Team 18

No. 1788-850191

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 2022

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

NICK NADAULD,

Respondent

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FOURTH DISTRICT

BRIEF FOR THE RESPONDENT

October 18, 2022

COUNSEL FOR THE RESPONDENT

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STATEMENT OF FACTS

On September 27, 2021, Nick Nadauld received a notice stating that in one month, law enforcement officers would be arriving at his home to verify his assault rifle had been rendered inoperable pursuant to California Penal Code 30915. R. at 4. Nadauld legally inherited an M16 assault rifle when his father, a former member of the military, died five years prior. R. at 2.

On September 29, 2021, at 5:23pm, Frank McKennery stopped by Nadauld's house to drop off some items. R. at 4. Approximately 30 minutes after he left, FBI Officers Jack Hawkins and Jennifer Maldonado arrived at Nadauld's house and began to question him outside his front door. R. at 4. Officer Hawkins asked Nadauld, "Do you still have that M16 your old man left you?" R. at 23. Nadauld responded that, pursuant to the letter he received two days prior, he expected them to come in one month. R. at 23. Officer Hawkins brushed off the confusion by stating that they wanted to get a head-start, and that Nadauld "should have nothing to worry about." R. at 23. Officer Hawkins then insisted that Nadauld show him the gun. R. at 23. Again, Nadauld asserted that, per the notice he received, he would show them the gun in one month. R. at 23.

Dissatisfied with this answer, Officer Hawkins then referred to a shooting in Balboa Park which occurred more than two weeks prior, claiming that they wanted to "make sure all assault weapons [were] accounted for." R. at 23. Nadauld agreed to show them the gun and asked that the officers wait for him while he went to get it. R. at 23. Officer Hawkins did not agree with this request and insisted that he needed to enter the house. R. at 24. Nadauld stated that he did not want them to come inside his home and asked for them to wait outside. R. at 24. Again, dissatisfied with Nadauld's answer, Officer Hawkins stated, "I don't think so, Nick," and walked past him into the house. R. at 24.

After Officer Hawkins entered his home without permission, Nadauld said, "Hey, I didn't say you could come into my house. Aren't you not allowed if I don't say so?" R. at 24. Officer Hawkins ignored his statement and asked Nadauld where the gun was. R. at 24. Nadauld didn't answer and instead responded, "Didn't you hear what I said?" R. at 24. Officer Hawkins then ordered Officer Maldonado to start checking the rooms. R. at 24. Nadauld repeated that he did not want Officers Hawkins and Maldonado in his house. R. at 24.

A few moments later, Officer Maldonado entered the room holding Nadauld's assault rifle which was still operable. R. at 24. Officer Hawkins then told Nadauld, "Well, well, well. Looks like you're the prime suspect for the Balboa shooting, Nick. How does that sound?" R. at 24. Nadauld responded that he was not the shooter, and that he did not have the rifle at the time of the shooting. R. at 24. Officer Hawkins asked if he gave it to Frank McKennery. R. at 24. Nadauld confirmed that he did but asserted that McKennery told him he was in the Arizona desert just doing target shooting. R. at 24. Officer Hawkins then placed Nadauld under arrest. R. at 25.

Approximately two weeks prior, on September 14, 2021, a masked shooter fired an M16A1 automatic assault rifle on an open crowd in Balboa Park from a rooftop. R. at 2. Nine people were killed, and six others were injured. R. at 2. The shooter escaped the scene without being identified. R. at 2. On the rooftop where the shooter fired the weapon, officers found a "Manifesto" which stated, "We are going to do this again. Get ready. Soon." R. at 36.

Law enforcement used numerous investigative methods to find the shooter. R. at 3. They first analyzed the surveillance footage from security cameras in and around Balboa Park. R. at 3. This footage showed forty individuals fleeing on foot before police arrived. R. at 3. However, due to the footage being blurry, law enforcement were unable to identify these individuals. R. at 3. Surveillance footage also showed fifty vehicles leaving the park before police arrived. R. at 3.

Police checked the criminal records of the owners of those fifty vehicles but found no evidence of prior violent crimes. R. at 3. One of the fifty vehicles was registered to McKennery. R. at 3.

Police then pulled up a list of registered assault rifle owners in the area. R. at 3. There were fifty individuals on this list. R. at 3. None of the individuals were police officers or members of the military. R. at 3, 10. None of the registered rifle owners were on the list of the fifty vehicle owners that fled the scene. R. at 3. Finally, law enforcement retrieved information from the Automatic License Plate Recognition database to investigate the movements of the fifty vehicles recorded leaving Balboa Park. R. at 3. They also used the information from the database to track the movements of vehicles owned by the individuals on the list of registered assault rifle owners. R. at 3. They cross referenced the movements of both groups and found several pairings which had significant overlap of being at the same locations at similar times. R. at 3-4. From these locations law enforcement isolated ten residences which corresponded the most to the driving location data. R. at 4. One of those residences was Nadauld's. R. at 4.

