Team 5

No. 4-422

In The
Supreme Court of the United States

October Term 2017

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 THE PETITIONER

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

State Court of Appeals Cases

Constitutional Provisions

Secondary Sources

ISSUES PRESENTED

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

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

STATEMENT OF THE CASE

Amanda Koehler, the defendant, was charged by indictment with three counts of kidnapping under 18 U.S.C. § 1201(a) on October 1, 2016. R. at 1. The United States additionally charged her with one count of possessing a handgun as a felon under 18 U.S.C. § 922(g)(1), as Ms. Koehler had already been convicted of several violent felonies. R. at 1-2. Working in tandem, the U.S. Border Patrol and the Eagle City Police Department (ECPD) discovered in August 2016 that Ms. Koehler was hiding three kidnapped children at Macklin Manor, an estate secluded on a mountaintop on the outskirts of Eagle City. R. at 1-5. The three teenagers, John, Ralph, and Lisa, are the children of billionaire biotech tycoon Timothy H. Ford. R. at 1. The children, who reside in San Diego, California, were reported missing a month earlier on July 15, 2016, and police believed that they were being held somewhere in Eagle City, the capital of Pawndale. R. at 44.

I. Factual Background – U.S. Border Patrol

On August 17, 2016 at approximately 3 a.m., U.S. Border Patrol agents Christopher Dwyer and Ashley Ludgate pulled over a car entering Eagle City from Mexico. R. at 1-2. As part of their routine practice of stopping every car that passes the border station during the early morning hours, the agents stopped the black Honda Civic and asked the driver, Scott Wyatt, why he was crossing the border. R. at 24-25. Mr. Wyatt appeared "incredibly agitated and uncooperative": he was pale, avoided eye contact, and fidgeted with the steering wheel, and gave only brief replies, leading the agents to "[suspect] that he might be hiding something." R. at 26. Mr. Wyatt denied carrying $10,000 or more in U.S. currency, but when the agents searched his car, they found $10,000 in $20 bills. R. at 2. The agents were aware that just recently, the kidnapper of the Ford children had demanded this exact amount in $20 bills in exchange for proof of the children's life, due by August 18, the next day. R. at 27.

In the trunk, the agents also found a laptop with the initials "AK," and Mr. Wyatt said that the laptop belonged to Amanda Koehler, his fiancé. R. at 2. From their criminal intelligence and border watch database, the agents learned that Ms. Koehler had previously been convicted of multiple violent felonies and that she was a person of interest in the kidnapping case. R. at 2. Agent Ludgate opened the laptop. R. at 3. Even though the officers might have had time to obtain a warrant before opening the laptop, the agents opened the laptop immediately, without a warrant, because they were concerned that Mr. Wyatt may have contacted Ms. Koehler before or during the stop. R. at 28, 42. The laptop was not password-protected, and the agents found several documents already open on the desktop. R. at 3. These included records of private information about Mr. Ford (such as his address, personal schedule, and staff list) and a lease agreement for Macklin Manor. R. at 3. Macklin Manor is owned by a shell company whose leader is "Laura Pope," a known alias of Ms. Koehler. R. at 3. By 4:30 a.m. the same morning, the agents had concluded their search and contacted Detective Raymond Perkins, lead detective on the kidnapping case. R. at 3.

II. Factual Background – Eagle City Police Department

Detective Perkins assigned officers Kristina Lowe and Nicholas Hoffman, of the Eagle City Police Department, to Macklin Manor to investigate that same morning. R. at 3. Macklin Manor is located atop Mount Partridge, a mountain that planes and aircraft generally avoid due to clouds and fog. R. at 3. The estate consists of a large main house, an open patio and pool area, and a single-room pool house – with no gate or fence enclosing the estate. R. at 4. The pool is fifteen feet away from the house, and the pool house is on the opposite side of the pool, roughly fifty feet from the main house. R. at 3.

Officer Lowe parked her squad car two blocks away from Macklin Manor and deployed a PNR-1 drone to survey the estate from overhead. R. at 4. The drone took seven minutes to get to

Macklin Manor, hovered above the estate for fifteen minutes, and took seven minutes to return. R. at 4. Of the twenty-nine total minutes in flight, Officer Lowe accidentally lost track of the drone's altitude for four to five minutes. R. at 4, 41. The PNR-1, a popular drone variety that has been "storming the market" in Pawndale, is equipped with an attachable camera that can store up to thirty photos and fifteen minutes of video, and it can zoom in on a subject up to fifteen feet away. R. at 3, 46. The drone is pre-programmed to fly at 1,640 feet, the legal maximum altitude for drones in Pawndale. R. at 4. Some PNR-1 drones in Pawndale have been known to ascend up to 2,000 feet due to network malfunctions. R. at 40. However, the specific drone Officer Lowe used had been tested monthly for the preceding six months, including three days prior to the Macklin Manor surveillance, and this drone had never malfunctioned. R. at 40-41. From the air, the drone was able to capture three minutes of video and twenty-two photos of the estate's general layout, including one image of Ms. Koehler traveling from the main house to the pool house. R. at 4.

