No. 1788-850191

IN THE

SUPREME COURT

OF THE UNITED STATES

THE UNITED STATES OF AMERICA

Petitioner,

v.

NICK NADAULD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE 4TH CIRCUIT

BRIEF FOR PETITIONER

Team 31; *Counsel for Petitioner*

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ISSUES PRESENTED

1. Was the warrantless use of the Automatic License Plate Recognition Database to retrieve Respondent's geographical information and the use of pole mounted cameras to monitor Respondent's home violations of his Fourth Amendment rights?
2. Was the warrantless entry and search of Respondent's home a violation of Respondent's Fourth Amendment rights?

STATEMENTS OF THE CASE

The United States of America respectfully requests that this Court reverse the California Fourth District Court of Appeals reversal of Respondent's Motion to Suppress evidence. There are two issues before this Court: (1) whether the warrantless use of the Automatic License Plate Recognition Database and the pole-mounted camera to survey Respondent violated his Fourth Amendment rights, and (2) whether the warrantless entry and search of Respondent's home violated his Fourth Amendment rights.

Factual History

On September 14, 2021, a large crowd including families, children, and the general public of San Diego were enjoying a normal day at Balboa Park. R. at 2. The peace was short lived as suddenly, gunshots rang out and an unidentified shooter, later discovered to be Frank McKennery ("McKennery"), open fired into the crowd from a nearby rooftop with an M16A1 ("M16") automatic assault rifle. Nine people were cut down and six were brutally injured in the deadly hail of gunfire. R. at 2.

Nick Nadauld ("Nadauld"), the Respondent, inherited his M16 assault rifle when his father died five years earlier. R. at 2. Pursuant to California Penal Code 30915, Nadauld was required to either render the weapon as inoperable, sell it, obtain a permit for it or remove it from the state. R. at 35. Yet, there are no facts to suggest that he managed to successfully adhere to any of the penal sections, and it is therefore presumed that Nadauld had illegally retained a fully operable, unpermitted assault rifle.

McKennery worked with and eventually befriended Nadauld at a construction company in San Diego about a year prior to the Balboa Park shooting. R. at 2. McKennery told Nadauld that he wanted to borrow his M16 for a shooting excursion. R. at 2. At some point prior to September 14, 2021, Nadauld lent his rifle to McKennery, which is a codified felony. R. at 2, 34. Nadauld's criminal negligence unfortunately provided McKennery, a violent and mentally unstable man, the means to carry out a mass shooting.

McKennery was infatuated with Jane Bezel, a girl that he was stalking on Instagram and was immediately inspired to specifically target her fiancé. R. at 37. But, in order to conceal his true target,

McKennery admitted that he planned to kill seven other bystanders to confuse the police. *Id.* On September 14, 2021, McKennery arrived in Balboa Park, killing nine people and wounding an additional six, escaping via car. R. at 2. Police later found ammunition casings on the rooftop–5.56x45mm NATO cartridges–and a "Manifesto," which threatened imminent future shootings and confirmed that he was not working alone. R. at 2, 36.

Thus began a two-week manhunt for the Balboa Park Shooter. R. at 33. Due to the heinous nature of the crime and immense pressure from both the victims and the public, law enforcement used numerous methods to find the shooter. R. at 3. First, surveillance footage from cameras in and around Balboa Park were analyzed. *Id.* Camera footage captured fifty vehicles leaving the scene before the police arrived to secure the area. *Id.* McKennery was one of the people identified in the footage. *Id.*

The 5.56x45mm NATO cartridges left at the scene were a caliber commonly used in assault rifles. R. at 2. This narrowed down the scope of the search for officers and pointed them to the niche group of people in San Diego who owned assault rifles. R. at 2. Police then cross-referenced the fifty vehicle owners with a list of registered assault rifle owners in the area. R. at 3. One of these fifty individuals identified on this list was Nadauld. *Id.*

Next, police retrieved geographical information from the Automatic License Plate Recognition ("ALPR") database about the movements of these fifty vehicles, including McKennery's vehicle. *Id*. The ALPR is a special camera system, usually mounted on police vehicles or at fixed locations at intersections, that scan passing cars for their license plate information and instantly compare the information with a police database. R. at 38. The ALPR is commonly used to track license plate encounters with a "hot list" of license plates involved in active investigations. *Id.* The time and location information for each license plate scan is stored in this database providing geographical information of the public movements of these vehicles. *Id.* Police accessed the database to investigate the movements of all fifty vehicles that were recorded leaving Balboa Park after the time of the shooting. R. at 3. Police

then examined the movements of vehicles owned by individuals on the assault rifle list, including Nadauld's. *Id.* Cross-referencing the vehicle movements of both groups, the police found that Nadauld and McKennery's vehicles had considerable overlap of being at the same locations at similar times. R. at 4. This information was the first major indication that the two were connected.

Ten residences on the list were observed by the police, including Nadauld's residence. *Id.* On September 24, 2021, cameras were placed on utility poles facing the residences, so that law enforcement could monitor any suspicious activity. *Id.* Law enforcement additionally mailed a letter to each of the ten residences, stating that officers would be arriving at their homes to verify whether their assault rifles had been rendered inoperable pursuant to PC 30915. *Id.* Nadauld received the letter on September 27, 2021. *Id.* Just one day later police received an anonymous call from an untraceable telephone booth, where a person said that they were the Balboa Park Shooter and that they were targeting a school next, and soon. *Id.* By this time, the public was frustrated with the police's failure to find the killer, and law enforcement was spread thin. R. at 31. Thus, state officials deployed the FBI to assist. *Id.* On September 29, 2021, at 5:23 pm, the camera placed near Nadauld's house recorded McKennery pulling into the driveway, giving Nadauld a large duffel bag– an exchange that looked to be like a hand-off returning of Respondent's M16. R. at 4.

