No. 17-88-850191

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

NICK NADAULD
Respondent.

On Writ of Certiorari to the Supreme Court of the United States

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES PRESENTED

I. An invasion by the Government into an area where a person has a reasonable expectation of privacy constitutes a Fourth Amendment search. The Government used license plate data from over a year to determine Nedauld's associations as part of their criminal investigation of the Balboa Park mass shooting. Did this invasion of Nedauld's privacy require a warrant under the Fourth Amendment?

II. A warrantless entry into a residence without exigent circumstances violates the Fourth Amendment. Officers surveilled a suspect in the Balboa Park shooting handing off a bag to Nadauld. Police immediately went to the home and, without a warrant, entered Nadauld's residence. There, they seized the bag which contained his legally owned rifle and arrested him. Did the search and seizure violate Nadauld's Fourth Amendment rights?

STATEMENT OF THE FACTS

In San Diego, law enforcement employs what is known as the Automatic License Plate Recognition (ALPR) system. R. at 3. This system consists of a vast array of cameras mounted on police vehicles and poles at various intersections. R. at 39-40. These cameras instantly snap pictures of the license plates of passing cars and log the time and location into an expansive police database, generally without the drivers ever being aware. R. at 3, 39. The intended purpose of this system is to locate stolen or illegally registered vehicles in real-time. R. at 3. The data generated by this system is stored for up to five years and can be used to gain significant insight into the vehicle owner's life. R. at 3, 39-40. For example, it can be used to determine where a person was at a given time, where they work, with whom they associate, and the frequency of their interactions. R. at 3-4.

In September 2020, Nick Nadauld worked at a construction company in San Diego. R. at 2. Unbeknownst to Nadauld, the ALPR system automatically tracked his movements on San Diego roadways and generated sufficient information to show where and with whom Nadauld worked. R. at 3-4. One of the people the system connected to Nadauld was Frank McKennery, a coworker whom Nadauld thought shared his interest in firearms. R. at 23-24. This information was stored in a database, readily accessible to law enforcement for at least six months. R. at 40.

The week of September 7, 2021, McKennery told Nadauld he planned to go on a target shooting excursion to the desert and wanted to borrow Nadauld's rifle. R. at 2. Nadauld legally inherited the rifle five years before this request and placing his trust in his coworker of one year, loaned the rifle to McKennery for this target shooting trip. R. at 2.

Tragically, Nadauld's trust was misplaced. On September 14, 2021, instead of going on a shooting trip as he told Nadauld, McKennery took Nadauld's rifle to a rooftop in Balboa Park and

opened fire, killing nine people and injuring six others. R. at 2. Hearing about this on the news, Nadauld asked McKennery where he was and if he heard anything about the shooting. R. at 26. McKennery sent Nadauld a picture of himself in Arizona target shooting and told Nadauld he had not heard about the shooting. R. at 26.

Meanwhile, In Balboa Park, a massive manhunt began. R. at 3. Under intense media pressure and without concrete leads, law enforcement cast a broad net to find the shooter. R. at 3, 31. Investigators first looked at security footage from the park and saw forty individuals fleeing the scene on foot. R. at 3. Law enforcement could not identify these individuals, so they turned to recordings of fifty vehicles that left the scene of the shooting. R. at 3. First, officers checked the registered owners of these vehicles against various databases. R. at 3. However, they found none of the vehicle's owners were members of law enforcement, had a violent criminal history, or were legally registered assault rifle owners. R. at 3. After this approach came up empty, law enforcement turned to their APLR database to determine the previous movements of the vehicles at the park. R. at 3. This included McKennery's Vehicle. R. at 3.

In addition to the vehicles at the park during the shooting, law enforcement retrieved the APLR tracking data for all the people who lawfully owned registered assault rifles. R. at 3. This included Nadauld. R. at 3. Law enforcement tracked how often drivers at the park during the shooting associated with those on the assault rifle registry using data from the APLR. R. at 3-4. Being friends and coworkers, Nadauld and McKennery were one of ten pairs law enforcement determined to associate most frequently. R. at 3-4. Based on these associations alone, law enforcement placed pole-mounted surveillance cameras in front of the rifle-owning half of each designated pair. R. at 4.

On September 25, 2021, law enforcement sent letters to each of the ten surveilled homes, stating they had one month to make their rifles inoperable before officers would inspect them. R. at 4. Nadauld received his letter on September 27, 2021. R.at 4.

On September 28, 2021, an unidentified caller, claiming to be the Balboa Park shooter, threatened to commit a school shooting. R. at 4. On September 29, 2021, at 5:23 pm, the pole-mount camera placed near Nadauld's house recorded McKennery pulling into the driveway, giving Nadauld a large duffel bag, and then leaving. R. at 4.