Detective Perkins, "fearful that alerting the occupants without more information would endanger the lives and safety of any potential hostages," scanned the main house's front door area and the pool house with a Doppler radar. R. at 4-5. Doppler radars, which are now commonly used by law enforcement, emit radio waves that can detect movements or breathing up to fifty feet away. R. at 4. In this way, a Doppler radar attempts to report how many people are within a structure and roughly where they are located, but nothing else about a structure's interior. R. at 4. Costing only $400 each, Doppler radars are affordable and thus "super popular amongst a bunch of different law enforcement agencies" in Pawndale, including in Eagle City. R. at 33, 35. The detective's radar indicated that in addition to one person in the main house, there were four people in the pool house: three individuals huddled together and one person pacing, apparently keeping guard. R. at 5. The officers then left to obtain a search warrant and returned at approximately 8 a.m. with a

warrant and a SWAT team. R. at 5. When they entered the main house, they found not one, but three individuals: Sebastian Little and Dennis Stein, whom the officers detained, and Ms. Koehler, who fled out the back door upon their arrival. R. at 5. Officers Lowe and Hoffman were able to chase and detain Ms. Koehler before she could escape the property, and they discovered that she was carrying a Glock G29 handgun. R. at 5. The officers then used force to enter the pool house, where they rescued John, Ralph, and Lisa. R. at 5.

III. Procedural History

On November 25, 2016, the U.S. District Court for the Southern District of Pawndale denied Ms. Koehler's motion to suppress evidence, and Ms. Koehler pled guilty to all charges. R. at 1, 15. Ms. Koehler appealed to the U.S. Court of Appeals for the Thirteenth Circuit. R. at 15. On July 10, 2017, the court granted her original motion to suppress, reversing the district court's ruling. R. at 15. This Court granted certiorari. R. at 22.

SUMMARY OF ARGUMENT

This Court should reinstate Ms. Koehler's convictions for kidnapping three children for over a month, and for possessing a firearm as a felon, because every procedural step by law enforcement complied with the Fourth Amendment. First, the Border Patrol's laptop search, conducted during the early morning hours when the Eagle City agents would consistently stop every car, was fully valid as part of a routine border search under the long-recognized border-search warrant exception. These searches require at most reasonable suspicion, which the agents had after stopping Scott Wyatt's car, observing his nervous demeanor, discovering $10,000 in U.S. currency illegally stowed in his trunk, and finding the laptop of Ms. Koehler, who was a person of interest in the kidnapping case. Further, the agents performed a very basic search that involved simply opening the non-password-protected laptop and viewing documents already open on the

desktop, without use of any special technology. Considering the strong basis for reasonable suspicion and the minimal invasiveness of the search, the agents properly searched the laptop to find the crucial evidence that directed the Eagle City police to rescue the Ford children.

Regarding the Eagle City Police Department's actions, flying the drone at over 1,600 feet was justified, because the drone flew within public navigable airspace and did not employ unreasonably invasive photography or filming. Nor did the Doppler radar provide a grounds to suppress evidence, as it is not "sense-enhancing" technology that would violate the Fourth Amendment. Although both technologies were validly used, a constitutional problem with either device still would not require suppression of the evidence, for neither device was necessary to generate the probable cause supporting the ultimate search warrant for Macklin Manor. The requisite probable cause instead came from the documents discovered on Ms. Koehler's laptop near the Eagle City border, as these documents connected Ms. Koehler to the kidnapping and provided the address of Macklin Manor. Given the drone and radar's significant information-gathering limitations, the officers used these devices merely to survey the premises as a safety precaution, not to secure the search warrant. Thus, as the laptop search was constitutional, the resulting warrant was valid and the evidence found should not have been suppressed. Accordingly, this Court must reverse the appellate court's decision to grant Ms. Koehler's motion to suppress based on ostensible procedural missteps.

STANDARD OF REVIEW

In reviewing the Thirteenth Circuit's order granting the suppression of evidence, this Court considers conclusions of law and applications of law to the facts *de novo*, while reviewing questions of fact for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. THIS COURT MUST DENY MS. KOEHLER'S MOTION TO SUPPRESS BECAUSE THE AGENTS WHO SEARCHED HER LAPTOP NEAR THE BORDER HAD REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND EXIGENT CIRCUMSTANCES DISPELLED THE NEED FOR A WARRANT.

The U.S. Border Patrol's cursory search of Ms. Koehler's laptop near the border was justified, requiring this Court to reverse the appellate court's ruling. The Fourth Amendment upholds "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. Although warrantless searches are presumptively unreasonable, there are several exceptions justifying warrantless searches under specific conditions. *Arizona v. Gant*, 556 U.S. 332, 338 (2009). The border agents' actions fall within two different warrant-requirement exceptions. First, under the well-established "border-search exception," reasonable suspicion at most is required to search a laptop near the border. *United States v. Arnold*, 523 F.3d 941, 946 (9th Cir. 2008); *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013). In our case, the agents had reasonable suspicion to believe that Ms. Koehler's laptop, stowed in a car crossing the border, contained evidence of criminal activity, making the search justified under any circumstance. Second, *Riley v. California*, which generally requires a warrant to search a digital device incident to lawful arrest, may not apply near the border, where suspicion requirements are more relaxed. *See United States v. Saboonchi*, 48 F. Supp. 3d 815, 819-20 (D. Md. 2014). Even if *Riley* does apply in spite of the border-search exception, this Court specifically stated that a warrantless digital search may still be permitted if a traditional warrant exception, such as exigent circumstances, applies. *Riley v. California*, 134 S. Ct. 2473, 2494 (2014). Because the pursuit of a kidnapper of three children held hostage for over a month epitomizes exigent circumstances, *Riley* does not invalidate the laptop search, and this Court must reverse the appellate court's decision.

A. The laptop search qualified under the border-search exception to the warrant requirement, as the agents had reasonable suspicion that the laptop contained evidence of criminal activity, if reasonable suspicion was even required.

