Team 9

No. 4-422

IN THE

Supreme Court of the United States

United States of America,
Petitioner,

v.

Amanda Koehler,
Respondent.

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

Brief for the Petitioner – The United States of America

Team 9
Counsel for the Petitioner
October 20, 2017

QUESTIONS PRESENTED

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

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

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STATEMENT OF JURISDICTION

The statement of jurisdiction has been omitted in accordance with the rules of the University Of San Diego School Of Law Criminal Procedure Tournament.

STATEMENT OF THE CASE

A. Statement of the Facts

The U.S. Border Patrol prioritizes securing the Eagle City border station. It is a major crossing point between the United States and Mexico and the largest and busiest ports of entry into the United States and the State of Pawndale. R at 2. Due to an uptick in criminal activity at the border station over the past two to three years, additional agents have been recently transferred to Eagle City. R at 24. As a result, there are now more agents assigned to Eagle City than any other station along the border. *Id.* Agents work in shifts, with traffic determining how many cars can be stopped as they pass through the border. *Id.* The traffic during the midnight to eight A.M. shift is particularly light, affording the officers the ability to stop every car and ask routine questions. *Id*.

During the early shift on August 17, 2016, Agent Ashley Ludgate and Agent Christopher Dwyer stopped a total of five to six cars. R at 25. One of these cars was a black Honda Civic with a single occupant who identified himself as Scott Wyatt. *Id.* Mr. Wyatt had a pale affect, would not make eye contact with Agent Dwyer or Agent Ludgate, was fidgeting with the steering wheel with his fingers, and gave brief answers to the questions asked. R at 26. The agents informed Mr. Wyatt that it was a routine stop and they have the right to search the vehicle. *Id.* Upon a request to do so, Mr. Wyatt stepped out of the car and opened the trunk. *Id.* Inside the trunk Agent Ludgate discovered a laptop with the initials "AK" on it and ten thousand dollars in twenty dollar bills. *Id.* Mr. Wyatt informed the agents that he shared the laptop with his fiancé, Amanda Koehler. *Id.* Agent Ludgate subsequently placed Mr. Wyatt under arrest for failing to disclose the ten thousand dollars. R at 27.

Agent Ludgate had been briefed on a recent kidnapping in San Diego, and was aware at the time of the arrest that the FBI and Eagle City Police had listed Amanda Koehler as a person of interest. *Id.* It was believed the three kidnap victims were being held in Eagle City, and that the same amount discovered, ten thousand dollars, was requested as proof of life by the kidnappers. *Id.* Without obtaining a warrant or permission from Mr. Wyatt or Ms. Koehler, Agent Ludgate then conducted a search of the contents of the laptop. *Id.* The laptop was not password protected, and open on the desktop were a number of files with personal and business information pertaining to Mr. Ford, the father of the kidnap victims. R at 28. The documents consisted of bank statements, a personal schedule, employee schedules, and a lease agreement in the name of "Laura Pope". *Id.* The lease agreement was for an address in Eagle City and the only document without Mr. Ford's information. *Id.* A subsequent database search provided that Laura Pope is a known alias for Ms. Koehler. *Id.*

With the information from both the Eagle City Police Department and Agent Ludgate that Amanda Koehler had leased at the address in question, Detective Raymond Perkin further investigated the status and nature of the property. R at 32. Macklin Manor is a previously abandoned estate on top of Mount Partridge on the outskirts of Eagle City. *Id.* Upon arrival at the location in question, Detective Perkins directed Officer Lowe to conduct an aerial search using a drone. *Id.* There were visibility issues with the area being constantly stormy, foggy and cloudy, but Officer Lowe was able to successfully deploy the drone. R at 42. She deployed the PNR-1 drone for 34 minutes during which time it obtained twenty two still photographs from a digital single-lens reflex camera and seven minutes of video. R at 4. The captured images displayed the layout of the premises and the image of a single female later identified as Ms. Koehler. *Id.* The unfenced property consisted of a main house, a pool located fifteen feet from the main house

and, a pool house approximately fifty feet from the main house on the other side of the pool. R at 32-33. Communication was lost to the PNR-1 unit for approximately five minutes, during which time there is a possibility that the unit exceeded the preprogrammed flight limit of one thousand six hundred and forty feet. R at 41. Although the manufacturer estimates that about sixty percent of the time during these communication outages, the drone may exceed this imposed flight maximum, monthly testing with the unit over the past six months failed to show any propensity for this response. *Id.* No other aircraft were observed during the operation. R at 42.

