No. 1788-850191

IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term 2022

United States of America,

Petitioner

v.

Nick Nadauld,

Respondent

ON WRIT OF CERTIORARI

TO THE CALIFORNIA FOURTH DISTRICT COURT OF APPEAL

BRIEF FOR PETITIONER,

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STATEMENT OF THE ISSUES

I. Does warrantless law enforcement use of an Automated License Plate Reader ("ALPR") database to identify and locate an individual in a criminal investigation violate that individual's reasonable expectation of privacy when it reveals only a partial record of their public movements?

II. Was the warrantless search and subsequent seizure of a weapon in a suspect's home in violation of the Fourth Amendment where the investigating officers were faced with exigent circumstances and had probable cause?

STATEMENT OF THE FACTS

The Parties. The parties to this case are Petitioner United States of America and Respondent Nick Nadauld. Mr. Nadauld is a resident of San Diego, California.

Respondent Loans his Assault Rifle. On or around September 7, 2021, the Respondent loaned his fully automatic M16A1 ("M16") assault rifle to his coworker, Frank McKennery ("McKennery"), who had expressed an interest in borrowing the weapon for use at an outdoor range. R. at 2. The Respondent had legally acquired the rifle, but had subsequently failed to either render it inoperable, sell it to a licensed gun dealer, obtain a permit form the DOJ authorizing its possession, or remove the weapon from the state, as required per California Penal Code 30600. *Id*.

The Shooting. On September 14, 2021, McKennery fired the M16 rifle into a crowd from an elevated position in Balboa Park, San Diego, California. *Id*. Using the rifle's automatic fire capability, the shooter killed nine people and injured several others before escaping without being identified. *Id*. San Diego police identified the rounds used as 5.56x45mm NATO cartridges, commonly used in several types of assault rifles. *Id*.

The Initial Investigation. Using surveillance footage from the scene, San Diego police were able to identify 50 vehicles that had left the area prior to the enforcement of a cordon. R. at 3. They checked the records of each vehicle's owner, one of whom was McKennery. *Id*. None had any record of violent crime. *Id*. The police next cross-referenced the list of 50 owners with a list of registered assault rifle owners in the area. *Id*. None of the individuals on this assault rifle list were owners of the vehicles that had fled the scene. *Id*. The Respondent was one of 50 individuals identified as local assault rifle owners. *Id*.

Police Use the ALPR Database. San Diego police next accessed the ALPR database in order to determine the movements of the 50 vehicles which had fled the scene. *Id*. The ALPR system relies on cameras mounted in static locations and on police vehicles and is often used to check if a vehicle is registered and licensed appropriately. R. at 39. The cameras take pictures of the exterior of the vehicle, focusing on the license plate. *Id*. The photos are compiled in a database where they can be automatically checked against current registration and licensing records. *Id*. Police used the ALR database to track the movements of both the 50 vehicles that had fled the scene (which included McKennery's vehicle), and the vehicles owned by the local registered assault rifle owners (which included the Respondent's vehicle). R. at 3–4. After cross-referencing the lists, the police found several pairings, where the movements of a vehicle from one list overlapped with the movements of a vehicle from the other list. R. at 3. McKennery and the Respondent's vehicles were one such pairing. R. at 3–4. The police did not request or receive a warrant prior to accessing the ALPR database. *See id*.

Pole Camera Surveillance. San Diego police next selected the ten residences of individuals on the registered assault rifle list that were most closely correlated with the individuals on the list of vehicles which fled the scene of the crime for additional surveillance. R. at 4. The Respondent's residence was among these. *Id*. On September 24, police mounted cameras on utility poles outside these homes. *Id*. On September 25, police sent letters to the ten residents of each home, notifying them that within a month, officers would stop by to verify their compliance with California Penal Code 30600. *Id*. The Respondent received this letter on September 27. *Id*. On September 29, a pole-mounted camera recorded McKennery arriving at the Respondent's home and handing him a large duffel bag before leaving. *Id*. By this point, public pressure on the San Diego police had resulted in the Federal Bureau of Investigation ("FBI") offering assistance in the investigation, and

after McKennery left the Respondent's home, two FBI agents immediately were sent there to investigate further. R. at 4, 31.

The FBI Search and Respondent's Arrest. Officers Hawkins and Maldonado arrived at the Respondent's home thirty minutes after Mckennery left. R. at 4. The investigating officers questioned the Respondent outside of his front door, and were not satisfied with his vague answers to questions concerning such a pressing matter. Exhibit A. The officers had received an anonymous phone call threatening another shooting on September 28, thus it was imperative to determine whether the Respondent was a suspect for the shooting. R. at 4. Between the Respondnet's defense answers, the potential for another mass shooting, and the connection between Nadlaud and McKennery, the officers conducted a search of the Respondent's home, where they located the gun that was later determined to be the murder weapon. *Id*. The gun was found in plain view in a bedroom in the home, and it was also determined that it was not rendered inoperable, violating California law. *Id*; California Penal Code 30600. During further investigatory questioning, the Respondent shared that McKennery had borrowed the gun and that although McKennery had sent him a picture from the desert, he could not account for his physical whereabouts. R. at 4. Following the questioning in his home, the officers arrested Nadauld and brought him into custody. *Id*.