Just before 6:00 pm, FBI Officers Hawkins and Maldonado arrived. R. at 4. Officer Maldonado, a rookie, initially hesitated to contact Nadauld and wanted to wait for backup. R. at 23. However, Hawkins, a veteran Officer, assured her they did not need backup. R. at 23. The two agents accosted Nadauld at his front door and demanded to see his rifle to ensure it was inoperable. R. at 4. After some back-and-forth, Nadauld offered to bring the rifle out to the Officers so they could inspect it. R. at 23. The Officers did not accept Nadauld's offer and demanded to enter his home. R. at 23. Nadauld told the Officers they did not have permission to enter. R. at 23. However, Officer Hawkins didn't take no for an answer, and simply said, "I don't think so Nick" before marching past Nadauld and through his front door. R. at 23.

Nadauld protested "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. Hawkins ignored Nadauld's plea and barked "Where's the gun Nick?" R. at 24. After asking this, Hawkins instructed Maldonado to search each room for the rifle. R. at 24.

Nadauld attempted in vain once more to stop the agents' search, saying "Hey, what's going on here? I don't want you in my house!" R. at 24. At this, Hawkins confronted Nadauld about the

shooting and about whether he had given his rifle to Frank McKennery. R. at 24. As Hawkins did this, Maldonado searched Nadauld's home room by room. R. at 24. Moments later, Maldonado emerged from Nadauld's bedroom holding the rifle. R. at 24.

At this point, the Agents told Nadauld he was the prime suspect in the Balboa Park shooting. R. at 24. Next, they briefly questioned him, absent *Miranda* advisements, about his role in the shooting and his relationship with McKennery. R. at 24. Finally, they placed Nadauld in handcuffs and took him from his residence. R. at 24.

After Nadauld's arrest, law enforcement went to McKennery's house to arrest him. R. at 4. Upon arrival they heard a gunshot from inside the house and found McKennery lying dead on the floor. R. at 4. Next to his body, they found a suicide note in which McKennery confessed to the Balboa Park shooting. R. at 4, 37. McKennery's note also stated that the person who gave him the rifle (Nadauld) bore no responsibility for the shooting and had no knowledge of McKennery's actual intended use of the rifle. R. at 4, 37.

On October 1, 2021, Petitioner charged Respondent, Nick Nadauld, with nine counts of second-degree murder under California Penal Code Section 187, nine counts of involuntary manslaughter under California Penal Code Section 192, one count of lending an assault weapon under California Penal Code Section 30600, and one count for failure to comply with the assault rifle requirements under California Penal Code § 30915. R. at 1. In response, Nadauld filed a timely Motion to Suppress Evidence, pursuant to California Penal Code § 1538.5. The Superior Court of San Diego denied Nadauld's motion to suppress on November 21, 2021, he appealed. R. at 1,12. On June 3, 2022, the California Fourth District Court of Appeals, Division One found for Nadauld, granted his motion to suppress, and remanded the case. R. at 13, 21. Petitioner sought

review from the California Supreme Court who denied Certiorari R. at 13, 21. Petitioner then filed a writ of certiorari with this Court, which was granted on September 23, 2022.

SUMMARY OF ARGUMENT

Neither technological advances nor the seriousness of the crime being investigated supersedes the protections of the Fourth Amendment. Courts must apply these protections in both cases involving new law enforcement technology and the most severe crimes. Otherwise, these advances and crimes will be used to justify government encroachments into the sanctity of people's homes and private lives. Nadauld respectfully asks this Court to renew and reinforce these protections and affirm the Ninth Circuit's decision below.

First, the Ninth Circuit correctly applied this Court's precedents when it held the government accessing Nadauld's location data was a search requiring a warrant. A search occurs where a person has a reasonable expectation of privacy and the government, absent a recognized exception, searches are unreasonable without a warrant. Nadauld had a reasonable expectation of privacy as to his movements and associations. The government invaded his expected privacy without a recognized exception when it accessed at least six months of location information to determine with whom Nadauld associated.

Second, this Court should uphold the Ninth Circuit's decision that the search of Nadauld's residence and subsequent seizure was illegal. For a search of a residence to be legal under the Fourth Amendment, absent a warrant, there must be probable cause based on articulable facts, based on a likelihood that the evidence will be found in plain sight, or the suspect committed the crime. Additionally, there must be an exigent circumstance coupled with probable cause to legally justify a warrantless entry. Officers Hawkins and Maldonado lacked both requirements. Since the

officers lacked probable cause and exigent circumstances, the evidence seized is inadmissible at trial under the fruit of the poisonous tree doctrine.