On September 24, 2021, law enforcement placed cameras on utility poles near those ten residences so they could monitor them for any suspicious activity. R. at 4. On September 25, 2021, law enforcement mailed notices to each of the ten residences stating that they would be arriving in one month to check on their assault rifles. R. at 4.

On September 28, 2021, at 10:37 a.m., police received an anonymous call from a telephone booth. R. at 4. A voice was heard saying, "This is the Balboa Park shooter. This time, it's gonna be a school." R. at 4. On September 29, 2021, the pole-mount camera placed near Nadauld's house recorded McKennery handing Nadauld a large black duffle bag. R. at 4. After arresting Nadauld, Officers Hawkins and Maldonado went to McKennery's house. R. at 4. Upon arrival, the officers heard a gunshot inside the house and when they entered, they found McKennery lying dead on the

floor with a letter next to his body confessing to the shooting. R. at 4. He confessed to planning and committing the shooting on his own and stated that "the guy" he acquired the rifle from didn't have anything to do with the shooting and did not know anything about it. R. at 37.

STATEMENT OF THE CASE

On October 1, 2021, Nick Nadauld was charged by indictment 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 for failure to comply with the assault rifle requirements under California Penal Code Section 30915. R. at 5.

Mr. Nadauld filed a motion to suppress the evidence collected on the date of his initial arrest, pursuant to California Penal Code § 1538.5. R. at 1, 5. On November 21, 2021, the San Diego Superior Court denied his motion on the grounds that his Fourth Amendment rights were not violated. R. at 5, 12.

On April 5, 2022, Mr. Nadauld filed an appeal with the California Fourth District Court of Appeals. R. at 13. On June 3, 2022, the court granted his motion to suppress and remanded the case for further proceedings, holding that the use of ALPR technology and the warrantless entry into Mr. Nadauld's home was a violation of his Fourth Amendment rights. R. at 21. The California Supreme Court denied certiorari. The People then requested and were granted certiorari by the United States Supreme Court on September 23, 2022.

SUMMARY OF THE ARGUMENT

Mr. Nadauld's Fourth Amendment rights were violated when the government retrieved his information from the ALPR database and searched his house without a warrant. Therefore, the

California Fourth District Court of Appeal correctly reversed the trial court's order denying Mr. Nadauld's motion to suppress.

To invoke the Fourth Amendment's protections, an individual must prove that he held a legitimate expectation of privacy that has been violated by government officials. An individual has a reasonable expectation of privacy when he demonstrates both an actual (subjective) expectation of privacy and that expectation of privacy is one society is prepared to recognize as reasonable.

Nadauld only came under police investigation because he was one of fifty individuals on a list of legally registered rifle owners. Nadauld was not at Balboa Park at the time of the shooting and officers did not have any reason to suspect him of being the shooter at the time they retrieved his information from the ALPR database. By accessing the database without a warrant, the officers were able to compile a comprehensive list of Nadauld's physical movements over the course of several days. Since the officers were able to compile a list of the whole of his physical movements, Nadauld exhibited a subjective expectation of privacy in the information stored in the ALPR database. Further, since it is not reasonable for individuals to expect that law enforcement will monitor their movements over an extended period without any probable cause to do so, his expectation of privacy is one that society is prepared to recognize as reasonable. Finally, the retrieval of Nadauld's information from the ALPR database constituted a search under the Fourth Amendment. Therefore, a warrant was required.

In addition to protecting an individual's expectation of privacy, the Fourth Amendment also expressly imposes two requirements: (1) all searches and seizures must be reasonable and (2) a warrant may not be issued unless probable cause is established. A warrantless search is only permissible when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. Where evidence is seized in violation of an

individual's Fourth Amendment rights, that evidence becomes "fruit of the poisonous tree," and must be suppressed.

Nadauld was one of fifty individuals on a list of registered assault rifle owners, not including military or law enforcement. There were also over ninety people who fled from Balboa Park on the day of the shooting including forty individuals who left on foot and fifty vehicles that drove away from the park after the shooting. Nadauld was not on this list of over ninety potential suspects who were at the park at the time of the shooting and at no point during their investigation did FBI officers discover any evidence that specifically connected Nadauld to the shooting. Therefore, the officers did not have probable cause to search Nadauld's house without a warrant.

Nor were there exigent circumstances. Two weeks had passed since the shooting in Balboa Park. Officers also waited one whole day to act after receiving an anonymous call from an individual claiming to be the Balboa Park Shooter stating that he would shoot a school next. On the day officers went to question Nadauld at his home, over thirty minutes had passed since they recorded McKennery dropping off a duffle bag. The officers lack of urgency shows that there were no exigent circumstances to warrant entry into Nadauld's house without a warrant. Further, the passage of time and Nadauld's cooperation with answering the officers' questions diminishes any argument that the officers feared Nadauld would try to destroy evidence. Therefore, since the officers did not have probable cause and because they could not show any exigent circumstances, their warrantless entry into Nadauld's home violated his rights under the Fourth Amendment. Any evidence obtained during the unlawful search is "fruit of the poisonous tree" and should be suppressed.

For the reasons stated above, the Court should affirm the holding of the California Fourth District Court of Appeal and find that the court did not err in its holding.

