of interest in the recent high profile kidnapping of the Ford children. Additionally, the money found in the trunk of vehicle was the exact increments requested by the kidnappers, further supporting Agent Ludgate's suspicion that Wyatt and Koehler were involved. The close relationship between Koehler—a known violent felon and person of interest in another felony—and Wyatt, established incriminating matters that supported the search of the vehicle and laptop.

c. The Laptop Contained Computerized Information Showing Propensity to Commit Relevant Crimes.

Lastly, the agents did find computerized information showing a propensity to engage in criminal activity. The documents that were already open on the screen included private, personal information about Mr. Timothy Ford, the father of the three children who had recently been kidnapped. These documents depicted Mr. Ford's "bank statements, his personal schedule, and his employee's schedules" suggesting that these documents may have been used in executing the kidnappings. R. at 28. The lease to the Macklin Manor also indicated criminal activity. The lease was signed under Ms. Koehler's known alias "Laura Pope" which was verified via a criminal database search by Agents Ludgate and Dwyer.

Even before the search of the laptop, Wyatt's nervous, agitated demeanor and his failure to announce the $10,000 dollars in his trunk—again, the exact increments the kidnappers requested earlier—were enough for reasonable suspicion that Wyatt and Koehler were engaged in on-going criminal activity. The additional fact that Wyatt had a close, intimate relationship with Koehler further supported Agent Ludgate's suspicion; each of these actions constitute specific and articulable facts and should serve as the basis of reasonable suspicion. *Irving*, 452 F.3d 110. These facts provided sufficient suspicion that the laptop in the trunk held additional information or

evidence of on-going criminal activity, which it did; the information recovered from the search and seizure of the laptop should therefore not be suppressed.

B. The Search of the Laptop Computer in the Context of the Border Search Exception is Not Analogous to the Impermissible Cellphone Searches at Issue in *Riley v. California*.

The Appellate Court improperly argues that *Riley v. California* should be applied to our case here. *Riley v. United States*, 134 S.Ct. 2473 (2014). The Court in *Riley* held that sensitive data on a cellphone was not subject to the warrant exception for searches incident to arrest and officers must obtain a warrant before searching the contents of an arrestee's cellphone. *Id.* at 2484. This however is an inappropriate rationale to apply to searches conducted under the "border search" exception, and would unduly undermine the government interests involved in this warrant exception.

1. The Border Search Exception is Unaffected by the Ruling in *Riley*.

While the Appellate Court asserts that the rationale in *Riley* should apply to the case here, the actual language used by the Supreme Court in their decision argues otherwise. *Id.* The decision itself did not recognize a categorical privilege for electronic data and even went as far as to state, "even though the search incident to arrest exception does not apply to cell phones, *other case-specific exceptions may still justify a warrantless search* of a particular phone," such as the exigent circumstances exception and in the case here, the "border search" exception. *United States v. Saboonchi*, 48 F.Supp.3d 815, 817 (D.Md. 2014) (quoting *Riley v. United States*, 134 S.Ct. 2473, 2494 (2014)) (emphasis added).

Though there is little case law addressing the *Riley* decision and its effect on digital searches conducted at the border, *United States v. Saboonchi*, attempts to reconcile the two. 48 F.Supp.3d 815 (2014). In *Saboonchi*, the defendant was indicted on multiple counts of unlawful export to an embargoed country after being stopped at the Canada-United States border by

Customs and Border Protection agents. Saboonchi and his wife were both questioned and several electronic devices were seized; the devices were sent to another location to be forensically examined. In the initial case, *United States v. Saboonchi*, 990 F.Supp.2d 536 (D.Md. 2014), the Court found there to be reasonable suspicion for the seizure and the forensic search of the electronic items based on a "hit" in a criminal investigation database. *United States v. Saboonchi*, 48 F.Supp.3d 815 (2014).

In analyzing the rationale in *Riley* to the facts of their case, the *Saboonchi* Court found that the purpose of the two warrant exceptions were not the same and should not be applied to fact situations unlike their own. A search incident to arrest in the interior, "involves a defendant *with a diminished, but still present, expectation of privacy*" (emphasis added) whereas in situations of border searches, this is not the case: "Time and again, [the Supreme Court has] stated that 'searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border'." *Id.* at 818.