Accordingly, this Court should affirm the ninth circuit's ruling. In its opinion, the Ninth Circuit correctly held the use of the APLR data was an invasion of privacy search and required a warrant and properly concluded the evidence obtained from the illegal search of Nadauld's home was fruit of the poisonous tree. This finding furthers the individual's rights against harmful police practices and keeps law enforcement accountable when they exceed Constitutional boundaries. Thus, the time is ripe for this Court to reaffirm its longstanding protections against unreasonable searches and seizures.

STANDARD OF REVIEW

The standard of review for a motion to suppress has two parts. *United States v. Favors*, 75 F. App'x 377, 379 (6th Cir. 2003). When conclusions of law predominate the case, the case is reviewed *de novo*. *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE NINTH CIRCUIT COURT'S DECISION THAT THE GOVERNMENT'S USE OF THE LICENSE PLATE READER DATA TO LEARN THE WHOLE OF NADAULD'S MOVEMENTS WAS A SEARCH UNDER THE FOURTH AMENDMENT REQUIRING A WARRANT

The Fourth Amendment protects "[t]he right of the people to be secure…. against unreasonable searches…." U.S. CONST. amend. IV. A Fourth Amendment search occurs when a person's justifiable, reasonable, or legitimate expectation of privacy is invaded by government

action. *Smith v. Maryland*, 442 U.S. 735, 740 (1979), citing *Katz v. United States*, 389 U.S. 347 (1967).

To be reasonable and therefore lawful under the Fourth Amendment, a government search for evidence of criminal activity generally requires a warrant. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Without a warrant, a search is lawful only if it falls within a specific exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 382 (2014) (*citing Kentucky v. King*, 563 U.S. 452,457-461 (2011)).

a. Nadauld Had a Reasonable Expectation of Privacy as to the Whole of His Movements and Associations.

To be reasonably protected by the Fourth Amendment two elements must be met: (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*, 442 U.S. at 740 (*quoting Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

(1) In *Katz*, this Court held, A person does not surrender a subjective expectation of privacy by venturing into the public sphere. 389 U.S. at 347. Further, in *Carpenter v. United States*, this Court held people generally have a subjective expectation that ". . . law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalog every single movement of an individual's car for a very long period." 138 S.Ct. 2206, 2217 (2018) (*quoting United States v. Jones*, 565 U.S. 400, 430 (2012)((Alito, J., concurring)). In his *Carpenter* opinion, Chief Justice Roberts cited concurring opinions from Justices Alito and Sotomayor in *Jones*. Justice Roberts's opinion reasoned that "long-term surreptitious tracking of a person's vehicle via GPS or cell phone signal 'impinges on expectations of privacy'—regardless of whether

those movements were disclosed to the public at large." *Carpenter*, 138 S.Ct. at 2231 (*quoting Jones*, 565 U.S. at 430 (Alito, J. concurring); and *id*., at 415, (Sotomayor, J. concurring)).

(2) Once a subjective expectation of privacy is shown, the court must next determine whether this expectation is "one society is prepared to recognize as reasonable." *Smith*, 442 U.S. at 740. There is no bright-line rule for this determination. *Carpenter 138 S.Ct. 2206,* at *2217*. However, this Court holds two guideposts: the Fourth Amendment secures people's "privacies of life" against "arbitrary power," 138 S. Ct. at 2214, and to "place obstacles in the way of a too-permeating police surveillance." *United States v. Di Re,* 332 U.S. 581, 595 (1948).

This Court used these guideposts when looking at the facts of *Carpenter*. There, Law Enforcement used information from Carpenter's cellphone gathered over 127 days that generated over 12,000 location points, to determine whether Carpenter was at or near the scenes of several bank robberies. *Carpenter,* 138 S.Ct. 2206, at 2212. This Court determined that the large repository of information detailing a Carpenter's location over time gave law enforcement "an intimate window into [his] life" which permeated not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Carpenter,* 138 S. Ct. 2206, at 2217. This Court determined that the window created by this location information allowed the government to intrude upon the "privacies of life." *Carpenter,* 138 S.Ct. 2206; quoting, Riley, 573 U.S. 373, 403 (2014).

However, when a person willingly provides private information to a third party, they fail to show a subjective expectation of privacy. See; *United States v. Miller*, 425 U.S. 435 (1976) (Defendant had no subjective expectation of privacy over bank's business records which consisted of information he had willingly provided); see also *Smith,* 442 U.S. 735 (Defendant had no

subjective expectation of privacy in the numbers he had contacted because he willingly provided them to the phone company by dialing the phone). This "third-party doctrine" from *Smith* and *Miller* has two elements. First, the information is possessed by a party other than the government or the individual claiming the privacy right, and second the individual claiming the right willingly provided the information to the third party generally for some business purpose. *Carpenter*, 138 S.Ct. 2206, at 2216. However, in *Carpenter*, even though both elements were met, this Court declined to extend the third-party doctrine to Carpenter's Cell Site Location Information (CSLI) because it gave authorities the "ability to chronicle a person's past movements," and held Carpenter still maintained a subjective expectation of privacy as to his movements. *Id.* at 2217.

