Team 12

No. 1788-850191

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM 2022

UNITED STATES OF AMERICA,

Petitioner,

v.

NICK NADAULD,

Respondent.

ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT

Counsel for Respondent

ORAL ARGUMENT REQUESTED

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II. Whether the California Fourth District Court of Appeal erred in holding that the warrantless entry and search of defendant's home violated defendant's Fourth Amendment rights under our precedents.

STATEMENT OF FACTS

On September 14, 2021, a masked man, identified fifteen days later as San Diego resident Frank McKennery ("McKennery"), opened fire on a crowd from a rooftop in Balboa Park using an M16A1 ("M16") assault rifle. Exhibit D. McKennery, known colloquially as "the Balboa Park Shooter," killed nine people and injured six others. Exhibit D. On September 29, 2021, Respondent Nick Nadauld ("Mr. Nadauld"), a coworker of McKennery's, was arrested in connection with the crime committed by McKennery. Exhibit F.

McKennery escaped the scene on September 14, 2021, unidentified. Exhibit D. He left behind only a "Manifesto" referencing his motives and threatening future shootings. Exhibit I. The document also referenced Jora Guru: a religion in which McKennery claims he attempted to find solace. Exhibit I. The Manifesto was later identified as a fabricated document left by McKennery to "send the cops on a wild goose chase." Exhibit J. From the scene, police were also able to identify that the rounds used in the shooting were 5.56x45mm NATO cartridges: a caliber commonly used in assault rifles. R. at 8.

In the two weeks, before McKennery was identified as the Balboa Park Shooter, the San Diego County Police Department faced increasing pressure from the public to identify the culprit, with local newspapers referring to law enforcement's difficulty identifying the culprit as "a humiliating catastrophe." Exhibit E. In response to mounting pressure and frustration, the FBI was called in to support local law enforcement with the investigation. Exhibit E.

To identify a suspect, law enforcement used two main investigation methods to identify the crime's perpetrator: Automatic License Plate Recognition ("ALPR") retrieval, and pole-mount camera surveillance. R. at 9-10.

In the immediate aftermath of the incident, surveillance footage from in and around Balboa Park was analyzed to identify potential suspects. R. at 9. The footage revealed that approximately forty individuals fled the scene on foot and did not come forward later to identify themselves. R. at 9. Due to the poor quality of the surveillance footage, none of the forty individuals could be identified through the government's databases. R. at 9. In addition to those who fled on foot, the footage also showed approximately fifty vehicles leave the scene before the police arrived on-site to secure the area. R. at 9. One of those fifty vehicles belonged to McKennery. R. at 9.

The police cross-referenced the license plates of those fifty vehicles with a criminal records search but found that none of the car registrants had a prior history of violent crimes. R. at 9. None of the fifty registrants were known affiliates of the Jora Guru religion. R. at 9. The list was then cross-referenced with a list of registered assault rifle owners in the area. Mr. Nadauld, who had legally inherited his M16 rifle from his late father, was on the list of registered owners. R. at 8. The cross-referenced list revealed that none of the fifty vehicle owners were also on the list of registered assault rifle owners. R. at 9.

The police then used the ALPR database to retrieve information about the movements of the fifty vehicles, including McKennery's. R. at 9. The ALPR process involves special cameras, typically mounted on police vehicles or poles at intersections, scanning passing cars to check if each vehicle is legally registered or licensed. R. at 9. The license plate information is run through a police database, and the time and location information for each scan is stored in this electronic database. In the case at hand, the police accessed the ALPR database to track to movements of all fifty cars that left Balboa Park after the shooting, including McKennery's. R. at 9. They also tracked the movements of all vehicles owned by nearby assault rifle owners, including Mr. Nadauld. After cross-checking the vehicle movements of both groups, the police noted that

McKennery and Mr. Nadauld, who were coworkers, were on several occasions in the same location at similar times. R. at 9-10.

Ten residences, including Mr. Nadauld's, were chosen to surveil using the driving location data of the fifty vehicles. R. at 10. On September 24, 2021, local law enforcement mounted cameras on utility poles close to the ten residences to monitor the homes and their occupants for suspicious activity. R. at 10.