Both the Supreme Court and the Maryland Court hold legitimate reservations regarding the sheer quantity and quality of information that is stored on electronic devices. Because of this concern, the Court in *Saboonchi* found the search of the electronic devices to be invasive and nonroutine; but as the Court notes, "the invasiveness of a search is only part of the puzzle [. . .] *Riley* did not diminish the Government's interests in protecting the border or the scope of the border search exception," and ultimately, "An invasive and warrantless border search may occur on no more than reasonable suspicion [. . .] and nothing in *Riley* appears to have changed that." *United States v. Saboonchi*, 48 F.Supp.3d 815, 819-20 (D.Md. 2014). *See also United States v. Caballero*, 178 F.Supp.3d 1008 (S.D.Cal. 2016) (denial of defendant's motion to suppress the cell phone data collected during a border search; the Court noted they are bound to the decision in *Cotterman*, 709 F.3d 952 (9th Cir. 2013), but if *Riley* were to be applied to border searches, the border search exception would likely be one of the included "other" "exceptions" mentioned by the Supreme Court).

2. The Rationale in *Riley* Unduly Undermines the Purpose of the Border Search Exception and Should Not Be Applied to the Case Here.

The *Riley* rationale was not created to be applied to border searches. 134 S.Ct. 2473, 2494 (2014). Not only was the decision in *Riley* only applicable to searches incident to arrest, the rationale in *Riley* was designed with different government interests in mind and to be used in an entirely different factual context. *Id*. Preventing criminal activity from entering the country is a legitimate government interest. Undermining agents' ability to conduct these warrantless and suspicion-less searches would undercut the purpose of the doctrine and threaten public safety.

The factual record here is not the same as *Riley*. Here, the search of the vehicle and laptop computer took place at the border station, prior to any arrest and not within the interior of the country. Agent Ludgate did not engage in a forensic search, and instead made a quick, cursory search of the laptop computer where documents were already present on the screen. Additionally, where the Appellate Court is concerned about Agent Ludgate having "Ms. Koehler's entire world and private life at her fingertips," the search only presented one document actually related to Ms. Koehler herself; the legitimate privacy interests the Appellate Court is concerned with does not include information used to execute criminal activities. R. at 18. For the foregoing reasons, the decision in *Riley* should not be applied to border searches in general, and in particular, the case here; therefore, the court should reverse the Appellate Court's decision, and affirm the District Court's denial of the suppression motion.

II. LAW ENFORCEMENT'S USE OF A PNR-1 DRONE AND HANDHELD DOPPLER RADAR DEVICE DID NOT CONSTITUTE A SEARCH IN VIOLATION OF THE 4TH AMENDMENT BECAUSE MS. KOEHLER HAD NO REASONABLE EXPECTATION OF PRIVACY IN MACKLIN MANOR ESTATE.

The aid of minimally intrusive technology to ensure officer safety does not constitute a search in violation of the 4th Amendment. United States citizens are entitled to be secure in their persons, houses, papers, and effects against unreasonable searches by the government. U.S. Const. amend. IV. A search, for 4th Amendment purposes, has taken place when the government infringes on an individual's reasonable expectation of privacy. *Kyllo v. United States*, 533 U.S. 27, 33

(2001). A reasonable expectation of privacy is found when the claimant has (1) manifested a subjective expectation of privacy in the place to be searched; and (2) such expectation is one that society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). While police generally cannot search a home without a warrant, the lawfulness of visual surveillance has been preserved by this court. *Kyllo*, 533 U.S. 27 at 33.

A. Ms. Koehler Made No Effort to Secure the Privacy of Macklin Manor and Failed to Manifest a Subjective Expectation of Privacy.

The 4th Amendment is intended to protect people, not places. *Katz*, 389 U.S. 347. This underlying principle requires the individual seeking protection to have an actual expectation of privacy. *Id*. at 361 (Harlan, J., concurring). The individual must demonstrate by her conduct, a subjective, actual expectation of privacy. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). For example, this Court found that a homeowner who surrounded his greenhouse in fencing and displayed a "keep out" sign, had sufficiently demonstrated a subjective expectation of privacy by his conduct of installing fencing and handing a sign. *Florida v. Riley*, 488 U.S. 445 (1989). However, this Court has also found that a Petitioner who sought to exclude phone records did not manifest an actual expectation of privacy in phone numbers dialed. *Smith*, 442 U.S. 735. Though Petitioner had specifically chosen to use his home phone for privacy, this action indicated merely that he sought to keep the conversation private, not the numbers dialed. *Smith*, 442 U.S. 735 at 740.

