In the

Supreme Court of the United States

November Term 2017

Docket No. 4-422

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 RESPONDENT, AMANDA KOEHLER

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II. Did the use of a PNR-1 drone and handheld Doppler radar device constitute a search in violation of Respondent's 4th Amendment rights?

STATEMENT OF FACTS

As the Eagle City border station has always been a major crossing point for criminals, the U.S. Border Patrol prioritized securing this port of entry by assigning more Border Patrol Agents to Eagle City than any other border station in the country. R. at 2. August 17, 2016 was an unusually slow and quiet night for Border Patrol Agent Christopher Dwyer and his partner, Agent Ashley Ludgate. They only had five or six cars that night, all of whom they stopped during their early shift – midnight to 8:00 A.M. R at 24-25. Based on Agent Ludgate's training and experience the early shift is not a peak time for criminal activity. One of the cars stopped at around 3:00 A.M. identified himself as Scott Wyatt. R. at 25. Agent Ludgate observed Mr. Wyatt to be extremely agitated and uncooperative as he would not make eye contact and was fidgeting with the steering wheel. R. at 26. Agent Ludgate asked Mr. Wyatt the routine question of whether he was transporting $10,000 or more, to which he replied in the negative. R. at 2, 26. Agent Ludgate then informed Mr. Wyatt that this was a routine stop and search done on every vehicle. R. at 2. Based on Mr. Wyatt's demeanor and his brief responses, he was asked to step out of the car and open the trunk, wherein the agent discovered $10,000 in $20 bills and a laptop with the initials "AK" inscribed on it. Suspicious of the contents, Agent Ludgate asked Mr. Wyatt if the laptop was his. R. at 2. Mr. Wyatt stated that the initials belonged to his fiancé, Amanda Koehler, and that they shared the laptop. R. at 2, 26. Agent Ludgate did not question Mr. Wyatt any further. R. at 28. The Agents then entered Ms. Koehler's name into its criminal intelligence and border watch database. The database search revealed Ms. Koehler's multiple felony convictions for a variety of violent crimes. Ms. Koehler was also listed as a person of interest in the recent high-profile, publicized Ford kidnapping case. R. at 27, 44. The three teenagers that were kidnapped were the children of the billionaire biotech mogul, Timothy H. Ford. R. at 2. This story was all over the news, and all

the agents at the Eagle City border station had been briefed on the case. R. at 27. The FBI and Eagle City Police Department (ECPD) had been working together, as they believed the Ford children were being held somewhere in Eagle City. Aware of this ongoing investigation, Agent Ludgate then opened Ms. Koehler's laptop and found several documents already open on the desktop. Many of these documents contained Mr. Ford's personal information. R. at 2-3, 28. While browsing through documents in the laptop, Agent Ludgate found a lease agreement with the name "Laura Pope." Because the address on the document did not match Mr. Ford's, Agent Ludgate entered the name Laura Pope into their database. That search revealed that Laura Pope was an alias for Ms. Koehler. R. at 2, 28. The ECPD had also recently obtained information that Amanda Koehler, their main person of interest, had used an alias to rent out Macklin Manor in Eagle City. R. at 32. Agent Ludgate searched Ms. Koehler's laptop without a warrant because she believed that during a border search agents are allowed to conduct a search of the laptop the same way they are allowed to search vehicles. R. at 28. Agent Ludgate was aware that the kidnappers had recently agreed to give proof of life in the form of a phone call with one of the children, in exchange for $10,000 in $20 bills, due at noon the following day, August 18th. R. at 2, 27. Considering Mr. Wyatt's close personal relationship with Ms. Koehler, and because the $10,000 found in Mr. Wyatt's car was the exact same amount and exact same increments the Ford kidnappers had asked for, Agent Ludgate suspected Mr. Wyatt may be involved in the kidnapping. R. at 8, 27. Mr. Wyatt was subsequently placed under arrest for failure to declare the $10,000, in violation of 31 U.S.C. § 5316. R. at 3, 27. After ECPD received information that Mr. Wyatt may be connected to the Ford kidnapping and learning that the lease agreement found on Ms. Koehler's laptop coincided with the information they already had, they decided to head to Macklin Manor. R. at 31-32. The Top of Mount Partridge is particularly cloudy, and fog and clouds usually cover Macklin Manor year-