On September 25, 2021, the police department mailed letters to each of the ten residents informing them that in one month, law enforcement would arrive at their homes to verify if their assault rifles had been rendered inoperable per California Penal Code § 30915. R. at 10. Mr. Nadauld received this letter two days later, on September 27, 2021. R. at 10.

On September 28, 2021, police received an anonymous phone call from a telephone booth at or around 10:37 am stating "This is the Balboa Park shooter. This time, it's gonna be a school." R. at 10. The call provided no additional information to indicate that the threat was imminent.

The following day, on September 29, 2021, the pole-mount camera near Mr. Nadauld's house recorded McKennery pulling into the driveway at or around 5:23 pm. R. at 10. McKennery was also recorded handing a large duffel to Mr. Nadauld before leaving. R. at 10. FBI Officers Jack Hawkins and Jennifer Maldonado were notified of the finding and immediately dispatched to Mr. Nadauld's home for further investigation. R. at 10.

Officers Hawkins and Maldonado arrived at Mr. Nadauld's home approximately thirty minutes following McKennery's departure. R. at 10. The two officers initially questioned Mr. Nadauld about his rifle outside of the home's front door. Mr. Nadauld was cooperative with the questioning and offered to retrieve the gun for the two officers. Exhibit A. He declined to allow the officers entry into his home, stating "My house is kind of messy. I'd prefer that you wait here."

Exhibit A. He also expressed confusion about the officer's presence, citing the letter which stated the officers were expected to arrive in one month. Exhibit A.

Dissatisfied with his answers, and without consent from Mr. Nadauld, Officers Hawkins and Maldonado barged into Mr. Nadauld's home and began looking for the assault rifle. R. at 10. After finding the rifle and noticing that it had not been rendered inoperable as required by California law, Officer Hawkins proceeded to question Mr. Nadauld with greater urgency and pressure. Exhibit A. During the questioning, Mr. Nadauld revealed that he had leant the rifle to McKennery one week before the Balboa Park shooting. Exhibit A. McKennery, a self-proclaimed shooting enthusiast, had borrowed the rifle from Mr. Nadauld under the claim that he planned to use it for an outdoor target shooting excursion. R. at 9. Mr. Nadauld insisted that McKennery had been in the desert on the day of the shooting and had sent him a picture from his location. Exhibit A; Exhibit B. Mr. Nadauld was then brought into police custody. R. at 10.

Law enforcement then arrived at McKennery's home, where they heard a gunshot inside, entered the home, and found McKennery lying deceased on the floor. R. at 10. Next to his body was a hand-written letter confessing to the Balboa Park shooting and explaining his motives. Exhibit J. His letter also noted that he had borrowed the rifle "from another guy" who was not involved in or aware of McKennery's plan. Exhibit J.

Procedural History

After confirming that Mr. Nadauld's rifle was the same weapon used by the Balboa Park shooter, a San Diego County grand jury indicted Mr. Nadauld's with the following charges on October 1, 2021.

1. Nine counts of involuntary manslaughter in violation of California Penal Code § 192
2. One count of lending an assault weapon in violation of California Penal Code § 30600

3. One count of failing to comply with California Penal Code §30915

Exhibit F; R. at 11.

Mr. Nadauld promptly filed a motion to suppress the evidence obtained on the day of his arrest, asserting that his Fourth Amendment rights were violated during the initial investigation process and the warrantless entry and search of his home. R. at 11. The Superior Court of the State of California for the County of San Diego denied Mr. Nadauld's motion to suppress the contested evidence. R. at 7. On appeal, the Fourth Appellate District (Division 1) in the Court of Appeal of the State of California reversed, finding the evidence in question was clearly attained through unconstitutional practices. R. at 27. The motion to suppress was granted and the case was remanded for further proceedings. R. at 27. The California Supreme Court denied the People's request for certiorari. Afterward, the People requested and were granted review by the United States Supreme Court.

SUMMARY OF THE ARGUMENT

The warrantless retrieval of Mr. Nadauld's information from the Automatic License Plate Recognition Database violated his Fourth Amendment rights. To be a search under the Fourth Amendment, a government action must qualify as a search under one of the Supreme Court's precedential tests. The government action in question only needs to qualify as a search under one test to implicate Fourth Amendment rights. In the case of Mr. Nadauld, the government's days-long surveillance of him and retrieval of his location data from the ALPR database qualifies as a search under the Fourth Amendment under all relevant tests, including the foundational *Katz* test as well as the more modem test from *Kyllo* and *Jones*. Also, law enforcement actions in this case do not fall under the binary search exception. The Fourth Amendment demands that law

enforcement acquire a warrant before conducting comprehensive surveillance. Honoring Mr. Nadauld's Fourth Amendment rights requires suppression of the ALPR location data.

