R28

IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

NICK NADAULD,
Respondent.

No. 1788-850191

Brief for Respondent

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STATEMENT OF THE ISSUES PRESENTED

I. Whether the warrantless use of Automated License Plate Reader technology and video cameras to surveil an individual's physical movements, locations, and personal associations may be justified under the Fourth Amendment.

II. Whether a warrantless search of a home may be justified under the Fourth Amendment in the absence of probable cause or a showing of exigent circumstances.

STATEMENT OF THE FACTS

Nick Nadauld ("Nadauld") is a construction worker in San Diego. R. at 2. In 2016, Nadauld's father, a former member of the military, passed away. R. at 2. Upon passing, Nadauld's father left Nadauld his M16A1 automatic assault rifle ("M16"), which Nadauld registered and legally owns. R. at 2. In early September 2021, Nadauld lent his coworker, Frank McKennery ("McKennery"), the M16 upon McKennery's request to borrow it for a target shooting excursion.

On September 14, 2021, a masked shooter fired into an open crowd in Balboa Park using an M16. R. at 2. After learning this, Nadauld reached out to McKennery around 1 p.m. to check in on him. R. at 26. McKennery told Nadauld that he was in Arizona and sent a picture of himself holding the M16 in a desert with a target in the background. R. at 26. Nadauld did not believe that McKennery was involved in the incident. R. at 2.

Police arrived at Balboa Park as hundreds of individuals were fleeing the scene. R. at 29. The officers could not identify the gunman, nor could they locate the weapon. R. at 29. The shooter left a manifesto at the scene indicating their intent to commit another mass shooting, but law enforcement later uncovered evidence that this manifesto was fabricated to lead police on a false trail. R. at 2–3. Instead, law enforcement learned that the gunman acted alone to kill a woman he had a vendetta against. R. at 37. The only other evidence retrieved from the scene were NATO cartridges, a caliber used in a variety of assault rifles. R. at 3.

Due to the lack of leads, law enforcement used numerous methods to locate the gunman. R. at 3. Surveillance footage from security cameras near Balboa Park captured about forty individuals that fled the scene on foot. R. at 3. However, because the footage was blurry and none of these people came forward to identify themselves, the government was unable to pursue

these individuals. R. at 3. Police next investigated the owners of the fifty vehicles who left the park following the shooting. R. at 3. None of the vehicle owners had previously been convicted of violent crimes nor were they members of the religion referenced in the manifesto. R. at 3. The list of vehicle owners did, however, include McKennery. R. at 3. Police also cross-referenced the fifty vehicle owners leaving Balboa Park with a list of the fifty registered assault rifle owners in the area. R. at 3. None of the vehicle owners had a registered assault rifle. R. at 3-4. Nadauld was included on this list of fifty registered assault rifle owners. R. at 3.

The officers subsequently retrieved information from the Automatic License Plate Recognition ("ALPR") database about the movements of the vehicles that left the park following the shooting. R. at 3. The ALPR database determines the time and location information for each vehicle scanned. R. at 3. By placing special cameras on police vehicles and poles at intersections, the technology can scan license plates and upload geographical location information to a localized database. R. at 3. The police used the ALPR data to examine the movements of the fifty vehicles that left Balboa Park after the time of the shooting, as well as the movements of vehicles owned by persons on the assault rifle list. R. at 3. Over the course of the next ten days, the police cross-referenced the movements of the group of fifty vehicles that left the park with the group of assault rifle owners. R. at 3-4. In addition to nine other pairings, the results showed an overlap between the locations of Nadauld's vehicle and McKennery's vehicle at similar times. R. at 3-4.

On September 24, 2021, law enforcement placed surveillance cameras on utility poles facing the residences of the ten assault rifle owners whose locations corresponded most with the vehicles who left Balboa Park after the shooting. R. at 4. The officers installed the cameras without a warrant to covertly investigate the residences for any suspicious activity. R. at 4.

On September 25, law enforcement mailed letters to each of the ten assault rifle owners to inform them that officers would visit their homes in one month to determine if their assault rifles were rendered inoperable pursuant to California Penal Code 30915. R. at 4. Nadauld received the letter on September 27. R. at 4.

At around 10:00 a.m. on September 28, 2021, the police received an anonymous call from an individual claiming to be the Balboa Park shooter. R. at 4. The individual stated their next target would be a school. R. at 4. At 5:23 p.m. the following evening, the pole-mounted camera outside Nadauld's home recorded McKennery handing Nadauld a duffel bag. R. at 4. As a result of the exchange, two Federal Bureau of Investigation ("FBI") officers were dispatched to Nadauld's home to investigate. R. at 4. They arrived at Nadauld's door thirty minutes later without a warrant. R. at 4. Nadauld asked the officers whether he was in trouble, and they responded, "maybe." R. at 23. The officers then asked if he still possessed his late father's M16. R. at 23. Nadauld asked the agents why they arrived nearly one month earlier than stated in the letter. R. at 23. The agents did not respond to his question. R. at 23. Instead, they told Nadauld that they wanted to get a head start, which should not have mattered if Nadauld was in compliance with the law. R. at 23.