round. Because of the perpetual fogginess, planes and other aircraft often steer of flying over Mount Partridge, opting to go around the mountain due to extremely limited visibility. R at 3. Macklin Manor originally belonged to former Eagle City Chief of Police, but the estate was abandoned after his death in 2015. About six months ago, a shell company, R.A.S., based in the Cayman Islands, purchased Macklin Manor. Further investigation revealed that R.A.S. was owned by "Laura Pope." The FBI later confirmed that "Laura Pope is one of aliases. However, nobody had seen any residents at the property. R. at 3. At around 4:30 A.M., Detective Perkins assigned Officers Kristina Lowe and Nicholas Hoffman to conduct loose surveillance on Macklin Manor, in order to gather more information. Officer Lowe, from a couple of blocks away, deployed a PNR-1 drone to fly over the property at dawn. R at 3. Because of the availability and affordability, the PNR-1 has become a favorite amongst drone enthusiasts. ECPD is the only police department in Pawndale to use drones for surveillance, even though the PNR-1 drone has become a favorite amongst drone enthusiasts. R at 3, 38, 46. The drone is aerodynamic and capable of reaching 30 mph speed. R at 46. It has a battery life of 35 minutes. R at 3, 40. It is equipped with state of the art HD camera, capable of taking high quality photos from as close as 15 feet. R at 3, 39, 46. It took the drone 7 minutes to reach Macklin Manor and 7 minutes to come back. R at 4. Due to bad visibility, lots of clouds and fog, the drone had to hover for a little bit before it took pictures. R at 40-41. The drone took 22 photos and 3 minutes of video, which provided the layout of the property. It consisted of a main house, a swimming pool 15 feet from the house, and pool house on the other side of the pool, roughly 50 feet from the main house. It was also able to capture an image of a young woman, who was identified to be Amanda Koehler. R at 4. After confirming that Ms. Koehler was on the premises, Detective Perkins became fearful that alerting occupants without more information would jeopardize the safety of any potential hostages. Detective Perkins and

Officer Hoffman surreptitiously approached the front of the house. Detective Perkins then used a handheld Doppler radar to scan inside the house, without a warrant. R at 4. The Doppler radar device is capable of detecting people based on their breathing, making it virtually impossible to hide from with 50 feet of it. It can tell how many people are inside a structure and roughly where they are located. R at 4. The radar detected what appeared to be one individual in the front room, a few feet away from the door. The officer then went to the pool house and conducted a second search, which revealed what appeared to be three individuals close together, breathing, but not moving. The scan also revealed another individual pacing by. R at 5. The officers retreated, obtained a search warrant for the entire residence and returned at around 8:00 am with the SWAT team. The team conducted a no-knock search pursuant to the warrant, detaining two individuals in the living room, and another one in the pool house. They were also able to detain Ms. Koehler before she could escape. The Ford children were found bound in the pool house, but otherwise unharmed. R at 5. Ms. Koehler was indicted by a federal grand jury on three counts of kidnapping and one count of possession of a handgun by a felon. Ms. Koehler filed a motion to suppress the evidence found on the day of the arrest, contending that the search of her laptop by Agent Ludgate, and the subsequent searches of Macklin Manor conducted by the PNR-1 drone and the Doppler radar violated her Fourth Amendment rights. R at 5. The District Court denied the motion, and the Thirteenth Circuit reversed on appeal. Certiorari was granted.

SUMMARY OF ARGUMENTS

The Court of Appeals for the Thirteenth Circuit properly found that the digital border search of Ms. Koehler's laptop was in violation of her Fourth Amendment rights. Contrary to the governments assertion, the Border Search Exception was not applicable to the search of Respondent's laptop because digital devices carry significant privacy interests that untether the

narrow scope of enforcing immigration and custom laws at the border. Moreover, because of the intrusiveness, search of Respondent's laptop was a non-routine border search unsupported by reasonable suspicion.

The Court of Appeals also properly found that the use of the PNR-1 drone and the hand held Doppler radar constituted a warrantless "search" in violation of the Fourth Amendment to the United States Constitution. It held that the search was unreasonable insofar that it was executed without a warrant and did not fall within any of the few exceptions to the warrant requirement that have been carefully crafted by this Court. Absent exigent circumstances, the warrantless search of one's home and the area identified surrounding it is *per se* unreasonable, and thus unconstitutional. Furthermore, it held that the officers could not establish probable cause for the subsequent search warrant without the searches conducted by the PNR-1 drone and the hand held Doppler device. Therefore, any "fruits" of that search are tainted and must be excluded from evidence.

Under a Fourth Amendment claim, the initial question is whether the government action constituted a "search." In *Katz v. United States*, 389 U.S. 347 (1967), the court held that the "Fourth Amendment protects people, not places." But it was the concurring opinion of Justice Harlan that set forth the so called "reasonable expectation of privacy test," a two-prong test that the later decisions employed when analyzing Fourth Amendment issues. *Id*. at 361 (Harlan, J., concurring). However, this did not replace the "trespass test" for "searches" under the Fourth Amendment. Indeed, in *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) the Supreme Court reaffirmed that a search occurs when the Government obtains information by physically intruding on a constitutionally protected area.

In the instant case, Ms. Koehler's Fourth Amendment rights were violated under both analyses. As discussed infra, officers trespassed onto her land, and all the way into her backyard

(which, as discussed below, is a constitutionally protected area), with the intent to gather information,[1] both, via the PNR-1 drone, and the Doppler radar device. Furthermore, Ms. Koehler had a reasonable right of privacy in her backyard, which included a swimming pool and a pool house. The Government's surreptitious deployment of highly sophisticated technological devices to spy on Ms. Koehler violated that right.

Some areas, however, fall outside the Fourth Amendment protections such as "open fields."[2] Attempting to render the Fourth Amendment issue inapplicable *ab initio*, the Government tried to mischaracterize the Respondent's backyard as an "open field" not subject to Fourth Amendment protections, concluding that the observations made by the drone *could not* be a "search" under Fourth Amendment in this context. This contention is simply wrong.