STANDARD OF REVIEW

In reviewing a denial of a motion to suppress this Court reviews factual findings for clear error and legal conclusions *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. THE CALIFORNIA FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT THE RETRIEVAL OF MR. NADAULD'S INFORMATION FROM THE ALPR DATABASE REQUIRED A WARRANT UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects "[t]the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.; *see United States v. Yang*, 958 F.3d 851, 858 (9th Cir. 2020). The "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials*." Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967). Application of the Fourth Amendment depends on whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735,740 (1979) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). The Court has implemented a two-part test in determining whether an individual has a reasonable expectation of privacy protected by the Fourth Amendment. An individual's expectation of privacy is protected when: (1) the individual has exhibited "an actual (subjective) expectation of privacy," and (2) the individual's expectation of privacy is one "that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S., 347, 361 (1967) (Harlan, J., concurring). Government action that violates the privacy upon which an individual reasonably relies constitutes a "search and seizure" within the meaning of the Fourth Amendment, and thus requires a warrant supported by probable cause. *Id.* at 353*, see Carpenter v. U.S.*, 138 S. Ct. 2206, 2213 (2018).

Because Mr. Nadauld held a reasonable expectation of privacy in the information stored in the ALPR database, and because the government's violation of his reasonable expectation of privacy constituted a search under the Fourth Amendment, a warrant was required before the government could retrieve his information.

A. Mr. Nadauld Exhibited a Subjective Expectation of Privacy in the Information Contained in the ALPR Database

Mr. Nadauld exhibited a subjective expectation of privacy in his information stored in the ALPR database and, therefore, the government violated his expectation of privacy when they retrieved his information without a warrant. As stated by the court in *Katz*, an individual has "exhibited an actual (subjective) expectation of privacy," when the individual, through his conduct, has shown that "he seeks to preserve [something] as private." *Smith v. Maryland*, 442 U.S. at 740 (quoting *Katz v. U.S.*, 389 U.S. at 351).

In *Katz*, FBI agents attached an electronic listening and recording device to the outside of a telephone booth from where the petitioner had placed several calls. *Id.* at 348. The FBI sought to introduce evidence of petitioner's end of telephone conversations recorded through this electronic listening device. *Id.* The petitioner argued that the telephone booth was a "constitutionally protected area," and therefore he maintained a reasonable expectation of privacy in the calls he placed while inside the telephone booth. *Id.* at 351. In reaching its holding, the Court noted that, "the Fourth Amendment protects people, not places." *Id.* However, the Court also stated that information an individual "seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Id.* (emphasis added). Therefore, the Court held that the "government's activities in electronically listening to and recording petitioner's words violated the privacy upon which he justifiably relied." *Id.* at 353.

Additionally, in *Carpenter*, the Court applied the reasonable expectation of privacy test to hold that an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through cell-site location data. *Carpenter*, 138 S. Ct. at 2217. In *Carpenter*, the prosecutors applied for a court order to obtain Carpenter's cell phone records following their investigation into a string of robberies. *Id.* at 2212. Federal magistrate judges issued two orders instructing Carpenter's wireless carriers to disclose cell-site location information (CSLI) during the four-month period that the robberies had occurred. *Id*. In total, the government obtained 12,898 location points cataloging Carpenter's movements during this time. *Id.* Carpenter argued that the government's seizure of the CSLI records violated the Fourth Amendment because the records were obtained without a warrant supported by probable cause. *Id.* The Court agreed and held that "when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the *whole of his physical movements*." *Id*. at 2219. (emphasis added). Therefore, the "location information obtained from Carpenter's wireless carriers was the product of a search," and thus required a warrant. *Id.* at 2217.

However, in *United States v. Yang*, the court held that the defendant did not have a reasonable expectation of privacy in his movements as revealed by historical location data of a rental car after the defendant failed to return the rental car by the due date. *United States v. Yang*, 958 F.3d 851, 861 (9th. Cir. 2020). In *Yang*, the defendant came under investigation by the U.S. Postal Inspection Service after he was captured on surveillance cameras engaging in "fishing," a method of stealing mail. *Id.* at 854. One of the surveillance videos captured a clear image of the license plate number of the car driven by the defendant. *Id.* After learning that the car was registered to a rental car company, and after discovering that the defendant had failed to return the rental car by the due date, the U.S. Postal Inspector requested a vehicle detection report through a

license plate location database, which uses ALPR technology to capture images of license plate numbers and then records and stores the GPS location information for these vehicles. *Id.* at 855. The U.S. Postal Inspector was able to use the information from the vehicle detection report to discover the location of defendant's residence, which ultimately led to his arrest. *Id.* at 856. The defendant argued that the use of the ALPR technology to track the rental car to his residence constituted a "search" under the Fourth Amendment. *Id.* at 857. The court disagreed and held that the defendant "failed to establish that he has a reasonable expectation of privacy in the historical location information of the [rental car]," under the facts of the case. *Id.* at 859.