FBI Officers Jack Hawkins and Jennifer Maldonado were immediately dispatched to Nadauld's house to investigate further. Id. Only two officers could be spared to send to Respondent's home, as the investigation was ongoing, and the department was already spread thin because of the expansive manhunt. R. at 23. They arrived just thirty minutes after McKennery left and questioned Nadauld outside of the front door about his M16. R. at 4. Nadauld was initially uncooperative with the officers but confirmed that he owned an M16 and insisted on retrieving the weapon for them. R. at 4. However, officers were not yet aware that McKennery was the shooter; they were relying on facts that pointed to both McKennery and Nadauld as prime suspects and could not yet determine exactly how deadly

Respondent was. Fearing that Nadauld may have conspired with or that he might even be the Balboa Park Shooter, Officer Maldonado refused to let Nadauld retrieve the weapon himself, out of fear for his own safety and the safety of not only his partner, but the public of San Diego. R. at 4, 24. Maldonado found the weapon in plain view in Nadauld's bedroom, laying on his bed as if it were just used or taken out. He discovered that the weapon was fully operable, confirming that Nadauld had violated at least one section of the California Penal Code. R. at 4. Upon further questioning after securing the assault weapon, Nadauld revealed that he had lent the M16 to McKennery. *Id.* After confirming Nadauld's second violation of the California Penal Code, he was brought into custody. *Id.*

The police visit to Nadauld's home provided the final piece of the puzzle and allowed the police officers to finally apprehend not only the shooter, but the supplier of the shooter's weapons. McKennery's presence at the scene of the shooting, the plethora of information connecting Nadauld and McKennery, and the discovery of the functioning M16 at Nadauld's home ultimately cemented the identity of the Balboa Park Shooter as Frank McKennery. But unfortunately, McKennery escaped justice. When law enforcement arrived at McKennery's house to arrest him, they heard a gunshot inside the house and found McKennery dead, having committed suicide *Id*. He left a letter confessing to the crime of shooting the victims at Balboa Park and admitted that he had been lent the weapon so that he could carry out his deadly plan. R. at 37. Given the evidence connecting Nadauld and McKennery, it was clear that Nadauld had provided the weapon for the mass shooting.

Procedural History:

On October 1, 2021, a San Diego County grand jury indicted Nadauld with nine counts of second-degree murder under California Penal Code Section 187, nine counts of involuntary manslaughter under California Penal Code Section 192, one count of lending an assault weapon under California Penal Code Section 30600, and one count of failing to comply with California Penal Code Section 30915. R. at 5. Nadauld filed a motion to suppress evidence collected on the date of his initial arrest in this case, pursuant

to Rule 12(b)(3)(c) of the Federal Rules of Criminal Procedure. *Id.* Nadauld argued that the warrantless use of the ALPR and pole mounted camera long with the warrantless entry and search of his home violated his Fourth Amendment rights. *Id*.

The Superior Court of California denied his motion to suppress. *Id.* The court found that the police's use of the ALPR and pole mounted cameras to survey Nadauld did not violate his Fourth Amendment rights. *Id.* The court also found that the police had probable cause that Nadauld was connected to the Balboa Park Shooter and that exigent circumstances were present when the FBI entered and searched Nadauld's home for the weapon used in the shooting. *Id.* Nadauld was found guilty of involuntary manslaughter and for violations of PC 30600 and 30915. R. at 14.

Nadauld appealed his conviction. *Id*. The California Fourth District Court of Appeal reversed the Superior Court's dismissal of Respondent's Motion to Suppress evidence. *Id.* The court found that the police's use of the ALPR to survey Nadauld did violate his Fourth Amendment rights. *Id.* The court did not analyze the use of the pole camera as they determined the information collected by the pole camera was fruit of a 'poisonous' search. R. at 18. The court also found that the police did not have enough information to support probable cause that Nadauld was connected to the Balboa Park shooter and that exigent circumstances were not present when the FBI entered and searched Nadauld's home for the weapon used in the shooting. *Id.* The United States appealed the Fourth District Court of Appeals reversal and the Supreme Court granted cert.

SUMMARY OF THE ARGUMENT

The California Fourth District Court of Appeal erred in reversing the California Superior Court for the County of San Diego's holding because law enforcement's use of the Automatic License Plate Recognition (ALPR) and pole mounted cameras did not violate Respondent's Fourth Amendment rights. Nor did the warrantless entry and search of his house violate his Fourth Amendment rights.

Regarding the First Issue, the use of camera surveillance tools did not amount to a search as Respondent did not have a reasonable expectation of privacy for the public information gained from

these police tools. Law enforcement gained the geographical information about Respondent via the ALPR system. The Supreme Court established that a person does not have a reasonable expectation of privacy regarding their public movements across public thoroughfares. The ALPR system only recorded these public movements; thus, Respondent's expectation of privacy was not infringed upon. Law enforcements use of a pole mounted camera to survey Respondent did not violate his Fourth Amendment rights either. The camera was placed facing the front of his home. Respondent did not have a fence or hedge obstructing the view of the public. Therefore, Respondent did not have a reasonable expectation of privacy regarding his public behavior seen in the front of his home. Thus, law enforcement's conduct here did not constitute a search in either action negating the warrant requirement.

Regarding the Second Issue, the Fourth District Court of Appeal erred in reversing the Superior Court for the County of San Diego's holding that the warrantless entry and search of Respondent's home violated his Fourth Amendment rights. Law enforcement had probable cause based on the expansive pool of evidence that was uncovered prior to and immediately before the entry and search of Respondent's home. Due to the aggregation of evidence surrounding the circumstances and Respondent's connection to the Balboa Park shooting the threshold required for probable cause to exist is far surpassed. Here there was clearly exigent circumstance here during law enforcement's visit to Respondent's home. Officers had only seconds to decide if their lives were in danger once Respondent began to retreat into his residence to retrieve his fully operable assault rifle. Exigency also existed on the grounds that there was a threat made by the shooter just twenty-four hours prior, where the murderer claimed that he was going to act again soon and target a school. Given these facts, law enforcement had probable cause that Respondent was connected to the Balboa Park Shooter and exigency was clearly present during the interaction with Respondent. The FBI officers acted appropriately, using the information and evidence that they had to find the criminal behind the Balboa Park shooting.