The agents then asked if Nadauld had anything to worry about, to which Nadauld said no. R. at 23. The officers requested to see the gun and Nadauld answered in the negative, again noting the language in the letter. R. at 23. The officers told Nadauld that they wanted to account for all assault weapons following the Balboa Park shooting, to which Nadauld replied, "I didn't have anything to do with that." R. at 23. The officers then insisted on seeing the gun, so Nadauld offered to bring it to them. R. at 23. The officers responded that they needed to enter Nadauld's home to check the status of the rifle. R. at 24.

For a second time, Nadauld requested that the officers wait outside of his home. R. at 24. Officer Hawkins replied, "I don't think so, Nick," and entered anyway. R. at 24. Nadauld reminded them that he did not consent to their entry and attempted to clarify whether they were permitted to enter anyway. R. at 24. The officers did not answer and instead asked where the gun was located while checking each room of Nadauld's house. R. at 24. When Nadauld repeated "I don't want you in my house," the officers asked if he had something to hide and suggested that Nadauld was the Balboa Park shooter. R. at 24. Nadauld again told the officers that he was not involved in the shooting, claiming "it wasn't my gun!" R. at 24.

After searching each room, the officers located and seized Nadauld's gun. R. at 24. They then told Nadauld that he was the prime suspect for the Balboa Park shooting. R. at 24. Nadauld explained that he was not in possession of the gun on the day of the shooting because McKennery was using it for targeting shooting in Arizona. R. at 24. The officers did not ask any follow up questions and arrested Nadauld instead. R. at 25.

When law enforcement arrived at McKennery's house soon after, they heard a gunshot and found McKennery lying dead inside. R. at 4. Beside him lay a letter confessing that he acted alone as the Balboa Park shooter. R. at 4.

Procedural History

On October 1, 2021, a federal grand jury indicted Nadauld for nine counts of second-degree murder, nine counts of involuntary manslaughter, one count of lending an assault weapon, and one count of failing to comply with California Penal Code Section 30915. R. at 5. At trial, Nadauld moved to suppress the record on several grounds. R. at 5. First, he contended that the warrantless usage of the ALPR database and mounted camera facing his home violated his Fourth Amendment right against unreasonable searches and seizures. R. at 5. Second, he

challenged the constitutionality of the warrantless search of his home. R. at 5. The Superior Court of the State of California denied Nadauld's motion to suppress. R. at 1. The Fourth Appellate District reversed, holding that both the warrantless usage of the ALPR database and the warrantless search of Nadauld's home were unconstitutional. R. at 18-20. The State filed a petition for a writ of certiorari to obtain review by this court. R. at 0.

SUMMARY OF THE ARGUMENT

This court should affirm the holding of the California Fourth District Court of Appeals on both issues. Law enforcement violated Nadauld's subjective and reasonable expectation of privacy when they engaged in prolonged tracking of Nadauld's physical movements and intrusively surveilled his home in the absence of a warrant. Officers Hawkins and Maldonado then violated Nadauld's Fourth Amendment right against an unreasonable search by entering and searching his private residence with neither a warrant, probable cause, nor exigent circumstances necessary to justify a warrantless search. The evidence obtained as a product of these constitutional violations should be suppressed.

The use of the ALPR database and video camera surveillance to track Nadauld's physical movements without a warrant violated his Fourth Amendment rights. The government's ability to search the persons, houses, papers, and effects of American citizens should, like any of its powers, be restrained. Law enforcement violated Nadauld's Fourth Amendment rights by engaging in prolonged tracking of his physical movement and invasive surveillance of his home. This intrusion by law enforcement implicates serious privacy concerns and highlights the necessity of the judiciary to accommodate a rapidly advancing technological society. As surveillance methods become more sophisticated, individuals like Nadauld require effective

safeguards to ensure the government is accountable for its intrusions, especially when they are not done pursuant to a warrant.

The evidence collected from the search of Nadauld's home is inadmissible because law enforcement's search was an unconstitutional violation of the Fourth Amendment. Despite the strong presumption in favor of obtaining a warrant, law enforcement conducted a warrantless, abrasive search of Nadauld's home without meeting an exception to the warrant requirement. In light of the totality of the circumstances, the officers did not have probable cause to conduct a search of Nadauld's residence. Additionally, there was no exigency to justify the warrantless search. Thus, the evidence obtained in the course of law enforcement's search is tainted and must therefore be suppressed as a violation of Nadauld's Fourth Amendment right against unreasonable searches.