Considering the reduced expectation of privacy at the border, the border patrol agents' decision to view documents on Ms. Koehler's laptop was entirely justified, for two reasons. First, the laptop search was routine, for the Eagle City border agents stopped Mr. Wyatt's car as part of a regular vehicle stop procedure and the agents viewed the laptop's contents in an unintrusive manner. Whereas non-routine searches may require reasonable suspicion, routine searches do not. *United States v. Roberts*, 274 F.3d 1007, 1012 (5th Cir. 2001); *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004). Second, even if this Court decides that, as a matter of policy, all digital border searches should require reasonable suspicion, the aggregate of observations and facts available to the agents undoubtedly created reasonable suspicion of not a merely minor offense, but a serious and ongoing felony continuing to threaten young lives.

1. The laptop search was routine and unintrusive, resembling the type of search that the border-search exception permits without individualized suspicion.

The border agents stopped Mr. Wyatt's car at 3 a.m. as part of a routine search of cars crossing the border, for the agents had a practice of stopping every car during the early morning hours. R. at 24. Further, only property (the vehicle and laptop), and not Mr. Wyatt's person, was searched, supporting the conclusion that it was a routine search. *Flores-Montano*, 541 U.S. at 152 (holding that the "non-routine" label usually attaches to searches of a person, rather than property). Even though laptops differ from other types of property in terms of the quantity of personal information that can be stored, the Ninth Circuit held in *Arnold* that laptops still classify as "property" whose search presumptively classifies as routine. *See Arnold*, 523 F.3d at 947.[1] The

[1] "The type of manual review at issue in cases like *United States v. Arnold* – which involved turning the device on and perusing visible files – is analogous to searches of other containers."

one instance where a laptop search may be non-routine, thus requiring reasonable suspicion, is where agents perform a "forensic" search involving the "application of computer software to analyze a hard drive." *Cotterman*, 709 F.3d at 967-68. The Eagle City agents, however, performed the exact opposite of a forensic search. In *Cotterman*, after the border agent reviewed accessible files on the defendant's two laptops, other agents arrived to deliver the laptops 170 miles away to a forensic examiner who then copied the hard drives. *Id.* at 957-58. These events, which took place over the course of several days and resulted in the recovery of password-protected information, rightly swayed the Ninth Circuit to create a greater degree of protection against such "exhaustive exploratory search[es]." *Id.* at 965.

By contrast, the search of Ms. Koehler's laptop was just one part of the events leading up to Mr. Wyatt's arrest, which altogether took less than an hour and a half. R. at 2-3. Moreover, the border agents did not send the laptop to a forensic expert or break any passwords. R. at 3. The Ninth Circuit held in *United States v. Arnold* that border agents did not need reasonable suspicion to open the defendant's laptop and open two unlocked folders containing nude photographs. 523 F.3d at 943. The Eagle City border agents, unlike the agents in *Arnold*, did not even open any files or folders that previously were unopen. R. at 3. The Eagle City agents' basic search instead resembled the *Cotterman* agent's initial "quick look and unintrusive search" of the two laptops before they were taken to the forensic examiner. 709 F.3d at 960. The *Cotterman* agent's actions alone would not have required particularized suspicion, *id.* at 961, and neither should the Eagle City agents' similar conduct. By simply opening the non-password-protected laptop and reviewing files that were already open on the desktop, the agents performed what was essentially a "manual

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Recent Case, *Ninth Circuit Holds Forensic Search of Laptop Seized at Border Requires Showing of Reasonable Suspicion*, 127 HARV. L. REV. 1041, 1046 (2014).

review of files on an electronic device," which does not require reasonable suspicion under *Cotterman*. 709 F.3d at 967. Therefore, the district court correctly denied Ms. Koehler's motion to suppress on the basis that that the laptop search was permissible.

2. The agents had reasonable suspicion of discovering evidence of criminal activity on Ms. Koehler's laptop.

Even assuming, arguendo, the border agents needed reasonable suspicion to view documents plainly open on Ms. Koehler's laptop, this Court should reverse the appellate court's ruling that the agents lacked reasonable suspicion. Reasonable suspicion exists where the totality of the circumstances would lead a reasonable officer to suspect illicit activity. *United States v. Winters*, 782 F.3d 289, 298 (6th Cir. 2015). The unusual behavior of the defendant, incriminating information found during a routine search, and information about past relevant crimes are three factors that can give rise to reasonable suspicion. *United States v. Irving*, 452 F.3d 110, 124 (2d Cir. 2006).

In our case, all three factors indicate that a reasonable border patrol agent would have suspected that the laptop's contents contained evidence of criminal activity. First, Mr. Wyatt appeared "incredibly agitated and uncooperative" when the agents stopped his car and questioned him pursuant to the routine search. R. at 26. He was very pale, avoided eye contact, fidgeted with the steering wheel, and gave only brief replies, leading the agents to "[suspect] that he might be hiding something." R. at 26. Second, Mr. Wyatt denied transporting $10,000 or more in U.S. currency, yet the agents discovered $10,000 in $20 bills inside the trunk. R. at 2. The border agents also were aware that just recently, the kidnapper of the Ford children had demanded this exact amount in $20 bills in exchange for "proof of life," due by the day after the agents stopped Mr. Wyatt. R. at 27. Third, the agents found the laptop, initialed with the letters "AK," and Mr. Wyatt told the agents that the laptop belonged to his fiancé, Amanda Koehler. R. at 2. Using their criminal

intelligence and border watch database, the agents learned that not only had Ms. Koehler already been convicted of several violent felonies, but she was in fact a person of interest in the Ford children's kidnapping. R. at 2. Finally, Mr. Wyatt's car, containing the $10,000 and Ms. Koehler's laptop, was stopped in Eagle City, the region where the Ford children were believed to be hidden, making a link to the kidnapping even likelier. R. at 2, 44.