After the PNR-1 drone reconnaissance, Detective Perkins along with Officer Hoffman approached the front door and deployed a handheld Doppler radar device. R at 33. The device is emits radio waves that detects movement and breathing, allowing the operator to roughly identify subject number and location within a range of fifty feet irrespective of visual barriers. *Id.* They did not obtain a search warrant for the scan, nor did they do so for a subsequent scan of the pool house. *Id.* The scans revealed a single individual in the main house and four individuals in the pool house, three stationary and one pacing nearby. R at 5.

After obtaining a search warrant, a search was performed with the assistance of a SWAT team. *Id*. Two individuals were detained in the main house, Ms. Koehler was detained after attempting to escape from back door of the main house, and a final suspect was detained in the pool house in close proximity to the three kidnapped children who were present within. *Id.*

B. Procedural History.

On October 1, 2016, Amanda Koehler ("Respondent") was charged by indictment with three counts of kidnapping under 18 U.S.C. § 1201(a) and one count of being a felon in possession of a handgun under 18 U.S.C. § 922(g)(1). R at 1. On August 17, 2016, pursuant to Rule 12(b)(3)(c) of the Federal Rules of Criminal Procedure, respondent filed a motion to

suppress evidence seized on the date of her initial arrest. A suppression hearing was conducted in the Southern District Court of Pawndale by District Judge Marietta Meagle, at which testimony from United States Border Patrol Agent Ashley Ludgate, Eagle City Police Department Detective Raymond Perkins, and Eagle City Police Department Officer Kristina Lowe was entered into evidence. R at 23-42. On November 25, 2016, Judge Meagle denied the motion to suppress evidence. R at 13. An appeal by the respondent on the constitutionality of the inclusion of the evidence was heard on January 7, 2017 by Judge Connor Middlebrooks, Judge Tamara Swan, and Judge Peter Hapley of the Thirteenth Circuit. R at 14-21. The decision, dated July 10, 2017, found that both the border and property searches violated the constitutional rights of the Respondent and the decision to deny the suppression of the evidence was Reversed and Remanded. R at 21. Petition for certiorari was subsequently granted by the Supreme Court of the United States. R at 22.

STANDARD OF REVIEW

"[A]s a general matter[,] determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal … [, but also] review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts." *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996). Some circuits have extended this determination to implicate a *de novo* or a hybrid review for the determination of cartilage. In the Ninth Circuit, "the determination of the curtilage must be reviewed *de novo* on appeal[, however,] ... any determination based therein are very complex, … it is vital for the district court to first make findings of fact upon which that review can be based." *United States v. Johnson*, 256 F.3d 895, 898-901 (9th Cir. 2001). Other circuits have preserved the historical clear error standard and continue to follow that "curtilage is a question of fact" *Hodges v. United*

States, 243 F.2d 281, 283 (5th Cir. 1957). Neither the Thirteenth District, nor the Supreme Court has yet to rule on the standard for the determination of curtilage, therefore both standards will be discussed where applicable.

SUMMARY OF THE ARGUMENT

The border patrol agents were lawful in their search of Mr. Wyatt's car pursuant to a valid border search. The search resulted in the discovery of the respondent's laptop. The search of the laptop was a routine search, however if this Court were to find that it was a non-routine search, there is ample reasonable suspicion to allow for an authorized search of the laptop. The PNR-1 drone can be equated to technology that is already permissible under case law and as used did not exceed well delineated Supreme Court guidance for aerial imagery. Additionally, the pool house was not in the curtilage of the main house and therefore the use of the Doppler radar device was lawful under a broader authority to inspect outbuildings. Finally, all searches are also afforded an exigency authority as the searches were minimally necessary to ascertain the location of the victims, and if they were in need of immediate assistance.

ARGUMENT

I. THE BORDER PATROL AGENT'S HAD THE LEGAL RIGHT TO SEARCH SCOTT WYATT'S CAR AT THE BORDER AND DISCOVER THE LAPTOP

The touchstone of the Fourth Amendment is reasonableness, and reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Generally, the protections of the Fourth Amendment are not triggered if there was a valid search warrant that was executed properly. Here, there was no search warrant to be able to stop Mr. Wyatt's car. However, under the border exception to the search warrant requirement, law enforcement may lawfully conduct warrantless, suspicionless, routine searches

of individuals, their vehicles, and their effects when passing through a border station. *United States v. Flores-Montano*, 541 U.S. 149 (2004). These warrantless searches are deemed reasonable because "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Flores-Montano*, 541 U.S. at 152. "Congress has always granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Flores-Montano*, 541 U.S. at 150, citing; *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985).