STANDARD OF REVIEW

On a motion to suppress, this court reviews legal conclusions *de novo* and factual findings "deferentially" and "for clear error." *See Ornelas v. United States*, 517 U.S. 690, 691 (1996). The facts before this court are not in dispute.

ARGUMENT

I. THE USE OF AUTOMATED LICENSE PLATE READER TECHNOLOGY AND VIDEO CAMERAS TO SURVEIL NADAULD WITHOUT A WARRANT WAS A VIOLATION OF THE FOURTH AMENDMENT

The Fourth amendment protects individuals to be secure against unreasonable searches and seizures. U.S. CONST. amend. IV. This protection extends to both physical and electronic intrusions where there is a reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring). Law enforcement's use of ALPR technology to track the movement of Nadauld's vehicle violated his reasonable expectation of privacy in his physical

movements and should thus be suppressed. Using video cameras to surveil Nadauld's home was derivative of the ALPR data, so this evidence should also be suppressed. Regardless, when viewed in conjunction with the ALPR location data, the video surveillance of Nadauld's home violated his constitutional right against unreasonable searches. In light of both of these constitutional violations the evidence used at Nadauld's trial and conviction should be suppressed.

A. The Use of ALPR Technology to Track Nadauld's Vehicle Constituted a Warrantless Search in Violation of His Constitutional Rights

Nadauld's Fourth Amendment right against unreasonable searches and seizures was violated when the government tracked his physical movements using ALPR. Searches without a warrant are *per se* unreasonable under the Fourth Amendment, subject to limited exceptions. *See Katz*, 389 U.S. at 357. Government intrusion is considered a search if: (1) a person exhibits a subjective expectation of privacy; and (2) the expectation is one that society is prepared to recognize as objectively reasonable. *See id.* at 361 (Harlan, J., concurring). Here, law enforcement tracked the physical movements of Nadauld for ten days without securing a warrant beforehand. R. at 2-4. Therefore, because Nadauld had a reasonable expectation of privacy, tracking his vehicle was a warrantless search violating his Fourth Amendment rights.

1. Nadauld Had a Subjective Expectation that ALPR Technology Would Not Track His Physical Movements

Technology that tracks extensive location data can violate subjective expectations of privacy. *Cf. United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) (claiming that long term use of global positioning system ("GPS") monitoring in investigations infringes on privacy expectations because the system monitors the vehicle's movements). ALPR is capable of accumulating location data to create the same results as extensive GPS monitoring.

R. at 3-4, 39. Here, ALPR was employed to examine the movements of certain individuals, including Nadauld. R. at 3. Nadauld did not expect that his movements and locations would be tracked by law enforcement, and he therefore had a subjective expectation of privacy that was violated.

Further, Nadauld did not expect that the government would engage in perpetual surveillance of his every movement. R. at 17. Because law enforcement employed the use of ALPR technology continuously over an extensive time period, using it to track Nadauld's vehicle constituted "longer term GPS monitoring" as defined by *Jones*. 565 U.S. at 415. Specifically, where surveillance is longer than one road trip across state lines, this court has suggested that a subjective expectation of privacy may apply. *Compare United States v. Knotts*, 460 U.S. 276, 283–84 (1983) (ruling there was no subjective expectation of privacy to be tracked for one car ride), *with Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018) (finding that using 152 days of cell phone location records violated expectations of privacy). Here, ALPR was compiling Nadauld's location data for approximately ten days, thus revealing more information than one vehicle ride. R. at 3-4. Nadauld therefore had a subjective expectation of privacy which was infringed upon through the use of ALPR tracking technology.

The fact that Nadauld's driving was on public roads and his movements were therefore visible to third parties does not defeat his expectation of privacy. Under the third party doctrine, a person has no legitimate expectation of privacy in information voluntarily turned over to third parties. *See Smith v. Maryland*, 442 U.S. 735, 743-44 (1979). However, where physical movement and location data is concerned, this court has refused to apply this doctrine. *See Carpenter*, 138 S. Ct. at 2219; *see also United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010) ("[T]he whole of one's movements over the course of a month is not actually exposed to

the public because the likelihood anyone will observe all those movements is effectively nil."). For example, in *Carpenter*, this court stated that cell phone use does not amount to a voluntary supply of one's location data. *See* 138 S. Ct. at 2220. Likewise here, Nadauld did not voluntarily turn over a log of his physical movements to third parties and yet, the ALPR technology was used to track the movements and locations of his vehicle. R. at 3. Therefore, the third party doctrine does not diminish Nadauld's subjective expectation of privacy.

