Team No. 15

No. 1788-850191

IN THE

SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

NICK NADAULD,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

BRIEF FOR PETITIONER

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ISSUES PRESENTED

I. Under the Fourth Amendment of the Constitution, does the Government's retrieval of an individual's vehicle location from an Automatic License Plate Recognition ("ALPR") database constitute a "search", when the ALPR intermittently captures images of a vehicle's license plates on public roads and records its geographic location?

II. Under the Fourth Amendment and this Court's precedents, is the warrantless search of a mass shooting suspect's home unconstitutional, when officers believe there is a reasonable probability that the suspect was involved in the mass shooting, there are emergency circumstances to retrieve the murder weapon, and to prevent future shootings?

STATEMENT OF THE FACTS

Mass Shooting at Balboa Park. On September 14, 2021, a masked shooter wearing black combat gear, later identified as Frank McKennery ("McKennery") fired an M16A1 ("M16") automatic assault rifle from a rooftop in Balboa Park. R. at 2. McKennery killed nine people and injured six others in this deadly attack. *Id*. San Diego Times correspondents described the scene as horrific, as hundreds of people ran for their lives. *Id*. at 29. When Police arrived on the scene, the M16 and McKennery were nowhere to be found. *Id*. at 39. The only piece of evidence left at the crime scene was a note ("Manifesto") discovered on the rooftop. *Id*. at 29. The Manifesto contained a fake story about McKennery's motives to commit the shooting and its intent was to send police on a false trail. *Id*. at 2. The Manifesto also stated, "[w]e're going to do this again. Get ready. Soon." *Id*. at 36.

Immediately after the mass shooting, law enforcement used numerous investigative techniques to catch the murderer due the despicable nature of these crimes. *Id*. at 3. Law enforcement began their investigation by analyzing surveillance footage from security cameras in and around Balboa Park. *Id*. Fifty vehicles were recorded leaving the scene before police arrived to secure to crime scene. *Id*. Police then cross-referenced the fifty vehicle owners with a list of registered assault rifles owners in the San Diego area and none of the fifty were a match. *Id*. The police did identify Respondent on the list of assault rifle owners. *Id*. Next, police retrieved information from the Automatic License Plate Recognition ("ALPR") database about the location of these fifty vehicles, and the vehicles of persons who are on the registered assault rifle list. *Id*.

How ALPR Works. ALPR system automatically captures an image of a vehicle and the vehicle's license plate. *Id*. at 38. It then compares the license plate number to one or more databases of vehicles that are of interest to law enforcement. *Id*. The system then alerts law

enforcement when the vehicle of interest has been observed by the ALPR unit. *Id*. ALPR units are attached to law enforcement vehicles or stationed at fixed locations such as poles at intersections. *Id*. at 39. One use of ALPR by California law enforcement agencies is to scope license plates around a crime scene to assist in identifying suspects, victims, and witnesses. *Id*. at 38. It acts as a "pointer system" for law enforcement to perform with limited information. *Id*. The ALPR database does not contain personal information of vehicle owners, it only contains the data of license plate numbers, photographs of the vehicles, and geographic locations. *Id*. There is no record of vehicle registration information or driver's license information of the vehicle owner in the database. *Id*. ALPR units cannot identify the occupants inside the vehicle, rather the purpose of the technology is only to identify the vehicle. *Id*. at 40.

The Government used ALPR as an investigative technique to apprehend a mass murderer. ALPR captured license plates in its database and law enforcement monitored the geographic locations of the fifty vehicles who were recorded leaving Balboa Park during the mass shooting. *Id*. at 3. The Government also used ALPR to monitor the geographic locations of the vehicles owned by individuals on the assault rifle list, including Respondent. *Id*. Then they cross-referenced the vehicle movements of both suspect groups and discovered that Respondent and Mckennery's vehicle had overlapped at the same location at similar times. *Id*. at 3-4.

With the information gathered from the ALPR database, law enforcement placed pole-mount cameras on utility poles near the residences of the ten individuals who corresponded the most to the driving location data of the fifty suspect vehicles, including Respondent's. *Id*. at 4. On September 25, 2021, law enforcement then mailed a letter to each of the ten residences, stating that in one month, they will be arriving at their homes to confirm they were complying with

California Penal Code Section 30915, meaning their assault rifles had been rendered inoperable. *Id*. On September 27, 2021, Respondent received that letter. *Id*.

Respondent's Arrest. On September 28, 2021, law enforcement received an anonymous phone call from a telephone booth stating, "'This is the Balboa Park shooter. This time, it's gonna be a school.'" *Id*. On September 29, 2021, law enforcement discovered through the pole-mount camera across from Respondent's home, Mckennery pulling into the driveway and giving Respondent a large duffle bag that looked big enough to hold an assault rifle. *Id*. Mckennery left instantly after the exchange. *Id*. FBI officers Jack Hawkins and Jennifer Maldonado were immediately dispatched to Respondent's home to investigate. *Id*.