The United States Supreme Court has already over turned a ruling from the Ninth Circuit Court of Appeals, in which the Ninth Circuit had ruled that there must be some sort of reasonable suspicion to be able to search a gas tank and dissemble it. The United States Supreme Court therein stated:

> But the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person--dignity and privacy interests of the person being searched--simply do not carry over to vehicles. Complex balancing tests to determine what is a "routine" search of a vehicle, as opposed to a more "intrusive" search of a person, have no place in border searches of vehicles. (*Flores-Montano*, 541 U.S. at 152.)

The Supreme Court went on to say: "Time and again, we have stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.'" *Flores-Montano*, 541 U.S. at 152-153.

A border patrol agent may stop any vehicle going through a checkpoint or trying to gain access into the county without reasonable suspicion, probable cause or a warrant. Therefore,

when border patrol Agents Christopher Dwyer and Ashley Ludgate were at the border they lawfully stopped Scott Wyatt and had the right to search his vehicle and the contents therein.

II. BORDER PATROL AGENTS LAWFULLY WENT THROUGH MR. WYATT'S AND MS. KOEHLER'S SHARED LAPTOP

A. The Search of the Shared Laptop Was a Routine Search

Mr. Wyatt's and Ms. Koehler's shared laptop was searched in a routine search. Searches at the border are separated into two categories, routine and non-routine. While there is not a distinct bright line rule as to what a routine or non- routine border search is, some courts have commented that non routine searches are of an individual's person, such as strip-searches and body-cavity searches. *United States v. Braks*, 842 F.2d 509, 512-13 (1st Cir. 1988).

At the border, numerous courts have stated that what is reasonable under the Fourth Amendment depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself; essentially it is a totality of the circumstances analysis. *New Jersey v. T.L.O.*, 469 U.S. 325, 337-342 (1985). The permissibility of a particular law enforcement practice is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States v. Montoya De Hernandez*, 473 U.S. 531, 537, 105 (1985), citing; *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

The application of the Supreme Court balancing test determining what is reasonable or not is greatly different at the international border than in the interior of the country. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause. *Montoya De Hernandez*, 473 U.S. at 538.

In a border search, where customs inspectors are authorized to conduct upon entry of persons or vehicles to the United States is of the broadest possible character. *People v. Matthews,* 112 Cal. App. 3d 11, 14, 169 Cal. Rptr. 263, 265 (1980). For routine searches reasonable suspicion is not required. Such activities require neither probable cause nor even an individualized suspicion. A more in depth search can be conducted on mere suspicion. *Matthews,* 112 Cal. App. 3d at 18-19.

United States Code section 1581 subsection (a) provides us with some guidance as to what borer patrol agents are lawfully allowed to do:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Reading the language of the code section, border patrol agents are allowed to go onboard any vehicle or vessel that is within the United States or in custom waters and examine the *manifest, other documents* and *papers*. They may also inspect and search the vessel or vehicle and every other part thereof of any person, trunk, package or cargo on the board. A laptop is essentially papers and documents. Both could contain highly sensitive, confidential information; however the code section dictates that customs agents are allowed to inspect those items. Here, what the agents did was clearly justified by the code section. They only looked at what was up on the computer screen, just the same as looking at a piece of paper or a document.

The search of the laptop can also be equated to a search of someone's personal belongings such as a container, gas tank, mail or any other sort of search that the Courts have

deemed to be routine and a not a violation of the Fourth Amendment. While the search of the laptop if done in a situation in which they were not at the border might be in violation of the Fourth Amendment, not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border. *Montoya De Hernandez,* 473 U.S. at 538-540, citing; *Florida v. Royer,* 460 U.S. 491, 525 (1983); *Carroll v. United States*, 267 U.S. 132, 154 (1925).

Lower courts have found that searches of computers are valid at the border. In *People v. Endacott,* 164 Cal. App. 4th 1346, 79 Cal. Rptr. 3d 907 (2008), the defendant was charged and convicted of possession of child porn. The defendant arrived at Los Angeles international airport in a plane from a foreign country. *Id*. at 1347. The Court held that without probable cause, custom officials could seize the defendant's laptop and view its files; this border search did not violate the Fourth Amendment. *Id.* The court went on to further state that, of course viewing confidential computer files implicates dignity and privacy interests, but no more so than opening a locked briefcase, which may contain writings describing the owner's intimate thoughts or photographs depicting child pornography. *Id*. at 1350. A computer is entitled to no more protection than any other container. *Id*. The suspicionless border search of defendant's computer was valid. *Id.*