This confluence of factors severely undermines the appellate court's contention that there was no reason to believe that searching Ms. Koehler's laptop would reveal any further evidence of crime. *Compare with United States v. Ickes*, 393 F.3d 501, 507 (4th Cir. 2005) (holding that border agents had reasonable suspicion to search a laptop when they had already found marijuana and photos and video containing child pornography in the car). Considering that laptops have the capacity to store vast amounts of information, it was reasonable for the border agents to at least suspect that the laptop contained some fact pertaining to the kidnapping. The agents' faith in that suspicion was what enabled the Eagle City police to ultimately rescue the children before any worse fate could befall them. This Court must therefore reverse the appellate court's decision.

B. *Riley* does not invalidate the laptop search because even if the warrant requirement applies in spite of the longstanding border-search exception, exigent circumstances necessitated an immediate warrantless search.

The appellate court misguidedly argues that this Court's decision *Riley v. California* rendered the laptop search unconstitutional, requiring the court to grant the motion to suppress. Decided in 2014, *Riley* held that police must have a warrant to search a cell phone seized incident to arrest. 134 S. Ct. at 2495. First, the holding on its face does not apply to border searches, so the appellate court's decision to apply it in this context was misplaced. Second, even if *Riley* does apply to border searches, the exigent circumstances warrant exception justified the agents' search of the laptop due to the immediate need to rescue the kidnapped children.

1. This Court did not intend for *Riley* to eviscerate the border-search exception, which is necessary to ensure national security.

If *Riley* required a warrant to search any device near the border, this would wholly swallow the border-search exception as it applies to digital searches. For this reason, the holding did not apply the heightened warrant requirement to the border. Accordingly, most federal courts that have ruled on the validity of digital border searches post-*Riley* have held that *Riley* does not change the no-suspicion requirement for routine searches or the reasonable suspicion requirement for forensic searches.[2] In one of these cases, a defendant whose forensic laptop search was declared valid just prior to *Riley* filed a motion to reconsider, arguing that *Riley* now required the evidence to be suppressed. *Saboonchi*, 48 F. Supp. 3d at 815. The Maryland district judge refused to reconsider, explaining:

> Beyond exigencies, *Riley* makes no specific reference to the border search exception or any other case-specific [warrant] exceptions . . . other than to clarify that they remained intact . . . . An invasive and warrantless border search may occur on no more than reasonable suspicion, and nothing in *Riley* appears to have changed that." *Id.* at 818-20.

Later cases such as *United States v. Caballero* and *United States v. Kolsuz*, both decided in 2016, have upheld the *Saboonchi* holding. *See United States v. Caballero*, 178 F. Supp. 3d 1008, 1016 (S.D. Cal 2016); *United States v. Kolsuz*, 185 F. Supp. 3d 843, 854 (E.D. Va. 2016) ("[A]lthough the Supreme Court's decision in *Riley* appears to indicate that cell phones deserve the highest level of Fourth Amendment protection available, the highest protection available for a border search is reasonable suspicion."). The only courts that have applied *Riley* to a border search did so where

[2] *See* Jared Janes, *The Border Search Doctrine in the Digital Age: Implications of* Riley v. California *on Border Law Enforcement's Authority for Warrantless Searches of Electronic Devices*, 35 REV. LITIG. 71, 98 (2016); Eunice Park, *The Elephant in the Room: What is a Nonroutine Border Search, Anyway? Digital Device Searches Post*-Riley, 44 HASTINGS CONST. L.Q. 277, 288-89 (2017).

the actual search took place at an international airport, not near a national border like in our case. *See United States v. Kim*, 103 F. Supp. 3d 32, 59 (D.D.C. 2015); *United States v. Djibo*, 151 F. Supp. 3d 297, 309 (E.D.N.Y. 2015). Courts have declined to apply *Riley* to traditional border searches because that would effectively eviscerate the meaning and purpose of the border-search exception, which is designed to enable officers to conduct expeditious, though not unfettered, searches at locations that require greater protection in the interest of national security. *See Flores-Montano*, 541 U.S. at 149. Therefore, this Court should use this opportunity to formally rule that *Riley*, as its text suggests, applies solely to non-border searches incident to arrest, so that the border-search exception may give officers the latitude necessary to detect crime near the nation's borders.

2. Even if *Riley* generally requires a warrant for digital border searches, exigent circumstances dispelled the need for a warrant to search Ms. Koehler's laptop.

Even assuming, arguendo, that *Riley* applies to border searches in spite of the border-search exception, the exigent circumstances surrounding the search for the kidnapped children excused the warrant requirement. In its holding, this Court emphasized that the general ban on warrantless digital searches is not designed to prevent law enforcement from conducting immediate searches under exigent circumstances, such as "to assist persons who are seriously injured or are threatened with imminent injury." *Riley*, 134 S. Ct. at 2494. Before opening the laptop, the border agents had reasonable suspicion to believe that Ms. Koehler's laptop contained information pertaining to the children's whereabouts. Prompt discovery of that information was critical, considering that the agents were concerned that Mr. Wyatt may have contacted Ms. Koehler before or during the stop, potentially prompting Ms. Koehler to relocate or even kill the children to avoid capture. R. at 42. Even though the agents may have had time to obtain a warrant before searching the laptop, R. at 28, time was of the essence – especially since the Ford children had already been missing for over

a month, greatly increasing the likelihood of serious injury or death due to dangerous conditions. The agents reasonably did not want to take any delays that could possibly result in further harm to the Ford children. In fact, this Court in *Riley* specifically offered child abduction as an example of an extreme circumstance where searching a digital device without a warrant would be prudent. *Riley*, 134 S. Ct. at 2494. Thus, this Court must reverse the appellate court's exoneration of Ms. Koehler, for the Eagle City agents acted swiftly to search the laptop to resolve an ongoing emergency threatening the lives of three children.