Finally, rights under the Fourth Amendment must be accorded more protection in light of new updates to technology. Courts have considered the third party doctrine as ill-suited to the digital age, where individuals can now reveal a great deal about themselves by doing mundane and routine tasks, such as driving a car. *See United States v. Moalin*, 973 F.3d 977, 992 (9th Cir. 2020); *see also* Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, U. ILL. J.L. TECH. & POL'Y 281, 282 (2011) (noting that the third party doctrine is outdated given the invasiveness of modern surveillance technology). ALPR aptly demonstrates the invasiveness of modern technology. It was able to not only track Nadauld's location, but use cross-referencing technology to track overlaps between Nadauld's location data and McKennery's. R. at 3-4. In light of modern-day technologies not envisioned decades ago, this court should consider the ways in which individuals must be afforded additional protections under the Fourth Amendment.

2. Nadauld's Expectation of Privacy was Reasonable

In order for government intrusion to be considered a search, an individual's expectation of privacy must also be reasonable. *See Katz*, 389 U.S. at 360 (Harlan, J., concurring). This court recognized in *Carpenter* that individuals have a reasonable expectation of privacy over data regarding their physical movements acquired through cell site storage information ("CSLI"). 138 S. Ct. at 2217. Here, ALPR technology was used by law enforcement to track Nadauld's

physical movements — a purpose similar to that of CSLI in *Carpenter*. R. at 3. Therefore, because ALPR implicates the same privacy concerns protected in *Carpenter*, this court should expand that ruling to include the use of ALPR as an infringement on Nadauld's reasonable expectation of privacy.

The distinction between location data derived from cell phone usage in *Carpenter* and vehicle travel through ALPR is irrelevant in light of the mosaic theory. Under the mosaic theory, the government may learn a great deal from a small amount of information when placed in a broader context. *See* Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine*, *and the Mosaic Theory*, SUP. CT. REV. 205, 205-06 (2015). The Court has acknowledged the mosaic theory in the context of cell phone information, noting an individual's entire life can be revealed through the combination of isolated records on a cell phone. *See Riley v. California*, 573 U.S. 373, 394 (2014). Similarly, ALPR technology uploads information to a large database that compiles the license plate numbers, photos, and geospatial locations of the vehicle being scanned. R. at 39. Thus, the reasoning in *Carpenter* should apply here because of the technology's ability to paint a similarly vivid picture of one's life. As such, Nadauld had a reasonable expectation of privacy.

Finally, the fact that law enforcement could have obtained the information through conventional means is not dispositive. Just because you can track someone using conventional methods does not diminish the expectation of privacy. *See Jones*, 565 U.S. at 416 (Sotomayor, J., concurring); *see also United States v. Tuggle*, 4 F.4th 505, 526 (7th Cir. 2021). Even though the government could have replicated the ALPR search by following Nadauld in person, this does not diminish his expectation of privacy. Therefore, Nadauld's expectation of privacy remains reasonable.

B. Law Enforcement's Use of Video Cameras to Surveil Nadauld's Home Constituted a Warrantless Search in Violation of the Fourth Amendment

1. The Evidence Obtained by the Video Surveillance was Derivative of the Location Data Retrieved by ALPR Technology and Should Thus be Suppressed

In *Wong Sun v. United States*, the Court held that evidence discovered from an illegal search is "tainted" and must be excluded. 371 U.S. 471, 492 (1963). Further, the exclusionary rule of the Fourth Amendment prohibits using the fruits of an illegal search to conduct a subsequent search. *See Nardone v. United States*, 308 U.S. 338, 340 (1939). Here, the government's use of video cameras to surveil Nadauld's residence was derivative of the government's illegal findings from the ALPR technology. R. at 4. In other words, law enforcement was only able to locate and monitor his home using video cameras due to law enforcement's illegal use of ALPR. Therefore, because the use of video camera surveillance of Nadauld's home was derivative of the use of ALPR technology, it is unconstitutional in violation of the Fourth Amendment.

2. The Combination of ALPR Technology and Video Surveillance Viewed Holistically Impinged on Nadauld's Expectations of Privacy

The video surveillance of Nadauld's home should not be considered in a vacuum. Instead, it should be viewed in conjunction with the use of ALPR technology. The adoption of the mosaic theory by this court in *Riley* may be used here due to the severity of the privacy implications. *See Riley*, 573 U.S. at 394. In *Riley*, this court acknowledged that a collection of distinct types of information can essentially reconstruct an individual's private life. *See id*. In one of the two cases that were consolidated in *Riley*, police officers arrested Brima Wurie after observing him make an apparent drug sale. *See id.* at 380. At the station, officers noticed Wurie's cell phone receiving calls from "my house" on the phone's external screen and decided

to access the phone's call log, determined the number associated with "my house," and used an online directory to trace the phone number to an apartment building. *Id.*

Here, law enforcement's use of both ALPR technology and video surveillance to monitor Nadauld constituted a warrantless search like that of law enforcement's search of Wurie's phone. When used concurrently, law enforcement officials were able to procure the location of Nadauld's residence, to track Nadauld's daily schedule, to monitor his associations with others, and to observe him as visitors brought items to his home. R. at 4. Just as the search of Wurie's phone was an unconstitutional violation, the use of video surveillance and ALPR to track Nadauld violated his reasonable expectation of privacy because it revealed the intricacies of his personal life.