It is a long standing precedent in Fourth Amendment jurisprudence that the curtilage is afforded the same Fourth Amendment protections as is the home. Common sense dictates that the yard of a person's house, or at least as here the area immediately surrounding it, is a part of the home subject to Fourth Amendment protections. Even applying the *Dunn* factors to the facts of this case, it is clear that the pool area and the pool house in Respondent's back yard fall within the curtilage of the home, and any finding to the contrary is clearly erroneous, regardless of the standard of review.

[1] Detective Perkins decided he needed more information, which was obtained as a result of deploying the drone and the Doppler radar. (R. at 4-5, 32-34)

[2] "[T]he special protection accorded by the Fourth Amendment to the people in their persons, houses, papers, and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Hester v. U.S.*, 265 U.S. 57, 59, 44 S. Ct. 445, 68 L. Ed. 898 (1924).

The discussion does not end with curtilage, however. "Basic purpose of Fourth Amendment prohibition against *unreasonable* searches and seizures is to safeguard privacy and security of individuals against arbitrary invasions by governmental officials. C*amara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (emphasis added). Thus, the vital question is that of reasonableness. Justice Harlan's two-prong test mentioned above has since provided guidance in determining whether the government has intruded upon an individual's reasonable expectation of privacy. Applying the facts of the present case to this test, the Thirteenth Circuit correctly concluded that Ms. Koehler had a reasonable expectation of privacy, violation of which constituted a search, requiring a warrant issued by a detached and neutral magistrate.

The Respondent's contention that the searches conducted by the drone and the radar device were done for officer safety is somewhat misplaced. Insofar that Respondent means to concede that these actions were "searches" under the Fourth Amendment, and purports to assert that they fall within one of the exigency exceptions to the warrant requirement – safety of officers or potential hostages – it is incorrect, because the officer's fear for their safety was not reasonable under the circumstances, and in any case officers were not in immediate danger and had time to obtain a warrant or return prepared, which in fact they did.[3]

[3] Officers returned with a warrant and the SWAT team three hours later.

STANDARD OF REVIEW

"We hold that the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo.*" *Ornelas v. United States*, 517 U.S. 690, 691, 116 S. Ct. 1657, 1659, 134 L. Ed. 2d 911 (1996)

When reviewing a district court's denial of a motion to suppress, this Court reviews the lower court's factual findings for clear error, and its conclusions of law de novo. *United States v. Soto*, 649 F.3d 406, 409 (5th Cir. 2011).

ARGUMENT

I. THE FOURTH AMENDMENT'S WARRANT REQUIREMENT APPLIES TO SEARCHES OF DIGITAL DATA AT THE BORDER

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Digital devices are the modern-day repository for the "papers" and "effects" that are stored in homes. Border searches are "a narrow exception to the Fourth Amendment prohibition against warrantless searches without probable cause." *United States v. Seljan*, 547 F.3d 993, 999 (9th Cir. 2008). The border search exception to the Fourth Amendment warrant requirement is intended to serve the narrow purpose of enforcing immigration and custom laws. *United States v. Cotterman,* 709 F.3d 952, 956 (9th Cir. 2013). The border exception was not "designed primarily to serve the general interest in crime control." *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000); and does not confer "unfettered discretion" on law enforcement. *Almedia-Sanchez v. United States,* 431 U.S. 266, 272-73 (1973*). United States v. Montoya de Hernandez,* 473 U.S. 531, at 539 (1985).

Here, the government acknowledges that the search of the Respondent's laptop was not linked to the Ford kidnappings. R. at 8. Accordingly, because the search of Ms. Koehler's laptop was not tethered to the border search exception Respondent's Fourth Amendment rights were violated.

It is crucial that searches without a warrant and probable cause, including suspicion-less searches, under the limited exceptions be "tethered" to the purposes justifying the border search exception. *Riley v. California,* 134 S. Ct. 2473, 2485 (2014) (citing *Arizona v. Gant*, 556 U.S. 332, 343 (2009)). See also *Florida v. Royer*, 460 U.S. 491, 500 (1983) (warrantless searches "must be limited in scope to that which is justified by the particular purposes served by the exception"). The government contends that "quick and non-intrusive digital border searches require no reasonable suspicion." R. at 7; citing *United States v. Arnold*, 523 F.3d 941, 947 (9th Cir. 2008). However, the government's "continued searching through the documents" of Ms. Koehler's laptop did not render this a "quick search," as the agents were not merely checking its functionality. R. at 3.