ARGUMENT

I. STANDARD OF REVIEW

The California Fourth District Court of Appeal reversed the Superior Court for the County of San Diego's dismissal of Respondent's Motion to Suppress evidence. In reviewing a denial of a motion to suppress evidence, this Court reviews factual findings for clear error and legal conclusions *de novo*. *Ornelas v. U.S.*, 517 U.S. 690, 699 (1996).

II. THE CALIFORNIA FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT POLICE NEEDED A WARRANT TO SURVEY RESPONDENT SINCE THE SURVEILLANCE DID NOT CONSITUTE A SEARCH UNDER THE FOURTH AMENDMENT.

The California Fourth District Court of Appeal erred in reversing the Superior Court for the County of San Diego's holding because law enforcement's use of the Automatic License Plate Recognition (ALPR) Database and pole mounted cameras did not amount to a search under the Fourth Amendment. Nick Nadauld, (hereinafter "Respondent") claims that the warrantless use of the ALPR system and pole mounted cameras violated his Fourth Amendment Rights. However, that is not the case here as Respondent did not have a reasonable expectation of privacy for the publicly observable information retrieved by these tools, negating the need for a warrant. His publicly observable actions led law enforcement to Frank McKennery, (hereinafter "McKennery). Thus, at issue is whether (1) the use of the ALPR system violated Respondent's Fourth Amendment rights and (2) if the surveillance provided by the pole mounted camera violated his Fourth Amendment Rights.

The Fourth Amendment protect citizens from unreasonable searches. U.S. Const. amend. IV. However, as this Court has previously stated, this amendment only protects a person's subjective expectation of privacy that society is prepared to recognize as reasonable. *Katz v. United States,* 389 U.S. 347, 361 (1967). A reasonable expectation of privacy requires consideration of "personal and societal values" and whether those values have been infringed. *Oliver v. United States,* 466 U.S. 170, 173 (1984). A "search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *U.S. v. Jacobsen*, 466 U.S. 109, 114 (1984). Here, these values were not infringed upon. Respondent drove on public roads and knowingly showed his behavior in the front of

his home to the public. Such activity is not protected as "[w]hat a person knowingly exposes to the public . . . is not subject [to] Fourth Amendment protection." *Katz*, 389 U.S. at 351. If a person's expectation of privacy is not infringed upon, then a search is not conducted under the Fourth Amendment. *Jacobsen*, 466 U.S. 109 (1984). Accordingly, Respondent fails to establish a reasonable expectation of privacy on both issues, and the evidence gathered against Respondent was admissible.

A. The Electronic Surveillance Of Respondent Via The ALPR Did Not Amount To A Search Since He Fails To Establish A Reasonable Expectation Of Privacy For His Public Movement Along Public Roads.

This Court determined in *United States v. Knotts*, that observation of public movement on public roads by law enforcement does violate the Fourth Amendment. *United States v. Knotts*, 460 U.S. 276, 281(1983). Additionally, law enforcement are not forbidden from using technology to carry out their duties as "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them . . . " *Id.* at 283. Here, Respondent's license plate was examined multiple times by the ALPR system. Law enforcement subsequently retrieved geographical information pertaining to his license plate in the ALPR database that revealed his public movements along public roads. At issue here is if (1) the examination of Respondent's license plate via ALPR cameras violated his reasonable expectation of privacy and (2) if Respondent's geographic information retrieved from the ALPR Database was intrusive enough to violate his reasonable expectation of privacy. Ultimately, such a level of privacy is not readily recognized today by society as the general public knows that "the government uses cameras to watch us in all sorts of venues, ranging from private stores to public restrooms, from government-owned buildings to public streets, from traffic intersections and parking lots to detentions of motorists by state troopers." Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 Miss. L.J. 213, 220 (2002).

First, the Court of Appeals for the Ninth Circuit determined that "when police officers see a license plate in plain view, and then use that plate to access additional non-private information about the

car and its owner, they do not conduct a Fourth Amendment search." *U.S. v. Diaz-Castaneda*, 494 F.3d 1146, 1152 (9th Cir. 2007). If information gained by viewing a license plate is already in a police database and available to any inquiring police officer, then the information is not private. *Id.*

In *United States v. Ellison*, the Court of Appeals for the Sixth Circuit denied a motion to suppress evidence regarding an officer's examination of a license plate and subsequent retrieval of information from the Law enforcement Information Network (LEIN), a law enforcement computer database. *U.S. v. Ellison*, 462 F.3d 557, 559 (6th Cir. 2006). The Court first recognized that the purpose of a license plate is to provide identifying information to law enforcement and is something, a person knowingly exposes to the public. *Id*. at 561-62. Second, they recognized that the purpose of law enforcement databases is to make such information readily available to officers. *Id* at 562. With these purposes in mind, the court determined that this was not a case where the police were using technology to "discover evidence that could not otherwise be obtained without "intrusion into a constitutionally-protected area."" *Id.* Rather, the use of the police database here allowed officers to access non-private information efficiently. *Id.*. In this case, the information retrieved did not intrude upon a constitutionally protected area as it pertained to the existence of a warrant. *Id*. Ultimately, "so long as the officer had a right to be in a position to observe the defendant's license plate, any such observation and corresponding use of the information on the plate does not violate the Fourth Amendment." Id. at 563.