What the *Endacott* Court focused on was a ruling made in *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005), in that case the court upheld a suspicionless border search of the defendant's computer. Mr. Ickes was driving through the border and was stopped at a border check point. In his van, custom officers found his computer and disks that were full of child porn. *Ickes*, 393 F.3d at 503-504. The court looked at the fact that it was undisputed that the

computer and disks were being transported in a vehicle over the border. *Id.* at 505. The court stated that the computer then would be like "cargo" and referenced U.S.C. section 1581, subsection (a). *Id.*, see *infra*. The court held that to hold other wise would undermine the longstanding practice of seizing goods at the border even when the type of good is not specified in the statue. *Id.* at 504. Moreover, the Court went on to discuss how since a port of entry is not a traveler's home, a person's expectation of privacy there is substantially lessened. *Id*.

The defendant in *Ickes* made the argument that the search of his computer was invalid because it involved the search of expressive material, the court viewed that as the defendant asking them to carve out a first amendment exception to the border search doctrine. *Id.* at 506. The court looking at this argument stated that if they accepted the argument, the results would be quite staggering. *Id.* The court held that following the logic of the defendant would undermine compelling reasons that lie at the very heart of the border search doctrine. *Id.* The *Ickes* Court went on to further lambast recognizing a first amendment exception to the border search doctrine stating that it would ensure significant headaches for those forced to determine the scope. *Id*.

If we were to ignore all the reasonable suspicion the agents had to search Mr. Wyatt and Ms. Koehler laptop, the search would be deemed a routine search at the border. The laptop was in a vehicle going over the border and is essentially cargo. It can also be viewed as any other paper or document that the border patrol agents are lawfully allowed to search. At the border agents have a wide latitude to protect the country. The search was not intrusive nor was it of Ms. Koehler's body. Doing a precursory search of the laptop is in compliance with the law.

B. If This Court Were to Find That It Was a Non-Routine Search, Agents Had Reasonable Suspicion to Search The Computer

If this court were to find that the search of the laptop was a non -routine search, all that is needed is a mere showing of reasonable suspicion. *See infra*. Looking at what happened that day,

the border patrol agents had reasonable suspicion that criminal activity was afoot. A temporary detention requires only a reasonable suspicion that the detained individual was involved in criminal activity. *(United States v. Sokolow* (1989) 490 U.S. 1, 7; *Terry v. Ohio* (1968) 392 U.S. 1, 22.) This reasonable suspicion must be based on specific articulable facts. (*Id*.) "[the] Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Montoya De Hernandez*, 473 U.S. at 544.

The agents were at an area that was known to have criminal activity. When the border patrol agents stopped Mr. Wyatt's car in a routine border stop, Mr. Wyatt was extremely agitated and uncooperative. They asked him if he had over ten thousand dollars or more of U.S. currency on him, he stated no. When the agents started to conduct the search of the vehicle, they found ten thousand dollars in currency in the trunk in twenty dollar denominations and a laptop with the initials AK on it. Mr. Wyatt was already in violation of 31 U.S.C. § 5136 for failing to disclose the large amount of money.

Mr. Wyatt told the agents it was a laptop he shared with his fiancée Amanda Koehler. The agents ran Ms. Koehler's name in a routine criminal database and discovered a host of information about her, such as she was a known violent felon and she was also named as a person of interest in the recent kidnappings of children belonging to a biotech billionaire mogul. Additionally, the kidnappers had just agreed to give proof of life in exchange for ten thousand dollars in denominations of twenty dollar bills, just like the money found in Mr. Wyatt's vehicle.

All of this equates to a high level of reasonable suspicion that criminal activity is afoot. The Agents had reasonable suspicion that Mr. Wyatt and the respondent were involved in the kidnapping of the children. At the border all that is needed for a more extensive search of a

person is a reasonable suspicion. To not look at the laptop of a known violent felon who is a suspect in the kidnapping of children and with the money in the car would be a dereliction of duty. Not only did the agents have the right to look at the laptop, the agents did not even go into an in depth search of the documents that were stored on the laptop. The agents only looked at documents that were already on the screen.

While under *Riley v. California,* 134 S. Ct. 2473 (2014), the United States Supreme Court unanimously held that the police officers generally could not, without a warrant, search digital information on the cell phones seized from the defendants as incident to the defendants' arrests, the Court commented on exigent circumstances. *Id.* In *Riley*, the United States Supreme Court stated the continued availability of the exigent circumstances exception may give law enforcement a justification for a warrantless search in particular cases. *Id.* at 2479.