In *Riley v. California*, 134 S. Ct. 2473 (2014), a unanimous Supreme Court held that officers must obtain a warrant before searching the digital information on an arrestee's cell phone incident to their arrest. Justice Roberts stated that neither the Government's interest in protecting officers' safety, nor its interest in preventing the destruction of evidence, justified dispensing with a search warrant for searches of cell phone data. *Id*. at 2484-87. Moreover, *Riley* recognized that search of one's person or physical effects is categorically different from a search of digital information. After reviewing some of its own previous decisions, the *Riley* Court stated that it was necessary "to decide how the search incident to arrest doctrine applies to modern cell phones . . . technology nearly inconceivable just a few decades ago." *Id.* at 2484.[4] Thus, the question we

[4] "cell phone" is itself misleading shorthand; many of these devices are in fact 'minicomputers' that also happen to have the capacity to be used as a telephone. *Riley,* at 2489

confront here "is what limits there are upon this power of technology to shrink the realm of guaranteed privacy" at the border. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Prior federal appellate decisions concerning digital border searches were constrained by precedent.[5] However, the decision in *Riley* provides relevant guidance in the present case where the border patrol agents went a fishing expedition during an "unusually quite night" at the Eagle City border station. R. at 25. As such, the government's contention that the border search exception extends to the contents of electronic devices is refuted by the rationale in Riley. Thus, this Court should affirm the Thirteenth Circuit's holding that digital border searches fall outside the border search exception. R. at 6,15.

The Supreme Court in *Ramsey* described the border search exception as "like the similar 'search incident to arrest' exception." *United States v. Ramsey*, 431 U.S. 606, 621 (1987) (citing *United States v. Robinson*, 414 U.S. 218, 224 (1973)). Although warrantless searches at the border 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" *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004), it is not "anything goes" at the border. *United States v. Seljan*, 547 F.3d 993, 999, 1000 (9th Cir. 2008). Rather, the Fourth Amendment requires that border searches without a warrant and probable cause be "tethered" to enforcing immigration and custom laws. See *United States v. Cotterman*, 709 F.3d 952, 956 (9th Cir. 2013) [emphasizing the narrow scope of the border search exception]. Agent Ludgate testified that based on her training "no warrant is necessary for the type of routine search conducted of Mr. Wyatt's car," and figured the search of

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[5] For example, Ickes provides little guidance here because the constitutional challenge to the search was based on First Amendment grounds; the government had reasonable suspicion; and the that a search of digital devices as if they are any other container, should be overruled on Riley's premise. *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005)

Ms. Koehler's laptop was just "part of the search of the car," regardless of Mr. Wyatt's lack of consent. R. at 27-28. However, there was no nexus established between the $10,000 found in the car and Ms. Koehler's laptop. Thus, the scope of the border search exceeded its purpose when the agents searched for information unrelated to the stop of Mr. Wyatt, as there was no evidence of contraband or criminal activity being sought in Ms. Koehler's laptop.

The Supreme Court in *Boyd* stated "[t]he search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo." *Boyd v. United States,* 116 U.S. 616, 523, 623, (1886). Accordingly, the search of Ms. Koehler's laptop was a mere fishing expedition to obtain information to assist the ECPD with a "possible lead," within the interior of the border, with their investigation of a past crime, the Ford kidnappings. R. at 2. Respondents laptop was not probative of criminal conduct. The government's interest in obtaining information is less significant than its interest in directly discovering illegal items. *Montoya de Hernandez* at 538, 541. Thus, what prompted the search of the laptop exceeded the border search exception and violated Respondent's Fourth Amendment rights.

The majority, if not all, of border search cases that the Supreme Court has approved were all specifically targeting at finding or preventing entry into the U.S. of contraband or inadmissible persons. Here, facts lack to support such approval, and it is this type of "potential unfettered dragnet effect that is troublesome." *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013). (emphasis added).[6] The search of Ms. Koehler's laptop "did not possess characteristics of a border

[6] *United States v. Ramsey*, 431 U.S. 606 (1987) (narcotics concealed in letters); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (narcotics in an alimentary canal); *United States v.*

search or other regular inspection procedure" it more resembled the common non-border search. See United *States v. Brennan*, 538 F.2d 711, 716 (5 Cir. 1976). Relying on the border exception to justify opening the laptop and clicking buttons is akin to justify pulling apart the curtains of someone's home to get a glimpse into their private life.

1. Logic and *Riley* Distinguish Digital Devices from Containers

The Court in *Riley* observed that search of "data stored" on digital devices is "'materially indistinguishable' from searches" of traditional "physical items," because the information contained in digital devices is both quantitatively and qualitatively different from other objects. The immense storage capacity; internet search and browsing history; information apart from the device itself that may be viewed, such as the cloud, are just a few distinguishing features. Riley *Id*. at 2488-89. To say that an interactive digital device is like a container, is "like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Riley* at 2488. The *Riley* Court was mindful of the realm of modern digital devices and "the sum of an individual's private life" held at the governments fingertips. *Riley* 2493. As Justice Werdegar pointed out– the "Supreme Court holdings on . . . containers were not made with mobile phones, smartphones and handheld computers - - none of which existed at the time - -in mind"). *People v. Diaz*, 244 P.3d 501, 516-17 (Cal. 2011) (Werdegar, J., dissenting). "A phone contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." Riley, 134 S. Ct. at 2491. These contents are not rendered searchable simply because they are stored in a laptop rather than a suitcase. See *United States v. Chadwick*, 433 U.S. at 13 (1977) (footlocker), abrogated by *California v. Acevedo*, 500

Flores-Montano, 541 U.S. 149 (2004) (narcotics concealed in a vehicle driving across the border).