The government maintains that, because video surveillance could only capture "[w]hat a person knowingly exposes to the public," it is not subject to Fourth Amendment protection. *See Katz,* 389 U.S. at 351. However, this court clearly articulated in *Katz* that what an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* Although Nadauld's home was visible to neighbors and others, failing to take countermeasures to conceal one's home from the "casual observer" does not eliminate the expectation of privacy from prolonged surveillance. *See United States v. Moore-Bush*, 36 F.4th 320, 330 (1st Cir. 2022) (Barron, J., concurring). While the front of Nadauld's home was visible to others, this does not diminish his reasonable expectation of privacy.

Additionally, the surveillance of Nadauld's home is distinguishable from warrantless flyover searches using aerial vehicles. Warrantless "flyovers" of private property, where aerial vehicles were used for a single observation, do not typically violate a reasonable expectation of privacy. *See California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (using a private plane for

surveillance of an individual's yard); *Florida v. Riley*, 488 U.S. 445, 450-51 (1989). While this may be true for singular instances, surveillance of property can impinge on expectations of privacy in the aggregate. *See Moore-Bush*, 36 F.4th at 330. In other words, because twenty-four-hour surveillance of one's home is significantly more intrusive than a momentary observation, it is distinguishable from these cases. Here, Nadauld's home was surveilled for an extended period of time, as opposed to a one-time "casual observation" from a lawful vantage point. R. at 4. Therefore, the multiple days law enforcement surveilled his home violated his expectation of privacy. To rule otherwise would go against this court's commitment to accounting for aggressive changes in technology.

3. Rapid Innovation of Surveillance Technology Will Inevitably Diminish Privacy Expectations Without Judicial Intervention

If law enforcement's prolonged use of surveillance technology is not held accountable by the issuance of warrants, application of the *Katz* test will become increasingly obscure with advances in technology. As surveillance practices become more widespread subjective expectations of privacy will diminish, thereby eroding Fourth Amendment protections under *Katz. See Tuggle*, 4 F.4th at 510. Further, this court should consider law enforcement's potential to abuse surveillance powers. If it is determined that the extensive use of video surveillance is not a warrantless search, law enforcement will have the ability to abuse this technology to procure endless extrapolations about a person's life.

This court pledged in *Kyllo v. United States* and again in *Carpenter* to ameliorate privacy concerns in light of technological advances by assuring the "preservation of [the] degree of privacy against government that existed when the Fourth Amendment was adopted." 533 U.S. 27, 34 (2001); 138 S. Ct. at 2214. Therefore, as society continues to use more sophisticated technology, this court should assume a proactive stance in safeguarding the protections of the

Fourth Amendment against such advancements. The only way to do so is to hold that extensive video surveillance, including that used to monitor Nadauld's home, categorically constitutes a warrantless search in violation of the Fourth Amendment.

II. LAW ENFORCEMENT VIOLATED THE FOURTH AMENDMENT WHEN THEY CONDUCTED A WARRANTLESS HOME SEARCH WITHOUT A SHOWING OF PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES

It is axiomatic that the physical entry of a home is the "chief evil" the Fourth Amendment protects against. *See United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 313 (1972). Even early Supreme Court jurisprudence worked to safeguard the integrity of the home from entry, declaring a man's home his "castle" which should be protected from unlawful invasion. *Miller v. United States*, 357 U.S. 301, 307, 313 (1958). Resultantly, it is a basic principle of Fourth Amendment jurisprudence that searches inside a home without a warrant are *per se* unreasonable. *See Kentucky v. King*, 563 U.S. 452, 459 (2011). To overcome the strong preference in favor of a warrant, the search must be supported by probable cause and the existence of exigent circumstances. *See King* at 460; *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010). The government failed to demonstrate the existence of either probable cause or exigent circumstances in this case.

A. Law Enforcement Did Not Have Probable Cause to Search Nadauld's Home

Probable cause has no precise definition or bright-line rule. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Florida v. Harris*, 568 U.S. 237, 244 (2013). Rather, it is a "flexible, common-sense standard" requiring a fair probability that contraband or evidence of a crime is present. *See Harris*, 568 U.S. at 244. Applying this standard, courts look to the totality of the circumstances, careful not to disregard facts that militate against probable cause. *See id.* at 244; *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005).

Here, the totality of circumstances does not amount to a finding of probable cause. The officers had not narrowed their investigation to Nadauld, and the illegally obtained surveillance footage could be susceptible to a variety of innocent explanations. Additionally, the anonymous tip received by law enforcement was not reliable or corroborated. Lastly, Nadauld's conversation with law enforcement would not lead to a reasonable belief that Nadauld possessed evidence of a crime. While some facts may lead to suspicion that Nadauld was involved in the shooting, probable cause requires more in order to enter a home. Taken together, these facts do not amount to a finding of probable cause.