II. THIS COURT MUST DENY MS. KOEHLER'S MOTION TO SUPPRESS BECAUSE NEITHER THE PNR-1 DRONE NOR THE DOPPLER RADAR VIOLATED THE FOURTH AMENDMENT.

The Eagle City Police Department (ECPD), in using a PNR-1 drone and handheld Doppler radar to assess whether it was safe to execute a search warrant, comported with criminal procedure laws. First, the drone was constitutional; second, the radar was constitutional; and third, notwithstanding constitutional issues, neither device was necessary to generate the probable cause underlying the ultimate search warrant, so neither device could have tainted the evidence found therefrom. Thus, this Court should reinstate the district court's refusal to suppress the evidence.

A. The drone did not violate the Fourth Amendment because Ms. Koehler lacked a reasonable expectation of privacy in the general layout of her estate, which could be observed by the naked eye from public navigable airspace.

The ECPD was justified in employing a drone to observe Macklin Manor, even without a warrant. Although the Supreme Court has yet to rule on the constitutionality of property searches via drone, scholars suggest that this type of technology will require the extension of already-existing principles governing flight technologies.[3] In *California v. Ciraolo*, the Court held that

[3] *See, e.g.*, Matthew R. Koerner, *Drones and the Fourth Amendment: Redefining Expectations of Privacy*, 64 DUKE L.J. 1129, 1135-36 (2015); S. Alex Spelman, *Drones: Updating the Fourth Amendment and the Technological Trespass Doctrine*, 16 NEV. L.J. 373, 377 (2016).

police officers did not violate the Fourth Amendment by flying an airplane in public navigable airspace above the defendant's property to confirm that the defendant was illegally growing marijuana. *California v. Ciraolo*, 476 U.S. 207, 207 (1986). For two reasons, our case not only resembles *Ciraolo* but presents an even stronger basis for the lack of a Fourth Amendment search. First, whereas the *Ciraolo* court permitted overhead surveillance of a yard that was clearly curtilage of the defendant's property, the PNR-1 drone's key observations pertained to the pool house outside Macklin Manor, which does not classify as curtilage and thus can be freely searched by police without a warrant. *See Oliver v. United States*, 466 U.S. 170, 176 (1984) (categorizing non-curtilage as "open fields"). Second, even if the pool house were considered curtilage, Ms. Koehler lacked a reasonable expectation of privacy in the general layout of the estate, including the pool house, for three reasons. First, the drone observed the estate from legally navigable airspace; second, the PNR-1 drone is in general public use; and third, photo and videos taken via drone do not inherently violate the Fourth Amendment.

1. The police department's surveillance focused on the pool house apart from Macklin Manor, which is not curtilage under the *Dunn* test.

Law enforcement was entitled to use a drone to survey the pool house, which is separate from the main house of Macklin Manor and not entitled to Fourth Amendment protection like the home itself is. The Supreme Court established in *Oliver* that the Fourth Amendment does not apply to "open fields," which encompass anything beyond the home and its immediate curtilage. 466 U.S. at 176. Curtilage is area, just outside the home, that is "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987). In *Dunn*, the Supreme Court set forth four factors to determine whether property surrounding a home can be considered curtilage. *Id.* ECPD acted upon drone footage that showed Ms. Koehler arriving at the pool house, where the officers suspected

the Ford children were being held hostage. R. at 4. Because the pool house is not curtilage of Macklin Manor under the *Dunn* test, the Fourth Amendment did not bar ECPD from surveilling the pool house or using the collected information to obtain a warrant.

The first *Dunn* factor concerns the proximity of the detached structure to the main home. 480 U.S. at 301. The pool house is on the opposite side of the pool, roughly fifty feet from the home. R. at 4. Courts have held that detached structures as close as forty-five feet from the main house lay outside protected curtilage. *See United States v. Brady*, 993 F.2d 177, 178 (9th Cir. 1993) (holding that an outbuilding forty-five feet from the house was not curtilage). *See also United States v. Pace*, 955 F.2d 270, 273 (5th Cir. 1992); *United States v. Calabrese*, 825 F.2d 1342, 1350 (9th Cir. 1986) (both holding that detached structures roughly fifty feet away were not curtilage). Thus, the fifty-foot distance at Macklin Manor indicates that the pool house was not curtilage.

The second factor asks whether the perimeter of the property was enclosed. 480 U.S. at 301. Whereas in *Ciraolo* there was a ten-foot fence shielding the defendant's marijuana crops, which were considered curtilage, 476 U.S. at 209, Macklin Manor had no gate or fence enclosing the estate. R. at 4. Because fencing "demark[s] a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house," the absence of an enclosure encompassing both the house and the detached structure contributed to the *Dunn* court's determination that a detached structure was not curtilage. 480 U.S. at 302. *See also Pace*, 955 F.2d at 275. Similarly, the lack of an enclosure circling both the Macklin Manor home and pool house should guide this Court to find that the pool house was not in the estate's curtilage.

The third factor pertains to the "nature of the uses" to which the detached structure is being put. 480 U.S. at 301. In *Dunn*, the Court noted that an important consideration favoring the government was the fact that the police already had "objective data" that the structure was not

being used not in connection with the "intimate activities of one's home" but to illegally manufacture drugs. *Id.* at 302. *See also Calabrese*, 825 F.2d at 1350. Similarly, ECPD's legal border search of Scott Wyatt's car produced strong circumstantial evidence that Ms. Koehler was imprisoning the Ford children on the Macklin Manor premises. This evidence, combined with the fact that people generally do not reside within a pool house, gave the police a legitimate basis to believe that the pool house was not being used as an adjunct to the home.