Like in *Ellison*, Respondent does not have a reasonable expectation of privacy against examinations of his license plate. His license plate was on the exterior of his car visible to the public eye and the purpose of a license plate is to provide identifying information to the police. Here, his license plate was not physically examined by an officer but instead was examined via ALPR cameras. R. at 3. This does not affect the constitutionality of the examination as the use of ALPR cameras here is just an augmentation of law enforcement's sensory abilities. *Knotts*, 460 U.S. at 281. Thus, Respondent's Fourth Amendment Rights were not violated here. As it was in *Ellison*, retrieval of the information from

a police database, in this case the ALPR database, did not violate Respondent's Fourth Amendment rights as Respondent did not have a privacy interest in his public movements across public roads. As stated in *Knotts*, such information is not private and does not fall under a constitutionally protected area. *Id.* The information of Respondent provided by the ALPR cameras was automatically placed in the ALPR database and when retrieved was readily available to any inquiring officer. R .at 38. The database does not contain any form of private or identifying information either. R. at 38-39. The only information recorded are the "data sets of license plate numbers, photos of the vehicles, and geospatial locations from where the images were captured." R. at 39.

Additionally, examination of Respondent's license plate by ALPR cameras did not occur in a forbidden area. Cameras were placed in public either in a police cruiser or on a fixed location at an intersection. R. at 39. The purpose of the ALPR is to capture such publicly observable information. Since Respondent knowingly exposed his license plate to the public by traveling on public roads and ALPR cameras were not illegally placed, he had no reasonable expectation of privacy from his license plate being examined. The subsequent retrieval of geographical information from the ALPR database also did not intrude upon his privacy interests as the ALPR databased only catalogued public information, his movements along public roads. R. at 7.

Second, the collection of Respondent's geographic information retrieved from the ALPR Database did not violate his reasonable expectation of privacy. The level of information recorded did not amount to the intrusiveness of perpetual surveillance of Respondent's travels as the ALPR only intermittently showed Respondent's location. R. at 6. In *United States v. Riley*, the Court of Appeals for the Sixth Circuit held that the police did not conduct a search under the Fourth Amendment when it tracked the real-time GPS coordinates of the defendant's cell phone for seven hours. *U.S. v. Riley*, 858 F.3d 1012, 1013 (6th Cir. 2017). The Fourth Amendment protects people from unreasonable physical trespass or unreasonable intrusions upon an individual's reasonable expectation of privacy. *Id.* at 1016.

In this case, the police tracked the defendant via GPS, so the court tested if the defendant's expectation of privacy was intruded upon. *Id.* Following the Supreme Court, the Sixth Circuit held that a criminal suspect does not have an expectation of privacy in his location while moving along public thoroughfares. *Id.* at 1017. While the Supreme Court has held that searches inside a home without a warrant are unreasonable, using seven hours of GPS location data to determine an individual's location "does not cross the sacred threshold of the home, and thus cannot amount to a Fourth Amendment search." *Id*. at 1018. So long as the tracking does not reveal movements within the home, the tracking cannot amount to a Fourth Amendment search. *Id.* In this case, the tracking only revealed where the defendant had traveled to, not his private movements within the hotel he stopped at. *Id*. Thus, the government did not conduct a search under the Fourth Amendment when it tracked the real-time GPS coordinates of Riley's cell phone. *Id*.

The facts of this case are similar to those in *Riley*. Respondent was traveling along public thoroughfares across San Diego. R. at 3. During his travels, his license plate was spotted by ALPR cameras which provided geographical information to law enforcement that allowed them to "track" Respondent's public location at certain intervals. *Id.* The surveillance was similar as law enforcement only tracked Respondent's public movements and no information regarding Respondent's private movements within his home were revealed. R. at 38. However, the present issue is also distinguishable from *Riley*. The ALPR system did not provide perpetual twenty-four-hour surveillance of Respondent's exact location. Nor did it provide the accuracy and exactness that a phone GPS signal can provide. Instead, the ALPR system provided singular geographical locations of Respondent's vehicle on public roads and did not create a complete record of his individual movements. R. at 38.

One issue the Fourth District Court of Appeal had with the Superior Court's holding was that law enforcement needed permission to track Respondent via the ALPR since in *United States v. Hufford*, tracking was only permissible when permission was given by the caffeine drum seller to place ta tracking

beeper. *U.S. v. Hufford*, 539 F.2d 32,33 (9th Cir. 1976). R. at 15. However, the comparison is inapplicable here as surveillance of Respondent is more in line with *Riley*. The surveillance here did not involve any physical intrusion on Respondent's physical property to track his location unlike *Hufford.* Rather the "tracking" was accomplished via visual surveillance. R. at 38. Thus, permission was not needed to track Respondent as only Respondent's public observable geographical information was recorded by isolated cameras separate from his vehicle. R. at 38.

The Fourth District Court also found issue with the ALPR as a "dragnet-type law enforcement practice". This level of tracking does not approach the level of a dragnet practice as The Fourth District Court mischaracterizes the function of the ALPR system. Dragnet refers to "any system of coordinated measures for apprehending criminals or suspects; including road barricades and traffic stops, widespread DNA tests, and general increased police alertness." R. at 16. Here, Respondent was not a specific target of police alertness as in other cases like in *Hufford* and *Riley*. Rather, Respondent was one of potentially thousands whose geographical information was catalogued by the ALPR database. Only later was it determined that Respondent was a person of interests. As of now, the Supreme Court has not established if scientific devices that provide surveillance of any citizen in public without judicial supervision falls under a dragnet practice. *Knotts*, 460 U.S. at 284. Such claims do not currently have a foundation within the Constitution. *Id.* Thus comparison here is erroneous.