Once arriving at Respondent's home, FBI officers questioned Respondent outside his front door. *Id*. Officer Hawkins questioned Respondent about the M16 he inherited from his father, and Respondent responded that he thought law enforcement was coming in a month to check if the M16 was rendered inoperable. *Id*. at 23. Officer Hawkins stated that they were getting a head start on the issue, and it should not matter, and he should have nothing to worry about since the M16 was supposed to rendered inoperable within ninety days of receiving it which was 5-years ago for Respondent. *Id*. at 38. Respondent paused to answer Officer Hawkins, and responded that there was nothing to worry about, but still did not want Officers to enter his home. *Id*. Respondent then said he will go get the M16, but worried that Respondent would alter the M16 by the time he brought it outside, Officer Hawkins stated that they needed to enter the home to verify the gun was rendered inoperable. *Id*. at 23-4.

Once in the home, Officer Maldonado observed Respondents M16 in plain view in his bedroom. Stipulation. at 1. The gun was not rendered inoperable pursuant to California Penal Code Section 30915. R. at 24. Officer Hawkins continued to question Respondent about his M16.

Id. at 4. Respondent admitted that Mckennery borrowed the M16 prior to the Balboa Park shooting but said that Mckennery had been in the desert target shooting on September 14, 2021, and sent Respondent a picture of himself there. *Id*. at 4, 26. FBI Forensic Investigator Matthew Fitzgerald revealed at trial that the desert photograph Mckennery sent to Respondent was taken on September 11, 2021, 3-days before the Balboa Park shooting. *Id*. at 28. Following the line of questioning by FBI officers and the discovery of the M16 at Respondent's home, he was arrested. *Id*. at 25.

When law enforcement arrived at Mckennery's home to arrest him, they heard a gunshot and found him dead lying on the floor inside his home. *Id*. at 4. Next to his body was a death note revealing his actual motives to commit the mass shooting. *Id*. at 37. In the note, he admitted to getting the rifle from another person but did not name a specific person. *Id*.

STATEMENT OF THE CASE

The Superior Court of the State of California for the County of San Diego found Respondent guilty of nine counts of Involuntary Manslaughter under California Penal Code Section 192, one count of Lending an Assault Weapon under California Penal Code Section 30600, one count for failure to comply with the assault rifle requirements under California Penal Code Section 30915. R. at 41-2. Prior to trial, and pursuant to California Penal Code Section 1538.5, Respondent filed a motion to suppress evidence collected on the date of his initial arrest. *Id*. at 1. The Superior Court denied Respondent's motion to suppress evidence. *Id*. The California Court of Appeals for the Fourth District reversed the lower court's decision, granted the Respondent's motion to suppress evidence, and remanded for further proceedings. *Id*. at 21. This Court granted certiorari regarding the motion to suppress evidence.

SUMMARY OF THE ARGUMENT

The Government's retrieval of Respondent's location data from the use of ALPR should not constitute a search within the meaning of the Fourth Amendment. First, Respondent did not have an actual expectation of privacy of his movements on public roads. Based on this Court's precedents regarding the tracking of an individual's automobile on public roads, this Court should hold that Respondent did not have a legitimate expectation of privacy in his automobiles location while driving on public roads. No facts presented establish that he subjectively sought to preserve his vehicle's movements as private. ALPR did not track Respondent's whole physical movements for a prolonged period of time to support the proposition that he had an actual expectation of privacy. Rather, ALPR intermittently monitored Respondent's movements through sparse collection of datapoints retrieved from special cameras mounted on police vehicles or placed at intersections in the public's view.

Second, the Respondent's expectation of privacy from the Government's retrieval of his vehicle information using ALPR is not one society is prepared to recognize as reasonable. ALPR promotes a shared value that society recognizes in regulating automobiles through license plates. Law enforcement's monitoring of an individual's vehicle movements on public roads is also not something society can establish as invading one's right to privacy. Society also cannot recognize an expectation of privacy in the retrieval of license plate information as reasonable because they are on the exterior of automobiles in the plain view of the public. Thus, this Court should hold that the Government's use of ALPR does not violate the Fourth Amendment.

The warrantless search of Respondent's home by law enforcement did not violate his Fourth Amendment rights based on this Court's precedents. First, there was probable cause for the Government to enter and search Respondent's home. Under the totality of the circumstances

and the reasonably trustworthy information known to the officers at the time of the search, there was a reasonable probability that the Respondent was involved in the Balboa Park shooting. Second, the warrantless search of Respondent's home was justified due to exigent circumstances. The FBI officers under the circumstances believed that they needed to prevent the imminent destruction of the M16 assault rifle, and needed to prevent further shootings, which made the warrantless search objectively reasonable. Additionally, the Respondent's admission of lending the M16 to McKennery is admissible because the officer's search of the Respondent's home was legal. Thus, this Court should reverse the California Fourth District Court of Appeal holding and deny Respondent's motion to suppress evidence.