Any evidence obtained as a result of the warrantless entry and search of Mr. Nadauld's home, including Mr. Nadauld's confession that he leant his rifle to McKennery, must be suppressed. The warrantless search of Mr. Nadauld's home by Officers Hawkins and Maldonado was not supported by probable cause and was not permitted under the exception for exigent circumstances. While the Petitioner may be able to show with the benefit of hindsight that the officers' warrantless search was fruitful, the officers did not have probable cause at the time to conduct the warrantless search. Additionally, there were no exigent circumstances present to allow for an immediate warrantless search. There was no true risk of imminent harm or danger to the officers or to anyone else, and Mr. Nadauld gave no reason to suggest he was planning to destroy any evidence. The tension of the situation and the mounting frustration with the police department's lack of progress with the investigation thus far were not valid reasons to support acting warrantless under the exigent circumstances exception. Consequently, the warrantless entry and search of Mr. Nadauld's home violated his Fourth Amendment rights, and any evidence obtained because of this search is inadmissible.

STANDARD OF REVIEW

On a motion to suppress evidence, this Court reviews the trial court's factual findings for clear error and the ultimate question of probable cause to make a warrantless search is to be reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. THE WARRANTLESS RETRIEVAL OF MR. NADAULD'S INFORMATION FROM THE AUTOMATIC LICENSE PLATE RECOGNITION DATABASE VIOLATED HIS FOURTH AMENDMENT RIGHTS.

This Court should uphold the California Fourth District Court of Appeal's decision to grant the motion to suppress evidence from the Automatic License Plate Recognition Database ("ALPR"). The evidence was retrieved via a warrantless surveillance search in violation of the Fourth Amendment and therefore must be excluded. The Fourth Amendment, applied to the states via the Fourteenth Amendment, protects individuals against "unreasonable searches and seizures" of their persons, houses, papers, and effects by the government. U.S. Const. amend. IV; U.S. Const. amend. XIV; *see Smith v. Maryland*, 442 U.S. 735 (1979). "It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment." *United States v. Jones*, 565 U.S. 400, 404 (2012) quoting *United States v. Chadwick*, 433 U.S. 1, 12 (1977). As the authority's actions are a search under all relevant tests this Court has set forth, the Constitution demands that the police acquire a warrant. The government failed to acquire a warrant to retrieve information from the ALPR and as such, this Court should uphold the grant of the motion to suppress.

The authorities violated Mr. Nadauld's rights by conducting an unconstitutional search via surveillance and retrieval of information from the ALPR. Searches need not fit the dictionary definition of search to qualify a government action as a search under the Fourth Amendment. The Supreme Court has developed tests for a variety of situations and perspectives to determine whether a government action constituted a search. In this case, the search involved data cataloging Mr. Nadauld's movements through surveillance technology compiled in a sophisticated government-operated database. The authority's actions here constituted a search per the Fourth Amendment under the traditional understanding from *Katz* as well as under modern tests from

Jones & *Kyllo*. To be a search per the Fourth Amendment, a government action must qualify as a search under just one of this Court's precedential tests. However, in this case, the government's actions are a search per the Fourth Amendment under all relevant tests.

A. Under *Katz,* the San Diego County Police Department's tracking and retrieval of Mr. Nadauld's movements from the ALPR is a search per the Fourth Amendment.

Per *Katz,* the authority's tracking and retrieval of Mr. Nadauld's movements from the ALPR is a search under the Fourth Amendment. The foundational test for what constitutes a search per the Fourth Amendment comes from *Katz v. United States.* 389 U.S. 347 (1967). The test in *Katz* has a subjective and an objective prong. A search has occurred per the Fourth Amendment when: (1) an individual has exhibited a subjective expectation of privacy; and (2) that expectation of privacy is one that "society is prepared to recognize as 'reasonable.'" *Smith v. Maryland*, 442 U.S. 735, 740 (1979), quoting *Katz,* 389 U.S. 361 (Harlan, J., concurring).