U.S. 565 (1990) ("the footlocker's mobility [does not] justify dispensing with the added protections of the Warrant Clause"). [7]

Requiring a warrant to search digital devices at the border will not impede the governments interest in securing its borders from contraband as the "officers remain free to examine the physical aspects" of the digital device. Riley 249. Had the agents inspected Respondent's laptop to identify that it was not a false container used to store contraband, or more money, such a search would have been justified under the border exception. However, a reading of the contents of documents intruded on Ms. Koehler's privacy rights, since such documents could deal with very personal matters. *United States v. Levy*, 803 F.3d 120 (2d Cir. 2015).

Indeed, "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. U.S.*, 533 U.S. 27, 33-34 (2001).

2. The highly intrusive nature of Digital Data constitutes a Non-Routine Search

"The level of intrusion into a person's privacy is what determines whether a border search is routine." Irving 452 F.3d at 123. The cell phone search in *Riley* involved a "manual" search, like the search of Ms. Koehler's laptop. Although the Court drew no distinction between a "manual" search and a "forensic" search, the Court's analysis appears to conflate the two as the privacy interests in digital devices outweigh any legitimate governmental interest. *Riley v. California,* 134 S. Ct. 2473 (2014). Any search of the data stored or accessible on a digital device- whether

[7] *Flores-Montano* and its progenies, reveal that the Court's logical underpinnings are limited to vehicles and associated inanimate objects, i.e. fuel tanks, which simply do not implicate the same dignity and privacy concerns presented by the border search of Ms. Koehler's laptop. *United States v. Flores-Montano*, 541 U.S. 149 (2004).

manually or with specialized "forensic" tools is a "highly intrusive" search that implicates the "dignity and privacy interests" of an individual, or may be considered "particularly offensive," and is thus deemed "non-routine." *Flores-Montano,* 541 U.S. at 152. Here, the agents reached into the interior of Ms. Koehler's life when they searched her laptop. "It is difficult to conceive of a property search more invasive or intrusive" than a sophisticated, digital search of a cell phone because such a search is "essentially a body cavity search" of the cell phone. *United States v. Saboonchi,* 990 F.Supp.2d 536, 569 (D. Md. 2014). Thus, although there was no forensic search of Ms. Koehler's laptop, a copying of every bit of data, it nonetheless implicated significant intrusion to privacy interests protected by the Fourth Amendment. To suggest otherwise is like suggesting that a strip search does not implicate a significant privacy interest so long as the government does not look between the person's toes. *United States v. Kolsuz,* 185 F. Supp. 3d 843, 857 (E.D. Va. 2016).

Furthermore, although travelers at the border have a "diminished privacy interest" at the border that "does not mean that the Fourth Amendment falls out of the picture entirely." *Riley v. California,* 134 S. Ct. 2473, 2488 (2014). "To the contrary when 'privacy related concerns are weighty enough' a 'search' may require a warrant, notwithstanding the diminished expectations of privacy.'" *Id.* (quoting *Maryland v. King,* 133 S. Ct. 1958, 1979 (2013)). Here, Respondents privacy interests are identical to those in *Riley,* and the governments interest are analogous. Just as in *Riley,* nothing here prevented agents from seizing Respondent's laptop at the border, securing it, then applying for a search warrant. A "person's digital life ought not to be hijacked simply by crossing a border." *Cotterman,* 709 F.3d at 965. By not extending the holding in *Riley* to the border search exception will mean that anything goes at the border which in essence obliterates Fourth Amendment protections.

Here, Agent Ludgate testified that she had enough time to get a warrant. R. at 28. An individual's privacy interest in digital data outweighs the governments interest in conducting warrantless (suspicionless) border searches. The highly intrusive nature of the search tilts the constitutional balance in favor of Respondents privacy interest. As "mobile devices now serve as digital umbilical cords to what travelers leave behind at home or at work," the search was just as intrusive, if not more, than strip search of a person. *United States v. Saboonchi*, 990 F. Supp. 2d 536, 557–58 (D. Md. 2014).

II. THE TOTALITY OF THE CIRCUMSTANCES DID NOT GIVE RISE TO REASONABLE SUSPICION TO SEARCH RESPONDENT'S LAPTOP

Since "[T]he ultimate touchstone of the Fourth Amendment is reasonableness." Riley, 134 S. Ct. at 2482 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). A warrantless search is reasonable only when it falls within the ambit of a specific exception to the Fourth Amendment warrant requirement. *Id*. (citing *Kentucky v. King*, 131 S. Ct. 1849, 1856-57 (2011)). In this case not only was the search beyond the border exception, but the agents did not have was not "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). Reasonable assessment is made in light of "the totality of the circumstances," Id at 417. The totality of the circumstances is assessed by the Irving factors: "the unusual conduct of the defendant, discovery of incriminating matter during routine searches, [and] computerized information showing propensity to commit relevant crimes [and] suspicion itinerary." R. at 7.; See *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006).