STANDARD OF REVIEW

This Court reviews appeals of motions to suppress evidence by: (1) reviewing findings of fact for clear error, and (2) determining the reasonableness of the government's warrantless search. *Ornelas v. United States*, 517 U.S. 690, 697 (1996). The factual findings of this case are not in dispute. R. at 14. The determination of reasonableness in review for a motion to suppress evidence creates a mixed question of law and fact and is reviewed *de novo*. *Id.* at 698.

ARGUMENT

I. THE GOVERNMENT'S RETREVAL OF THE RESPONDENT'S INFORMATION FROM THE AUTOMATIC LICENSE PLATE RECOGNITION DATABASE WAS NOT A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDEMENT BECAUSE THE RESPONDENT DID NOT HAVE AN ACTUAL EXPECTATION OF PRIVACY, AND SOCIETY IS NOT PREPARED TO RECOGNIZE HIS EXPECTATION AS REASONABLE.

The Government's retrieval of Respondent's information from the ALPR database was not a search under the Fourth Amendment. The Fourth Amendment states, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. Under the Fourth Amendment, courts have applied a property-based approach and the modern expectation of privacy approach. *See United States v. Jones*, 565 U.S. 400, 405–06 (2012). Insofar as the approach to take in this case, "the Fourth Amendment protects people, not places". *Katz v. United States*, 389 U.S. 347, 351 (1967). And when applying Fourth Amendment protection to motor vehicles, the right of privacy is the proper standard of inquiry. *See Cardwell v. Lewis*, 417 U.S. 583, 591 (1974). Therefore, the more recent test associated with "legitimate expectation of privacy" derived from Justice Harlan's concurrence in *Katz* should apply in this case. *See Jones*, 565 U.S. at 405–06; *See Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (the legitimate expectation of privacy test "supplements rather than displaces" the property-based approach).

The expectation of privacy standard requires the Respondent to satisfy a two-prong test: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361. Respondent does not satisfy both prongs. He did not have an actual expectation of privacy in his vehicle's location on public roads from the Government's use of ALPR, and society is not prepared to recognize his expectation of privacy as reasonable. Thus, the Government's retrieval of

Respondent's information from ALPR database did not constitute a search within the meaning of the Fourth Amendment.

A. Respondent did not have an actual expectation of privacy in his vehicle's historical location data on public roads because he did not seek to preserve his movements on public roads as private, and his movements were not tracked for a prolonged period of time.

Respondent did not have an actual expectation of privacy because he did not seek to preserve his movements on public roads as private. Whether an individual has a legitimate expectation of privacy depends on: (1) "whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy'", and (2) "whether. . . the individual has shown that 'he seeks to preserve [something] as private.'" *Smith v. Maryland*, 442 U.S. 735, 740 (1979) *quoting Katz*, 389 U.S. at 361. Additionally, "individuals have a reasonable expectation of privacy in the whole of their physical movements." *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. This Court has stated that an individual has a reduced expectation of privacy in an automobile because, "its function is transportation and it seldom serves as one's resident or as the repository of personal effects." *Cardwell*, 417 U.S. at 590. An automobile's passengers and contents are in "plain view" when it travels through public roads. *Id*.

1. Based on this Court's precedents, an individual cannot seek to preserve his movements on public roads as private.

An individual's movements on public thoroughfares from one place to another have no reasonable expectation of privacy. *See United States v. Knotts*, 460 U.S. 276, 281–82 (1983). In *Knotts*, police officers placed a beeper in a container of chemicals that is used for drug manufacturing. *Id.* at 278. The container was being transported by the defendant in his automobile.

Id. The police tracked the container using the GPS in the beeper and intermittent visual surveillance on the public roads back to the defendant's cabin. *Id.* Police officers utilized this information and obtained a warrant and searched the defendant's cabin. *Id.* This Court held that the officers warrantless monitoring of the chemical container attached to defendant's vehicle on public roads through the signal of a beeper, which led officers to his cabin, did not amount to an unconstitutional search because it did not invade any legitimate expectation of privacy of the defendant. *Id.* at 285. However, this holding did not touch upon "dragnet type" practices by law enforcement that "different constitutional principles" may apply to. *Id.* at 284.

The Government's use of ALPR intermittently monitored Respondent's movements through sparse collection of datapoints retrieved from special cameras mounted on law enforcement vehicles or placed at fixed locations on public roadways and public property that are within public view. R. at 38. ALPR simply acted as a "pointer system" which allowed law enforcement to investigate with limited information. *Id*. ALPR is not a dragnet type law enforcement practice that would need a different constitutional analysis applied than the one this Court used in *Knotts*. ALPR only captured Respondent's location when passing through the lens of an ALPR camera on public roads. Respondent's location was not GPS tracked by a twenty-four-hour surveillance system for this Court to depart from the analysis formulated in *Knotts*. Based on the holding in *Knotts,* Respondent could not have an actual expectation of privacy from the ALPR database capturing his movements on public roads.