Procedural History. On October 1, a grand jury indicted the Repsondent for second-degree murder, involuntary manslaughter, lending an assault rifle, and failing to comply with California Penal Code 30600. R. at 5. The Respondent filed a motion to suppress, stating that the police's warrantless use of the ALPR database and pole-mounted cameras, along with the FBI agents' warrantless search of his home, were violations of his Fourth Amendment rights. *Id*. The Superior Court for the County of San Diego denied his motion, concluding that the use of the ALPR database and the pole mounted cameras did not rise to the level of surveillance that would violate

a person’s reasonable expectation to privacy, and therefore constitute an illegal search, and that the FBI agents had both probable cause and exigent circumstances justifying their search of the Respondent's home. R. at 6–12. At trial, the Respondent was convicted by a jury of involuntary manslaughter, lending an assault rifle, and failing to render said assault rifle inoperable per California Penal Code 30600. R. at 14.The Respondent appealed his conviction, and the Fourth District Court of Appeal granted his motion to suppress, throwing out the verdict and remanding the case for further proceedings. R. at 21. The Appellate Court stated that the use of the ALPR database did violate the Respondent’s reasonable expectation of privacy, and that the FBI agents did not have probable cause, nor did exigent circumstances exist justifying the search of the Respondent's home. R. at 14–21.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal incorrectly granted the Respondent's motion to suppress the government's evidence because the warrantless use of the ALPR database and warrantless search and seizure of the murder weapon were not in violation of the Fourth Amendment to the United States Constitution. This Court should reverse the Appellate Court's decision and find that the government's evidence was admissible.

First, the San Diego Police Department's use of the ALPR database to construct a partial record of the public movements of the Respondent's vehicle did not violate the Fourth Amendment because such use did not violate his reasonable expectation of privacy. A person's public movements are generally subject to little, if any, expectation of privacy, especially where their vehicle is concerned. It is only when law enforcement agents use techniques that enable total or near-total surveillance, such as live GPS tracking, or cell phone location data, that this Court has found the expectation of privacy to be violated. The use of the ALPR database here did not rise to this level, and both state and federal courts across the nation have yet to find an instance where any ALPR use has risen to such a level.

Second, the warrantless search and subsequent seizure that occurred at the Respondent's home was not in violation of the Fourth Amendment because the officers had probable cause and were faced with exigent circumstances. The officers' actions were not in violation of Nadauld's rights, and as such the "fruit of the poisonous tree" doctrine does not apply and the evidence should not be suppressed. The officers had probable cause to search the Respondent's home as required by the Fourth Amendment. The circumstances leading up to the investigation that led to the arrest of the Respondent were sufficient to amount to probable cause. Courts have stated that sufficient

probable cause is analyzed in light of the information available to the officers at the time, and the actions of the officers in the present case were appropriate given the information that was available to them. In addition to probable cause, the nature of the circumstances surrounding the investigation created exigency, and thus the officers needed to act quickly to ensure the safety of the public. Faced with the potential of another shooting, the officers needed to act immediately to prevent any other lives from being taken. Requiring the officers to obtain a warrant under such circumstances could have frustrated their goals of ensuring that the public be protected. Due to these reasons, the "fruit of the poisonous tree" doctrine is not applicable, and thus the evidence obtained from the Respondent's home should not be suppressed.

For the foregoing reasons, this Court should reverse the Appellate Court's decision granting the Respondent's motion to suppress the evidence, and remand for further proceedings, because no violation of his Fourth Amendment rights occurred.

STANDARD OF REVIEW

This Court is reviewing the Fourth District Court of Appeals' reversal of the San Diego County Superior Court's denial of the Respondent's Motion to Suppress Evidence. In reviewing such a denial, this Court reviews factual findings for clear error and questions of law *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). The facts in this case are not in dispute, and thus *de novo* review is appropriate in reviewing the legal conclusions regarding the Fourth Amendment issues presented.

ARGUMENT

The Fourth District Court of Appeal improperly reversed the lower court's denial of the Respondent's motion to suppress because the warrantless searches of both the ALPR database and Nadauld's home were not violations of the Fourth Amendment. The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. When law enforcement agents violate this right, any evidence gleaned from the illegal search or seizure has a high likelihood of being suppressed, a principle known as the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 654 (1961). However, in the case at bar, no Fourth Amendment violations occurred, and therefore none of the evidence gathered should have been suppressed. The police use of the ALPR database did not constitute a search that would violate an individual's reasonable expectation of privacy, and the search that the FBI agents conducted of the Respondent's home was justified by both probable cause and exigent circumstances, thus falling under an exception to the Fourth Amendment.