1. Law Enforcement's Investigation Was Too Broad to Establish Probable Cause to Enter Nadauld's Home

Probable cause is not established where law enforcement lacks incriminating evidence specific to an individual suspect. *See Wong Sun*, 371 U.S. at 481 (holding that an arrest was unlawful where officers did not have information to narrow the scope of their search to a particular individual). Specifically, probable cause cannot be based solely on the fact that the defendant possessed traits that are "generalized in nature." *See Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006). For instance, in *Commonwealth v. Richards*, the court held that there was not probable cause to arrest a person merely because he, like the suspect, had blonde, thinning hair and was "real skinny." 458 Pa. 455, 463 (1974). Likewise, here, Nadauld was only included in this investigation because he was one of at least fifty individuals who owned an assault rifle in San Diego. As in *Richards*, owning a gun is an extremely general characteristic that applies to a broad list of individuals. Despite the fact that police only had general information, they were desperate to pin down a suspect after a news article coined the law enforcement's failure to locate the gunman a "humiliating catastrophe." R. at 31. Without more, the broad list of fifty

individuals provided law enforcement only a slight chance that Nadauld was involved in the crime, not a fair probability.

Even after narrowing down the suspects to a list of ten, law enforcement still did not establish probable cause as to Nadauld. In a survey of 166 federal judges, the overwhelming majority believed that probable cause requires more than thirty percent certainty, many requiring over fifty percent certainty. *See* C.M.A McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327 (1982). At the time of the warrantless entry into Nadauld's home, there were nine other people that law enforcement could have pursued, meaning that there was a mere ten percent chance that Nadauld was involved in the shooting. Thus there was hardly a fair probability that Nadauld committed the crime. Without more, law enforcement could not have had probable cause to enter his home.

2. The Illegally Captured Surveillance Footage Showing the Exchange of a Duffel Bag Did Not Increase the Suspicion Needed for Probable Cause at the Time of the Search

Probable cause is not established where the circumstances are susceptible to a variety of innocent explanations that are not necessarily criminal. *See United States v. Selby*, 407 F.2d 241, 243 (9th Cir. 1969) (holding that there was no probable cause where there were "a variety of credible interpretations not necessarily compatible with nefarious activities."). All law enforcement saw was someone handing Nadauld a duffel bag in broad daylight. R. at 3. This is susceptible to a variety of interpretations. For example, McKennery and Nadauld were coworkers at a construction company, so the duffel bag could have contained tools or equipment for a job. R. at 2. Just because the duffel bag was big enough to contain a gun does not mean the government should have concluded that an M16 assault rifle was in the bag. The mere exchange

of the duffel bag is susceptible to a variety of credible interpretations and should thus not lend support toward finding probable cause.

3. The Tip Law Enforcement Received Via Anonymous Call was Insufficient to Establish Probable Cause Because the Tipster Was Not Reliable and the Information was Never Corroborated

Standing alone, an anonymous tip is insufficient to establish probable cause. *See Illinois v. Gates*, 462 U.S. 213, 227 (1983). A tipster's reliability is highly relevant in determining whether a tip may be used to help establish probable cause. *See Gates*, 462 U.S. at 230. If a tipster's reliability cannot be established, the need for corroboration is paramount. *See United States v. Capozzi*, 91 F. Supp. 2d 423, 431 (D. Mass. 2000) (holding there was no probable cause where law enforcement failed to corroborate the reliability of an anonymous tipster's information). Here, law enforcement did not determine whether the caller was reliable. Additionally, the substance of what the caller said, that they were going to act again, was never verified. R. at 4. The officers also did nothing to actually corroborate whether this information was true. R. at 4. The only information they had suggesting this to be true was the language from the manifesto, which was also never corroborated. R. at 2. In fact, the manifesto relied on was actually fabricated. R. at 2-3. Without a reliable informant or independent police corroboration, the anonymous call cannot contribute to probable cause here.

4. Nadauld's Conversation with Law Enforcement Weighs Against Probable Cause Under the Circumstances

An occupant has the right to decline entry to an officer and may refuse to speak to law enforcement if he wishes. *See King*, 563 U.S. at 470. A lack of consent to a warrantless search of one's premises may not contribute to a finding of probable cause. *See Gasho v. United States*, 39 F.3d 1420, 1438-39 (9th Cir. 1994). Nadauld repeatedly requested that the officers not enter

his home, but they entered his home anyway. R. at 24. This lack of consent should not have contributed to probable cause.