Finally, the Fourth District Court also applied *Kyllo v. United States* in reversing the Superior Court's decision. R. at 16. This Court in *Kyllo* held that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," constitutes a search—at least where the technology in question is not in general public use." *Kyllo v. U.S.*, 533 U.S. 27, 34 (2001). The Fourth District Court compared the technology seen in in *Kyllo* to the ALPR system and found the level of information provided as comparable. R. at 16. However, the surveillance of Respondent did not approach

the level of information observed in *Kyllo*. The technology used in *Kyllo* clearly crossed the line of intruding into a constitutionally protected area, the interior of home. *Id*. at 34. However, the technology in the present issue does not reveal any information regarding the inside of Respondent's home. R. at 38. Nor did it reveal any information regarding the interior of any buildings the Respondent entered once he exited his car. Instead, all the information provided to the police regarded Respondent's publicly observable movements, the most pertinent being his route to work, which connected him to his co-worker, McKennery. R. at 7. The ALPR technology cannot be compared to the *Kyllo* standard as it does not intrude upon the societal expectation of privacy a person has as today "in many urban, and even some suburban, areas today, full-time technological surveillance of the public is the norm." Slobogin, 72 Miss. L.J. at 216. Nor did the information provided by the ALPR reveal any other private information. R. at 38-39. ALPR cameras do not have the capacity to identifying the driver of the vehicle. Rather, the ALPR only identities the vehicle, not the occupants inside. R. at 40. In fact, the ALPR system, provides no identifying information associated with the data collected to peer into a person's private life. R. at 38. In this case, the ALPR system only provided certain points of information where Respondents had been sighted. Thus, the Fourth District Court's comparison is erroneous.

In regard to the Fourth District Court's issue with the publics access to this technology, the ALPR system uses camera technology. R. at 38. Such technology is available to the public to use. Any person could record a person's public movements at a fixed location and keep track of when they pass through the camera. The ALPR does just that, it only provides a limited collection of datapoints of vehicles that traveled in plain view on public roads. R. at 38. The ALPR database just makes it easier to catalogue the enormous amount of information recorded and makes this information readily available to law enforcement. Again, the general public has access to such technologies as the use of cameras and subsequent databases to record this information is widespread throughout society as a whole. While the government operates many security cameras, camera use is even more widespread in the private sphere

as a survey of companies nationwide found that over "75% use CCTV surveillance." Slobogin, 72 Miss. L.J. at 222. While license plate scanner technology is not in general public use, the use of scanners in this case does not intrude upon Respondent's reasonable expectation of privacy as he did not have a privacy interest in the geographical information recorded by the ALPR database. This information only pertained to his publicly observable movements and *Knotts* established observation of public movement on public roads does violate the Fourth Amendment. *Knotts*, 460 U.S. at 28. Members of the public during the shooting even expressed this expectation stating "There's gotta be hundreds of security cameras in Balboa Park that would have shown something." R. at 31. Clearly, the societal norm is that cameras should be able to capture such public conduct.

Respondent knowingly exposed his license plate to the public placing his identifying information in the public eye. His public movements were also not subject to Fourth Amendment Protection. Use of the ALPR system is not comparable to issues seen in *Kyllo* or *Hufford*, since it is not a piece of technology that is used to view the interior of a home or that requires consent. Thus, the use of the ALPR system did not constitute a search under the Fourth Amendment since Respondent knowingly exposed his public movements to the public along public roads. Respondent lacked a reasonable expectation of privacy regarding the geographical information gained by his surveillance via the ALPR system. Thus, a warrant was not needed since a search did not occur under the Fourth Amendment.

B. The Electronic Surveillance Of The Front of Respondent's Home Did Not Amount To A Search Since Respondent Fails to Establish A Reasonable Expectation Of Privacy For His Publicly Visible Conduct.

Similar to the use of the ALPR, the warrantless use of pole mounted cameras in a public place does not violate a person's Fourth Amendment right to privacy. Today we live in a society where public conduct is constantly recorded from a variety of cameras. From cameras that track drivers in intersections to security cameras placed around buildings, "full-time technological surveillance of the public is the norm." Slobogin, 72 Miss. L.J. at 216. This Court recognized this societal norm in *Katz* as "[w]hat a

person knowingly exposes to the public . . . is not subject [to] Fourth Amendment protection." *Katz*, 389 U.S. at 351.

In regard to cameras surveying homes, the Court of Appeals for the Sixth Circuit in *United States v. Houston* held that the use of a police camera on a public pole did not constitute a search under the Fourth Amendment. *U.S. v. Houston*, 813 F.3d 282, 288 (6th Cir. 2016). *See also U.S. v. Powell*, 847 F.3d 760, 773 (6th Cir. 2017). Appellant "had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads." *Id.* Additionally, a person cannot have a reasonable expectation of privacy for activities recorded or seen in the front of their home if no steps are taken to conceal the activity. *U.S. v. Bucci*, 582 F.3d 108,116 (1st Cir. 2009). Failure to establish a reasonable expectation of privacy renders surveillance reasonable and not a search under the Fourth Amendment. *Id.* at 116-17.

In *United States v. Tuggle*, the Court of Appeals for the Seventh Circuit denied appellant's motion to suppress evidence regarding the warrantless use of pole cameras to observe a home as it did not amount to search under the Fourth Amendment. *U.S. v. Tuggle*, 4 F.4th 505, 511 (7th Cir. 2021), cert. denied, 142 S. Ct. 1107 (2022). In this case, several law enforcement agencies were investigating a large methamphetamine distribution conspiracy and cameras were planted facing Tuggle's front yard. *Id.* at 512. These cameras provided surveillance video evidence that depicted several individuals including Tuggle, participating in a large-scale drug operation. *Id.* at 512. In determining if the use of the pole camera amounted to a search, the court found that Tuggle did not "exhibit an actual (subjective) expectation of privacy" in the activity outside of his home. *Id.* at 513. Tuggle did not erect any fences or try to shield his yard from public view. *Id.* Nor did Tuggle exhibit a reasonable expectation of privacy regarding what happened in front of his home. *Id.* at 514. Tuggle knowingly exposed the areas captured by the cameras, in particular the outside of his house and his driveway were plainly visible to the public. *Id.* Even with the *Kyllo* standard, "the Supreme Court has routinely approved of law enforcement

officers' use of cameras to aid investigations" as cameras are in "general public use." *Id.* at 515-156. The duration of time was also permissible as even though eighteen months was excessive; the police could have physically watched Tuggle for that period. *Id.* Police use of cameras here enhanced their abilities to survey and was deemed constitutional. *Id.* at 526. Thus, the use of pole cameras "did not run afoul of the Fourth Amendment." *Id.* at 511.