The United States Supreme Court stated: "In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or *a child abductor who may have information about the child's location on his cell phone*. *Id.* at 2494 (*emphasis added.*)

In *United States v. Bell,* 500 F.3d 609, 613 (7th Cir. 2007), officers had arrested Mr. Bell in connection to a kidnapping. The victim had been taken from work and his wife was called by the kidnappers and was told to put ransom money in a bag at a subway station. *Id.* at 610. Undercover DEA agents were at the subway station and observed Mr. Bell come pick up the bag with the ransom money. *Id.* Mr. Bell was arrested and adamantly denied having to do anything with the kidnapping. *Id.* at 610, 611. In his pocket he had a key card to a hotel. *Id.* at 611. Officers went to the hotel and went to Mr. Bell's room, and his girlfriend answered. *Id.* The

kidnapping victim was not there, however there was a safe in the room. *Id.* Looking for information on the location of the victim, officers opened the locked safe and found drug indicia. *Id.* Officers arrested Mr. Bell on drug charges.

The United States Court of Appeals for the Seventh Circuit commented on the exigency of a kidnapping situation. The *Bell* court looking at a multitude of other cases and found that the exigent exception allows police officers to search without a warrant to protect or preserve life or prevent serious injury. *Mincey v. Arizona*, 437 U.S. 385, 392-393 (1978). Exigent circumstances exist if an officer had an objectively "reasonable belief that there was a compelling need to act and no time to obtain a warrant." *Bell*, 500 F.3d at 613, citing; *United States v. Andrews*, 442 F.3d 996, 1000 (7th Cir. 2006). The question as to whether exigent circumstances exist is viewed through the eyes of a reasonable police officer. *Bell*, 500 F.3d at 613, citing; *Brigham City v. Stuart*, 547 U.S. 398 (2006).

That is the situation before this Court. Once the agents found the exact amount of cash that the kidnappers received for the proof of life and then ran the records check and found out that the respondent was a named suspect in the kidnapping of the children, it became an exigent circumstance. The life of these children was at risk, there was potential information on the laptop that could lead to their discovery.

Additionally, it must not be forgotten that this search did not happen to a citizen on the interior of the country like in *Riley*. This search occurred at a border stop. The law is clear that a person's privacy interests are much less at the border. Looking at the totality of the circumstances, what the agents did was reasonable under the Fourth Amendment.

III. AERIAL IMAGING IS PERMISSIBLE

The Fourth Amendment protects the People, specifically their persons, houses, papers, and effects, against unreasonable searches and seizures by the government. U.S. Const. amend. IV. These words do not assure a general right of privacy, nor a blanket requirement for a warrant to search, but solely prohibit unreasonable governmental intrusion. The interpretation of what is reasonable and what constitutes a search has changed over time. Initially it was limited to a property law trespass to one of the above enumerated protected areas, but evolved to a more modern interpretation where a sphere of protection, objectively defined by society, travels with the individual. *Olmstead v. United States*, 277 U.S. 438, 464, 48 S. Ct. 564, 568, 72 L. Ed. 944 (1928) *compare to Katz v. United States*, 389 U.S. 347, 350, 88 S. Ct. 507, 510, 19 L. Ed. 2d 576 (1967). The sphere of protection is not unyielding, as it may be pierced when to do so would be objectively reasonable. Exigencies such as the entry to prevent destruction of evidence, to fight fire, while in "hot pursuit" of a fleeing suspect, and to render aid to individuals who are seriously injured or threatened with injury, fail to induce a Fourth Amendment violation. *Brigham City*, 547 U.S. at 403.

In addition to authority to pierce the sphere of protection with just cause, the sphere itself is also constantly being redefined by societal expectation. *Katz* 389 U.S. at 350. Specifically a violation does not occur when items are placed in "plain view", nor does it occur when entry is to areas where "society is unwilling to afford such protection" *Florida v. Riley*, 488 U.S. 445, 449, 109 S. Ct. 693, 696, 102 L. Ed. 2d 835 (1989). Each interaction must be evaluated independently as "[t]here is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails" *Terry*, 392 U.S. at 21. There are two separate incidents of surveillance at the property in

question. Each instance must be evaluated independently as to the particular facts in question to determine if those acts violated the Fourth Amendment protection guaranteed to the citizenry in the Bill of Rights.