This case is also similar to *United States v. Hufford*, which held that the installation of a beeper in the drum which was attached to the defendants' vehicle was a "probing, exploratory quest for evidence", in which the defendants did not have an actual expectation of privacy. 539 F.2d 32 (9th Cir. 1976). The beeper device used by law enforcement in *Hufford*, augmented only

visual surveillance on public roads and with more officers, automobiles, and planes, defendant's movements could have been followed without the use of a beeper. *Hufford*, 539 F.2d at 34. The court found no distinction between the use of the beeper to aid the officers in the movements of defendants' automobile along public roads and less efficient visual surveillance. *Id.*

Respondent's expectation of privacy was not violated from Government's use of ALPR because it is no different than if the Respondent was monitored on public roads by patrolling police officers. Respondent does not have an expectation of privacy when he is driving on a public road and police vehicles drive by him to monitor his speed or view his license plate. There is no contrast between such police surveillance, and ALPR used in this case. ALPR is just a more effective and efficient way to monitor the public roads with limited information to conduct investigations such as the one in this case.

Additionally, for Respondent to have an actual expectation of privacy, he must have sought to preserve something as private. *Smith*, 442 U.S. at 740; *Katz*, 389 U.S. at 361. There are no facts that attribute the Respondent conducted himself in a certain way to preserve the privacy of his vehicle location information while driving on public roads. Respondent also could not seek to preserve his license plate information as private since it is on the exterior of his automobile in plain view for anyone to examine. Respondent was on the list of legal assault rifles owners in the San Diego area. R. at 3. Any information gathered from that list which led law enforcement to use ALPR to record his vehicles movements cannot infringe on his legitimate expectation of privacy since he did not seek to preserve that information as private. Thus, applying this Courts and others previous holdings, Respondent could not have an actual expectation of privacy in the Government's use of ALPR to monitor his vehicles movements on public roads.

2. ALPR is not a prolonged surveillance technique used by the Government that would violate Respondent's actual expectation in privacy.

Respondent will try to argue the holdings in *United States v Jones*, 565 U.S. 400 (2012) and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), apply in this case for the theory that ALPR constitutes prolonged surveillance which violates an individual's actual expectation of privacy. This theory is displaced because ALPR only momentarily captures individual's automobile geographic location on public roads. In *Jones*, FBI agents installed a GPS tracking device to the defendant's automobile. 565 U.S. at 403. The agents tracked the defendant's automobile for 28-days. *Id*. This Court held that a search occurred because the Government physically occupied defendant's personal property and were monitoring his movements over an extended period of time. *See Id.* This Court's holding specifically relied on the fact that the GPS tracking device "encroached on a protected area" of the defendants. *Id*. at 410. Additionally, there is a difference between the relatively short-term monitoring of an individual's movement that does not invade a legitimate expectation of privacy, as opposed to the long-term 24-hour GPS monitoring of an individual's movements for 28-eight days. *Id*. at 430.

Jones holding should not apply in this case because there was no physical intrusion upon the Respondent's vehicle and there was no long-term tracking of the Respondent's vehicle location. From the day of the mass shooting on September 14, 2021, to the day FBI Officers arrested Respondent on September 29, 2021, only 14-days had passed. R. at 2-4. And throughout these 14-days, Respondent was not monitored twenty-four seven. Rather, his vehicle's geographic location was only monitored and recorded in the ALPR database when he passed the sparsely implemented ALPR units on public roads and the camera captured his license plate. This form of investigation is wholly different than attaching a GPS tracker to one's automobile and following their every move.

Additionally, Respondent will try to erroneously argue that the holding in *Carpenter* applies to this case. In *Carpenter*, after police suspected the defendant was tied to a series of robberies, the Government applied for a court order under the Stored Communications Act that permitted law enforcement to access cell-site location information (CSLI) from the defendant's wireless carriers. 138 S. Ct. at 2212. The records obtained from CSLI identified the location of the defendant's phone while he was making phone calls during a 4-month period and gathered approximately a hundred data points a day. *Id*. This Court held that the Government's acquisition of 7-days of cell-site records from the CSLI was a search under the Fourth Amendment. *Id*. at 2220. The Court reasoned that tracking a cell phones location over the course of 127-days provides an "all-encompassing record of the holder's whereabouts." *Id*. at 2217. And that "individuals have a reasonable expectation of privacy in the whole of their physical movements." *Id*.

The facts in *Carpenter* cannot be compared to ALPR in this case. In *United States v. Yang*, the concurring opinion distinguished the ALPR database used in that case to CSLI in *Carpenter*, because the ALPR database did not contain information that revealed the whole of the defendant's physical movement. 958 F.3d 851, 863 (9th Cir. 2020). Nearly identical to this case, ALPR only intermittently captures an individual's geographic location when passing an ALPR unit. Whereas, tracking a cellphone for 14-days will reveal far more about an individual's physical movements, than ALPR ever would.