I. POLICE USE OF THE ALPR DATABASE DID NOT VIOLATE THE RESPONDENT'S REASONABLE EXPECTATION OF PRIVACY

The San Diego Police Department's use of the ALPR database to identify and locate the respondent was lawful and not a violation of the Fourth Amendment because such use did not violate his reasonable expectation of privacy. This Court has stated that the Fourth Amendment applies not only to protect against unreasonable *physical* searches and seizures by government agents, but also to protect an individual's right from searches that intrude on their reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 350 (1967). A person's reasonable expectation of privacy is driven by both their own subjective expectation of privacy and whether

"society is prepared to recognize [this expectation] as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). In the past, the Court has decided on the fulfillment of this latter prong by carefully considering historical and societal factors, keeping in mind the Framers' desire to "secure the 'privacies of life' against 'arbitrary power'" and prevent "too permeating police surveillance." *Carpenter v. United States*, 138 S.Ct. 2206, 2214 (2018). Keeping these considerations in mind, the Court has ruled that there is no reasonable expectation of privacy for what an individual "knowingly expose[s]" to the public. *Katz*, 389 U.S. at 351. A person generally does not have a "reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281 (1983). The exterior of a person's vehicle is also not protected by any reasonable expectation of privacy; since it is "thrust into the public eye, . . . to examine it does not constitute a 'search.'" *New York v. Class*, 475 U.S. 106, 114 (1986). This includes license plates, since their "very purpose . . . is to provide identifying information to law enforcement and others." *United States v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2006). Law enforcement use of cameras in public to capture said exteriors also presents no Fourth Amendment concerns. *Dow Chem. Co. v. United States*, 476 U.S. 227, 238-39 (1986).

In the case at bar, the respondent has failed to show that he had any reasonable expectation of privacy in relation to his presence in the ALPR database, because the police use of this database did not reveal "the whole of [the respondent's] movements." *See Carpenter*, 138 S.Ct. at 2217. This Court has continued to refine its Fourth Amendment jurisprudence in the face of developing technology, and indeed has found that "different Constitutional principles . . . apply" when dealing with potential 24-hour surveillance capabilities. *Knotts*, 460 U.S. at 284. While it has yet to be expressly referenced in a decision, the "mosaic theory" has gained increasing traction in the last few years as this Court and others grapple with the role of data aggregation as a law enforcement

tool. This theory suggests that small data points about a person may reveal nothing on their own, but when combined by law enforcement or a third party, can potentially violate an individual's reasonable expectation of privacy by revealing "a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor Concurring). To determine if law enforcement use of technology rises to this level, the Court looks at whether it is intrusive enough that "the whole of [an individual's] movements" is revealed. *Carpenter* 138 S.Ct. at 2217.

Federal and State courts around the nation find that current police use of ALPR systems does not violate the Fourth Amendment as it does not rise to the level of surveillance that would violate a person's reasonable expectation of privacy. *United States v. Graham*, No. CR 21-645 (WJM), 2022 WL 4132488 *4-5 (D.N.J. Sept. 12, 2022); *United States v. Rubin*, 556 F. Supp. 3d 1123, 1125-32 (N.D. Cal. 2021); *United States v. Brown*, No. 19 CR 949, 2021 WL 4963602 *1-4 (N.D. Ill. Oct. 26, 2021); *United States v. Bowers*, No. 2:18-CR-00292-DWA, 2021 WL 4775977 *1-4 (W.D. Pa. Oct. 11, 2021); *Commonwealth v. McCarthy*, 484 Mass. 493, 494-509 (2020). For example, in *United States v. Graham*, a defendant challenged the police's warrantless use of the local ALPR database to identify his vehicle and himself after he allegedly robbed a cell phone store, contending that his "reasonable expectation of privacy in his locations and movements" was violated. *Graham*, 2022 WL 4132488 at *4. The District Court for the District of New Jersey denied his motion to suppress, stating that unlike cell phone or GPS data, "the ALPR database does not infringe upon an individual's reasonable expectation of privacy because it does not reveal intimate details of an individual's daily life, nor does it track a person's every movement." *Id*. at *5.

The District Court for the Northern District of California denied a defendant's motion to suppress evidence gathered by the San Francisco Police Department's warrantless use of ALPR data. *Rubin*, 556 F.Supp.3d at 1132. The defendant was suspected of robbing a pharmacy and surveillance video captured a portion of his getaway vehicle's license plate, along with the car's make and model. *Id*. at 1125. Using ALPR data, the police were able to locate the defendant's home and possible identity, and use this information to obtain a warrant to place a GPS tracking device on the vehicle, eventually leading to an arrest. *Id*. at 1126. The District Court denied the motion, finding that "there [was] no reason to believe that the database provided a detailed log of Rubin's movements." *Id*. at 1129. While the record did not state how many entries were pulled from the ALPR database, the court distinguished the case from *Carpenter*, stating that "the data provided no more information than what could have been obtained through police surveillance," and it was a far cry from the "detailed, encyclopedic" knowledge gleaned by law enforcement in the *Carpenter* case. *Id*. at 1130.