Here, unlike the defendant in *Yang*, Mr. Nadauld did not take any steps to impair his reasonable expectation of privacy. Mr. Nadauld is the lawful owner of his vehicle; he was not involved in any illegal activity while driving his vehicle and only came under investigation by the police because he was one of fifty individuals on a list of legally registered assault rifle owners. R at 2-3, 15. In *Yang*, the defendant did not own the vehicle that was captured with the ALPR technology but instead was in possession of a rental car that was past its due date and which the owner had attempted to repossess. 958 F.3d at 861. The court found this fact significant in reaching its conclusion that Yang did not have a reasonable expectation of privacy in the historical location data. *Id.* at 859.

Further, unlike *Yang*, where the defendant's rental car was only captured once with the ALPR technology, here it can be reasonably concluded that Mr. Nadauld's car was captured multiple times. After monitoring Mr. Nadauld's movements through the ALPR database, FBI officers were able to determine "considerable overlap" of Mr. Nadauld having driven to the same locations at the same times. R. at 4. The police were then able to use this information to compile a list of ten residences that corresponded most to the driving locations, which allowed the police to

begin monitoring Mr. Nadauld at his home. R. at 4. Although it is not clear from the trial court's record how long the police were monitoring Mr. Nadauld or how many times his car was captured with the ALPR technology, the fact that the police were able to compile a comprehensive list of his physical movements shows that the ALPR technology captured multiple images of Mr. Nadauld's car as he was driving to the same locations at the same times over a course of several days. R. at 4. Therefore, like *Carpenter*, Mr. Nadauld had a reasonable expectation of privacy in the "whole of his physical movements," and the government violated that reasonable expectation of privacy when it retrieved his information from the ALPR database without a warrant.

B. Mr. Nadauld's Subjective Expectation of Privacy is One that Society is Prepared to Recognize as Reasonable

Since Mr. Nadauld has exhibited a subjective expectation of privacy in the information stored in the ALPR database, the next step is to determine whether his subjective expectation of privacy is one that society is prepared to recognize as reasonable. In deciding which expectations of privacy are entitled to protection, the Court has held that the "Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925); *Carpenter*, 138 S. Ct. at 2214. The Court has recognized basic guideposts to determine which expectations of privacy are entitled to Fourth Amendment protection. First, the Court has recognized that the "Amendment seeks to secure 'the privacies of life' against 'arbitrary power.'" *Id.* And second, "that a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance." *Id.* (citing *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

The Court has kept this attention to Founding-era understandings of privacy in mind when applying Fourth Amendment standards to advances in technology and surveillance tools. *Id.* As

such, the Court in *Carpenter* found that while, prior to the digital age, "law enforcement might have pursued a suspect for a brief stretch," doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." *Id.* at 2217. For this reason, "society's expectation has been that law enforcement agents and others would not – and indeed, in the main, simply could not – secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.*, *see U.S. v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring).

However, the Court in *U.S. v. Knotts* held that "a person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *U.S. v. Knotts*, 460 U.S. 276, 282 (1983). In *Knotts*, officers began investigating the Respondent after they received a call from a chemical manufacturing plant which notified the police that Respondent had been stealing chemicals used to manufacture illicit drugs. *Id.* at 278. The officers installed a beeper inside a five-gallon container of chloroform which they then used to track the location of the container after it was purchased by one of Respondent's co-defendants. *Id.* The officers then proceeded to follow the car in which the chloroform had been placed through both visual surveillance and a monitor that received signals from the beeper. *Id.* The signal emanating from the beeper ultimately led officers to a secluded cabin occupied by the Respondent. *Id.* In reaching its holding, the Court determined that "the government surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways," which the Court has long held that an individual has a diminished expectation of privacy while traveling in an automobile. *Id.* at 281. Thus, the Court found that the officers' monitoring of the beeper signals did not invade Respondent's reasonable expectation of privacy and, therefore, the officers did not need to obtain a warrant before installing the beeper. *Id.* at 285. However, the Court reserved the question whether a warrant would be required in a case

involving "twenty-four-hour surveillance," noting that "if such dragnet-type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 284.

In *U.S. v. Maynard*, the court considered these "dragnet-type" law enforcement practices. In *Maynard*, the police installed a GPS device on the defendant's jeep without a warrant and tracked his movements for 24-hours a day for four weeks. *U.S. v. Maynard*, 615 F.3d 544, 555 (D.C. Cir. 2010). The defendant argued that the use of the GPS device "violated his 'reasonable expectation of privacy' and was therefore a search subject to the reasonableness requirement of the Fourth Amendment." *Id.* In reaching its holding, the court clarified the ruling in *Knotts*, finding that the Court there held only that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," and *not* that such a person "has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it." *Id*. at 557. Thus, the court found that the police used the GPS device "not to track Jones's 'movements from one place to another,' but rather to track Jones's movements 24 hours a day for 28 days as he moved among scores of places, thereby discovering the *totality* and pattern of his movements from place to place." *Id.* at 558. (emphasis added). The court determined that there can be only one conclusion and held that "society recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation." *Id.* at 563.