The final factor inquires into the measures that the landowner took to prevent others from observing the detached structure. 480 U.S. at 301. In *Dunn*, where the defendant's property contained "typical ranch fence[s]," the Court nonetheless held that the fences were not designed to "prevent persons from observing what lay inside the enclosed areas." *Id.* at 303. Conversely, the Macklin Manor estate does not contain fencing of any type. R. at 4. Nor does it have guard dogs, "no trespassing" signs, or any other features intended to keep out onlookers. R. at 4. Although Macklin Manor is located on top of a mountain with poor weather, R. at 3, the record does not state that the estate is the sole property on the mountain or that other Eagle City residents do not travel near the estate, and Ms. Koehler did not take measures to secure the pool house from observation. Therefore, all factors weigh in favor of classifying the pool house as non-curtilage.

2. Even if the pool house were considered curtilage, Ms. Koehler lacked a reasonable expectation of privacy in the general features of the estate observable from a public vantage point using generally available technology.

First, even assuming, arguendo, that the pool house were considered curtilage, ECPD still was entitled to view the area "from a public vantage point where he has a right to be and which renders the activities clearly visible . . . within public navigable airspace in a physically nonintrusive manner." *Ciraolo*, 476 U.S. at 207. Because PNR-1 was pre-programmed to fly at 1,640 feet, the legal maximum drone altitude in Pawndale, R. at 4, the drone surveilled Macklin

Manor from public navigable airspace, as *Ciraolo* requires. Other PNR-1 drones used in Pawndale have occasionally malfunctioned and ascended to up to 2,000 feet, technically violating state law. R. at 40. However, the specific drone deployed by ECPD had been tested monthly for the six months preceding the Macklin Manor surveillance, including three days prior, and this drone had never malfunctioned. R. at 40-41. Only the particular drone used in connection with Macklin Manor is of any relevance. Thus, the district court concluded – even though ECPD admitted to losing data on the drone's altitude for roughly four minutes during the drone's twenty-nine-minute flight – that there was no proof that the drone surpassed the maximum legal altitude. R. at 10. Whether the police department's drone exceeded a certain altitude is a question of fact. A trial judge's factual findings underlying a denial or grant of a motion to suppress evidence should be sustained on appeal, absent clear error. *Ornelas*, 517 U.S. at 699. Thus, the court of appeals erred in deciding, without any new evidence, that just because other PNR-1 drones in Pawndale have malfunctioned, ECPD's drone that had never before exceeded the legal maximum altitude must have done so during its flight over Macklin Manor. Applying the clear error standard of review, this Court should reinstate the district court's reasonable factual finding that ECPD's drone flew legally over the Manor and was therefore in public navigable airspace.

Second, it is not significant that Macklin Manor is located atop a mountain that planes and aircraft generally avoid due to clouds and fog, for Ms. Koehler still lacked a reasonable expectation of privacy from drones in unrestricted airspace. The constitutional question is not whether inclement weather might make aircraft navigation undesirable, but whether Ms. Koehler had a subjective expectation of privacy from drone surveillance more generally and whether that expectation was objectively reasonable from society's perspective. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (O'Connor, J., concurring). In assessing expectations of privacy, courts

traditionally have not scrutinized the frequency of region-specific airspace navigation based on weather conditions; instead, they have evaluated the *type* of surveilling technology used and whether use of that technology is commonplace on a broader scale. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445, 450 (1989) (noting that helicopter travel was not "unheard of" in the region); *Ciraolo*, 476 U.S. at 215 ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected . . . ."). Applying this principle to drones, scholars in recent years have posited that drones, due to their growing prevalence, are now in general public use – making an expectation of privacy in this context objectively unreasonable.[4] The PNR-1 drone, a particularly popular drone variety that has been "storming the market" in Pawndale, R. at 46, exemplifies the point at which drone usage is ubiquitous enough to undermine subjective and objective expectations of privacy. In light of these reduced expectations, the poor weather conditions surrounding Macklin Manor do not change Ms. Koehler's Fourth Amendment rights. To rule otherwise would encourage criminals to hide the fruits of their crimes in areas with murky weather in order to conceal their misdoings from law enforcement. Because drones are legally allowed to fly 1,640 feet, regardless of bad weather, ECPD's use of the drone was proper.

Lastly, the drone's video and high-definition photo-taking capabilities do not change the outcome, because these features are not "sense-enhancing technology" under *Kyllo v. United States*. *Kyllo* prohibits police from using "sense-enhancing technology" that is not in general public use to acquire information about the interior of a home that could not otherwise be observed

[4] In 2016, a Nevada Law Journal article predicted, "[W]ith the already widespread use of drones by private citizens, it appears unlikely that the Court will find our expectations of privacy to be reasonable . . . ." Spelman, *supra* note 3, at 377. *See also* Koerner, *supra* note 3, at 1158 ("[D]rones will likely soon be within general public use under *Kyllo*, and many forms of drone technology . . . already satisfy the general-use standard.").

without entering into Fourth Amendment-protected areas. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). As discussed *supra*, drones are now a technology within general public use, and photo and video cameras are even more commonplace, so *Kyllo* does not apply. Moreover, the drone's cameras could not capture anything within the interior of the home. Last year, the Seventh Circuit rejected a claim that videotaping violates the Fourth Amendment when the filming device only captures what a person could otherwise observe. *United States v. Thompson*, 811 F.3d 944, 950 (7th Cir. 2016). *See also Dow Chem. Co. v. United States*, 476 U.S. 227, 229 (1986) (finding no Fourth Amendment search where police used a high-resolution aerial mapping camera to conduct surveillance). Although a drone does not carry human passengers, a person flying at that height would likely have been able to see the very general features of the mansion that the drone observed: a large main house, an open pool and patio area, single-room pool house, and a woman travelling from the main house to the pool. R. at 4. Further, the camera's zoom-in function only works at a fifteen-foot distance, R. at 46, so from a height of over 1,600 feet, the drone could not have magnified the features of Macklin Manor, eliminating any argument that the PNR-1 has such advanced technological capabilities as to make the drone "sense-enhancing."