The Supreme Judicial Court of Massachusetts considered this issue extensively in *Commonwealth v. McCarthy*. In that case, police used ALPR data gathered from bridge locations to track the movements of the defendant, a suspected heroin distributor, over a three-month period. *McCarthy*, 484 Mass. at 494. Using this data, along with other surveillance and methods, police were able to build a case against the defendant and make an arrest. *Id*. at 496. The defendant filed a motion to suppress the evidence gathered through the warrantless use of the ALPR database. *Id*. at 497. The court discussed concerns that arose when new technology is used by law enforcement, noting that historical protections of privacy were rooted less in Constitutional considerations and more in practical ones, and that certain technologies could undermine these protections. *Id*. at 499. The court also expressly discussed the mosaic theory and potential dangers of big data aggregation,

but ultimately found that the use of ALPR data did not rise to the same level of concern presented by cell phone location data or continuous GPS tracking. *Id*. at 503-07. Focusing on the "extent to which a substantial picture of the defendant's public movements are revealed by the surveillance," the court declared that the "limited picture [did] not divulge 'the whole of [the defendant's] physical movements,' or track enough of his comings and goings so as to reveal 'the privacies' of life.'" *Id*. at 506, 508-09.

And though they are only memorandum opinions, the decisions by the District Courts in *United States v. Brown* and *United States v. Bowers* offer yet more examples of federal courts applying this Court's own standard when analyzing ALPR data in a Fourth Amendment context. In *United States v. Brown*¸ the District Court for the Northern District of Illinois found that the FBI's act of combining ALPR data and video surveillance to identify and locate a suspect did not violate the Fourth Amendment. *Brown,* 2021 WL 4963602 at *4. In this instance, the defendant was suspected of robbing two banks, and the FBI using "two dozen snapshots [gathered] over ten weeks" to identify a car that was seen on surveillance cameras near both robberies, and eventually its driver. *Id*. at *1-2. After his arrest, the driver challenged the FBI's warrantless use of the ALPR system as violative of his reasonable expectation of privacy "in his movements" and "to be free from near-constant surveillance." *Id*. at *2.. The District Court ruled that this use of technology did not "reveal the whole of Brown's movements," and "exposed no . . . intimate details of his life," unlike in other cases where a Fourth Amendment violation was found. *Id*. at *3. In *United States v. Bowers,* the District Court for the Western District of Pennsylvania considered whether the FBI's warrantless use of ALPR data to locate and identify a suspect should be suppressed on Fourth Amendment grounds. *Bowers,* 2021 WL 4775977 at *1. In this case, the FBI had gathered 106 reports associated with the defendant's license plate, covering 33 locations over a period of

four months from the local ALPR database on behalf of the Allegheny County District Attorney's office. *Id*. at *2. The court distinguished the use of the ALPR data from cell phone location data, the subject of the Supreme Court's ruling in *Carpenter*, stating that the "limited data collection [in the case at bar] does not even begin to approach the same degree of information as gathered in *Carpenter*, nor does it otherwise implicate similar privacy concerns." *Id*. at *4.

Until the appellate court's ruling in the case at bar, Federal and State Courts had yet to find that warrantless police use of ALPR data violated a suspect's Fourth Amendment protections. However, in cases involving other new or developing surveillance technologies, this Court and others have found that police conduct an illegal search inviolation of the Fourth Amendment when said technology is used to continuously track an individual's location, violating their reasonable expectation of privacy. *United States v. Jones*, 565 U.S. 400, 402-31 (2012); *Carpenter*, 138 S.Ct. at 2212-20; *Leaders of a Beautiful Struggle v. Baltimore Police Dept.*, 2 F.4th 330, 333-40 (4th Cir. 2021). In *United States v. Jones*, this Court held that a warrantless use of a GPS tracker on the defendant's vehicle violated his Fourth Amendment protections. *Jones*, 565 U.S. at 413. In this instance, the police placed the tracker on a suspected drug trafficker's vehicle after a warrant authorizing it had already expired and were able to continuously monitor its location over a period of four weeks. *Id*. at 402-04. Though this Court technically decided the case on more traditional "physical intrusion/trespass" grounds, subsequent decisions by both Federal and State courts have relied heavily on the concurring opinions by Justices Sotomayor and Alito, who argued that the continuous monitoring capability enabled by the GPS tracking system went far beyond an individual's reasonable expectation of privacy. *Id*. at 413-31 (J. Sotomayor concurring) (J. Alito concurring). "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and

sexual associations" *Id*. at 415 (J. Sotomayor concurring). Though not part of the official decision, the majority of this Court, in the two concurrences, found that such monitoring violated the defendant's reasonable expectation of privacy guaranteed by the Fourth Amendment. *Id*. at 413-31 (J. Sotomayor concurring) (J. Alito concurring).