Here, the information held in the ALPR database is analogous to the GPS tracking in *Maynard* and the twenty-four-hour type of "dragnet" surveillance practices the court in *Knotts* warned of. As stated earlier, the information held in the ALPR database allowed the FBI officers

to compile a comprehensive list of Mr. Nadauld's movements over a prolonged period of time. R. at 3-4. Unlike *Knotts*, where the government only used the beeper device to monitor the defendant's movements during a single trip, here the officers were able to use the ALPR technology to monitor Mr. Nadauld's movements as he drove to multiple locations at various times over several days, thereby compiling a comprehensive list of locations most frequented by Mr. Nadauld. R. at 4. Therefore, like *Maynard*, the police here were able to use the information captured in the ALPR database to discover the "totality and pattern" of his movements during this time. It is this totality, the "*whole of his physical movements*," in which Mr. Nadauld held a reasonable expectation of privacy. *Carpenter*, 138 S. Ct. at 2219.

Further, while ALPR technology does not operate as a twenty-four-hour type of surveillance, its ability to capture and compile comprehensive data about one's physical movements is sufficiently similar to the GPS monitoring discussed in *Maynard*. The trial court's argument that the information stored in the ALPR database does not create a complete record of all the movements of the individuals it captures therefore must fail. R. at 6. Although the ALPR technology only logs information when a vehicle passes through the lens of an ALPR camera and thus does not operate as a type of twenty-four-hour surveillance, the police here were still able to use the information stored in the ALPR database to create a comprehensive list of Mr. Nadauld's movements over a certain period of time, which ultimately led to the discovery of his residence and eventual arrest. R. at 3-4, 6. Therefore, the information stored in the ALPR database did more than simply provide "a small glimpse into an individual's travels on public roads." R. at 6. While momentary captures of geographic locations may be reasonably expected by individuals when they travel on public roads, it is not reasonable to expect that law enforcement will monitor their movements without any probable cause to do so and compile a comprehensive list of their physical

movements over an extended period. R. at 6. As the appellate court here noted, "accessing a substantial history of a person's movements contravenes societal expectations of privacy." R. at 17. Therefore, Mr. Nadauld's reasonable expectation of privacy is one that society is prepared to recognize as reasonable.

C. The Government's Retrieval of Mr. Nadauld's Information from the ALPR Database Constituted a Search Under the Fourth Amendment and, Therefore, a Warrant was Required

Traditionally, Fourth Amendment jurisprudence has been tied to common-law trespass leading the Court to hold that there could be no "search" without physical penetration into a protected area. *Katz*, 389 U.S. at 352; see *Olmstead v. United States*, 277 U.S. 438 (1928). However, the Court in *Katz*, in recognizing that "the Fourth Amendment protects people – and not simply 'areas' – against unreasonable searches and seizures," concluded that the reach of the Fourth Amendment cannot "turn upon the presence or absence of a physical intrusion into a given enclosure." *Katz*, 389 U.S. at 353.

In *U.S. v. Jones*, the Court, in applying the *Katz* analysis, held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements" constituted a "search" within the meaning of the Fourth Amendment. 566 U.S. at 406. In *Jones*, the Government applied for a warrant authorizing the use of an electronic tracking device on a Jeep which was registered to Jones's wife. *Id.* at 402. Over the next 28 days, the Government used the device to track the vehicles movements. *Id.* at 403. Through signals received from multiple satellites, the tracking device established the vehicle's location within 50 to 100 feet and communicated that location via a cell phone to the Government's computer. *Id.* In reaching its holding, the Court stated it was clear that "the Government physically occupied private property for the purpose of obtaining information," regarding Jones's location. *Id.* at 404. The Court further

stated that while *Katz* established that "property rights are not the sole measure of Fourth Amendment violation," it did not erode the principle that "'when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'" *Id.* at 407 (citing *Knotts*, 460 U.S. at 286).

Additionally, in *Kyllo v. U.S.*, the Court considered whether the use of a thermal-imaging device aimed at a private home from a public street constitutes a "search" within the meaning of the Fourth Amendment. *Kyllo v. U.S.*, 533 U.S. 27, 29 (2001). In deciding this issue, the Court noted that "it would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Id.* at 33. In *Kyllo*, officers suspected that marijuana was being grown inside Kyllo's home. *Id.* at 29. To prove their suspicions, the officers used a thermal imager to scan the triplex where Kyllo lived. *Id.* The scan of Kyllo's home took only a few minutes and was performed from the passenger side of the officer's vehicle parked across the street from Kyllo's house. *Id.* at 30. The Court held that by obtaining information through "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," constituted a search at least where the technology in question is not in the general public use. *Id.* at 34. Based on this criterion, the Court held that "the information obtained by the thermal imager in this case was the product of a search." *Id.*

Here, the Court should apply the reasoning in *Jones* and find that the government's retrieval of Mr. Nadauld's information from the ALPR database constituted a search within the meaning of the Fourth Amendment. Although ALPR technology does not act as a continuous location indicator in the same manner as a GPS location device, the information obtained in the ALPR database allows the government to construct a comprehensive list of an individual's movements over an

extended period and thus comes within the purview of GPS monitoring and should be designated as a search. R. at 16. Like *Jones*, here the FBI officers used the information stored in the ALPR database to gather a list of driving locations and times frequented by Mr. Nadauld over an extended period and were thereby able to use this information to assume there was a connection between him and the shooter. R. at 4. Therefore, the information obtained by the government in *Jones* through the GPS location device and the information obtained from the officers here through the ALPR database is substantially similar and warrants a finding that the retrieval of Mr. Nadauld's information constituted a search under the Fourth Amendment. The fact that the FBI officers did not "physically intrude" on Mr. Nadauld's property when obtaining the information holds no significance in determining that the retrieval of the information constituted a search.