Additionally, Nadauld's behavior constituted a typical, surprised response to the officers' arrival, which militates against probable cause. An officer does not have probable cause to search an individual's apartment based on their surprised reaction to police presence. *See Struckman*, 603 F.3d at 740. Showing surprise, such as taking a few steps backwards upon seeing an officer or briefly objecting to a warrantless search or arrest, should not contribute to probable cause. *See United States v. King*, 439 F. Supp. 3d 1051, 1055 (N.D. Ill. 2020) (distinguishing between surprise and evidence of criminality, where criminality may be signaled by evasive behavior); *Skube v. Koester*, 120 F. Supp. 3d 825, 831 (C.D. Ill. 2015). In fact, surprise is a normal reaction for someone who is innocent of wrongdoing. *See United States v. Griffin*, 884 F. Supp. 2d 276, 786 (E.D. Wisc. 2012). Nadauld did not expect law enforcement to arrive at his home for another month. R. at 23. Despite the unexpected presence of law enforcement, Nadauld reacted by simply objecting to their entry. R. at 23. In light of his calm demeanor and the lack of other circumstances that would weigh towards a fair probability of criminal activity, there was no probable cause for law enforcement to enter his home.

B. The Government Failed to Demonstrate the Existence of Exigent Circumstances to Justify Warrantless Entry Into Nadauld's Home

Even with probable cause, a warrant is required to conduct a search of a home unless an exception to this requirement applies. *See Horton v. California*, 496 U.S. 128, 137 n. 7 (1990). Specifically, a warrantless search of a person's home cannot be excused unless the government can demonstrate an exigent circumstance that made their entry imperative. *See McDonald v. United States*, 335 U.S. 451, 456 (1948). Exigent circumstances include: (1) the need to prevent physical harm to police or other persons; (2) the need to prevent the imminent destruction of

evidence; (3) the hot pursuit of a fleeing suspect; and (4) the need to prevent the escape of a suspect. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). No exigent circumstances existed here to excuse the warrantless search.

1. Nadauld Was Not at Risk of Harming the FBI Agents or Other Persons

Where a reasonable person believes that entry is necessary to prevent physical harm to law enforcement or other persons, a warrantless home entry is justified. *See United States v. Zermeno*, 66 F.3d 1058, 1063 (9th Cir. 1995). There are two types of exigencies: (1) those that are well known in advance of a search, and (2) those that are unexpected that arise on the scene. *See United States v. Dupras*, 980 F.Supp. 344, 347 (D. Mont. 1997). Neither were present here.

i. The Facts That the Government Knew in Advance of the Search Did Not Give Rise to an Exigency

The roughly two weeks that passed between the Balboa Park shooting and the search of Nadauld's home demonstrates that there was not enough urgency with which to apply the exigency exception. The amount of time between the criminal activity and the warrantless search is indicative of whether there was ongoing threat to establish an exigency. *See United States v. Gooch*, 6 F.3d 673, 679 (9th Cir. 1993). The defendant in *Gooch* was accused of shooting at people on a campsite. *See id.* at 677. Officers arrived at the campsite around three hours after the incident, at which point the campsite was quiet and Gooch was asleep in his tent. *See id.* Without a warrant, the officers arrested Gooch and searched his tent for the firearm. *See id.* The Ninth Circuit held that there was no exigency in part because the gunshot took place several hours earlier. *See id.* at 679. Similarly here, there was a considerable lapse in time between the shooting and the search, thus the circumstances were not urgent enough under the exigency exception. In fact the Balboa Park shooting occurred two weeks prior to the

warrantless search, a significantly longer time than in *Gooch*. R. at 33. The amount of time between the shooting and the search of Nadauld's home thus diminished any possible exigency.

The constant government surveillance of Nadauld's home before the search also minimized the imminent threat he posed to others because his movements were under constant observation. In *Ortiz-Sandoval v. Clarke*, even though the underlying offense was murder and the murder weapon had not been recovered, the subsequent surveillance of defendant's residence suggested that no one would have been in danger if the officers had waited for a warrant. *See* 323 F.3d 1165, 1171 (9th Cir. 2003) (dictum). Nadauld's home was also under 24/7 surveillance. R. at 3. Due to this surveillance and the fact that it only took thirty minutes for the officers to arrive, no one would have been in danger had officers waited to obtain a warrant. R. at 4. Thus, the urgency necessary for a finding that exigent circumstances apply does not exist here.

Additionally, there are no circumstances demonstrating an imminent harm to third persons. Where exigencies are found to exist, there are typically case-specific facts demonstrating concerns of an imminent threat to third parties. *See e.g.*, *State v. Wakeford*, 287 Mont. 220, 226-27 (1998) (holding that exigent circumstances existed when respondent admitted that he had been fighting with a woman inside of a motel room, was suicidal, and would not fully open the door for officers to see the state of the woman). For instance, the court in *United States v. Gonzales-Barrera* found that there was an exigency where it appeared that hostages were in the home and law enforcement heard noises that created a concern about the safety of the officers surrounding the house. *See* 288 F. Supp. 2d 1041, 1052 (D. Ariz. 2003). Similarly, in *Colburn v. Texas*, the court held there to be an exigency where an informant told the police that the appellant had just killed someone, and the appellant's apartment door was fully open. See 966 S.W.2d 511, 518 (Tx. Ct. Crim. App. 1998).