This Court addressed privacy concerns head on in *Carpenter v. United States*, where it found that the government's warrantless use of cell phone location data constituted an illegal search under the Fourth Amendment. *Carpenter*, 138 S. Ct. at 2220. The defendant was part of a group of people suspected of carrying out a series of robberies of various stores. *Id*. at 2212. The FBI compelled the defendant's cell phone service provider to turn over a massive amount of CSLI data, detailing 12,898 location points over 127 days. *Id*. The defendant was later convicted in large part due to the government's ability to demonstrate his proximity to each of the robberies based on this CSLI data. *Id*. at 2212-13. The Sixth Circuit affirmed, since the location data was voluntarily shared with the cell phone service provider, a third party, and thus was not entitled to Fourth Amendment protections since it had become a public business record. *Id*. at 2212. This Court found that this third-party exception was inappropriate given the sheer scale of surveillance possible through law enforcement use of this data. *Id*. at 2217. Justice Roberts wrote that compared to the GPS monitoring in *Jones*, "historical cell-site records present even greater privacy concerns. . . [I]individuals regularly leave their vehicles, [but] they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." *Id*. at 2218. CSLI data was "detailed, encyclopedic, and effortlessly compiled," offering "near perfect surveillance, as if [the government] had attached an ankle monitor to the phone's user." *Id*. at 2216; 2218. This Court found that the defendant's reasonable expectation of privacy in the whole of his

physical movements had been violated, and that going forward, a warrant would be required to obtain such records. *Id*. at 2219.

The Fourth Circuit Court of Appeals used this Court's framework in *Carpenter* to guide its decision in *Leaders of a Beautiful Struggle v. Baltimore Police Department*, a civil suit where a group of activists in Baltimore challenged the city police department's new Aerial Investigation Research (AIR) program. *Leaders of a Beautiful Struggle*, 2 F.4th at 339-40. The Baltimore police used the program, which entailed aerial photography conducted by multiple aircraft above the city, to track public movements associated with serious crimes. *Id*. at 333-34. Combined flights resulted in at least 12 hours of coverage of ninety percent of the city on any given day, and the police department hired contractors to use the data to determine routes and locations of individuals and vehicles related to crime scenes. *Id*. at 334. The court applied *Carpenter*, finding that the AIR program, which created a full record of where everyone in public was during the day over a six-week period, violated individuals' reasonable expectations of privacy. *Id*. at 339-40.

The Respondent has failed to show that the San Diego Police Department's use of ALPR data to identify and locate him violated his reasonable expectation of privacy because such use did not track the whole of his physical movements. *See Carpenter*, 138 S. Ct. at 2219 . The data gleaned from ALPR use in this case, while not specified in quantity or duration, is comparable to the data gathered in *Brown*, *Graham*, and *Bowers*, where the court found that no "intimate details" had been uncovered about the suspects' lives. *See Brown*, 2021 WL 4963602 at *3; *Bowers*, 2021 WL 4775977 at *4; *Graham*, 2022 WL 4132488 *5. Here, the only data cited in the record as being used was the location of the Respondent's residence and presumably his workplace (where he was frequently co-located with the Balboa Park shooter). R. at 2-4. This is hardly revealing of the Respondent's "privacies of life." *See McCarthy*, 484 Mass. at 509. Like the data acquired in *Rubin*,

none of the information here could not have been obtained through normal surveillance by law enforcement. *See Rubin*, 556 F.Supp.3d at 1130. While some of these courts have acknowledged that the use of ALPR systems *may one day* rise to a level of concern under the Fourth Amendment (if developed to a point where a camera was present on every street corner), its limited capability currently does not present a threat to an individual's reasonable expectation of privacy under the *Carpenter* standard pronounced by this Court. *See Bowers*, 2021 WL 4775977 at *4; *Rubin*, 556 F.Supp.3d at 1129; *McCarthy*, 484 Mass. at 1105.

The facts here can easily be distinguished from the times when this Court and others have found that new surveillance capabilities threaten Fourth Amendment privacy protections. In its current state, the ALPR system does not and cannot provide *continuous* tracking of an individual's location and thus does not rise to the level of surveillance that prompts concern. The AIR program in Baltimore provided continuous tracking during daylight hours of the majority of public foot and vehicle traffic in the city. *See Leaders of a Beautiful Struggle*, 2 F.4th at 333-34. The GPS device affixed to the defendant's vehicle in *Jones* provided continuous location monitoring, regardless of the presence of any camera system or whether the road was a public one. *See Jones*, 565 U.S. at 402-04. And the CSLI data in *Carpenter*, seen by this Court as possibly the most alarming case, provided a truly intimate window into the defendant's life, both in public and private spheres, regardless of location. *See Carpenter*, 138 S. Ct. at 2218. The ALPR data differs entirely. It merely provides a snapshot of the occasional times an individual has driven past one of the system's cameras. *See* R. at 39. The ALPR cameras only exist on public thoroughfares, and do not capture an individual's movement outside of this narrow field. *See Id*. This Court was careful to limit its ruling in *Carpenter*, stating that it did not apply to traditional methods of surveillance such as security cameras, which have been accepted as part of public life. *Carpenter*, 138 S. Ct. at 2220.

Given the above, this Court should agree that the Respondent has failed to demonstrate that his reasonable expectation of privacy was violated by the use of the ALPR data, because the system did not provide a record of the whole of his continuous movements. Thus, the police department's actions did not constitute a search under the Fourth Amendment, and no warrant was required. Therefore, this Court should reverse the appellate court's decision granting the Respondent's motion to suppress and remand the issue for further proceedings.