In the present case, the government gathered location information on Nadauld surreptitiously and stored that location for at least six months through the over 300 cameras in the APLR system. R. at 3,39-40, Cody Dulaney, *Escondido, La Mesa Police Keep Sharing Driver Location Data Across U.S. Despite Legal Concerns*, TIMES OF SAN DIEGO.COM (Jan. 25, 2022) https://timesofsandiego.com/politics/2022/01/25/police-sharing-drivers-location-data/. At a minimum the government determined Nadauld's occupation and association with McKennery from the APLR date. R. at 4. Further, the record states that the Government determined the frequency with which Nadauld associated with McKennery. R. at 4. The information gathered in this case is nearly identical to the information the CSLI data provided the government in *Carpenter*. While APLR may not contain as many location points as CSLI, both systems show when a person leaves their residence, where they go, when they return, and with whom they associate. In both cases, the government can use the data to look back in time and determine who a person was with and how frequently based on a vast collection of location data.

Further, the longer a period of time the data sets cover the more they reveal. In *Carpenter*, the government only looked a 127-day period. 138 S.Ct. 2206, at 2212. This Court held that time was sufficient to create the permeating police surveillance into the privacies of Carpenter's life that the Fourth Amendment prohibits. Here, Nadauld's location data for at least six months to a year was used. R. at 40. Just as in *Carpenter*, the information gathered came from such a long period of time it would have revealed not only Nadauld's social and professional association with McKennery, but certainly any other familial, political, professional, religious, and sexual associations. This Court described all these associations as the privacies of life which are protected by the fourth Amendment against arbitrary government power. As such, Nadauld's expectation of privacy in these areas was reasonable.

Additionally, this Court's third-party doctrine from *Smith* and *Miller* does not apply in this case. First, as the record states the APLR system is not the record of a private entity like the bank records in *Miller* or the phone company records in *Smith*. They are exclusively for law enforcement purposes and are only available for law enforcement use. R. at 39. There is no "third party" in this case, only the government and Nadauld. The second element fails, unlike Smith and Miller's bank records or phone records Nadauld did not willingly provide the APLR data: the cameras simply took pictures of his license plate and recorded the time and location to the database. The record contains no indication Nadauld was aware of this, much less that he provided the location information willingly. This case, like *Carpenter*, involves government surveillance so pervasive that it revealed the whole of his movements. Even if the elements of the doctrine were met, he could not have meaningfully been aware of the depth and breadth of the information he was revealing. Therefore, the third-party doctrine does not apply.

Thus, Nadauld had a reasonable expectation of privacy in the information the APLR data revealed and did not lose this expectation because he did not voluntarily provide it to a third party.

b. The Government Invaded Nadauld's Expectation of Privacy by Accessing his License Plate Reader Data.

A search occurs when the government either invades a citizen's reasonable expectation of privacy, or when the government physically intrudes on the private property of someone to obtain information. *Jones*, 565 U.S. 400, 404 (2012).

Where an individual's expectation of privacy is reasonable, the government need only access the information to invade that expectation. *See Carpenter*, 138 S.Ct. 2206 at 2217. Generally, such searches involve the use of technology. For example, in *Katz* this Court held FBI agents searched by listening to Katz's phone conversation with an electronic recording device. 389 U.S. 347, 352. Similarly, in *Kyllo v. United States*, this Court held federal agents' use of a thermal imaging device to see heat coming from inside Kyllo's house was a search. 533 U.S. 27,40 (2001). Finally, in *Carpenter*, this Court held law enforcement's use of the cell site data to determine Carpenter's location was a search. 138 S.Ct. 2206 at 2217.

In *Kyllo* this Court held that because the government used technology, not in general public use, to obtain information they could not otherwise obtain without physical, trespassory intrusion into a constitutionally protected area, their actions constituted a search. 533 U.S. 27 at 34. *Jones* provides an example where this Court held that the government placing a GPS tracking device on a suspects' vehicle to track the driver's movements was a physical intrusion on private property constituting a search under the Fourth Amendment. 565 U.S. 400 at 404.