1. Mr. Nadauld had a reasonable expectation of privacy in his movements.

Mr. Nadauld had a reasonable expectation of privacy in his movement over the course of a week as he did nothing to undermine his privacy interest, such as sharing information with a third party. One major way individuals undermine their expectation of privacy is by sharing this information with the public or a third-party. *Smith*, 442 U.S. 743; *Katz*, 347 U.S. at 351. In other words, when one shares information with a third-party, they assume the risk that the third-party will share that information with the government. For example, in *U.S. v. Miller,* an individual did not have a reasonable expectation of privacy for their bank records, because this information was being shared with a third-party, i.e., the bank, and are essentially that third-party's business records.

The California Fourth District Court of Appeal noted in their opinion that while the ALPR is owned and operated by the government, i.e., not a third-party, the ALPR is analogous to the facts of the recent landmark decision in *U.S. v. Carpenter*, which addressed the third-party doctrine. In *Carpenter*, the Court held that compelling wireless carriers to turn over data that tracks users' movements for a period of time, e.g., 127 days, requires a warrant, absent exigent circumstances. *Carpenter v. United States*, 585 U.S. __ ;138 S. Ct. 2206 (2018). The Court found this to be the case due to the (1) "the deeply revealing nature" of the information, (2) "its depth, breadth, and comprehensive reach" (3) "the inescapable and automatic nature of its collection." *Id.* at 2217, 2223.

While the defendants in *Carpenter* voluntarily disclosed their location to their wireless carriers through their cell phones, which slightly undermines their reasonable expectation of privacy, this Court still held that those defendants had a reasonable expectation of privacy. In this case, Mr. Nadauld did not consent to sharing any information with a third-party. Mr. Nadauld merely legally drove his vehicle down the streets of his home, San Diego, indicating he has the utmost reasonable expectation of privacy concerning his location data.

While one may expect that the traffic cameras supplying data for the ALPR may track a singular point of data about one's location, Mr. Nadauld certainly did not expect that these traffic cameras would be used by the government to track his movements over the course of an entire week. In *Carpenter*, this Court stated that even though a third party had full access to the defendant's location data, they still had a reasonable expectation of privacy, meaning the government needed a warrant to access this information. *Id.* at 2223. Just as in *Carpenter*, the ALPR contained information about Mr. Nadauld's movements over the course of several days. Mr. Nadauld's location information was just as (1) deeply revealing, (2) had a wide breadth, and

(3) was collected in an inescapable nature as in *Carpenter*. Through this revealing and wide breadth of location data, the police learned with whom Mr. Nadauld associates, e.g., McKennery. Furthermore, the ALPR data of Mr. Nadauld's movements was also inescapable. Mr. Nadauld was merely driving down the road going about his typical daily activities. There was no way for him, or any other drivers in the area, to avoid this data collection.

2. Society is prepared to recognize Mr. Nadauld's expectation of privacy as reasonable.

Society is prepared to recognize Mr. Nadauld's expectation of privacy as reasonable. In other words, Mr. Nadauld's expectation of privacy was objectively reasonable. The California Fourth District Court of Appeal noted that even though some may argue that Mr. Nadauld's location data only involved his public movements, which could be considered a disclosure to a third party because members of the public could observe his vehicle, this does not undermine his reasonable expectation of privacy. R. at 17. Mr. Nadauld decidedly did not overturn his information to a third-party, nor did he expect that his movements over the course of a week would not be private. In short, the government must have a warrant to access such comprehensive location data about an individual as such surveillance amounts to a search under the Fourth Amendment. Society, just like Mr. Nadauld, expects that law enforcement is not tracking their every movement over the course of several days without a warrant.

B. Per *Jones* and *Kyllo,* the San Diego County Police Department's tracking and retrieval of Mr. Nadauld's movements from the ALPR is a search under the Fourth Amendment.

Under *Jones* and *Kyllo*, the San Diego County Police Department's tracking and retrieval of Mr. Nadauld's movements from the ALPR is a search under the Fourth Amendment. While

technological developments have complicated Fourth Amendment analyses and changed both an individual's subjective and society's objective expectations, the importance of a warrant remains unchanged. In the last two decades, the Supreme Court has taken a case-by-case approach when assessing whether the police's use of technology implicates Fourth Amendment protections. In the landmark case, *U.S. v. Jones.* (2012), the Supreme Court reviewed a case where police physically placed a tracker on a suspect's vehicle and tracked his movements for twenty-eight days. 565 U.S. 400. This Court held that this was a search per the Fourth Amendment as there is a search where the Government obtains information by physically intruding on a constitutionally protected areas as a part of an attempt to obtain information. *Id.* at 406, 408 n.3, 5.