II. THE SEARCH AND SEIZURE OF MR. NADAULD'S HOME WERE CONSTITUTIONAL BECAUSE THERE WAS SUFFICIENT PROBABLE CAUSE AND THEY WERE CONDUCTED UNDER EXIGENT CIRCUMSTANCES.

The Appellate Court decision should be reversed because the search and seizure did not violate Fourth Amendment rights where it was an appropriate exception to the warrant requirement. The Fourth Amendment to the US Constitution protects citizens from illegal searches and seizures, and it outlines the rights of individuals to privacy in their "persons, houses, papers, and effects . . . ." U.S. CONST. amend. IV. "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). Typically law enforcement officers must have probable cause and obtain a warrant from a judge to conduct a search and seizure; however, courts have made exceptions to the warrant requirement for situations where taking the time to obtain a warrant may result in losing a suspect or allowing evidence to be destroyed. *United States v. Ogden*, 485 F.2d 536, 539 (9th Cir. 1973); *Riley* v. *California*, 573 U. S. 373, 382; Cal Pen Code §§ 1523 - 1542.

In regards to probable cause, courts have defined the term to be below the "beyond a reasonable doubt" standard, and instead consider the totality of the circumstances to determine whether the facts would lead an "ordinary man of caution" to believe that the accused is participating in criminal activity. *People v. Hurtado,* 52 P.3d 116, 121 (Cal. 2002). Further, the

court in *Gates* established a set of factors that can be used to determine whether the totality of the facts available to officers were enough to amount to probable cause. *Illinois v. Gates,* 462 U.S. 213, 230 (1983).

In addition to probable cause, an officer may make a warrantless entry when "the exigencies of the situation," in combination with probable cause, create "a compelling need for official action and no time to secure a warrant." *Kentucky* v. *King,* 563 U. S. 452, 460; *Missouri* v. *McNeely,* 569 U. S. 141, 149. When traditional protections have not provided a definitive answer, precedents have "analyzed a search or seizure in light of traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia v. Moore,* 553 U.S. 164, 171 (2008).

In the present case, the motion to suppress should be denied. The facts available to the officers were sufficient as to amount to a reasonable belief that probable cause existed, and the circumstances leading up to the search were such as to create exigent circumstances in which the officers needed to act. As such, the fruit of the poisonous tree doctrine does not apply because the search and seizure was legal under the exceptions to the warrant requirement of the Fourth Amendment.

A. Law Enforcement Officers Established Sufficient Probable Cause Because the Circumstances Leading to the Encounter With Nadauld Would Lead a Reasonable Person to Believe That There Was a Probability of Criminal Activity

The totality of the circumstances of the events leading up to the search and seizure were sufficient to amount to probable cause.

Probable cause exists when “officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe an offense has been or is being committed by the person being arrested.” *United States v. Lopez,* 482 F.3d 1067, 1072 (9th Cir. 2007) (citing *Beck v. Ohio,* 379 U.S. 89, 91 (1964). It is well established amongst courts that probable cause is not evaluated by elements set in stone, but rather by factors by-which when taken into consideration as a whole, establish probable cause. *People v. Hurtado,* 52 P.3d 116, 121 (Cal. 2002). Probable cause is more than mere suspicion, and exists when "the totality of circumstances" known to acting officers leads them to conclude that there is a "fair probability" that a crime was, or is being committed. *United States v. Smith*, 790 F.2d 789, 792 (9th Cir.1986). Further, this analysis is not made through the eyes of acting agents of the law, but rather from the perspective of "prudent men," meaning that the facts in their totality would lead a regular person to conclude that there is a fair probability that criminal conduct is occurring. *Brinegar v. United States,* 338 U.S. 160 (1949). To determine probable cause, courts have established a two-part analysis that looks at the facts leading up to the encounter, and the analysis involves both questions of law and fact. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The first part of the analysis is a determination of the historical facts, and the second part of the analysis is whether the historical facts satisfy the standard for probable cause. *Id*. Further, a number of courts across the country have established that where the facts of the case are determined and not in dispute, the existence of probable cause is a question of law for the court. *Vargas Ramirez v. U.S.*, 93 F. Supp. 3d 1207, 1222 (W.D. Wash. 2015); *United States v. Hernandez,* 322 F.3d 592, 596 (9th Cir. 2003); *Tsao v. Desert Palace, Inc.,* 698 F.3d 1128, 1146 (9th Cir. 2012); *D'Angelo v. Mussler,* 290 S.W.3d 75 (Ky. Ct. App. 2009); *Blacktail Mountain Ranch, Co., L.L.C. v. State, Dept. of Natural Resources*

and Conservation, 2009 MT 345, 353 Mont. 149, 220 P.3d 388 (2009); *Fortunato v. City of New York*, 63 A.D.3d 880 (2d Dep't 2009).

In the present case the facts are undisputed, thus the court must then turn to the application of the facts to the law. R at 14. Because the concept of probable cause is one that is so fluid, courts agree that "one determination will seldom be a useful 'precedent' for another," thus this analysis must be conducted on a case-by-case basis to allow for sufficient consideration of the specific facts in each case. *Wood v. Emmerson*, 66 Cal. Rptr. 3d 847, 861 (Cal. App. 4th Dist. 2007). Further, when special needs superseding the need for a warrant exist, courts balance governmental and privacy interest in determining whether there was probable cause. *Terry v. Ohio*, 392 U.S. 1 1968).