Additionally, a person expects a cellphone to be far more private than an automobile. An automobile is in plain view of the public when it is on public roads. In contrast, a cell phone is affixed to their persons nearly most of the time. Individuals leave their vehicles constantly, but a cellphone follows its owner beyond public roads. *See Carpenter*, 138 S. Ct. at 2218. Tracking an individual's historical location by obtaining access into their cellphone is wholly different than

periodically capturing images of a vehicles license plate while driving on public roads. Respondent cannot rely on *Carpenter* for the proposition that he had an actual expectation of privacy in the Government's use of ALPR to retrieve his vehicle's location information. Thus, Respondent cannot satisfy the first prong of the *Katz* test.

B. Respondent's expectation of privacy from the Government's retrieval of his vehicle information using ALPR is not one society is prepared to recognize as reasonable because automobiles are subject to pervasive government regulation and a license plate is on the exterior of an automobile in plain view of the public's eye.

Respondent cannot satisfy the second prong of the *Katz* test because society is not prepared to recognize the Government's use of ALPR to monitor Respondent's location on public roads as infringing on one's reasonable expectation of privacy. This prong turns on "whether . . . the individual's expectation of privacy, viewed objectively, is 'justifiable' under the circumstances." *Smith*, 442 U.S. at 740 *quoting Katz*, 389 U.S. at 352. Society cannot expect an automobile to receive the type of privacy that the Fourth Amendment is aimed to protect because it travels through public throughfares in plain view and is nearly impossible to escape public scrutiny. *See Cardwell*, 417 U.S. at 590. Additionally, society cannot have a reasonable expectation of privacy in automobiles because unlike a person's home, automobiles are "'subject to pervasive and continuing governmental regulation and controls….'" *New York v. Class*, 475 U.S. 106, 113 (1986) *quoting South Dakota v. Opperman,* 428 U.S. 364, 368 (1976). "Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy. . . ." *Class*, 475 U.S. at 113. Everyday law enforcement examines vehicles to check if license plates are expired, or if safety equipment such as headlights are not working properly. *See Id*.

ALPR does not intrude on an individuals' personal information that they expect to keep private, rather it promotes a shared value that society recognizes in regulating automobiles through

license plate recognition. ALPR is an innovative way to scan license plates and compare them to police databases instead of police officers manually scanning license plates. Regardless, both methods are techniques in which the government regulates license plates on public roads. The ALPR database contains license plates numbers, photos of vehicles, and geographic locations of where the images were captured. R. at 38-9. The database does not contain vehicle registration information nor driver's license information of vehicle owners. *Id*. at 39. ALPR is an innovative, efficient, and economic way that law enforcement can reasonably regulate automobiles.

ALPR was used to catch a mass murderer in a short period of time. This technique used by law enforcement was efficient and led to the right suspects. It would be equivalent to police officers patrolling these suspects during the 14-day period between the mass shooting and Respondent's arrest. Society will recognize the use of ALPR in this case as reasonable because it served the public purpose of catching a mass murderer who had threatened to commit another mass shooting. *Id*. at 36.

Society cannot recognize an expectation of privacy from ALPR capturing photographs of license plates as reasonable because they are on the exterior of a vehicle directly in public's view. Like *Class*, which dealt with a Vehicle Identification Number ("VIN") on an automobile, a license plate is the subject of pervasive regulation by the Government and is on the exterior of an automobile that is thrust in public view. 475 U.S. at 113. This Court held that it does not violate the Fourth Amendment when a police officer reaches into the passenger compartment of a vehicle to move papers obscuring the VIN after the defendant was stopped for a traffic violation. *Id*. at 107. It reasoned that to facilitate the VIN's usefulness for its governmental purposes, the VIN must be placed in plain view on the exterior of the automobile. *Id*. at 111. Additionally, "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place

ordinarily in plain view from the exterior of the automobile." *Id*. at 114. "The exterior of a car. . . is thrust into the public eye, and thus to examine it does not constitute a 'search'." *Id*.

A license plate, like a VIN, is on the exterior of car and required by law to be in plain view. Because this Court has held that examining the exterior of a car cannot constitute a search, a different rule should not be applied in this case. It should not distinguish on whether it is a police officer examining the exterior of the vehicle, or ALPR. Both are methods used by law enforcement to regulate the license plate. Society would find it unjustifiable to determine that ALPR invaded the Respondent's expectation of privacy and should have a different analysis than *Class* simply because it uses technology and is a more productive way to investigate automobiles. Since Respondent cannot satisfy both prongs of *Katz,* the Government's use of ALPR should not constitute as a search under the Fourth Amendment.

II. THE GOVERNMENT'S WARANTLESS ENTRY AND SEARCH OF RESPONDENT'S HOME DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS BASED ON THIS COURT'S PRECEDENTS BECAUSE THERE WAS PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES.