Here, Respondent fails to a reasonable expectation of privacy for activities conducted in the front of his home. Like in *Tuggle,* the camera was in the present issue was placed atop a public utility pole and was solely pointed at the front of Respondent's house. R. at 4. The front of Respondent's house was fully exposed to the public. R. at 8. Any activity that Respondent conducted in the front of his house was publicly visible and could be seen by the typical passerby from the street. Moreover, Respondent made no attempts to conceal his activity such as erecting a fence. Thus, Respondent had no expectation of privacy when the McKennery returned Respondent's M16 rifle, the same weapon used in the mass shooting, in his driveway. R. at 4. Any person on the street could have seen the exchange.

As this Court held in *Knotts*, the police can use technology to enhance their sensory abilities to pursue their duties. *Knotts*, 460 U.S. 276 at 283. The use of the pole mounted camera here follows this holding as it enhanced law enforcement's ability to survey. Law enforcement was already stretched thin after two and a half weeks of searching for the Balboa Park Shooter. R. at 23. Placing constant physical surveillance at each of the residences would have been a waste of police resources. Thus, use of a camera was a reasonable step to allow officers to carry out their duties more efficiently. Even if the *Kyllo* standard is applied for the technology used here, cameras are a tool in use by the general public. Nor was the surveillance as intrusive as other methods as the surveillance of Respondent's house in this issue did not reveal any information regarding the interior of his home. R. at 4.

Regarding the length of time surveyed, the court in *Tuggle* held that a surveillance time of eighteen months was permissible. *Tuggle,* 4 F.4th at 526. The court in *Houston* held that a period of ten

weeks was permissible. *Houston*, 813 F.3d at 290. Here the time observed does not even approach these lengthy periods. Respondent was only observed for a mere week. R. at 4. Thus, the duration that Respondent was surveyed was permissible. Given these facts, it is clear that Respondent did not have a reasonable expectation of privacy regarding his public behavior in the front of his home. Respondent did not exhibit a reasonable expectation of privacy as any person on the street could have seen when the McKennery returned the M16 rifle. Thus, the police use of a pole mounted camera to survey Respondent did not violate his Fourth Amendment rights and did not constitute a search, negating the need for a warrant.

Since Respondent did not have a reasonable expectation of privacy regarding his public movements nor in the activity seen in the front of his home, the use of the ALPR system and pole mounted camera were not unreasonable. Society today is not prepared to recognize a reasonable expectation of privacy for public observable behavior or movements. The information captured by ALPR cameras and the pole mounted camera was public, not private. The societal expectation today is that what we expose in public is likely to be captured by some form of camera surveillance. Thus, these were not unreasonable searches of Respondent in violation of his Fourth Amendment rights as the surveillance in this case did not constitute searches under the Fourth Amendment. Thus, a warrant was not required. Accordingly, the evidence gathered via technological surveillance here was admissible.

III. THE CALIFORNIA FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE ENTRY AND SEARCH OF RESPONDENT'S HOME VIOLATED HIS FOURTH AMENDMENT RIGHTS BECAUSE PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES NEGATED THE NEED FOR A WARRANT.

The California Fourth District Court of Appeal erred in holding that the entry and search of Respondent's home was unconstitutional, because Officers Hawkins and Maldonado had an extensive pool of evidence that gave them grounds to establish probable cause that Respondent was linked to criminal activity. Additionally, the presence of exigency negated any need for a warrant, giving the officers permission to enter the Respondent's home when they had only seconds to evaluate the danger

that Respondent posed as a potential deadly shooter with a fully operable assault rifle inside of his home. Respondent claims that there was no exigency, and that the entry and search into his home violated his Fourth Amendment Rights. An unwarranted entry into a home may be justified so long as there is probable cause that an exigent circumstance existed. *Minnesota v. Olson,* 495 U.S. 91, 92 (1990). An exigent circumstance includes a situation that subjects the responding officers to danger or potentially deadly circumstances. *Id*. Notably, the gravity of the crime and likelihood that the suspect is armed should be considered. *Id.; see also Welsh v. Wisconsin* 466 U.S. 740, 742 (1984). For a warrantless entry to be permissible under the Fourth Amendment, law enforcement needs to establish both that an exigency exists, and that there was probable cause that the exigent circumstances existed. Thus, at issue here is whether (1) there was probable cause to tie Respondent to the Balboa Park shooting or any other criminal activity and (2) whether exigency existed to allow the officers to enter lawfully, absent a warrant.

A. FBI Officers Had Probable Cause To Search Respondent's House Because There Were Multiple Grounds That Connected Respondent To The Balboa Shooting.

Probable cause exists when, under the totality of the circumstances known to officers, a prudent person 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 does not require overwhelmingly convincing evidence, but only reasonably trustworthy information. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); see *Georgeon v. City of San Diego*, 177 F. Appx. 581, 584 (9th Cir. 2006). Further, this Court has stated that law enforcement officers are under no constitutional duty to call halt to criminal investigation the moment they have the minimum evidence to establish probable cause, and that faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause is an inappropriate imposition of duty. *Kentucky v. King* 563 U.S. 452, 456 (2011).