1. <u>The surveillance of Mr. Nadauld creates a mosaic of revealing information which requires protection under the Fourth Amendment.</u>

Some courts have recognized the mosaic theory, which is the idea that through a culmination of actions by law enforcement, none of which individually infringe on a reasonable expectation of privacy, together can constitute a Fourth Amendment search. *United States v. Maynard*, 615 F.3d 544, 566 (D.C. Cir. 2010), *aff'd sub nom. Jones*, 565 U.S. 400. As renowned Fourth Amendment scholar Orin S. Kerr stated, "Identifying Fourth Amendment searches requires analyzing police actions over time as a collective "mosaic" of surveillance; the mosaic can count as a collective Fourth Amendment search even though the individual steps taken in isolation do not." *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311 (2012).

The facts of *Jones* are analogous to the surveillance of Mr. Nadauld and his location data from the ALPR database. While the new technology used to collect unsuspecting individual's location data for the ALPR database is more advanced than the surveillance technology in *Jones* as it does not require a physical intrusion into one's vehicle, the same type of data is collected.

Moreover, while some may argue that the fact that Mr. Nadauld's location data was collected over a week instead of a month should be dispositive, it is not. As discussed in the context of *Carpenter*, the location tracking of Mr. Nadauld is still highly revealing when considered together. This accumulation of location data can expose with whom Mr. Nadauld is friends, the locations he frequents, where he attends church, who his romantic partner is and much more. While the traditional use of ALPR and similar traffic camera technology is focused on a singular instance, such as ticketing an individual for a traffic violation, the tracking of an individual's location across days and numerous locations is entirely different. This accumulation of information creates a mosaic of one's life and thus, Fourth Amendment protections are implicated.

2. A search can occur without physical intrusion into a protected area.

A search can still occur without physical intrusion into a protected area as not all tracking systems involve law enforcement physically placing a tracker on a vehicle. For example, in *Kyllo v. United States*, police used advanced thermal imaging technology to reveal information about items on the inside of a home. 533 U.S. 27 (2001). The Supreme Court developed a test for whether use of technology that does not involve physical intrusion during surveillance is a search. In *Kyllo*, a search per the Fourth Amendment occurred if the government: (1) obtains information that could not otherwise have been obtained without intruding into a constitutionally protected area and (2) the technology used was not in general public use. *Id.* at 34.

A major difference between the facts of *Jones* and this case is that law enforcement did not have to physically intrude into a protected area to place a tracker on Mr. Nadauld's vehicle. Advancements in law enforcement's surveillance technology should not obfuscate constitutional rights. Just as in *Kyllo*, prior to the development of the surveillance cameras and ALPR systems, police would have previously had to use a tracker to follow an individual for several days, e.g.

Jones. Thus, this tracking information could not have otherwise been obtained without intruding on Mr. Nadauld's property by accessing his vehicle without his consent. Moreover, this surveillance technology and ALPR database is certainly not available to the general public. When analyzing law enforcement's actions in this case, whether through the test set out in *Jones* or *Kyllo*, their surveillance of Mr. Nadauld and retrieval of information from the ALPR amounted to a search under the Fourth Amendment.

C. The surveillance of Mr. Nadauld was not a binary search.

Law enforcement's tracking of Mr. Nadauld over the course of seven days and retrieval of this location data from the ALPR was not a binary search. A binary search is the idea that inspection by law enforcement of an otherwise protected area is not a search per Fourth Amendment if the only information revealed is about contraband. For example, in *Illinois v. Caballes*, law enforcement used a canine to conduct a scent investigation outside of a vehicle during a lawful traffic stop. 543 U.S. 405 (2005). The canine indicated the presence of illegal narcotics, and when officers searched the vehicle, they found marijuana. *Id.* at 406. Ultimately, this Court held that the canine's scent investigation did not constitute a search under the Fourth Amendment as the canine could only reveal information about illicit substances. *Id.* at 408. One cannot have a legitimate interest in possessing contraband, so the Fourth Amendment cannot be implicated in a binary search. *Id.*