The Government's warrantless entry and search of the Respondent's home did not violate his Fourth Amendment rights. The Fourth Amendment states, "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. While it is understood that entries and searches inside a residence are "presumptively unreasonable", certain circumstances may exist that would excuse the failure to procure a search warrant." *United States v. Johnson*, 9 F.3d 506, 508 (6th Cir. 1993); *See United States v. Radka*, 904 F.2d 357, 361 (6th Cir. 1990). To protect individuals of their Fourth Amendment rights, and to establish the existence of circumstances that would excuse the necessity of a search warrant, a two-pronged test must be met. *United States v. Ogden*, 485 F.2d 536, 539

(9th Cir. 1973). First, there must be probable cause, and second, there must be exigent circumstances. *Id*.

The Government had probable cause to enter the Respondent's house because there was a reasonable probability that the Respondent was involved in the Balboa Park shooting. *Illinois v. Gates,* 462 U.S. 213, 235 (1983). Additionally, the Government's warrantless entry and search of the Respondent's home was justified due to the exigent circumstances that made it objectively reasonable for the officers to enter and search the home. *Carpenter*, 138 S. Ct. at 2222. Thus, the Government's warrantless entry and search of the Respondent's home was not a violation of his Fourth Amendment rights, and the Respondent's resultant confession was not tainted.

A. There was probable cause for the Government to enter and search Respondent's home because under the totality of the circumstances and the reasonably trustworthy information known to the officers, there was a reasonable probability that the Respondent was involved in criminal activity.

The Government had probable cause to enter the Respondent's home without a warrant because under the totality of the circumstances surrounding the officers', a prudent person in their position would have concluded that there was a fair probability that a crime was committed. *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994). Probable cause must be looked at from the perspective of "prudent men, not legal technicians." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Fair probability can be outlined as, "just the probability, not prima facie showing, of criminal activity." *Gates*, 462 U.S. at 235. Additionally, the officers' acted based off reasonably trustworthy information. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Reasonably trustworthy information can comprise of facts and circumstances that are present in the moment. The rule of probable cause is intended to be practical, not technical. *Brinegar*, 338 U.S. at 176.

1. Under the totality of the circumstances facing the officers, a prudent person in their position would have concluded that there was a reasonable probability that the Respondent was involved in the Balboa shooting.

Courts have found that officers only need to have a reasonable basis to believe a defendant was involved in criminal activity when considering the totality of the circumstances. *See Gasho*, 39 F.3d at 1428. In *Gasho*, the defendants' attempted to fly their plane from Arizona to Canada. *Id.* at 1425. Upon arrival at the Canadian airport, the defendants' plane was seized for "improper markings" and the defendants were given permission to remove their personal belongings. *Id*. at 1426. One of the items the defendant removed was their logbooks. *Id*. Consequently, the defendants were booked for unlawfully removing property from customs custody. *Id*. The court held that under the totality of the circumstances the officers did not have a reasonable basis to infer criminal intent. *Id*. at 1432. The defendant was given permission to remove her personal belongings, and it was clear that she was unaware that she was not entitled to keep the items that she removed. *Id*. at 1439; *See United States v. Moore* 483 F.2d 1361, 1363 (9th Cir. 1973) (outlines that there isn't necessarily a reasonable basis if the totality of the circumstances are susceptible to a variety of different interpretations that are not necessarily compatible with criminal activity).

The FBI officers in this case had a reasonable basis to believe that the Respondent was involved in criminal activity based on the totality of the circumstances. The officers were immediately dispatched to the Respondent's home after the pole-mount camera revealed Mckennery, one of the shooting suspects exchanging with the Respondent a duffle bag large enough to hold a M16. R. at 4. Upon arrival, the Respondent was acting suspicious and not cooperating with the officers' questions. *Id*. The Respondent was hesitant and unwilling to show the officer's the M16 and insisted that the officers' wait outside while he retrieved it. *Id*. at 23. This court should hold that under the totality of the circumstances surrounding the officers', they

had a reasonable basis to infer that the Respondent was involved in criminal activity based on his conduct outside his home. Unlike *Gasho,* where the defendant's behavior could be explained multiple ways without criminal activity, the Respondent's behavior in this case cannot.

Gates is another example in which this Court held that only a reasonable probability of criminal activity is necessary under the totality of the circumstances. 462 U.S. at 213. The police needed probable cause to obtain a search warrant. *Id*. The police received an anonymous letter that implicated the defendants. *Id*. This Court held that the letter combined with the lead detective's affidavit corroborating the letter, was enough to determine that there was a reasonable probability of criminal activity under the totality of the circumstances. *Id*. at 238. This Court outlined that looking at the totality of the circumstances is meant to achieve a common-sense decision based on fair probability, not certainty. *Id*. The focus is on flexibility and practicality when trying to better achieve the interests that the Fourth Amendment requires. *Id*. at 239.