While the absence of physical trespass does not automatically exclude the potential for a privacy invasion, *United States v. Jones*, 565 U.S. 400, 407 (2012), Ms. Koehler lacked a reasonable expectation of privacy in the general features of her estate, viewed from a legally accessible public viewpoint high in the air. Further, in *Ciraolo*, *Riley*, and *Dunn*, the Supreme Court condoned the use of overhead surveillance to facilitate convictions for relatively minor drug offenses, which did not pose a direct, imminent threat to human life or liberty. Ms. Koehler similarly lacked a reasonable expectation of privacy in her pool house, and drones should be treated similarly to planes and other aircraft in evaluating Fourth Amendment implications. Therefore,

ECPD's use of the PNR-1 to rescue three kidnapped teenagers who had been in captivity for more than a month did not violate the Fourth Amendment, and this Court should reinstate the district court's denial of the motion to suppress.

B. The Doppler radar did not violate the Fourth Amendment because the radar is a technology in general public use, and the radar's imprecision prevents acquisition of specific information about a home's interior.

The ECPD officers did not violate Ms. Koehler's Fourth Amendment rights by using a Doppler radar to vaguely ascertain the presence of people in the main house and pool house, as to ensure the officers' safety when executing a search warrant. A Doppler radar attempts to detect individuals within fifty feet by emitting radio waves whose frequency is altered by humans' movement or breathing. R. at 4. *Kyllo v. United States* established that "[w]here . . . the Government uses a device that is not in general public use, to explore [interior] details of a home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40. Our case is distinguishable from *Kyllo* for two reasons. First, Doppler radars are now in general public use, unlike the thermal-imaging device at issue when *Kyllo* was decided over a decade ago. *Id.* at 27. Second, the Doppler radar is too unsophisticated to relay any reliable evidence about the interior of a home. The imprecise reportings generated by ECPD's radar reveal the device's severe limitations, resolving in the Government's favor the Tenth Circuit's concerns about the possibly invasive precision of Doppler technology. *See United States v. Denson*, 775 F.3d 1214, 1219 (10th Cir. 2014). As neither element of the *Kyllo* rule is satisfied, ECPD's use of the radar was permissible under the Fourth Amendment.

1. Doppler radars are not banned under *Kyllo* because these devices are in general public use.

As Doppler radars are common enough to be in general public use, the *Kyllo* prohibition does not apply here because the case's holding applies exclusively to technologies that are not in general public use. *See Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting) ("[P]rotection [from unreasonable searches] apparently dissipates as soon as the relevant technology is 'in general public use.'"). Doppler radars are affordable, costing only $400 each, and are "super popular amongst a bunch of different law enforcement agencies" in Pawndale, including in Eagle City. R. at 33, 35. The fact that these devices are used primarily by law enforcement rather than by ordinary citizens, R. at 35, does not preclude the devices from being within general public use. Courts have noted that advanced technologies as law enforcement-specific as DNA profiling might be considered within general public use. *Raynor v. Maryland*, 99 A.3d 753, 767 n.13 (Md. Ct. App. 2014) ("At least one commentator has noted that 'the claim that DNA profiling is not in public use is, at worst, false, or at best, in need of refinement or development.'"). Therefore, considering Doppler radars' popularity amongst law enforcement, this Court should find that the *Kyllo* rule does not apply because the device is sufficiently in public use.

2. Doppler radars are not banned under *Kyllo* because the device is too imprecise to generate meaningful data about a home's interior and thus is no more probative than a layperson observing from outside the premises.

Assuming arguendo that Doppler radars are not in general public use, this Court still should decide that ECPD's use of the radar was acceptable because the radar is only capable of gathering vague data about the interior of Macklin Manor, information that could also be acquired without technology. Courts confirm that technologies used primarily by law enforcement are permissible, as long as they do not harness otherwise unascertainable information about a home's interior. *See, e.g.*, *People v. Evensen*, 208 Cal. Rptr. 3d 784, 792 (Ct. App. 2016) (holding that police could use

specialized law enforcement software to discover defendant's child pornography disseminated illegally via peer-to-peer file sharing). Like the police in *Evensen*, ECPD used a law enforcement-targeted device to gather publicly knowable information about the general presence of people inside Macklin Manor. The Doppler radar can only roughly estimate how many people are within a home and where they are located – it cannot reveal what those people look like, who they are, or any other information about a home's interior. R. at 4. For instance, when the ECPD officers scanned Macklin Manor's front door, they detected one person inside. R. at 5. However, when the officers left and returned to the premises with a search warrant that same morning, they found that there were not one, but three people inside the home. R. at 5. Detective Perkins said in a deposition that it was possible that two more people could have arrived after the radar was used, while the officers were obtaining a warrant. R. at 34. When questioned about the radar's accuracy, however, he admitted that "nothing's perfect." R. at 35.

This information about the device's unreliability should enable this Court to answer the questions about Doppler radar technology posed by the Tenth Circuit in *United States v. Denson*. In 2014, the *Denson* court stated:

> We know the radar suggested the presence of someone inside. But how far inside the structure could it see? Could the device search the whole house and allow the officers to be sure that they had located every person present? Could it distinguish between one person and several? We just don't know. *Denson*, 775 F.3d at 1219.