Law enforcement's surveillance of Mr. Nadauld in this case is highly distinguishable from a binary search like the one in *Caballes.* The information law enforcement collected on Mr. Nadauld's location reveals a significant about of personal information—much more than just information about contraband or an illegal activity. After all, the only allegedly illicit activity police gained information about in this case was an exchange of a duffle bag between Mr. Nadauld

and his co-worker. That exchange is innocuous and at best for the prosecution, ambiguous. Law enforcement's actions in this case constitute a search under *Katz, Jones*, and *Kyllo* and do not fall under the binary search exception.

II. THE WARRANTLESS ENTRY AND SEARCH OF MR. NADAULD'S HOME VIOLATED THE FOURTH AMENDMENT, RENDERING HIS SUBSEQUENT CONFESSION INADMISSIBLE.

The California Court of Appeal correctly held that the warrantless entry and search of Mr. Nadauld's home violated his Fourth Amendment rights, rendering his subsequent confession inadmissible. Nonconsensual warrantless searches of a private home are presumptively unreasonable but may lawfully occur when there is both probable cause and the presence of exigent circumstances. *Kirk v. Louisiana*, 536 U.S. 635, 637 (2002). As properly noted by the Court of Appeal, the search of Mr. Nadauld's home was not supported by probable cause and did not involve exigent circumstances. Because the search was a violation of Mr. Nadauld's Fourth Amendment rights, his subsequent admission that he had loaned the gun to Mr. McKennery is inadmissible under the "fruit of the poisonous tree" doctrine.

A. The warrantless search of Mr. Nadauld's home was not supported by probable cause.

The Court of Appeal correctly held that Officer Hawkins did not have probable cause to justify the warrantless entry and search of Mr. Nadauld's home. Mr. Nadauld's ownership of an automatic assault rifle and his minor association with Mr. McKennery were insufficient to support probable cause for Officer Hawkins's warrantless search of Mr. Nadauld's home.

There is no elemental or factor-based test for a probable cause determination. Rather, its determination is made using a totality-of-the-circumstances analysis based on "the assessment of

probabilities in particular factual contexts." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Probable cause is "more than mere suspicion"; it requires a showing that "'a prudent person would have concluded that there was a fair probability' that a crime was committed" by the particular suspect. *Gasho v. United States*, 39 F.3d 1420, 1438 (9th. Cir. 1994) (quoting *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986)). Probable cause may not be evaluated in hindsight, "based on what a search does or does not turn up." *Florida v. Harris*, 586 U.S. 237, 248 (2013).

The Court of Appeal was correct in holding that Mr. Nadauld's involvement in the Balboa Park shooting was "far from probable." R. at 25. The Petitioner, with the benefit of hindsight, may pile inference upon inference to argue that probable cause existed to justify the warrantless search of Mr. Nadauld's home, but hindsight may not be used to justify prior actions. Their eventual identification of McKennery and Mr. Nadauld as suspects was sheer luck. In beginning with a list of the vehicle registrants that left Balboa Park that night, the police department ignored the likelihood that the shooter could have been using a car not registered in his name. They assumed that the weapon used must have been legally registered and owned by a nearby resident. And, at the time of the warrantless search, the officers claim to have inferred that because Mr. Nadauld legally owned an M16 assault rifle, and because his vehicle was frequently in the same place as his coworker McKennery's, he must have leant his rifle to him to be used in the Balboa Park shooting. While hindsight may show that this warrantless entry and search were fruitful, this stacking of inferences pushes far beyond the limits of what a "prudent person" would assume amounts to guilt.

Furthermore, although the Superior Court noted that Mr. Nadauld's "blatant noncompliance" with the Officers' request to search his home was "suspicious" and suggested guilt requiring immediate action by police, this argument does not hold water. R. at 17-18.

"Passively asserting [one's] right" to privacy in the home by refusing police entry without a warrant may not be considered evidence of criminal wrongdoing and should therefore not be used to determine probable cause. *See United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir.) Mr. Nadauld's confusion about the officers showing up one month earlier than expected and his refusal to allow entrance into his home were wholly justified.