As to the first factor, Agent Ludgate testified that the Mr. Wyatt "appeared incredibly agitated and uncooperative," and "based on the was acting" (not making eye contact and fidgeting

with the steering wheel) they "suspected he might be hiding something" so they asked him to "step out" and "open his trunk" R. at 26. However, there was nothing unusual about Mr. Wyatt's conduct. Considering that it was 3:00AM and the he answered all of the agent's questions and abided by their commands, such behavior was not unusual when being stopped by two authorities in an empty border stop. See *United States v. Guadalupe-Garza,* 421 F.2d 876, 879 (9th Cir. 1970) [defendant's nervous appearance did not warrant real suspicion that defendant was concealing something on his person and a strip search was illegal and heroin recovered was product of illegal search.]

Second, Agent Ludgate testified that Mr. Wyatt's "close personal relationship with Ms. Koehler, a person of interest," and the fact that "the money in his trunk matched the kidnapper's demands" gave rise to suspect that Mr. Wyatt was involved in the kidnapping. R. at 27. However, Mr. Wyatt was "placed under arrest for failure to declare in excess of $10,000,"[8] as opposed to being an accomplice in the Ford kidnapping; despite the fact that the agents saw a bunch of Ford's personal information on the desktop of the Ms. Koehler's laptop. R. 28. Moreover, there are no facts that Mr. Wyatt was questioned about the kidnapping. This highlights the agents lack of reasonable suspicion that the $10,000 or the contents of the laptop was related to the crime of kidnapping. R. at 3, 8, 32.

More importantly, the prior to the search of Ms. Koehler's laptop, Agent Ludgate did not articulate objective facts of criminal activity found during the routine search of Mr. Wyatt's car. After the traveler informed the agent that he shared the laptop with is fiancé and that AK stood for Amanda Koehler, they entered Respondents name into its criminal intelligence and border watch

[8] No violation of 31 U.S.C. § 5316 as only $10,000

database. R. at 2, 26. There are no facts indicating that the agents searched the travelers name, nor questioned how it was shared (storing personal information or using it for searches) The routine search of the car transformed into a non-routine search when agents searched the laptop.

Lastly, the database search on Ms. Koehler revealed multiple violent felony convictions, and listed her as a "person of interest." R. at 27. However, as the district court stated "the laptop was not directly linked to the Ford Kidnapping," and therefore no nexus between the stop and the search. R. at 8. The mere fact that the $10,000 found in the trunk was the same amount and in the same increments the Ford kidnappers asked for does not give rise to the reasonable suspicion necessary to search the laptop. After all, because asking travelers if they are carrying $10,000 or more is part of the routine questioning implies that is common occurrence. R. at 26.

Mr. Wyatt was stopped at the Eagle City border station on August 17, 2016 at 3:00 A.M. The proof of life ransom was not due until noon the following day, August 18th. This information was known to the agents. Agent Ludgate testified she was aware of the ongoing Ford kidnapping investigation as they had been briefed on the case. R. at 2. Agent Ludgate could have easily confirmed if the ransom had yet been paid. Instead, Agent Ludgate did not contact the lead Detective Perkins, with "a potential lead," until after conducting a search of Ms. Koehler's laptop. R. at 31. It was an unusually quite night at Eagle City border station on August 17th. Only five or six cars came through the station that night, and all of them were stopped. R. at 25. Since not a lot of cars were coming through and the agents still had several hours in their shift, after stopping Mr. Wyatt's car, Agent Ludgate took it upon herself to conduct an investigation on behalf of ECPD. R. at 24. A warrant requirement would not allow border agents, such as Agent Ludgate, unbridled discretion to perform investigatory searches of electronic devices that are with Fourth Amendment

principles. This border search would have been legitimate in scope had the agents only searched Mr. Wyatt's car. R. at 17. The agents could have seized the laptop sought a warrant. R. at 27.

The totality of the circumstances did not give rise to the level of reasonable suspicion necessary to search Ms. Koehler's laptop. The kidnappers were believed to already be somewhere in Eagle city, and ECPD had "recently" obtained information that their "main person of interest had used an alias to rent out Macklin Manor" in Eagle City. R. at 27, 32.

The governments exploratory search was "highly intrusive" and a prime example of when "a border search might be deemed "unreasonable" because of the particularly offensive manner in which it is carried out." Flores-Montano, 541 U.S. at 155 n.2 (2004) (quoting United States v. Ramsey, 431 U.S. 606, 618 n.13 (1987)). The appropriate level of suspicion cannot be merely a hunch. *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 n.4 (1985). The uniquely sensitive nature of data on electronic devices carries with it a significant expectation of privacy and thus the intrusion violated Ms. Koehler's Fourth Amendment.

III. THE POLICE'S USE OF THE PNR-1 DRONE AND THE HANDHELD DOPPLER RADAR CONSTITUTED A "SEARCH" IN VIOLATION OF THE FOURTH AMMENDMENT TO THE UNITED STATES CONSTITUTION.

A "search"occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984). Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Katz*, 389 U.S. at 357. The two questions that must be answered, thus, are: 1) did the defendant have a subjective expectation of privacy;

and 2) is the society prepared to objectively accept that expectation of privacy as reasonable. *Id*. at 361 (Harlan, J., concurring).