Macklin Manor was purchased by Ms. Koehler's shell company R.A.S. in 2016, six months before law enforcement suspected she was using the Estate to hold hostages. R at 3. In that six-month time Ms. Koehler took no affirmative steps to indicate an expectation of privacy. Ms. Koehler built no fence, put up now awnings, and planted no trees. R at 10. The record does not reflect the existence of a "keep out" sign or its equivalent. The Estate is wholly unprotected from prying eyes of the public. Officers walking along public thoroughfares are not required to avert their eyes, and any officer passing by Macklin Manor would be able to discern the layout out of

the Estate and view activities taking place outside the house. *California v. Ciraolo*, 476 U.S. 207, 213 (1986). If a window were open, any person walking by would easily be able to see inside the house, with no fence or tree blocking the view. What one willingly exposes to the public, even inside their home, is not subject to 4th Amendment protections. *Katz*, 389 U.S. 347 at 351. Ms. Koehler willingly exposed the activities of Macklin Manor to the public when she declined to protect the Estate from observation.

Though it may be argued that the remote location of Macklin Manor itself suggests Ms. Koehler had a subjective expectation of privacy, the rule established in *Smith* requires a manifestation by conduct. *Smith*, 442 U.S. 735 at 740. Ms. Koehler's failure to prevent intrusion in any way highlights a severe lack of conduct. Ms. Koehler did not act in a manner which suggests an expectation of privacy, and thus this Court should find she had no subjective expectation of privacy in the estate.

B. Ms. Koehler Does Not Have an Objectively Reasonable Expectation of Privacy Against Aerial Surveillance of Macklin Manor Because the PNR-1 Drone Did Not Reveal Intimate Details of the Home.

This Court has repeatedly held that no reasonable expectation of privacy exists against the aerial surveillance of private property from legally navigable airspace. *California v. Ciraolo*, 476 U.S. 207 (1986), see also *Florida v. Riley*, 488 U.S. 445 (1989). Justice Scalia argues the area immediately surrounding the home, or the *curtilage*, is rigorously protected by the 4th Amendment. *Ciraolo*, 476 U.S. 207. However, police are not required to shield their eyes as they pass by a home on public thoroughfares. *Id*. at 213. As such, police officers are entitled to observing private property from public areas. *Id.* In *Ciraolo*, this Court found that police officers who viewed defendant's home and backyard from public airways had not conducted a search in violation of the 4th Amendment. *Id.* Because the surveillance was (1) conducted in a non-intrusive manner; (2) the officers remained within the legal altitude limits for aviation; and (3) the evidence was observable with the naked-eye, defendant had no reasonable expectation of privacy against the surveillance. *Id*. The very same year *Kyllo* was decided, Justice Burger argued that the ability to

view activities with naked eye is immaterial so long as technology used by law enforcement does not reveal intimate details. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

The drone surveillance of Macklin Manor did not reveal intimate details about the Estate, and thus it did not constitute a search in violation of the 4th Amendment. The case at bar closely resembles the facts in *Dow Chemical Co.*, in which this Court held that aerial surveillance of an industrial complex did not violate the 4th Amendment. 476 U.S. 227. Chief Justice Burger concluded that the open areas of an industrial complex, with numerous structures spread over 2,000 acres, are not analogous to the *curtilage* of a dwelling, and the complex is more comparable to an *open field*. *Id*. An individual may not legitimately demand privacy of activities out of doors and in fields, except in the area immediately surrounding the home. *Oliver v. United States*, 466 U.S. 170 (1984). As such, the manufacturing plant is open to the view and observation from persons flying in legally navigable airspace. *Dow Chemical Co.*, 476 U.S. 227.