Here, there was no victim inside the home or any other circumstance like a suspicious noise to validate their concern. Rather, they received an anonymous phone call threatening violence against a school. R. at 4. However, the search of Nadauld's home was conducted at 5:23 p.m., many hours before school would be in session again. R. at 4. Additionally, unlike cases where there was an exigency, the officers had not concluded that Nadauld was the gunman. These facts taken together do not create the same type of imminent threat that is typically considered to give rise to an exigency.

ii. Nadauld's Conversation with Law Enforcement Did Not Suggest He Would Harm the Officers

Similar to the probable cause analysis, surprise or confusion that law enforcement is present at one's home does not give rise to an exigency. *See Struckman*, 603 F.3d 731, 744 (9th Cir. 2010). Rather than acting out, Nadauld responded to the officers' questioning calmly, suggesting that he did not in fact pose a threat. R. at 23. Nadauld was told that law enforcement would visit his home in one month, not two days after receiving the letter. R. at 4. It is not unreasonable to presume that someone might be surprised to see two FBI officers at their home unexpectedly, especially when they are innocent and suddenly accused of wrongdoing. R. at 23. Even in light of this, Nadauld was cooperative he did not act out in violence when officers entered his home against his wishes. R. at 23. Thus, based on Nadauld's behavior, there was no reason to perceive him as an imminent threat to the safety of law enforcement or other persons.

iii. There Are No Exigent Circumstances, Even in Light of the Nature of the Crime

Although the gravity of a crime and the likelihood that a suspect is armed should be considered, these elements do not demonstrate an exigency if certain facts dispel concerns of an imminent threat. *See Olson*, 495 U.S. at 100-01. Where the respondent is not the prime suspect

of a crime or is merely tangentially involved, the threat of harm to other persons is not imminent enough to justify the application of the exigency exception. *See id.* at 101 (holding that even though law enforcement's search was conducted in response to a shooting that occurred one day prior, there were no exigent circumstances because the respondent was thought to be the driver of the getaway car, not the murderer). Here, the police did not believe that Nadauld was the prime suspect. R. at 2. Rather, law enforcement believed that Nadauld lent McKennery the assault rifle to use. R. at 24. As Nadauld was not thought to be the prime suspect, the threat of harm to the officers was not imminent enough to justify their warrantless entry.

2. The Remaining Exigent Circumstances Were Also Not Present: There Was No Need to Prevent the Imminent Destruction of Evidence, to Pursue a Fleeing Suspect, or to Prevent the Escape of a Suspect

As established above, even if entry is not necessary to prevent physical harm to others, exigent circumstances may exist if a reasonable person believes that evidence will be destroyed, a suspect is currently fleeing, or a suspect will flee if the officers do not enter the home. *See Olson*, 495 U.S. at 100. Here, Nadauld was not at risk of destroying or disposing of his M16 upon the officers' arrival. Nor did it appear that he was in the process of fleeing the scene or about to flee. There are no facts to suggest that there was an imperative need to enter Nadauld's home, thus the government failed to show the existence of any exigency to justify their warrantless search.

C. The Evidence Retrieved by the Officers Is Inadmissible Under the Fruit-Of-the Poisonous-Tree-Doctrine

When the government conducts an illegal search, it has the "ultimate burden of persuasion to show that its evidence is untainted." *Alderman v. United States*, 394 U.S. 165, 183 (1969). Evidence found to be derived from an illegal search is tainted, and thus inadmissible, because it is a "fruit of the poisonous tree." *Utah v. Strieff*, 579 U.S. 232, 237 (2016). The

"fruit" may include both physical evidence and verbal confessions. *See Taylor v. Alabama*, 457 U.S. 687, 687 (1982). This also applies to evidence seized in plain view, which is only admissible if law enforcement did not violate the Fourth Amendment in arriving at the vantage point from which they located the evidence. *See King*, 563 U.S. at 462-63.

Here, the evidence retrieved from the ALPR technology and the pole-mounted camera was unreasonably obtained in violation of the Fourth Amendment. Additionally, the government's search of Nadauld's home was a violation of the Fourth Amendment, as it was conducted without probable cause or the existence of exigent circumstances. Nadauld's admission that he lent McKennery the rifle, as well as observation of the M16 in plain view are therefore tainted evidence that must be excluded.

CONCLUSION

For the foregoing reasons, Respondent Nick Nadauld respectfully requests this court affirm the judgment of the California Fourth District Court of Appeals on both issues.

Respectfully submitted,

/s/ *R28*

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Counsel for the Respondent