A. "Search" occurred under the "reasonable expectation test."

To determine whether an individual should be afforded Fourth Amendment protections, Justice Harlan outlined a two-prong test for "reasonable expectation of privacy." The first prong asked whether the person had a subjective expectation of privacy in the situation. The second prong asked whether this expectation is "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). "The Court later clarified that the second part of Justice Harlan's test inquires 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" Nina Gavrilovic, *The All-Seeing Eye in the Sky: Drone Surveillance and the Fourth Amendment*, 93 U. Det. Mercy L. Rev. 529, 537 (2016) (*citing Oliver v. United States*, 466 U.S. 170, 182-83 (1984)). Since the areas searched by the electronic devices were different, they require separate discussions.

a. Officer Lowe's use of the PNR-1 drone.

1. Did Ms. Koehler have a subjective expectation of privacy?

Macklin Manor is located on the outskirts of the city, on top of Mount Partridge, which presumably is quite a tall mountain, because it is "particularly cloudy, and fog and clouds usually cover Macklin Manor year-round," and "planes and other aircraft often steer clear of flying over Mount Partridge … opting to go around the mountain…." R at 3, 41. The seclusive nature of Macklin Manor is further evidenced by the fact that it took the PNR-1 drone about seven minutes to reach it. R at 4. The drone is "aerodynamic and capable of reaching a top speed of 30 miles per hour." R at 46. Simple arithmetic puts Macklin Manor about 3.5 miles from officer Lowe if flying

at top speed, or about 1.75 miles if flying at half its speed. The former is more likely since the officers would want to get the drone there sooner rather than later because of its limited battery life of about 35 minutes. R at 3.

The foregoing factors, along with the fact that Ms. Koehler used an alias to purchase the property, R at 3, 32, show that Ms. Koehler had an expectation of privacy.

2. Was Ms. Koehler's expectation of privacy one that the society is objectively prepared to recognize?

The Government asserts that there can be no reasonable expectation of privacy from aerial surveillance. In doing so, the Government relies heavily on *California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d (1986) and *Florida v. Riley*, 488 U.S. 445, 109 S. Ct. 693, 102 L. Ed. 2d 835 (1989). In both cases a sharply divided court held that aerial surveillance of the defendant's curtilage by the police was not a search under Fourth Amendment. However, nowhere in those cases did the Court make a per se rule that all aerial surveillances are valid under the Fourth Amendment. On the contrary, both these decisions were factually driven as to whether the defendants in *those* cases, under *those* specific facts could have a reasonable expectation of privacy. Indeed, as the Thirteenth Circuit aptly points out "No matter how much technology advances, the question of whether a search violates an individual's fourth amendment rights will always begin and end with reasonableness." R at 18. While it might have been objectively unreasonable to expect privacy under the facts of those cases, the facts of this case render Ms. Koehler's expectation of privacy objectively reasonable.

There were some significant similarities and differences between the facts in *Ciraolo* and *Riley*. Both involved manned aircrafts, and in both cases officers made their observations from lawfully navigable air space from clear vantage points, and in both the Court stressed that any

member of the public could have easily observed with the "naked eye" what the officers had observed.

In a 5-4 decision, the *Ciraolo* Court focused on the fact that the airplane used by the police was operating at an altitude of 1000ft where plane traffic was very common and any members of the general public often fly and can easily observe with an unarmed eye what the police had observed. Quoting *Katz*, the Court reiterated that "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'"

In *Riley*, the court was faced with an identical issue, but this time with a helicopter flying at 400 feet above the ground. The Court found *Ciraolo* to be the controlling precedent. A more divided Court in Riley[9] focused its analysis on the fact that as long as the helicopter flew within *lawfully permissible* altitudes, observations made by the unarmed eye were not considered to be a search. The Court admitted, however, that it would have been a different case if the police had observed any "intimate details" connected with the use of the home or curtilage, *cf. Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (stressing the importance of photographs revealing intimate details as to raise constitutional problems), or "if flying at that altitude had been contrary to law or regulation." The present case is that case.

In this case, the overflight occurred by a technologically advanced, unmanned aerial vehicle (UAV), commonly known as a drone.[10] It is equipped with a state of the art high definition camera that "allows the user to zoom in on a target up to 15 feet away." R at 46. This powerful

[9] This was a plurality opinion

[10] Drones generally are dubbed UAVs, "unmanned aerial vehicles." The Federal Aviation Administration terms a drone an "unmanned aircraft system" (UAS). Daniel E. Harmon, *Drone Regs & Legal Issues: Government Officials Ponder the Uav Phenomenon*, Law. PC, April 15 2016, at 1