Additionally, like the thermal imager used by the officers in *Kyllo*, the ALPR technology here was a type of "sense-enhancing technology" that was not in the general public use. R. at 16, 38. Here, the FBI officers would not have been able to compile a comprehensive list of Mr. Nadauld's movements during the time following the shooting without the use of the ALPR technology. R. at 3-4, 7. While it might have been possible for the officers to monitor some of Mr. Nadauld's movements after they obtained his name from a list of fifty legally registered assault rifle owners, it is not plausible to believe that the officers would have been able to monitor his every movement over this extended period of time and obtain the same comprehensive information they were able to retrieve from the ALPR database. R. at 3-4. Therefore, the officer's use of the sense-enhancing ALPR technology constituted a search under the Fourth Amendment.

Further, the trial court's reliance on *New York v. Class* in holding that the use of the ALPR technology did not constitute a search is erroneous. R. at 7. In *Class*, police officers stopped the defendant for several moving violations. *New York v. Class*, 475 U.S. 106, 108 (1986). During the

traffic stop one of the officers reached inside the defendant's car and moved some papers to get a view of the vehicle's VIN number. *Id.* While moving the papers the officer found a gun, and the defendant was ultimately arrested for possession of a firearm. *Id.* The Court found that the defendant did not have a reasonable expectation of privacy in the VIN number, which is required to be kept in plain view, and held that "the exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id.* at 114. However, the facts in *Class* are not applicable to the issues here. To start, the fact that Mr. Nadauld was driving on public roads does not bar his right to Fourth Amendment Protection. R. at 17. Further, unlike the defendant in *Class*, here Mr. Nadauld was not stopped for a moving violation and was not engaging in any illegal activity when the officers accessed his information from the ALPR database. R. at 3. The only reason why the FBI officers decided to retrieve Mr. Nadauld's information was because he was one of fifty individuals on a list of legally registered rifle owners. R. at 2-3. Mr. Nadauld was not suspected of being at Balboa Park at the time the officers retrieved his information, and his car was not even one of the fifty vehicles that was captured on surveillance cameras leaving the park at the time of the shooting. R. at 3. Unlike the officers in *Class*, the officers here did more than just conduct a visual inspection of Mr. Nadauld's vehicle, they used the ALPR technology to track his every move over several days. Therefore, unlike the actions taken by the police in *Class*, here the actions taken by the officers in retrieving Mr. Nadauld's information from the ALPR database did constitute a search under the Fourth Amendment.

For the reasons stated above, Mr. Nadauld held a reasonable expectation of privacy in the information stored in the ALPR database and the government's violation of his reasonable expectation of privacy constituted a search under the Fourth Amendment. Therefore, the California

Fourth District Court of Appeal did not err in holding that the retrieval of Mr. Nadauld's information from the ALPR database required a warrant.

II. THE CALIFORNIA FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT THE WARRANTLESS ENTRY AND SEARCH OF MR. NADAULD'S HOME VIOLATED HIS FOURTH AMENDMENT RIGHTS

The Fourth Amendment expressly imposes two requirements: (1) all searches and seizures must be reasonable; and (2) a warrant may not be issued unless probable cause is properly established. U.S. Const. amend. IV. Therefore, in order to conduct a search, law enforcement must have probable cause. *Id*. Furthermore, searches and seizures inside a home without a warrant are presumptively unreasonable. *Kentucky v. King*, 563 U.S. 452, 459 (2011). However, this presumption may be overcome when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. *Id*. at 460. Certain exigencies have been established as being compelling by the court, including the imminent destruction of evidence and the imminent threat to public safety. *See Welsh v. Wisconsin,* 466 U.S. 740, 753 (1984). Finally, where evidence was seized in violation of a person's Fourth Amendment rights, that evidence becomes "fruit of the poisonous tree" and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963).

Mr. Nadauld's Fourth Amendment rights were violated because officers did not have probable cause nor exigent circumstances to justify a warrantless search of his home. Therefore, pursuant to the Fruit of the Poisonous Tree Doctrine, the evidence gathered should be suppressed.

A. Officers Hawkins and Maldonado Had No Probable Cause to Believe Mr. Nadauld Was Involved With the Balboa Park Shooting.