Where technology allows location tracking, and the duration of the tracking is short, the number of movements observed is low, and as a result, not much detail about the person's life is exposed, and the lesser the government's privacy intrusion. *See, e.g., United States v. Knotts* 460 U.S. 276, 281-82 (1983) (holding that tracking for one trip from a chemical store to a cabin using a hidden GPS device was not an invasion of privacy constituting a search); *see also United States v. Yang*, 958 F.3d 851, 855-56 (9th Cir. 2020) (holding that tracking a suspect's movements in a rental car determined by license plate reader records for one day was not an invasion of privacy constituting a search). However, where the length of the tracking is extensive, the number of movements observed is great, and as a result, the greater detail about the person's life is exposed, and the greater the government's privacy intrusion. *Carpenter*, 138 S.Ct. 2206 at 2217. While no bright-line rule exists for when location tracking constitutes a search, in Justice Alito's concurrence in *Jones* (cited by the majority in *Carpenter*), Justice Alito stated that "[w]e need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark." 565 U.S. 400 at 430. Thus, based on this Court's precedent, it is significantly more likely that a search occurred where tracking went on for more than four weeks. *Id.*

Presently, the government's actions involve technology, just as in *Katz*, *Kyllo*, *Jones*, and *Carpenter*. The APLR system, like the thermal imaging device in *Kyllo*, was not in general public use. Further, like *Jones* and *Kyllo*, the APLR system allowed the government to do something that would not have otherwise been possible without some sort of physical trespass. Here, going back in time and obtaining detailed information about Nadauld's comings and goings was impossible without the APLR system. To replicate this information without ALPR, the government would need one of two things: (1) place a GPS device on Nadauld's vehicle, and which this Court ruled

in *Jones* was a Physical intrusion, constituting a search under the Fourth Amendment, or (2) obtain Nadauld's CSLI data like the FBI did in *Carpenter*, which this Court held was a search. *See generally,* 138 S.Ct. 2206.

Further, this case is distinguishable from *Knotts* and *Yang*. In Knotts the information obtained by the hidden tracker was real-time location information from one trip that could have been obtained by simply following Knotts's van which would not have been a search or trespass under the Fourth Amendment. 460 U.S. 276 at 277. Similarly, in *Yang* officers used only a day's worth of license plate reader information to locate a suspect. 958 F.3d 851 at 855-56. This could have been accomplished simply by patrol officers spotting the suspect on the road and reporting his whereabouts, which would not have constituted a search under the fourth Amendment. Conversely, to accomplish what the APLR did by use of non-trespassory or traditionally investigative techniques would have required either that Nadauld was followed by officers prior to any criminal activity involving him even occurring, for at least a year with meticulous notes maintained about where he went and when, or after the fact it would have required questioning hundreds of witnesses about where Nadauld was and when every day for over a year. These actions are not only impractical but also impossible. The information the Government obtained was only alternatively available through either trespassing on Nadauld's property or by use of cellphone data which this court held constitutes a search.

Thus, when the government accessed the APLR records containing Nadauld's location information they conducted a search under the fourth amendment.

c. The Government Did Not Establish a Valid Exception to the Fourth Amendment's Warrant Requirement.

Warrantless searches are generally unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652–653 (1995). Without a warrant a search "is reasonable only if it falls within a specific exception to the warrant requirement." *Riley*, 573 U.S. 373 at 382.

In *Carpenter*, this court held that a warrant is generally required in accessing data to which a suspect has a legitimate privacy interest. 138 S.Ct. 2206, at 2222. This Court determined the one exception that would generally apply to such a search would be exigent circumstances. *Id*., at 2222-23. This Court discussed exigent circumstances where warrantless use of location information would be reasonable. *Ibid*. These included: (1) ongoing emergencies, (2) fleeing suspects, (3) imminent bomb threats, (4) active shootings, and (5) child abductions. *Ibid*. This Court further expounded that accessing location data after the fact criminal investigations require a warrant. *Ibid*.

Presently, when the government accessed Nadauld's location data more than a week after the shooting had concluded. R. at 3. The government was not only not pursuing a suspect but had not yet identified a suspect. R. at 31. Further still, the anonymous call about a school shooting happened after the government accessed the APLR data to determine Nadauld's location information. R. at 4. None of the exigencies described by this Court in *Carpenter* were present in this case when the government accessed the location data. Despite how horrific the crime was this was an after the fact criminal investigation.

Thus , there were no exigencies to make obtaining a warrant unreasonable, and the Fourth Amendment required the government to obtain a warrant prior to accessing Nadauld's APLR location data.

II. THIS COURT SHOULD AFFIRM THE NINTH CIRCUIT COURT'S DECISION THAT THE ENTRY AND SUBSEQUENT SEARCH OF NADAULD'S RESIDENCE LACKED PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES, MAKING THE EVIDENCE OBTAINED THE FRUIT OF THE POISONOUS TREE.

The Fourth Amendment protects the rights of Americans "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause…and the persons or things to be seized." U.S. CONST. amend. IV. Subsequent case law has further defined critical aspects of the Fourth Amendment to limit warrantless arrests. *See generally* H.H. Henry, *Lawfulness of Nonconsensual search and seizure without warrant, prior to* arrest, 89 A.L.R.2d 715. The Supreme Court enforced the standard of presumptive warrant requirements for searches in *Katz v. United States.* 389 U.S. 347, 357 (1967).