"eye" of the drone enhances the naked eye. Gavrilovic, *supra* at 538. This is substantiated by officer Lowe's testimony that the drone took high definition photographs when the visibility was not clear. R at 41. Furthermore, it was highly intrusive in that it revealed intimate details about Ms. Koehler when it took facial photographs from a distance of up to 15 feet close detailed enough to make a positive identification. It photographed and recorded the swimming pool area, an area generally associated with intimate activities of the home. Furthermore, the Government contends that the drone did not break any laws while flying over Macklin Manor. R at 10. The Government, however, cannot be sure. After all, officer Lowe lost track of it for 4-5 minutes. R at 41. Officer Lowe also testified that based on a statement by the manufacturer, 60% of the time PNR-1 drones exceed the maximum allowable altitude limit from 1640 feet all the way up to 2000 feet, a full 360 feet over the navigable airspace. R at 41. Officer Lowe further testified that they had conducted six tests with that PNR-1 drone and it had not exceeded the altitude. Since the drones exceed the limit 6 times out of 10, and the previous 6 times this drone did not exceed, it is reasonable to infer that it was extremely likely to exceed the legal limit.

Considering these circumstances, it is reasonable that Ms. Koehler did not knowingly expose herself or her curtilage to the public, and it is likewise objectively reasonable that she did not need to protect herself from an aerial surveillance. Therefore, she had a subjective expectation of privacy, which the society is objectively prepared to accept as reasonable. Thus, the search conducted by the PNR-1 drone was unreasonable and violated Ms. Koehler's Fourth Amendment rights.

b. Detective Perkins's use of the Doppler radar

In *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) the Court held that obtaining by sense-enhancing technology any information regarding the interior of a

home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a "search"—at least where the technology in question is not in general public use. The Doppler radar used here is not in general public use. Detective Perkins testified that it is common among police departments throughout the country, and that they order it directly from the manufacturer. He further testified that they are built specifically for law enforcement and that he does not believe that it is popular amongst the public. R at 35. The use of the Doppler radar was also very intrusive. Detective Perkins placed it directly on the front door of the main house, penetrating through its walls and into the privacy of the home. He was able to detect its occupants by observing their body heat and their breathing. R at 4, 33. It's hard to imagine anything much more intimately intrusive than that. Detective Perkins did the same with the pool house. R at 4, 33.

The main house, and probably the pool house, are considered areas protected by the Fourth Amendment. Therefore, "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant." *Id*. at 40.

IV. BECAUSE THE OFFICERS COULD NOT ESTABLISH PROBABLE CAUSE FOR THE SEARCH WARRANT WITHOUT THE ILLEGAL SEARCHES BY THE PNR-1 DRONE AND THE DOPPLER RADAR, ALL "FRUITS" HARVESTED FROM THE SUBSESQUENT "WARRANTED" SEARCH ARE TAINTED WITH ILLEGALITY AND MUST BE SUPPRESSED.

Evidence obtained as direct result of unconstitutional search or seizure is plainly subject to exclusion, and question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of prior illegality is whether the challenged evidence was come at by

exploitation of initial illegality or instead by means sufficiently distinguishable to be purged of primary taint. *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984). "[T]he independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Utah v. Strieff*, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016). Thus the question becomes whether the officers could independently from those searches have obtained a warrant. In other words, the Government must show that the probable cause existed prior to the illegal searches.

"Probable cause" for search without warrant means more than a bare suspicion and exists where the facts and circumstances within knowledge of the officers and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

The facts in support of the Government's claim that probable cause existed independently, do not give rise to any reasonable inference that anything more than a bare suspicion existed. The officers found $10,000 in $20 denominations in Mr. Wyatt's car, claiming it was consistent with the request by the kidnappers. R at 2, 12, 20, 26. The officers, however, should have known that the requested amount was only supposed to have passed to the kidnappers some 36 hours later, and hence could not have been connected. R at 2. Next, they had a laptop with initials "AK" that revealed a lease document for Macklin Manor under an alias of Ms. Koehler. All this shows that she may have purchased the property. To assume that she is present there, is a guess at best. Furthermore, Detective Perkins testified that ECPD obtained information that Ms. Koehler had used an alias to "rent out" Macklin Manor. So the officers believed that she in fact may not be there since she rented it out. Without more information to support probable cause, a warrant would

not have been issued. The fact that information obtained from the prior illegal searches was used is further evidenced by the fact that they "obtained a no-knock and announce" warrant. Generally, a no-knock warrant will not be issued unless the Government can show some degree of elevated danger or exigent circumstances. *See United States v. Singleton*, 441 F.3d 290 (4th Cir. 2006) (Exigent circumstances that would justify no-knock entry of apartment were not necessarily established by combination of dangerous neighborhood, existence of drug investigation and suspect's criminal history, even though the suspect had history of arrests and convictions for violent crimes.) In order to justify a "no-knock" entry under the Federal Constitution's Fourth Amendment, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would, among other things, be dangerous or futile. *Richards v. Wisconsin*, 520 U.S. 385, 387, 117 S. Ct. 1416, 1418 (1997). The police must have used the information obtained from the searches to obtain such a warrant, and to have the SWAT team present. Therefore, any evidence recovered from that search is tainted by the illegality of the prior searches, and must be suppressed.

CONCLUSION

The Respondent respectfully requests This Court to affirm the decision of the Thirteenth Circuit.

Respectfully Submitted,

Team R. 38.

Counsel for Respondent

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