Det. Perkins and team were able to discern the layout of Macklin Manor Estate by flying a drone over the property in legally navigable airspace. The drone footage showed the location of the pool house relative to the main house, and informed the officers that no persons were patrolling the premises. R. at 32 and 33.The drone was unable to penetrate the walls or windows to reveal intrusive information about activities going on inside the house. The drone did return with a photo showing Ms. Koehler crossing from the main house to the pool house. R. at 4. However, this photo reveals no details about the inside of the house and does not violate the standard applied in *Dow Chemical*. 476 U.S. 227 at 236.

There is no evidence in the record to suggest the PNR-1 drone in this case flew over 1640 feet. The state of Pawndale has a maximum flight altitude of 1640ft. for all drones. R. at 39. Though the record suggests that some drones had been malfunctioning, and flying at an altitude higher than allowed by law, there is no direct evidence to indicate that the drone used by Officer Lowe did in fact fly higher than permitted.

In a concurring opinion, Justice O'Connor noted her belief that the routineness of flight in legally navigable airspace weighs heavily on a reasonable expectation of privacy. *Riley*, 488 U.S.

445. Thus, if flight through the area in question is common, the claimant has a lesser expectation of privacy. *Id*. However, if flight through the airspace is uncommon, the claimant has a stronger expectation of privacy. *Id*. Admittedly the record indicates flight through the foggy atmosphere surrounding Macklin Manor is uncommon. However, the minimally intrusive nature of the drone surveillance outweighs its non-routine nature. The drone did not reveal any information that would otherwise require entry into the Manor, and it did not interfere with the occupant's use of the land. Weighed against the minimally intrusive drone flight, the non-routine nature is immaterial.

Because the drone was flown in legally navigable airspace and captured little detail in a non-intrusive manner, the drone surveillance did not constitute a search in violation of the 4th Amendment.

C. Law Enforcement's Use of the Doppler Radar Device Did Not Reveal Significantly Detailed Information About a Home, and Thus Does Not Constitute a Search in Violation of the 4th Amendment.

The Doppler radar device is minimally intrusive technology that helps to ensure the safety of law enforcement. Justice Scalia argues the use of sense-enhancing devices is a search if the device reveals information that would otherwise not be discernable without entering the house. *Kyllo v. United States*, 533 U.S. 27 (2001). However, if the device is in common use, the claimant's reasonable expectation of privacy is lowered. *Id*. This Court found that a thermal imaging device used to scan the front of a home constituted an illegal search because the device revealed intimate details of the home, and was not in common public use. *Id*. However, this Court has held that when a home becomes a commercial center from which unlawful business is facilitated, the expectation of privacy is lowered. *Lewis v. United States*, 385 U.S. 206, 211 (1966).

1. Macklin Manor Does Not Deserve Strict 4th Amendment Protections Because the Estate is Not Used as a Home, and is Merely the Location from Which Ms. Koehler Facilitates Unlawful Business.

Because the Estate is not a home to Ms. Koehler or anyone else, it does not warrant the constitutional safeguards afforded to traditional homes. When a home is open to outsiders and used

for purposes of transacting unlawful business, that home is no longer given the strictest 4th Amendment protections. *Lewis*, 385 U.S. 206 at 211. In *Lewis*, an undercover officer entered the home of Defendant to facilitate a drug deal. *Id*. Defendant alleged that upon entry into the house, the officer had conducted an illegal search in violation of his reasonable expectation of privacy. *Id*. This Court reasoned that because the house was being used to facilitate a business, defendant's home was not entitled to the rigid constitutional protection applied to traditional homes and Defendant had no reasonable expectation of privacy. *Id*.

Ms. Koehler did not use Macklin Manor as a home. She used the Estate as the center from which to hold teenagers hostage and demand ransom from their father. She conducted what is analogous to a business deal, from Macklin Manor. Her business, albeit an illegal one, included employees, strategy, and the hope to exchange goods for money. The Estate was not owned by Ms. Koehler herself, it was purchased by her fraudulent company, R.A.S., further illuminating the business-like nature of Macklin Manor Estate. R. at 3. Ms. Koehler's failure to protect the Estate also suggests it was open to outsiders. This Court found no reasonable expectation of privacy in *Lewis*, where an officer lied to the defendant and then physically entered Defendant's home. *Lewis*, 385 U.S. 206 at 211. In the present case, the officers did not deceive Ms. Koehler, nor did they use the Doppler to physically enter the house. The methods by police in this case are far less intrusive than the methods used in *Lewis*, and therefore the court should find no reasonable expectation of privacy. This Court has opined on numerous occasions that the "sanctity of a man's home" warrants strict 4th Amendment protections, however Macklin Manor is not deserving of such honorable status. Though Macklin Manor is house, it is not a home.