For a warrantless search or seizure to be legal, reasonable probable cause and exigent circumstances must exist at the time. *Carroll v. United States.*, 267 U.S. 132, 155-156 (1925). While an unlawful search and seizure does not prohibit an individual's prosecution or ensuing conviction, *Gerstein v. Pugh*, 420, U.S. 103, 119 (1975) suppresses the illegally seized evidence. *Weeks v. United States*, 232 U.S. 383, 398 (1914). If there is a lack of exigent circumstances when the police searched and seized evidence without a warrant, the search is unlawful, and evidence found is excluded from use in a criminal case based on the doctrine of "The Fruit of the Poisonous Tree." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

a. Officers Hawkins and Maldonado did not establish probable cause to enter Nadauld's home without a warrant.

The Fourth Amendment of the Constitution prohibits the warrantless search and seizure by government agents. U.S. CONST. amend. IV. To violate someone's Fourth Amendment rights, there must be an actual, objective, reasonable expectation of privacy concerning the place or object searched. *California v. Greenwood*, 486 U.S. 35, 39 (1988). Probable cause requires more than "mere suspicion" to exist, *Gasho v. United States,* 39 F.3d 1420, 1428 (9th Cir. 1994), and requires specific facts to justify that a reasonable police officer would believe that a person has committed or is about to commit a crime. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). To determine whether probable cause exists, the court must "examine the totality of the circumstances" in a common-sense, non-technical determination based on articulable facts which is based on a likelihood that the evidence will be found in plain sight, or the suspect committed the crime. *Illinois v. Gates*, 462 U.S. 213, 231 (1983). While certain circumstances may permit warrantless searches, the presumption favors requiring a warrant for a search. *Katz v. U.S.,* 389 U.S. 347, 357 (1967). Further, there is a lack of probable cause if "the circumstances relied on are susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities." *Gasho,* 39 F.3d at 1432 (quoting *United States v. Moore*, 483 F.2d 1361, 1363 (9th Cir. 1973) (citing *United States v. Selby*, 407 F.2d 241, 243 (9th Cir. 1969))).

As in the cases above, balancing the intrusion of privacy on the accused and the duties of law enforcement requires the consideration of factors that determine whether the Fourth Amendment is violated. Probable cause is, in essence, "the North Star of the Fourth Amendment jurisprudence." Craig S. Lerner, *The Reasonableness of Probable Cause,* 81 Tex. L.Rev. 951, 954 (2003).

In the present case, officers failed to follow the "North Star" of the Fourth Amendment when they failed to establish probable cause to search and seize Nadauld's weapon. With few leads

and an irate public, law enforcement surveilled fifty people they knew to be at the park. Nadauld was not on this list. Nadauld was on a separate list of an additional fifty people that had registered weapons similar to what officials believed to be used in the shooting. When they witnessed McKennery drop at off the bag at Nadauld's home, they assumed that based on the size of the bag, and that Nadauld owned a rifle that used standard ammunition like the murder weapon, this established sufficient probable cause. However, based solely on this information, there was less than a two-percent chance that the duffle bag dropped off by McKennery contained the murder weapon.

In fact, if the two lists of fifty people are combined to a total of at least 100 suspects, that meant that Nadauld had just a one-percent chance of being the shooter. Furthermore, since law enforcement, for no apparent reason, ruled out all military and law enforcement rifle owners, this percentage is superficially larger than the actual chance that Nadauld was either the shooter or the owner of the weapon used in the shooting, had law enforcement considered each individual in San Diego County and the surrounding area who had access to a similar rifle. To properly establish probable cause, law enforcement, specifically Officers Hawkins and Maldonado required more than mere suspicion that the duffle bag contained a weapon that, with no known certainty used in the Balboa Park murders.

Additionally, probable cause may not be found in a situation "susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities." *Gasho*, 39 F.3d at 1432. At the time of the search, police monitored at least 100 suspects. Of all of these suspects, the interaction between the two of exchanging a duffle bag, which could realistically have been an amalgam of things, was targeted as being definitively nefarious. This duffle bag in question easily

could have contained infinite possibilities, yet there were no visible signs that the bag contained incriminating evidence or that a crime was being committed.

The actions the officers observed were vague and lacked definitiveness. This Court previously held that "to hold an officer may act in his own unchecked discretion upon information too vague and from too untested a source . . . to accept it as probable cause for an arrest warrant, would subvert fundamental policy." *Wong Sun*, 371 U.S. at 482. This fundamental policy is that improper actions cannot be retroactively justified based on the officers' findings. *Id.* at 484 (*citing Byars v. United States*, 273 U.S. 28 (1927)). Just as officers Maldonado and Hawkins's actions in this case cannot be retroactively justified by the fact that the duffel bag actually contained the rifle used in the Balboa Park shooting.