In *United States v. Meyer*, the Court of Appeals for the 8th Circuit held that probable cause there was not a close call; the officers had multiple grounds that allowed them to establish probable cause that

the Defendant was involved in criminal activity. *United States v. Meyer*, 19 F.4th 1028, 1033 (8th Cir. 2021), cert. denied, 142 S. Ct. 2827 (2022). There, officers knew that the defendant Myers had ties to the individuals who were livestreaming the sexual abuse of children. *Id.* The defendant had told the officers that he stayed in regular contact with the individuals and had admitted that the devices used to record the sexual acts were inside of his home. *Id* at 1035. The court held that there was certainly probable cause, and that additionally, just because the defendant had an innocent explanation for some of the facts, did not mean that the officers had to believe him, or that those explanations weighed negatively on a reasonable finding of probable cause. *Id.*

Here, Respondent's case is very similar to *Myers*. Prior to even arriving at Respondent's home, the officers had discovered multiple facts that linked Respondent to the Balboa Park shooting. This information included (1) his identification by the FBI as a suspected illegal retainer of a fully operable M16 assault rifle, (2) close overlap of movements with McKennery, who was confirmed to have been at the scene of the crime, (3) involvement in a suspicious hand-off with McKennery and then later, (4) suspicious, inadequate answers and actions during the FBI Officer Hawkins knock-and-talk confrontation. R. at 2-5.

First, the law enforcement utilized basic identification technology to generate a list of cars and their registered owners that were seen fleeing the park just moments after the shooting occurred. R. at 3. Then, based on the kind of ammo found on the scene of the crime, law enforcement was able to narrow their search down to the people in the San Diego Area who owned assault rifles, because 5.56x45mm NATO cartridges are commonly used in assault rifles, including M16 rifles. *Id.* Law enforcement then cross-referenced the existing rifle owners list with the list generated by the ALPR system. *Id.* While there was no name that appeared twice, once on each list, the police did have Respondent listed as a registered owner of the exact kind of gun used during the massacre. *Id.* While alone, this fact was not enough to even constitute reasonable suspicion, when the police began to monitor the movements of

Respondent and compared them with the movements of McKennery–who appeared on the list of those who fled the scene immediately after the shooting–the officers discovered that there was "considerable overlap" between the two. R. at 3-4. Both men frequently visited the same locations at the same times. *Id.* Additionally, the manifesto that the Balboa Park Shooter left at the scene of the crime stipulated that he was working closely with friends, it was a very realistic and a likely probability that McKennery and Respondent were prime suspects at this time, based on the totality of the circumstances presented to the officers. R. at 36.

Further, under Cal. Penal Code § 30915, Respondent was required by law to have rendered the assault rifle inoperable within ninety days of his intestate succession. R. at 35. Law enforcement had no data to suggest that Respondent successfully adhered to any of the requirements set out in the California Penal Code. However, law enforcement did know that Respondent's father, who he inherited the weapon from, had died more than five years prior. R. at 2. His father's death occurred well before the ninety-day limit as set forth in the California Penal Code, and because there is no evidence to suggest otherwise, there was a reasonable probability that Respondent was engaged in criminal activity regarding the status of his deadly assault weapon and absence of an approved license or proof that he had made the gun inoperable.

Like in *Myers*, the law enforcement at this point were aware that (1) there was a potentially illegally fully operable and deadly assault rifle within Respondent's residence and (2) that Respondent and McKennery, who was present at the shooting, were familiar with each other, which under *Myers*, constitutes probable cause enough to warrant a search.

However, law enforcement received additional information that even further surpassed this threshold. After setting up pole mounted cameras to monitor the residences of multiple pairings who the police had found connections between that were similar to the data retrieved regarding Respondent and McKennery, the camera recorded McKennery dropping off a large, black duffle bag to Respondent. R.

at 4. Again, like *Myers*, during the conversation that the FBI officers Hawkins and Maldonado had with Respondent at his home, he admitted to having an M16 inside of his home and further, suspiciously avoided responding when the officers asked if it was inoperable. R. at 23.

Based on the police's investigation, Respondent was found to be potentially in violation of two different sections of the California Penal Code via failure to make the rifle inoperable and lending the weapon. Additionally, the surveillance of Respondent and McKennery- a person who was recorded to have fled the scene of the shooting- connected the two in a way that warrants probable cause to believe that Respondent was tied to the shooting. Given all this info, law enforcement had multiple grounds to establish probable cause to search Respondent's home, especially considering that a fully operable assault weapon in the hands of a potential mass shooter poses a clear and imminent threat to both the officers at Respondent's door, and the general public of San Diego.

The factual basis here far surpasses a "close call" as to probable cause to search Respondent's home; there is reasonable and clear suspicion that Respondent could be tied to criminal activity. *Meyer*, 19 F.4th at 1033. Since law enforcement only need reasonably trustworthy information here, as opposed to overwhelming evidence; probable cause is certainly met on these facts.

Further, there is no need for the police officers to stop their investigation as soon as they have established probable cause to get a warrant, especially not when there is a form of exigency about the situation. *King* 563 U.S. at 456. Here, the San Diego Police department in conjunction with the FBI and state officials were stretched thin, searching desperately for the maniac who was responsible for gunning down nine people at Balboa Park. R. at 4. Law enforcement are under no duty to stop investigating to obtain a warrant at any specific time during their investigation, especially under conditions where halting an investigation may allow for another mass murder to occur, or a danger to the San Diego public to continue. *Id.* From the time that they established probable cause, they were very quickly thrown into an exigent circumstance, which in itself, does not require a warrant at all.

B. Exigent Circumstances Circumvented The Need For A Warrant When A Mass Shooter was on the Loose, Who Had Threatened To Murder School Children and Teachers.

An exigent circumstance is an emergency situation requiring swift action to prevent imminent danger to life. *People v. Ramey* 16 Cal.3d 263, 265 (Cal. 1976). An important part of determining an exigent circumstance is the gravity of the underlying offense. *Welsh v. Wisconsin* 466 U.S. 740, 752; *see also Minnesota v. Olson*, 495 U.S. 91, 92 (1990). An officer may make a warrantless entry when the exigencies of a situation create a compelling law enforcement need. *Lange v. California*, 141 S. Ct. 2011, 2017 (2021). The subjective motives of the police officers have no bearing on whether a search and seizure is unreasonable under the Fourth Amendment. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006). Instead, based on the entirety of the circumstances, the question the court will decide is whether a reasonable officer, confronted with those circumstances, could have objectively believed that an immediate search was necessary to safeguard potential victims or themselves. *United States v. Evans*, 958 F.3d 1102, 1106 (11th Cir. 2020); *see also Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.3d 1065, 1072 (10th Cir. 2010).