2. Use of the Doppler Radar Did Not Reveal Intimate Details That Would Normally Require Entering Macklin Manor.

The Doppler radar device is simply not capable of revealing probative information about the interior of a home or building. In *Kyllo*, Justice Scalia held that the use of a thermal device to detect heat levels inside a home was a search. Because the device was not in general public use,

and heat level is a detail that would otherwise have been unknowable without physical entry, the use of thermal imaging constituted a search. *Kyllo*, 533 U.S. 27.

The Doppler used by Eagle City police revealed no information that would require entry into Macklin Manor. The Doppler is capable of detecting the presence of breathing beings. R. at 33. The device cannot discern between the breath of a human and the breath of a family pet. It does not reveal building layouts, record conversations, or take photographs. Additionally, the Doppler used in this case was inaccurate. R. at 34. The Doppler revealed one breathing being in the front of the house, but when the police entered, they apprehended two. R. at 43. Because the information collected by the Doppler was not accurate, it cannot be deemed intrusive.

Additionally, the information revealed by the Doppler is strikingly similar to the information revealed by canines trained to detect drugs. Drug sniffing dogs will reveal whether or not drugs are present, and approximately where they are located. Similarly, the Doppler radar reveals if a breathing being is present, and approximately where the breathing being is located. This Court has allowed the use of drug sniffing dogs with little limitation, and the same conclusion should be applied to the case at bar. *United States v. Place*, 462 U.S. 696 (1983). In 1983 this court held that a dog sniff that detected only the presence or absence of narcotics did not constitute a search in violation of the 4th Amendment. *Id*. at 707. Justice Stevens argues in his dissenting opinion that the use of sense enhancing technology is sufficiently analogous to drug sniffing dogs, and warrants the same treatment. *Kyllo*, 533 U.S. 27 (Stevens, J., dissenting). Because the Doppler was non-intrusive and revealed no probative information, the use of a Doppler did not constitute a search in violation of Ms. Koehler's 4th Amendment rights.

D. Even if This Court Finds a Reasonable Expectation of Privacy, Evidence Obtained by Law Enforcement Should Not Be Excluded Because the Officers Acted in Good Faith, and had Sufficient Probable Cause to Obtain the Warrant Through the Independent Source Doctrine.

When a claimant has proven the existence of both a subjective and objective expectation of privacy, the court will find a search. *Katz*, 389 U.S. 347. A search is presumed unreasonable

unless one of the narrowly tailored exceptions applies. *Id*. at 357. The Independent Source Doctrine applies when officers conduct an illegal search, and later obtain a search warrant on grounds unrelated to the initial illegal search. *Segura v. United States*, 468 U.S. 796 (1984). Additionally, the Good Faith Exception applies when law enforcement executed a search warrant on a good faith belief that the warrant was valid. *United States v. Leon*, 468 U.S. 897 (1984).

1. The Officers Acted in Good Faith When They Executed the Search Warrant at Macklin Manor, and Therefore the Evidence Obtained by the Search Should Not be Excluded.

Even if this court finds the basis of the search warrant to be invalid, the evidence should not be excluded because the officers acted on a good faith belief that they were executing a valid warrant. The exclusionary rule should not be applied as to bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant that, though issued by a detached and neutral magistrate, is ultimately found to be invalid. *Leon*, 468 U.S. 897. However, the officer's reliance on a warrant issued by a magistrate must be objectively reasonable. *Id*. If the warrant clearly lacks probable cause and the officers conduct a search, then the evidence is excluded. *Id*. For example, relying on a confidential informant, police began investigation of alleged drug trafficking, and surveilled defendant's activities. *Id*. Based on the observations of one officer, another officer applied for a warrant to search three homes. *Id*. The judge issued the warrant, and officers searched the homes, finding drugs and guns. *Id*. It was later determined that the warrant lacked probable cause. *Id*. Because the officers had acted in good faith, the exclusionary rule did not apply. *Id*. The judge believed reasonable minds could differ as to the establishment of probable cause in this case, and therefore the officers could have reasonably believed the warrant was based on probable cause. *Id*.