Thus, Officers Hawkins and Maldonado failed to adequately establish probable cause due to the scant amount of factual information that the officers relied upon to justify entering Nadauld's residence. Based on the lack of concrete facts used by the officers to justify their warrantless entry, probable cause did not exist.

b. Officers Hawkins and Maldonado did not identify any exigent circumstances to validate a warrantless entry of Nadauld's home.

As previously established, the Fourth Amendment dictates that any search or seizure requires probable cause and a valid warrant. 138 S. Ct. at 2213 (2018). In the absence of probable cause, a warrantless search may be legal if exigent circumstances exist. *Kentucky v. King*, 563 U.S. 452, 459 (2011). Exigent circumstances exist when there is probable cause: (1) to save life or limb; (2) that a suspect in a continuous chase committed a crime (hot pursuit); (3) that a suspect therein committed a grave or violent offense and is an immediate threat; or (4) that evidence is about to be destroyed or removed from the premises. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990); *E.g.*,

Michigan v. Tyler, 436 U.S. 499, 510 (1978); *U.S. v. Santana*, 427 U.S. 38, 42 (1976); *Kentucky v. King*, 563 U.S. 452, 461 (2011).

Another exception is the plain view doctrine. This applies in a search or seizure where the officers observe evidence in plain sight from a space where they have a lawful right to be, that they have probable cause to believe is incriminating in nature, or that one of the aforementioned exigent circumstances exists. *Arizona v. Hicks*, 480 U.S. 321, 323 (1987). To be in plain view, a lawful search must be underway, and the evidence seized must be immediately apparent as evidence of a crime (probable cause). *Coolidge v. New Hampshire*, 403 U.S. 443, 463-464 (1971). Furthermore, "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances,'" (*Id*. at 468.) and belief or suspicion does not rise to the level of probable cause. *Aguilar v. Texas*, 378 U.S. 108, 112 (1964) (*quoting Nathanson v. United States*, 290 U.S. 41, 47 (1933)).

The purpose of allowing for exceptions to the Fourth Amendment warrant requirement is to balance especially pressing or urgent needs of law enforcement or public officials (such as firefighters) to enter a home to do limited searches. *See generally Michigan v. Tyler*, 436 U.S. 499, 509-11 (1978). This policy is meant to account for specific, unusual circumstances in which, in the time it would take to get a warrant: (1) someone may be gravely injured or die; (2) evidence may be destroyed; (3) police may be in hot pursuit of a suspect; or (4) or there is a clear, immediate threat of a violent offense occurring. *Olson*, 495 U.S. at 100. These carefully specified exigent circumstances were delineated by this Court "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961).

Presently, the government's claim of the exigent circumstance, that Nadauld committed a grave or violent offense that posed an immediate threat, is wholly invalid. R. at 11. In *Minnesota*

v. Olson, this Court found no exigent circumstances and held that the warrantless arrest of a murder suspect was unconstitutional where the murder weapon was previously recovered, there was no suggestion of danger to those with the suspect inside the residence, and the suspect could not leave without apprehension by law enforcement. *Id.* at 91-92. Similarly, Nadauld was under surveillance by police and could not have left the residence without law enforcement knowing. R. at 3.

Additionally, while the government contends that the phone call made to law enforcement threatening another shooting was justification for an exigent circumstance, there was little known about who made the phone call, and if the phone call was credible, a copycat, or even a prank. R. at 11. There was also no evidence that Nadauld was an immediate threat to anyone. The idea that Nadauld could have made the threatening phone call is pure speculation and entirely unsupported by fact.

Further, there was no causal link between the initial attack and Nadauld which would lead to the conclusion that Nadauld was a part of the shooting. The only connection to the shooting that law enforcement made was that Nadauld was one of 100 suspects monitored by law enforcement, and had contact through work with a suspect who was known to be at Balboa Park at the time of the shooting. R. at 2. These details, coupled with the fact that others were present at Balboa at the time of the shooting and on the assault rifle list that officials were investigating attributes to a lack of concrete evidence. R. at 3.

When the officers saw the exchange of the duffel bag, rather than take the time to get a warrant and properly seize the weapon, they made unsupported inferences of Nadauld's participation in the shooting. There were also no signs that Nadauld would attempt to dispose of the weapon, flee, or commit an act of violence. Under pressure from the media and survivors of the attack, law enforcement made a brash conclusion. R. at 29-32. These unsupported inferences

fall to the level of reasonable suspicion, which legally does not support probable cause of an exigent circumstance.