The probable cause analysis is from the perspective of a reasonable person, and the facts analyzed "would persuade someone of reasonable caution" that there is a probability that criminal activity is occurring. *Wood v. Emmerson*, 66 Cal. Rptr. 3d 847, 861 (Cal. App. 4th Dist. 2007). Further, courts agree that a sufficient showing of probable cause does not need to demonstrate that crime has been committed, but rather that the facts would lead an ordinary individual to strongly entertain a strong suspicion of the guilt of the accused. *Kind v. Superior Cour*t, 143 Cal.App.2d 100 (1956); *People v. Dickinson,* 59 C.A.3d 320, 321 (1976). Further, California courts agree that when analyzing the evidence offered to support the prosecution, every legitimate inference that may be drawn from the evidence must be drawn in favor of the government. *See People v. Dickinson*.

In the present case, the court should conclude that the facts would lead a reasonably prudent person to believe that there was a probability that criminal conduct was likely going to occur, or was in progress, and that Mr. Nadauld was involved. The lower court incorrectly decided that the chances of Nadauld's involvement were low. R. at 19. In terms of probability, courts do not require

absolute certainty, but instead a reasonable belief that there was involvement. Further, we must analyze probability within the perimeters observed by the officers and those that would be considered by a reasonable person under these circumstances. *See Brinegar*. As a result, the justification by the lower court for finding a low probability of Nadauld's involvement should not be considered. R. at 19. The trial court analyzed probability under a scope that exceeded that of what the police officers had available to them in the events leading up to the encounter between officers and Nadauld. R at 6. Further, because courts do not require officers to be certain of criminal involvement for purposes of probable cause, it is irrelevant that there are individuals outside of those who legally own an automatic assault rifle who are excluded from the list of suspects. R. at 3. If law enforcement officers were required to consider every unidentified potential suspect in every single case, they would not be able to be effective in their purposes of enforcing the law and protecting the public from harm. The circuit court also erred in determining that the evidence was "coincidental at best," because the tracking and overlap of Nadauld and McKennery's movements, in addition to the established fact that the two individuals were co-workers who were regularly in contact, is more than sufficient to establish a reasonable probability that Nadauld and McKennery could have been involved in criminal conduct. R. at 2. Furthermore, the officers at the time they approached Nadauld were conducting an investigatory inquiry based on evidence gathered for suspicious activity. R. at 4. This information would lead a reasonable person in the same position to believe that it is probable that the two individuals could be engaging in criminal conduct. As the court in *Beck* and *Georgeon* stated, a probable cause analysis need not yield overwhelming evidence of involvement, but rather only "reasonably trustworthy information." *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *see Georgeon v. City of San Diego*, 177 F. App'x 581, 583-84 (9th Cir. 2006). A reasonable person would assume that evidence gathered by

surveillance of potential suspects in the Balboa Park shooting is trustworthy in regards to discerning whether potential suspects are involved in the conduct.

Drawing every legitimate inference from these facts in favor of the government would lead a reasonably prudent person to believe that there was a substantial probability that criminal conduct was taking place, and therefore the court should conclude that Officers Hawkins and Maldonado met their burden and established probable cause to approach Nadauld.

B. The Search and Seizure Performed by the Law Enforcement Officers Was Not in Violation of the Fourth Amendment Under the Exception for Exigent Circumstances.

The search and subsequent seizure performed by the officers was lawful under the exception to the warrant requirement for exigent circumstances. It is widely agreed upon that under the doctrine of exigent circumstances, officers may execute a warrantless search where facts show that a warrant would be detrimental to the goals of the officers. *People v. Duncan*, 720 P.2d 2, 5 (Cal. 1986). The court has defined exigent circumstances to include emergency situations in which swift action is required to prevent imminent danger to officers, destruction of evidence, or the fleeing of a suspect. *Kentucky v. King*, 563 U.S. 452 (2011); *People v. Escudero*, 23 Cal. 3d 800 (1979); *People v. Autry*, 232 Cal. App. 3d 365 (4th Dist. 1991); *People v. Snead*, 1 Cal. App. 4th 380, (1st Dist. 1991). Without the presence of exigent circumstances, even where there is probable cause, warrantless search or seizure is unlawful; however, courts are hesitant to make hindsight assessments of what the officers should've done, as this analysis is one that is made case-by-case. *People v. Wilson*, 59 Cal. App. 4th 1053 (2d Dist. 1997). In regards to warrantless entry and search of a dwelling, courts have created a two-prong test to determine whether the circumstances were pressing enough to be considered exigent and waive the warrant requirement. *People v. Higgins*, 26 Cal. App. 4th 247 (4th Dist. 1994). First, the court must resolve any factual questions as to what the officers knew or believed at the time of action, and how they responded to that belief. *Id*.