The officers in this case acted on a good-faith basis. They believed they had probable cause, and a neutral magistrate agreed. Reasonable minds can differ as to whether or not there is probable cause, as evident by the differing opinions from the District Court and Thirteenth Circuit. The District Court found sufficient probable cause, and the Circuit Court did not. If the officers had

acted in bad faith, both courts would have found the warrant lacked probable cause. But two groups of highly intelligent legal scholars sharply disagree. The purpose of the exclusionary rule is to deter police misconduct. *Id*. Because the officers acted in good faith, there would be no deterrent effect if the court excluded the evidence since the officers executed the warrant in good faith. The officers were not seeking violate the 4th amendment, as evident by their pursuance of a search warrant. If they had sought to violate Ms. Koehler's constitutional rights, the officers would have barged into Macklin Manor without bothering to secure a warrant. Because the officers acted in good faith, the exclusionary rule should not apply.

2. The Evidence Used to Obtain a Search Warrant for Macklin Manor is Wholly Independent from the Information Gathered By Drone and Doppler Radar Technology.

Even if the court finds the use of the PNR-1 Drone and Doppler Radar devices constituted an illegal search, the Officers had sufficient probable cause to obtain a warrant to search Macklin Manor without the information gained from those devices. Though difficult to define, probable cause is generally understood to exist where the facts and circumstances within an officer's knowledge are sufficient to warrant a man of reasonable caution in the belief that an offense has or is being committed. *Brinegar v. United States,* 338 U.S. 160, 175 (1949). And where a warrant based on probable cause, is obtained on grounds wholly unrelated to the initial illegal search, the evidence need not be suppressed pursuant to the *independent source doctrine*. *Segura*, 468 U.S. 796.

Before deploying the drone and Doppler, Det. Perkins felt he had probable cause to obtain a search warrant based on the findings of Agent Ludgate and Agent Dwyer at the Eagle City border station. R. at 34. Det. Perkins testified to his belief that the officers had sufficient probable cause from the information recovered at the border search. R. at 34. He deployed the drone and Doppler solely to ensure officer safety. R. at 32. The Eagle City border patrol agents lawfully stopped and searched Scott Wyatt's vehicle, and discovered ample evidence to conclude that a crime was being committed. Wyatt was carrying the exact amount of money, in the exact form requested by the

Ford children's kidnapper. Wyatt admitted the laptop was co-owned by himself and Amanda Koehler; a person of interest in the kidnappings. And the brief search of the unlocked laptop not only revealed detailed information about the children's father, but also a remote location to easily hold hostages. Further, that remote location was owned by a fake company, and leased to the known alias of Ms. Koehler. The logical inference that follows the border search is that criminal activity is taking place, and most reasonable officers would come to such conclusion. Because the evidence gathered at the border is sufficient to establish probable cause, the search warrant is wholly independent from information gathered through the Drone and Doppler searches.

Additionally, the main purpose of the exclusionary rule is to deter police misconduct. *Murray v. United States*, 487 U.S. 533 (1988). The officers in this case aroe not guilty of misconduct, as Det. Perkins sought only to protect the safety of his officers by the least intrusive means. Excluding the evidence in this case would not be punishing misconduct of police, and would not facilitate the purpose of the exclusionary rule.

This Court should find that Amanda Koehler did not have an objectively reasonable expectation of privacy in Macklin Manor. However, if this Court does find a reasonable expectation of privacy, two exceptions to the warrant requirement are sufficient to bar use of the exclusionary rule in this case, and the motion to suppress should be denied.

CONCLUSION

This Court should uphold the decision and order of the District Court, thereby denying Ms. Koehler's motion to suppress. The border search conducted by Agents Dwyer and Ludgate was routine and constitutionally valid pursuant to the border search exception to the warrant requirement. Additionally, the use of a PNR-1 drone and Doppler radar device did not constitute a search because Ms. Koehler had no reasonable expectation of privacy in the areas viewed by law enforcement.