In *Welsh v. Wisconsin,* this Court explained that when an offense is minor, there should be a more restrictive approach to allowing an exigent circumstance to precede the warrant requirement. *Welsh,* 466 U.S. at 742. There, the petitioner had driven while inebriated, and had refused to take a breathalyzer exam. *Id* at 743. The officers entered his home with no warrant and walked upstairs to find the petitioner lying in bed. *Id.* This court held that in the event that the offense is minor, such as a potential intoxicated driver situation, it is very difficult to overcome the presumption of unreasonableness for an entry without a warrant because the privacy of the home is one of the most protected and respected under the 4th Amendment. *Id at 755.*

The facts in *Welsh* are distinguishable from the present issue. Here, officers are desperately searching for a dangerous killer who, on two occasions, had threatened to act again. R. at 4. Once as written in his manifesto: “We’re going to do this again. Get Ready. Soon.” R. at 36. And again, during

an anonymous phone call just twenty-four hours prior, where the Balboa Park Shooter threatened to murder innocent children, claiming a school would soon be his next target. R. at 4. The facts of *Welsh* are vividly distinguishable here; the situation is extremely dire as the lives of others, including the lives of innocent children and the police officers, are in imminent danger. Because of the time-sensitivity and high gravity of the crime that was committed, and the looming threat of another attack, the seriousness of the crime will indefinitely play a factor in the police officer's determination of exigency.

In *Estate of Bennett v. Wainwright,* the court held that an imminent threat to the life or safety of members of the public or the police officers may qualify as an exigent circumstance that renders a warrantless entry reasonable. *Estate of Bennett v. Wainwright*, 548 F.3d 155, 170 (1st Cir. 2008); *see also Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.3d 1065, 1072 (10th Cir. 2010) (holding that exigency permits warrantless home entries when officers reasonably believe that some actor or object in a house may immediately cause harm to persons or property not in or near the house). There, before arriving on the scene, the two police officers, Wainwright and Turner, were informed by the 911 dispatcher that the Defendant had a mental illness and that there were firearms inside of his residence. *Id* at 160. The dispatcher also informed the officers that the mentally ill defendant had savagely beat a stray dog and had verbally threatened his mother. *Id.* The court there held that based on the objective facts known to the officers at the time, that it was clear Wainwright and Turner had reasonable grounds to believe that Bennet was a person who presented an imminent and substantial threat of physical harm to others, including the officers themselves. *Id.*

Here, while the Respondent was not diagnosed as mentally ill, based on the facts that the police had gathered from the manifesto, he was an extremely troubled and mentally unwell individual. Based on the manifesto left at the scene of the crime, which was the only information the police had before finding McKennery's note, the shooter had been raised in a broken, drug-infested home where his father was imprisoned, and his mother was an addict. R. at 36. He unsuccessfully sought help from multiple

psychiatrists who were unable to get through to him. *Id.* While he was not diagnosed as mentally ill, he was very unstable and manic, obviously holding no regard for other human life. These facts are still starkly similar to *Wainwright*. There are multiple events that occurred that excuse the need for a warrant per exigency.

First, Respondent was linked to a deadly mass shooting, where the shooter killed nine and injured an additional six people and had threatened twice to "do [it] again soon." R. at 4. This blatant threat to the safety and wellbeing of the public of San Diego and more specifically, the lives of young school children alone constitute an exigent circumstance under the holdings of several courts who have priorly visited similar issues. However, additional information acquired law enforcement continued to heighten the emergency in addition to the corroborated threats.

FBI officers Hawkins and Maldonado knew when approaching Respondent's home that the M16 was somewhere in his residence, and that it was likely fully operable per the lack of information regarding any adherence by Respondent to the California Penal Code as established above. When Respondent confirmed this fact at the door and began to retreat into his residence to go and get the M16, the officers acted appropriately in refusing to let him retrieve the deadly weapon alone while they remained at the door, given the information that they had and the potential risk that their lives were in. This situation could have easily been perceived by the officers as one where a mass murderer, suspected of killing nine, innocent people was going to retrieve a deadly assault rifle, they only had a few seconds to determine whether they were safe, and to consider the lives of those in the community. Given the facts they knew at the time, they took appropriate action to take control of a potentially deadly situation.

A police officers' job is to use their experience, educated judgment and instinct to protect the citizens of their jurisdiction. Here, not only were the lives of the police officers in imminent danger, but also the lives of those people in the officer's direct line of duty to protect. The Fourth Amendment exists to protect the privacy of the home, but when the danger and severity of the situation usurps that purpose,

the officers must be able to rely on the exigency exception to protect themselves and uphold the safety of their community. In mass-shooting scenarios, where the perpetrator is not yet apprehended or known, where there is probable cause and an obvious threat to the personal safety of the officers, that exigency undoubtedly exists.

C. Fruit Of The Poisonous Tree Doctrine Is Inapplicable Here Since Respondent Fails To Show "Poisonous Fruit" Resulting From An Unreasonable Search.

This Court first articulated the "Fruit-of-the-Poisonous-Tree" doctrine in *Wong Sun v. United States*, 371 U.S. 471 (1963). The "fruit" is evidence derived from an illegal source, the poisonous tree. *Id.* In *Wong Sun*, the Court held that evidence and witnesses discovered because of an illegal search are "tainted" and must be excluded. *Id.* at 492.

Here, none of the evidence obtained by the San Diego Police Department was derived from an illegal source. Additionally, Respondent had not been placed under arrest and was not coerced into this confession. Thus, Respondent's resultant confession during the home search is not tainted and shall not be suppressed.

CONCLUSION

For the reasons above, this Court should reverse the California Fourth District Court of Appeal's holding and deny Respondent's motion to suppress evidence. Accordingly, this Court should uphold Respondent's conviction.