B. There were no exigent circumstances allowing for a lawful warrantless search of Mr. Nadauld's home.

The Court of Appeal correctly held that there were no exigent circumstances justifying a warrantless search of Mr. Nadauld's home.

"The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1986) (quoting *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972)). Consistent with this intent, searches and seizures of a home without a proper warrant are presumed unreasonable. *Payton*, 445 U.S. at 586. A few "specifically established and well-delineated exceptions," however, may allow an officer to conduct a search without a proper warrant when there is a "compelling need for official action and no time to secure a warrant." *Katz*, 389 U.S. at 356-57; *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978). These well-delineated exceptions may include the threat of destruction of evidence, to prevent imminent harm to an officer or other person, and hot pursuit of a suspect attempting to flee the scene. *Fisher v. City of San Jose*, 538 F.3d 1069, 1074 (9th Cir. 2009).

Obtaining a warrant is a vital procedural safeguard that allows a neutral judiciary to assess the facts of the case and ensure that a search is reasonable and supported by probable cause. *McNeely*, 569 U.S. at 174. In keeping with the principal goal of the exigent circumstances

exception, to allow law enforcement to act quickly when there is insufficient time to obtain a warrant, use of exigent circumstances to support a warrantless search must be the exception, not the norm. *See Prescott*, 581 F.2d at 1351.

As the Court of Appeal aptly noted, there were no carefully delineated exceptions present to justify warrantless action under the exigent circumstances exception. Officer Hawkins and the Superior Court improperly mischaracterized the tense uncertainty of the situation at hand as a well-delineated exception to the requirement to obtain a warrant. R. at 26-27. While the Superior Court noted that public fear and frustration regarding the police's failure to identify a suspect justified quick action, increasing pressure to bring closure to a community is not an established exception allowing for warrantless action. Likewise, an individual politely declining a police request to search his home is a basic Fourth Amendment right; it is not an exigent circumstance.

Mr. Nadauld, calm and collected in his interaction with the two officers, gave no reason to suggest that he was planning to harm the officers, destroy the gun, or flee the scene. He calmly offered to retrieve the gun for Officer Hawkins to inspect, requesting only that the officers not enter his home. This request was well within his constitutional rights and did not justify the officers forcing their way into his home without a warrant and without Mr. Nadauld's consent.

The Petitioner may argue that a recent anonymous phone call warning "This is the Balboa Park Shooter. This time, it's gonna be a school" justified emergency action under the exigent circumstances exception. R. at 10. However, this call occurred two weeks after the Balboa Park incident, and the caller gave no reason to suggest that the threat was truly imminent. While there may have been a legitimate threat of future harm, it was not imminent and thus was not exigent.

While the Petitioner may also choose to cite the Superior Court's ruling that "there was no time to waste," this is simply not the case. R. at 17. Officer Hawkins could have walked away from

the calm and cooperative Mr. Nadauld and obtained a warrant. There were no exigent circumstances present, just a simple case of police frustration and impatience. Officer Hawkins did not need to skip this vital step of obtaining a warrant; in opting to do so, he violated Mr. Nadauld's Fourth Amendment rights.

C. Mr. Nadauld's confession that he loaned his gun to Mr. McKennery is inadmissible under the fruit of the poisonous tree doctrine.

Mr. Nadauld's statement to the police, in which he admitted to loaning his gun to Mr. McKennery, is inadmissible and must be suppressed under the "fruit of the poisonous tree" doctrine. *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963). In *Wong Sun v. United States*, the Supreme Court held that evidence obtained through illegal police activity, including confessions made against one's self-interest, is inadmissible because it is "fruit of the poisonous tree." 371 U.S. at 487-488.

Because the warrantless search of Mr. Nadauld's home was not supported by probable cause and was not justified by exigent circumstances, therefore rendering it a Fourth Amendment violation, Mr. Nadauld's statement to Officers Hawkins and Maldonado that he loaned his gun to McKennery is inadmissible. Any statements made by Mr. Nadauld in the immediate aftermath of the unconstitutional warrantless search may not be used to support indictments of California Penal Section Code 192 or any other charge.

CONCLUSION

In conclusion, this court should uphold the Court of Appeal's judgment granting Mr. Nadauld's motion to suppress evidence and remand the case for further proceedings consistent with this decision.

Respectfully submitted,

/s/ R12

R12

Counsel for the Respondent