Now we know. The Doppler radar purports to be able to sense people roughly fifty feet away. However, notwithstanding the possibility that more people arrived after the radar was used, the device cannot necessarily search an entire house, giving officers certainty that they had accounted for everyone present. Detective Perkins admitted that the ECPD officers were surprised by the extra two people they discovered in the house and that it was fortunate that the officers had brought a SWAT team capable of handling the situation. R. at 34. Likewise, it is also evident that the

Doppler radar cannot necessarily distinguish between one person and several people. These answers reveal the radar's fundamental lack of precision, alleviating the Tenth Circuit's concerns about these devices revealing intimate details of the home in violation of the Fourth Amendment. As the district court correctly concluded, the only useful information that the officers had gleaned from the radar was "merely that people were present inside the house." R. at 11. An officer, or even a layperson, observing the house for some time could probably ascertain – from noise or from seeing people enter and exit the home – that people were somewhere inside Macklin Manor at some point in time. Because the Doppler radar did not capture private information about the interior of a home that would be otherwise imperceptible, this Court should reverse the appellate court's decision to grant the motion to suppress.

C. This Court must reverse the appellate court's decision to exonerate Ms. Koehler, for even if the PNR-1 drone or Doppler radar was used impermissibly, those errors could not have tainted the search warrant.

Even if this Court believes that either the PNR-1 drone or Doppler radar conducted an impermissible search, the Court still must reverse the appellate court's decision, because neither device was required to generate the probable cause underlying the search warrant leading to Ms. Koehler's convictions. Probable cause to support a warrant exists when "given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The relevant question is whether the events leading up to the search, viewed by an objectively reasonable officer, created a high enough degree of suspicion to give rise to probable cause. *Ornelas*, 517 U.S. at 696; *United States v. Sokolow*, 490 U.S. 1, 10 (1989).

ECPD officers were sent to Macklin Manor based on what the border agents discovered after searching the car of Scott Wyatt, Ms. Koehler's fiancé, near the Eagle City border. R. at 3. It

was the fruits of this entirely legal search that independently created probable cause for ECPD to believe that Macklin Manor harbored fruits or instrumentalities of the kidnapping. The essential links are 1) Ms. Koehler's fiancé was caught transporting $10,000 in $20 bills, the exact proof of life amount that the kidnapper had extorted; 2) Ms. Koehler had a laptop containing publicly unavailable information about Mr. Ford; 3) the laptop contained a lease agreement for Macklin Manor, executed under the name "Laura Pope," one of Ms. Koehler's known aliases, via her shell company; and 4) Macklin Manor is located in Eagle City, where police believed the children were being held. Considering that Ms. Koehler was already a person of interest in the case, the available information alone would have been enough for a reasonable officer to believe that Macklin Manor contained evidence of the kidnapping. Thus, ECPD was entitled to obtain a warrant for Macklin Manor after the car search, without needing any further evidence from the drone or radar.

Although the officers happened to use the drone and Doppler radar prior to applying for the warrant, the purpose of those technologies was not to gather evidence required to generate probable cause, for the car search had already accomplished that. As discussed *supra*, the drone (which cannot zoom in at 1,640 feet) and the radar (which can only roughly estimate the number and location of people inside a home) had significant limitations and thus had little crime-detecting value. Rather, knowing that an already-convicted violent felon was probably the kidnapper, the officers needed to survey the estate to alleviate safety concerns. Multiples times throughout the record, the officers reiterated their concerns for the safety of both the officers and the children who could be on the estate. In a deposition, Detective Perkins even stated, "The only real reason we deployed the drone and the Doppler was because we wanted to be safe as we approached." R. at 35. Officer Lowe added, "If we didn't act quickly, if we didn't determine that we could safely

enter the premises and hopefully apprehend Ms. Koehler and save the Ford children, we were worried they would get away and we would have to start from scratch." R. at 42.

Therefore, ECPD's use of the two devices was a virtual "quick and limited search of premises . . . conducted to protect the safety of police officers or others," akin to the "protective sweep" that this Court validated in *Maryland v. Buie*. *Maryland v. Buie*, 494 U.S. 325, 327 (1990). *Buie* applies to protective sweeps incident to executing a warrant, *id.*, and the Eagle City officers had not yet obtained a warrant when they used the drone and radar. R. at 5. However, several circuits have held that where there is reasonable suspicion of danger, police may conduct a limited protective sweep pending the issuance of a warrant, which is precisely what happened at Macklin Manor when the officers used the devices just prior to obtaining a search warrant. *See, e.g.*, *United States v. Taylor*, 248 F.3d 506, 513 (6th Cir. 2001) (holding that police can conduct a protective sweep while awaiting a warrant). *See also United States v. Martins*, 413 F.3d 139, 150 (1st Cir. 2005) (holding that exigent circumstances, even without a warrant, can justify a protective sweep). Classifying the technologies as instruments of a protective sweep makes it even more evident that they were used to guarantee the safety of the officers and the children, rather than to gather key evidence needed to obtain a warrant. Because the probable cause sustaining the search warrant did not rely on any data obtained by either the drone or the Doppler radar, this Court must reverse the appellate court's decision to suppress the evidence that the police ultimately discovered.

CONCLUSION

For the foregoing reasons, the Thirteenth Circuit erroneously decided to suppress the evidence incriminating Ms. Koehler. This Court therefore must reverse the appellate court and reinstate the district court's original denial of Ms. Koehler's motion to suppress.