Secondly, the court must answer the legal question of whether those beliefs and actions were reasonable given the circumstances. *Id*. In *Minnesota v. Olson*, the court set forth the type of exigent circumstances that justify warrantless entry into a home, which include: a violent offense; a reasonable belief that the suspect may be armed; a strong belief that the suspect is at home; and the likelihood that they will escape if not arrested immediately. *Minnesota v. Olson*, 495 U.S. 91 (1990). Further, courts find that where an officer's investigation reveals information that reveals an emergency situation that requires prompt action, a warrantless entry and search may be appropriate. See *Duncan.* In the case of warrantless search and seizure under exigent circumstances, officers are allowed to seize any evidence that is observed in plain view during the entry. *People v. Superior Court*, 204 Cal. App. 4th 1004 (2d Dist. 2012).

The first part of the test to determine whether warrantless entry of a home was a violation is to determine what facts were available to the officers at the time, and what actions were taken as a result. *See Higgins*. In addition, where officers are conducting an investigation and the findings of that investigation reveal an emergency situation that requires swift action to prevent further harm and protect the public and any evidence, warrantless entry and search is appropriate. *See Duncan*. The second part of the test determines whether the actions taken by the officers under the circumstances were reasonable. *See Higgins*.

For the first part of the test, courts look to the facts that were available to the officers at the time. *See Higgins*. Because the facts here are not in dispute, we take them as is to determine the information factually available to the officers at the time. In the present case, the officers were aware of the threat of an imminent school shooting, the threat of other potential shootings, and were aware of the fact that the Respondent and McKennery were in contact regularly. R. at 3, 4. Further, the officers were aware of the bag exchange between the Respondent and McKennery,

and also knew that the Respondent was the owner of an assault rifle, and that McKennery was one of the cars tagged at the scene of the crime. *Id*. In addition, courts analyze any interactions between law enforcement and any individuals inside the home, analyzing such things as the tone, body language, or appearance of the individual being asked questions. See Higgins; *see also Twan*. In the present case, the recording reveals that the Respondent was hesitant in his responses and that many times, he did not answer the officers questions in a definite manner. Exhibit A. Further, the Respondent responded that he was going to go retrieve the rifle when officers questioned him about it, which could have created a moment for the Respondent to flee, or retrieve an object to harm the officers. *Id*. With the facts available to the officers, the court should find that it was reasonable for the officers to believe that going to obtain a warrant would frustrate the purpose of their investigation, and created the need for officers to act immediately, satisfying the second part of the test. It was reasonable for the officers to enter the Respondent's home where he could have fled or retrieved another weapon. Further, because the officers were not aware of who the shooter was, for purposes of protecting the public, it was necessary that they confirmed whether the Respondent was a potential suspect as soon as possible. Lastly, the seizure of the gun was appropriate under the circumstances where it was in plain view and in violation of California Law. R at 4.

In light of the above analysis, the court should find that the information available to the officers at the time of the search and seizure, in addition to the interaction between the officers and the Respondent at the time of questioning, were sufficient to satisfy the exigent circumstances on multiple grounds.

C. The "Fruit of the Poisonous Tree" Doctrine is Not Applicable Because the Evidence Was Not Acquired in Violation of the Fourth Amendment.

The police officers were able to establish sufficient probable cause and the search and seizure was conducted under the exception to the warrant requirement, as as such, the "Fruit of the Poisonous Tree" doctrine need not apply. The exclusionary rule only applies to evidence that is seized during a search that the court deems to be unlawful. *Wong Sun v. United States,* 371 U.S. 471 (1963). In the present case, because there was probable cause and exigent circumstances, the rule does not apply and the court should admit the evidence obtained through the search and seizure. Furthermore, even if the evidence was obtained in violation of the Fourth Amendment, the Supreme Court has created three exceptions to suppression. These are "the independent source doctrine," the "inevitable discovery doctrine," and the "attenuation doctrine." *Utah v. Strieff*, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016); United States v. *Ramirez-Sandoval,* 872 F.2d 1392, 1396 (1989).

The "attenuation doctrine" is an exception that applies when the connection between the warrantless search and the evidence acquired is so weak that it diminishes in light of the evidence collected. See Wong; see also Ramirez-Sandoval. Courts consider the temporal proximity of the warrantless search, as well at the purpose that officers had in their conduct. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975); *U.S. v. Gorman*, 859 F.3d 706, 718 (9th Cir. 2017). In the present case, because we have determined that the officers had probable cause and were faced with exigent circumstances, the warrantless search was in furtherance of the purpose of public safety and prevention of any further loss of life. To suppress this evidence, as a matter of public policy, would diminish those purposes, and thus even if the court were to find that the search and seizure were in violation, the evidence should still be submitted for consideration.

CONCLUSION

The Appellate Court improperly reversed the Superior Court's denial of the Respondent's Motion to Suppress Evidence because law enforcement use of the ALPR database did not violate his reasonable expectation of privacy, and the search of his home was justified by probable cause and exigent circumstances. Thus the Respondent's Fourth Amendment rights were not violated, and for this reason, Petitioner respectfully requests that this Court reverse the decision of the California Fourth District Court of Appeal and remand the case for further proceedings.