Probable cause is present where there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 230 (1983). In *Gates*, the Bloomingdale Police Department received a tip from an anonymous letter stating that Lance and

Susan Gates were selling drugs out of their home. *Id.* at 225. After observing the Gates' taking action consistent with the claims made in the anonymous letter, investigating law enforcement officers obtained a search warrant. *Id.* at 226. Pursuant to the warrant, officers searched the suspects' car and home and uncovered large quantities of marijuana, various other contraband, and weapons. *Id.* at 227. The Gates' moved to suppress the admission of this evidence, claiming the affidavit submitted in support of the search warrant was insufficient to show probable cause because it was based on the anonymous letter. *Id.*

On review, the Supreme Court held that courts must consider the totality of the circumstances in determining whether there is probable cause to grant a warrant. *Id.* at 238. The Court found that, under the totality of the circumstances, there was probable cause to believe contraband would be found in the Gates' home and car. *Id.* at 243. The Bloomingdale police and the DEA conducted investigations where they observed the Gates taking actions which suggested the couple were involved in drug smuggling. *Id*. The fact that the anonymous letter predicted those actions established the letter as a reliable source, which only strengthened the finding of probable cause. *Id.* at 244.

The case at bar is extremely different from *Gates.* First, the officers in *Gates* investigated Lance and Susan Gates specifically because the anonymous tip isolated them as persons of interest. This is not what happened to Mr. Nadauld. Mr. Nadauld was one of fifty registered gun owners in San Diego – not including any military or law enforcement personnel. R. at 3. This number does not consider any gun owners who live outside of the San Diego area, any gun owners who don't have their weapons registered, or any gun owners who illegally modified their semi-automatic rifle into a fully automatic rifle. Furthermore, there were at least ninety people recorded fleeing Balboa Park – forty people fled on foot, while fifty vehicles (with an unknown number of people in each

vehicle) drove away from the scene. R. at 3. Mr. Nadauld was not one of those ninety people. R. at 3. In fact, at no point during their investigation did law enforcement uncover any evidence that pointed to Mr. Nadauld specifically being involved with the Balboa Park shooting.

While it is true that Mr. Nadauld's residence was one of ten that had a connection to the vehicles which fled Balboa Park the day of the shooting, this is still an extremely small statistic which does not create a foundation for probability. R. at 4. The officers only cross-checked the gun owners with the list of vehicles that fled Balboa Park, thereby assuming the only people who could have possibly been involved with the shooting were people who had a connection to one of these vehicles. R. at 3. They did not consider whether the registered gun owners were connected with people who walked or carpooled to the park that day. They did not factor in the possibility of law enforcement involvement. R. at 3, 19. They did not even consider that the shooter could have been someone who does not live in the San Diego area. R, at 19. The bottom line is that the officers did not have a reason to believe that, based on the totality of the circumstances, Mr. Nadauld specifically was involved with the Balboa Park shooting.

Furthermore, the recording of McKennery handing a large black duffle bag to Mr. Nadauld is still not enough to establish probable cause. R. at 4. A large duffel bag could be anything, and considering that Mr. Nadauld was just one person out of a very large number of people who could have been involved in the shooting, the totality of the circumstances simply do not support the notion that Mr. Nadauld was involved in the crime they were investigating.

Finally, although Mr. Nadauld was reluctant to show the officers his rifle, his reaction was reasonable given the circumstances. R. at 23. Mr. Nadauld received a letter stating that police were going to check his weapon in one month, yet officers showed up two days later demanding that he let them into his house and hand over property he legally owned. R. at 23. Citizens have a right to

protect their home and their property, and therefore he was not obligated to consent to Officers Hawkins and Maldonado's warrantless demands. As such, Officers Hawkins and Maldonado did not have probable cause to suspect Mr. Nadauld of being involved with the Balboa Park shooting. Therefore, the warrantless entry into his home was a violation of the Fourth Amendment.

B. Even if the Court Finds There Was Probable Cause, There Were No Exigent Circumstances to Justify the Warrantless Entry into Mr. Nadauld's Home.

The warrantless physical entry of a home is a substantial invasion which is prohibited by the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 589 (1980) (quoting *United States v. Reed,* 572 F.2d 412, 423 (1978)). Absent exigent circumstances, the firm line at the entrance to the house may not reasonably be crossed without a warrant. *Id.* at 590. The exigent circumstances exception to the warrant requirement applies where the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. *Kentucky v. King*, 563 U.S. at 460 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). Under these circumstances, any delay would bring about some real, immediate, and serious consequences. Therefore, the absence of a warrant is excused. *Welsh v. Wisconsin*, 466 U.S. at 751.