While *Gates* is factually different from this case, this Court should utilize similar reasoning. Upon being dispatched to the Respondent's home after seeing the pole-mounted camera footage, the officers encountered the Respondent. R. at 4. The Respondent made strange requests, such as asking the officers if they could come back another time. *Id*. He also answered the officers' questions as if he had something to hide. *Id*. at 24. This Court should find the combination of the duffle bag interaction between Respondent and Mckennery, and the Respondent's suspicious behavior to be enough to justify a reasonable probability of criminal activity the same way the letter and affidavit were enough in *Gates.* The totality of the circumstances in this case, do not have to add up to an absolute certainty that the Respondent was involved in the Balboa Park shooting. But if this Court views these circumstances with flexibility and practicality, it should

conclude that there was a reasonable probability that the Respondent was involved in the Balboa Park shooting.

2. The officers' concluded there was a reasonable probability that the Respondent was involved in the Balboa Park shooting based off the reasonably trustworthy information known to them at the time of the search.

This Court held that reasonably trustworthy information is enough to justify the belief that there is a reasonable probability of criminal activity. *Beck*, 379 U.S. at 91. In *Beck*, the arresting officers acted based off very little information. *Id*. All they knew was what the defendant looked like and what his previous arrests and convictions were. *Id*. at 97. This Court held that knowledge of physical appearance and previous criminal record were not enough to justify a reasonable belief that the defendant was involved in criminal activity. *Id*. at 96. Additionally, this Court held that those two facts were not particularly relevant to the issue at hand. *Id*. at 97; *See Carroll v. United States*, 267 U.S. 132, 162 (1925) (supports the notion that at the moment the officers decide to act, there must be reasonably trustworthy facts that would warrant a reasonable person to believe that a crime has been committed).

Here, the officers had a plethora of facts and information prior to entering the Respondent's home. They knew that the Respondent was one of the individuals who possessed an automatic rifle in the San Diego area, and that the rifle was likely not rendered inoperable. They also knew through the ALPR database that he was at the same locations at similar times with Mckennery, and they viewed the pole-mount camera footage of the suspicious duffle bag exchange with Mckennery. R. at 4, 10. This Court should look at what the officers in this case knew compared to what the officers in *Beck* knew. This Court should hold that because the facts known to the officers in this case were more detail oriented and related directly to the Balboa Park shooting, the

officers had reasonably trustworthy information that would justify a belief that the Respondent was involved in criminal activity.

In *Georgeon v. City of San Diego,* the defendant was searched and arrested for being a suspect in multiple thefts. 177 Fed. App'x. 581 (9th Cir. 2006). All that the arresting officer knew was that property had been stolen and the defendant's story was not adding up. *Id*. at 582. The court held that this alone constituted reasonably trustworthy information that allowed the officer to believe that there was a fair probability that a crime was committed. *Id*. at 584.

This Court should utilize the holding in *Georgeon* to support a similar holding in this case. When the officers arrived at the Respondent's home, they knew that he owned the same type of assault rifle that was used in the Balboa Park shooting. R. at 4. They also had video proof of a relationship between the Respondent and Mckennery, who was one of fifty people driving away from Balboa Park on the day of the shooting. *Id*. at 3. Referencing *Georgeon*, in this case the officers knew a heinous crime had been committed, the Respondent owned the same type of weapon used to murder nine people and injure six others, and that he and Mckennery exchanged a duffle bag that appeared to be able to hold an assault rifle. If the court in *Georgeon* found those limited facts to be reasonably trustworthy information, this Court has an even stronger basis for doing the same in this case. The officers had probable cause to enter the Respondents house without a warrant since there was a reasonable probability that the Respondent was involved in the Balboa Park shooting under the totality of the circumstances and the reasonably trustworthy information known to them.

B. The Government's warrantless entry of the Respondent's home was justified due to exigent circumstances that made the entry and search objectively reasonable.

Despite the general requirement that a warrant must be obtained to search a home, there are certain exceptions that support a warrantless search of one's home. *Carpenter,* 138 S. Ct. at

2222. A well-established exception is when the "exigencies of the situation" make the need for law enforcement so compelling that a warrantless search is objectively reasonable. *Id*. Courts have looked to the nature of the underlying crime as an important factor to be considered when calculating whether a circumstance is exigent. *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984). "The exigent circumstances exception relies on the premise that the existence of an emergency situation, demanding urgent police action, may excuse the failure to procure a search warrant." *Radka,* 904 F.2d at 361. Courts have found exigencies that create an emergency such as time and possible removal of the threat or suspect to be an objectively reasonable justification for a warrantless search. *Ogden*, 485 F.2d at 540. Courts have also found the exigency of the need to prevent the imminent destruction of evidence to make a warrantless search objectively reasonable. *Kentucky v. King*, 563 U.S. 452, 473 (2011); *See also Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

In *Ogden*, the defendants checked bags at the airport and because the defendants fit the hijacking profile, the bags were placed to the side. 485 F.2d at 537. The agents decided to pry open the bags because it smelled like marijuana. *Id*. at 538. Upon doing so, the agents discovered bricks of marijuana and the defendants were arrested. *Id*. The court held that the warrantless search of the bags was objectively reasonable because the exigencies of time and possible removal of contraband before it got to another state created an emergency that did not require a warrant. *Id*. at 540.