A. The PNR-1 Drone Is Consistent With Previously Sanctioned Observation Tools

Although drones are a new technology, they are already an integral part of the airspace above our heads.[1] Although no authorities have directly ruled on the nexus of drone based surveillance and the Fourth Amendment, new technology does not create a *per se* violation of the Fourth Amendment rights of the citizenry. Such advancements must be evaluated as to if the new technology exceeds prior historical boundaries.

The PNR-1 is a commercially available drone deployed with both digital single-lens reflex and video cameras. R at 39. Although frequently used by law enforcement, it is marketed to the general public and is of a type and price equally useful to a hobbyist. R at 46. It is capable of sustained flight for approximately thirty five minutes and can hold only thirty photos and fifteen minutes of video. *Id.* It is capable of hovering, flying at thirty miles per hour and has an imposed flight limitation of sixteen hundred and forty feet in compliance with the state of Pawndale. R at 40-41, 46.

This type of drone, outfitted in this a way, is a functional equivalent to a helicopter observation platform. It is capable of a similar style of flight in altitude and capacity for observation but has a significantly smaller capacity in flight time and image capture capability than a helicopter with an onboard observer would have. The cameras are well within prior

[1] FAA administrator Huerta in a speech two weeks before the incident in question iterated "[W]e've registered more than 500,000 hobbyists in eight months. To put that in perspective, we only have 320,000 registered manned aircraft – and it took us 100 years to get there" https://www.faa.gov/news/speeches/news_story.cfm?newsId=20594

guidelines in that they are typical cameras capable of no more than standard optical imaging. *Dow Chem. Co. v. United States*, 476 U.S. 227, 239, 106 S. Ct. 1819, 1827, 90 L. Ed. 2d 226 (1986). The only novel aspect of drone aviation is that the device is operated remotely. This does not alter its nature as an observation platform any different than a microphone acts as a remote device intercepting sound. *On Lee v. United States*, 343 U.S. 747, 751, 72 S. Ct. 967, 971, 96 L. Ed. 1270 (1952) reaffirmed in *United States v. White*, 401 U.S. 745, 750, 91 S. Ct. 1122, 1125, 28 L. Ed. 2d 453 (1971).

Some newer technologies affording improved information gathering by the government have been found to be overly intrusive, but such technologies either enabled a physical intrusion by the government. *United States v. Karo*, 468 U.S. 705, 719, 104 S. Ct. 3296, 3305, 82 L. Ed. 2d 530 (1984). Or are significantly more intrusive than mere observation from afar. *Kyllo v. United States*, 533 U.S. 27, 28, 121 S. Ct. 2038, 2040, 150 L. Ed. 2d 94 (2001). Therefore, these cases do not alter the conclusion that a drone deployed in a manner equivalent or less intrusive to that which was acceptable for observations by an officer in an aircraft should be evaluated with the same guidelines.

B. Aerial Observation Has Well Defined Fourth Amendment Parameters

Society in general rather than individual subjective belief determines where the transition from public to private space occurs. Officers have historically been afforded the right to observe where they have been given access either explicitly or implicitly through a societal norm. *Harris v. United States*, 390 U.S. 234, 234, 88 S. Ct. 992, 992, 19 L. Ed. 2d 1067 (1968). When applied to aerial observations in "public navigable airspace, [observing] in a physically nonintrusive manner…[where]…any member of the public flying in this airspace who glanced down could have seen …we readily conclude that respondent's expectation…is unreasonable and is not an

expectation that society is prepared to honor." *California v. Ciraolo*, 476 U.S. 207, 213–14, 106 S. Ct. 1809, 1813, 90 L. Ed. 2d 210 (1986).

Later, the court applied a similar analysis to helicopters capable of stationary flight where a flyover of 400 feet was found to be acceptable. *Riley*, 488 U.S. at 451–52. Even lower levels of flight have also been found permissible as long as they do not create a potential hazard to persons or property. *United States v. Van Damme*, 823 F. Supp. 1552, 1559 (D. Mont. 1993). Although invasive technologies that penetrate the walls of a building may run afoul as being well beyond human observational capacity, conventional cameras deployed from the air, even precise commercial cameras used for fine mapping do not alter this analysis. *Dow Chem. Co.* 476 U.S. at 238. A camera mounted on a helicopter legally flying at 400 feet would not be a violation of the Fourth Amendment protections, nor would a camera mounted on a drone flying in a similar manner.

C. The use of the PNR-1 Was Contained to Areas Where Flights Are Expected

The use of the PNR-1 type drone to make a single flight over the property falls within these guideposts of acceptable government action. The drone was deployed with a preprogrammed flight limitation of 1640 feet and hovered over the property for a mere 15 minutes during which it took 22 photos and 3 minutes of video. R at 4. The photos and video described the exterior layout of the buildings, allowed the determination that gates or fencing were absent, and captured an image of an individual later identified as the suspected kidnapper. R at 4. The duration of the flight, the flight pattern and the images captured were equal to what a similar camera system mounted on a helicopter could have reasonably achieved.