In *Kentucky*, officers followed a suspected drug dealer to an apartment complex after an undercover officer observed a controlled buy of crack cocaine. *Kentucky v. King*, 563 U.S. at 456. After smelling burnt marijuana outside an apartment, officers knocked on the door and loudly announced their presence. *Id.* They then heard noises from within the apartment which was consistent with the destruction of evidence. *Id.* Upon hearing these noises, law enforcement officers announced their intent to enter the apartment, kicked in the door, and found the respondent along with other people inside. *Id*. They also found drugs in plain view during a protective sweep of the apartment and found additional evidence during a subsequent search. *Id*. at 457. Respondent moved to suppress the evidence, but the circuit court denied the motion on the basis that exigent

circumstances existed. *Id*. The Court of Appeals affirmed, but the Supreme Court of Kentucky reversed on the grounds that the police should have foreseen that their conduct would prompt the occupants to attempt to destroy the evidence. *Id.* at 457-458. However, the Supreme Court held that exigencies reasonably existed, and that the officer's conduct – banging on the door and announcing their presence – was reasonable because they did not demand to enter the apartment in a way which threatened to violate the fourth amendment. *Id.* at 471.

In *Welsh*, a witness watched the defendant drive his car into an open field after swerving on the road. 466 U.S. at 742. No people were injured, and no property was damaged. *Id.* The witness stopped to help, but the defendant walked off after being told that he should wait for police to arrive. *Id.* After arriving on the scene, officers looked at the car's registration and discovered that the defendant's house was within walking distance. *Id.* Officers then went to the house, gained entry when the defendant's stepdaughter answered the door, and arrested the man inside his home for operating a motor vehicle while intoxicated. *Id.* at 743. The trial court concluded that the arrest of the petitioner was lawful, but the appellate court held that the warrantless arrest of the petitioner in his own home violated the Fourth Amendment because the state failed to establish the existence of exigent circumstances. *Id.* at 747. On review, the Supreme Court held that there were no exigent circumstances as the defendant was home and therefore was not a threat to public safety, and the potential destruction of evidence (the defendant's blood alcohol content) did not outweigh the defendant's fourth amendment protections given that the offense was not criminal. *Id*. at 753-755.

Here, the facts presented are entirely inconsistent with the precedent set in *Kentucky*. First, Officers Hawkins and Maldonado arrived at Mr. Nadauld's house at approximately 6:00pm – a full thirty minutes after McKennery was recorded handing over a large duffle bag. R. at 4. When they arrived at his house, they knocked on the door and he answered it. R. at 4. They spoke to him

for a few minutes in front of his house before Officer Hawkins demanded entry. R. at 24. There were no rustling sounds like there were in *Kentucky*. There was no delay in answering the door like there was in *Kentucky.* And Mr. Nadauld stayed in front of Officers Hawkins and Maldonado the entire time, establishing that there was no risk of him destroying any evidence. Thus, the officers delay in searching for Mr. Nadauld's assault rifle inherently undermines any argument that they wanted to prevent him from destroying evidence.

Furthermore, although there was a threat of a school shooting there were no exigent circumstances which prevented officers from getting a warrant. R. at 4. In *Welsh*, the Supreme Court decided that there was no threat to public safety which would justify a warrantless entry because the threat itself was already over. Similarly, here the threat to public safety had passed. Almost a whole day had passed since the officers received the anonymous phone call stating there would be a school shooting. R. at 4. By the time officers arrived at Mr. Nadauld's house it was already 6:00 in the evening. R. at 4. While being concerned about a school shooting is compelling, it is not an imminent danger as school would not have started again until the next day. Thus, the officers had the time to get a warrant and they simply chose not to.

Next, while it is true that the underlying crime is a serious felony in the case at bar while the underlying crime was non-criminal in *Welsh*, it should be noted that the court in *Welsh* weighed the potential destruction of evidence against the severity of the crime. Here, given the fact that Mr. Nadauld was right in front of the officers the entire time and that the officers did not hear any sounds to indicate any possible evidence was going to be destroyed, there is no argument that the imminent destruction of property outweighs Mr. Nadauld's Fourth Amendment protections.

Finally, although the manifesto found by law enforcement threatened more shootings, eleven days had passed by the time officers sent out letters informing the ten residences that they

were going to be coming by to check on their guns. R. at 4, 36. Thus, the lapse of time between the shooting and law enforcement taking action to check on automatic assault rifle owners is inconsistent with the goal of trying to preserve public safety. Furthermore, the fact that law enforcement gave the ten residences one month to prepare is inconsistent with the goal of preventing the destruction of evidence. R. at 4. Thus, there was no evidence to suggest serious consequences would imminently occur if Officers Hawkins and Maldonado took the time to get a warrant, and any argument the state may make that the warrantless entry was justified by exigent circumstances is unfounded. Therefore, their actions were a violation of the Fourth Amendment.

C. Per the Fruit Of The Poisonous Tree Doctrine, The Evidence Seized Must Be Suppressed

In *Wong Sun*, the Fruit of the Poisonous Tree Doctrine was articulated stating that any evidence discovered as a result of an illegal search is tainted and must be excluded. 371 U.S. at 486. Here, because there was no probable cause or exigent circumstances to justify a warrantless search of Mr. Nadauld's home, the search conducted by Officers Hawkins and Maldonado was a violation of his Fourth Amendment rights. Therefore, pursuant to the Fruit of the Poisonous Tree Doctrine, any evidence retrieved as a result of their search must be suppressed.

CONCLUSION

For the reasons stated above, the Court should uphold the decision of the California Fourth District Court of Appeal.