It had been 14-days since the mass shooting at Balboa Park that killed nine people and injured six, and the shooter had still not been found. This fact alone, can justify impatience and urgency for attempting to find the person who is responsible for this heinous crime. Law enforcement then received a call from an anonymous person from a public telephone booth

saying that it was the Balboa Shooter and that a school was the next target. R. at 4. When the officer's decided to enter the Respondent's home, they did not know how much time they had before the shooter would attempt to take more lives. They had an opportunity to remove the threat of another shooting when they decided to enter the house. Like the court in *Ogden*, this Court should find that the urgency to find the shooter combined with the opportunity to prevent further harm, created an emergency that would make the warrantless search objectively reasonable.

In *King*, the officers were outside of an apartment that smelled like marijuana. 563 U.S. at 456. They proceeded to knock on the door to announce their presence. *Id*. Upon doing so, they began to hear the apartment's occupants hurrying and moving around the apartment. *Id*. Worried that evidence might be destroyed, the officers kicked down the door and entered the apartment. *Id*. This Court held that because the officers were trying to prevent the imminent destruction of evidence, the warrantless search was objectively reasonable. *See Id*. at 455. The court noted that officers can create the exigent circumstances, so long as they do not violate the Fourth Amendment or threaten to do so before the exigent circumstances are created. *Id*. at 462.

The FBI officers in this case were dispatched to the Respondent's house immediately following the pole-mount camera footage of the duffle bag exchange that showed the Respondent receiving the bag from Mckennery. R. at 4. As the officer's questioned the Respondent about the whereabouts of the M16, the Respondent told the officers to wait there while he went to get it from inside the house. *Id*. at 23. This could have given the Respondent the opportunity to potentially dispose of the murder weapon or render it inoperable, which would be destruction of evidence. At this point the officers decided to enter the house with the intention of finding the M16. Just like in *King*, this Court should hold that since the officers were trying to prevent imminent destruction

of the M16 used in the Balboa Park shooting, the warrantless search was objectively reasonable. Thus, the Government's warrantless entry of the Respondent's home was justified due to exigent circumstances that made the entry and search objectively reasonable.

C. The Respondent's confession cannot be suppressed under the "fruit of the poisonous tree" doctrine because the officers did not illegally search his home and he was not coerced into a confession.

The Respondent will erroneously argue that his confession should be suppressed under the "fruit of the poisonous" doctrine. This doctrine outlines that evidence seized during an unlawful search cannot constitute as proof against a victim. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). In *Wong Sun*, approximately seven officers barged into one of the defendant's bedrooms, where his wife and child were. *Id*. at 473. The defendant was immediately handcuffed and arrested. *Id*. at 474. The defendant then proceeded to make a statement about the location of certain drugs that the officers were searching for. *Id*. This Court held that the statement made by the defendant was inadmissible because the police officers had no authority to enter the defendant's home. *Id*. at 487. The statement derived from illegal police conduct which pressured the defendant into making the statement, tainted it, and prevented it from being admitted into evidence. *See Id.* at 486. The Respondent's confession in this case should not be suppressed based on the "fruit of the poisonous tree" doctrine. The officers warrantless search of the Respondent's home was not illegal, which would prevent the "fruit of the poisonous tree" doctrine from applying.

This Court in *Wong Sun* considered a concept that, "[w]e need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Id*. at 487-88. Rather, the more apt question is, "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be

purged of the primary taint.'" *Id*. *quoting* Maguire, Evidence of Guilt, 221 (1959). The evidence of the Respondent's admission did not come directly from the search of his home. Respondent volunteered his admission to Officer Hawkins that he let Mckennery borrow the M16 when the initial questioning was about whether his M16 was rendered inoperable pursuant to California Law. R. at 24. Unlike the defendant in *Wong Sun*, who was under arrest while admitting to a crime, the Respondent was not under arrest or coerced when he stated his admission. *Id*. It was the initial line of questioning about his M16 being rendered inoperable, and not strictly the entry into his home that prevents his admission from being tainted. Therefore, this Court should hold that the Respondent's statement could not have been tainted based on the "fruit of the poisonous tree" doctrine.

CONCLUSION

For the foregoing reasons, this Court should reverse the California Court of Appeals for the Fourth District decision and deny Respondent's motion to suppress evidence. This Court should find that the Government's use of ALPR to retrieve Respondent's information did not constitute a search within the meaning Fourth Amendment, and that the warrantless search of the Respondent's home was not unconstitutional under the Fourth Amendment and this Court's precedents.