It is irrelevant that the device may or may not have exceeded its legal flight parameters; although potentially unsafe for other aircraft, such deviation toward a higher altitude would not

be facilitating increased penetration of the property. R at 41. The focus brought to the FAA regulations does however highlight a more important underlying question: which standard should apply in determining how close an aircraft can come to the property. Does one limit the approach of government intrusion by reviewing the pure technical nature of an FAA minimum combined with an absence of abject interference, or should one use or a balancing approach proposed by Justice O'Connor? *Riley*, 488 U.S. at 452. The first and binding standard clearly allows the right to flyover by a drone if it goes no further than a citizen observer in a helicopter would. The second approach would also come to the same conclusion, but requires a more nuanced analysis. It reintroduces a variant of the prior conceptualization that one who seeks privacy in even a public area may be afforded protection and there are no "bright lines" between public and private space. *Katz* 389 U.S. at 351.

Air traffic avoids Mount Partrige due to the inhospitable conditions, but air traffic does fly nearby on routes to and from Eagle City. R at 41. In spite of a reputation for poor weather, the drone was in short order able to find a window of opportunity to successfully image the property. *Id*. The climate and hilltop location are the only factors present that show a zone of privacy. R at 4. There were no apparent attempts to enclose the property with a fence or protect it from view otherwise. *Id*. More importantly, there is no testimony as to the steps taken by Ms. Koehler to create a private space, nor her expectations of such, or even if the property in question was selected for its microclimate or hilltop location. It would be poor policy to use the vagaries of the weather as guidance for where the public affords an expectation of privacy when one has done nothing to prevent observation. Justice O'Connor clearly places the burden of proof on the defendant for this very reason. *Riley*, 488 U.S. at 452. A camera mounted on an aerial device flying in a space where aerial traffic is authorized, with no apparent attempt to stop or prevent

observation, would not exceed the bounds afforded aerial observation under either standard. The Government did not violate the Fourth Amendment rights of Ms. Koehler by deploying the drone.

IV. USE OF THE DOPPLER RADAR DEVICE WAS NOT A VIOLATION

A. Areas Within the Curtilage Are Naturally Afforded An Increased Expectation of Privacy

Aerial observation from navigable airspace does not depend on a determination of curtilage. Authority to view from the air is based upon an "open view" theory where the "home and its curtilage are not necessarily protected from inspection that involves no physical invasion" *Riley*, 488 U.S. at 449. The secondary acts of Detective Perkins do however make the determination of curtilage of import as he approached and scanned the main house and then pool house. R at 10. A residential house is afforded protection as it is explicitly listed in the Fourth Amendment; however a pool house may or may not be in the curtilage of the residence. The determination of curtilage is fact based and the court has offered a four factor test where one must evaluate "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326 (1987). Here, the lower court made a finding of fact that the pool house was 50 feet away from the main building, there was no attempt to indicate to others the privacy of the area, and no attempts made to isolate or shield the property from view. R at 10. Judge Meagle then used these facts to rule that the pool house was not within the curtilage. *Id.*

As discussed in the standard of review section of this brief, there is a divide on the standard of review for curtilage. On a clear error basis, the court should affirm the prior ruling. The distance from the house and the particular attempts to isolate the area from observation were evaluated under the proper Dunn standard and upon those facts entered into evidence. *Id*. Even when applying a *de novo* standard, there are compelling findings showing that the lower court was accurate. There is an abject absence of fencing on the expansive hilltop property. *Id.* The property is open to view without any guards, signs, protections. *Id.* The court also inferred that the pool house is not occupied on a permanent basis, and is approximately fifty feet away from the main house. *Id.* These findings were based on the testimony given in court, direct observation of the individuals testifying, and the photographs and video captured. Even if a *de novo* review finds that a pool house is more intimately connected to the residence than other outbuildings and was located with sufficient proximity to the main house, the respondent failed to contend that the property was mischaracterized at the suppression hearing, or challenge the determination of curtilage on appeal. The argument was at best tangentially made and therefore forfeited.