Finally, the plain view doctrine does not apply to this scenario. Since the officers did not have a warrant to search the premises, officers would need probable cause and an exigent circumstance to legally search the residence, and, can only seize if the evidence is found in plain view. *Hicks*, 480 U.S. at 323. The plain view doctrine denotes that police cannot meaningfully interfere with a possessory interest (e.g., lift or move). *Id.* For example, in *Hicks*, this Court found that the seizure of stereo equipment was illegal and did not satisfy the plain view doctrine because the officer moved the stereos to read the serial numbers, called the numbers into the station to confirm they were stolen, and then seized them. *Id*. This Court determined that the government meaningfully interfered with the possessory interest of the accused, and overturned Hicks' conviction. *Id.*

Similar to Hicks, even if officers had passed the initial threshold of establishing an exigent circumstance, the actual weapon was not in plain view: only the duffel (which showed no signs of holding the weapon other than its size) was in plain view of the officers after they entered the house and searched the bedroom. This scenario does not satisfy either of the two elements of plain view because (1) the seizure was not lawful, and (2) the evidence seized was not immediately apparent as evidence of a crime. The rounds that were recovered from the crime scene were "a caliber commonly used in a wide variety of assault rifles." R. at 2. Even if the weapon was in plain view outside the duffle bag, there was no direct evidence linking Nadauld's rifle to the Balboa shooting. The conclusion made by the officers was, at best, a hunch.

c. Officers Hawkins and Maldonado's warrantless entry was illegal, thus prohibiting the use of evidence collected under Fruit of the Poisonous Tree.

To uphold the Constitutional guarantee of "sanctity of home and inviolability of the person," evidence seized during an unlawful search cannot be used as evidence against the defendant. *Wong Sun,* 371 U.S. at 484. Also known as the exclusionary rule, the prohibition of evidence collected in an unlawful search extends to indirect and direct findings from such illegal searches. *Coolidge*, 403 U.S. at 463. To deter improper conduct by law enforcement and to further the individual's rights, the courts may not use evidence of unconstitutionally obtained verbal and physical evidence. *Wong Sun*, 371 U.S at 486. Further, this rule extends using evidence that violates the Fourth Amendment in state proceedings. *Mapp*, 367 U.S. at 663. The only exception to this is that if there is sufficient attenuation to dissipate the taint, subsequent evidence found after an unlawful arrest may be admissible. 371 U.S. at 491.

In *Wong Sun*, based on a tip that James Toy was selling heroin out of his laundromat, law enforcement approached Toy. 371 U.S. at 474. When Toy ran to his sleeping quarters in the back of the laundromat, law enforcement chased, interrogated, and arrested him. *Ibid.* Toy moved to suppress the heroin seized during the warrantless arrests. The court denied his motion and convicted him. *Id*. at 477. On review by the Supreme Court, in the majority opinion, Justice Brennan explained that Toy's warrantless arrest violated the Fourth Amendment because law enforcement agents lacked probable cause or exigent circumstances. *Id.* at 479. As such, this Court concluded that anything collected after the unlawful entry (the heroin seized and subsequent confession) was fruit of the poisonous tree. *Id*. at 488.

Like *Wong Sun*, officers forcibly entered Nadauld's residence without a warrant or exigent circumstance and collected evidence that was used to convict him in a criminal proceeding. R. at 5. Similar to Toy, Nadauld's evidence must be excluded because it resulted from a warrantless search where there was a lack of probable cause and exigent circumstances. Based on *Wong Sun*,

any evidence collected, or statements made from the original point in time where the Fourth Amendment violation occurred, would be tainted. Comparable to *Wong Sun*, this point in time begins when officers entered Nedauld's home. Just as Toy's heroine was seized and statements made during the illegal search were deemed tainted, the seized rifle and statements made by Nedauld are similarly tainted. Unlike Toy's subsequent confession, which was made after he was released on bail, there is no intervening circumstance to purge the taint and allow the admission of statements or evidence collected from Nedauld's residence. *Id.* at 491.

Since probable cause was not established, and none of the four exigent circumstances were present, the warrantless entry and subsequent search were illegal. Thus, the weapon found in the bag in Nadauld's bedroom during the search is the fruit of the poisonous tree. Additionally, the statements made after Officer Hawkins intensely questioned Nadauld during the unlawful search are also the fruit of the poisonous tree. Similar to *Wong Sun*, where Toy's statements made during the unlawful search were found inadmissible, Nedauld's subsequent statements are also tainted since they were made during an illegal search. R. at 24.

In summary, the evidence and subsequent statements made during the unconstitutional search and seizure are fruits of the poisonous tree.

CONCLUSION

For these reasons, this Court should Affirm the Ninth Circuit Court of Appeal's decisions.