B. Search of an Accessory Structure is Permissible

Arguments that a scanning device that penetrates the envelope of a building to determine the presence and location of subjects is not a search would abjectly go against the clear standard that "all details are intimate details" inside the home. *Kyllo* 533 U.S. at 37. A handheld Doppler device would violate such a standard if deployed in a search for evidence. R at 33. However the only information obtained from the scan of the main house was that there was a single individual, on the left of the front door, ten to fifteen feet away. R at 34. This information was erroneous and irrelevant. Upon execution of the warrant, two individuals were detained in the

main house, and the kidnapping victims were not present. The main house scan yielded no evidence that facilitated the arrest or discovery of evidence.

The pool house was not within the curtilage of the residence and therefore police may intrude further than they can for a home. *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214 (1984). Peering into accessory structures, including the use of flashlights are not a violation. *Dunn*, 480 U.S. at 304. Here the Detective peered into the accessory structure using the Doppler radar device to determine if it was occupied and how many people were present. R at 34. Valuable information was obtained from that scan in that there were three unmoving individuals and a single pacing individual nearby. *Id.* This information compounded with the prior information that Ms. Koehler had leased the property, had intimate details of the father of the victims, was a person of interest in the kidnapping, and was currently present at the location leads to the reasonable conclusions that the three kidnap victims being held in the pool house.

C. Search is Authorized as an Exception to the Warrant Requirement

> "The emergency exception allows police officers to make a warrantless entry and search when they reasonably believe that a person within the home is in need of immediate aid. [citation] "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." [citation]. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."
>
> *Oliver v. United States*, 656 A.2d 1159, 1164 (D.C. 1995)

Entry without warrant is authorized when an officer has probable cause to believe a person is in "danger of bodily harm inside the premises…[and] do[es] no more than is reasonably necessary to ascertain [such] … need" *Oliver* 656 A.2d at 1165. Prior to deployment

of the drone or Doppler device, Detective Perkins had obtained new evidence associating a historically violent felon, already a person of interest, to the Ford kidnapping. There were sufficient evidence to find probable cause and to fear for the safety of the victims; the exact dollar amount of the proof of life requirement, a number of computer files pertaining to the crime, a recently leased the property, and a putative associate under arrest with the potential of contact with her. R at 12, 42. Many kidnappings end without recovery of the victim, a kidnapping transaction inadvertently interrupted or with known police involvement significantly increase this likelihood as the parties cut their losses in the face of discovery.

The intent given most frequently in the record was officer safety; however it is implied that the victims would also be at risk, and an explicit statement of intent to save the victims was made by Officer Lowe. R at 42. Granted there is a dual motivation here, but that is not preclusive of a finding of a reasonable entry. In fact, entry may be afforded "regardless of the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action" *Brigham City* 547 U.S. at 404.

When searching for victims of a kidnapping, when an implicated violent felon is known to be present at a particular location, police may perform a warrantless entry if it is reasonable to do so. *United States v. Bottoson*, 644 F.2d 1174, 1176 (5th Cir. 1981). Detective Perkins did no more than what is minimally necessary to ascertain if the victims are present and in need of assistance. First the aerial scans were used as a least intrusive method of discovery; they would be authorized without a warrant irrespective of a curtilage determination or probable cause. The drone identified Ms. Koehler at the location in question. R at 33. Her presence increased the likelihood that the victims were present and in danger, as it was unknown if Mr. Wyatt had contacted her in regards to his arrest and the discovery of the operation. Detective Perkins then

proceeded to apply a next minimum level of incursion to confirm if the victims were present, in danger, and therefore in need of immediate rescue, the Doppler scan. *Id.* Once he determined that the victims were safe and not in immediate danger, the Detective halted incursive activity to obtain a search warrant. R at 34. This minimally necessary activity was authorized behavior under the warrant exception, was minimally implemented, and therefore was at no time a violation of Ms. Koehler's rights.

CONCLUSION

Border patrol agents Ludgate and Dwyer's actions were reasonable under the Fourth Amendment. Under the totality of the circumstances, the agents were lawful in searching the computer. The PNR-1 is a commercially available drone, that is the equivalent to a helicopter observation platform and the cameras are well within prior guidelines in that they are typical cameras capable of no more than standard optical imaging. Additionally, it was permissible for officers to use the Doppler radar on the pool house, which was not in the curtilage of the house. For the foregoing reasons, the Thirteenth Circuit's decision should be reversed.

Respectfully submitted,

Team 9

Counsel for the Petitioner

CERTIFICATION OF ADHERENCE TO COMPETITION RULES

All team members understand the Rules of the Competition and have adhered to all rules in writing this brief. We have not received any assistance in writing this brief.

Team Member #1	October 20, 2017
Team Member #2	October 20, 2017