# THE FOURTH AMENDMENT and AUTOMATIC LICENSE PLATE READER (ALPR) TECHNOLOGY:

## A Practical Guide for Missouri Criminal Defense Attorneys

M. McDermott

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# INTRODUCTION

Between 2016-2017, law enforcement in the United States used automatic license plate reader (ALPR) technology (occassionally referred to as automatic or automated license plate recognition technology) to scan the license plates of approximately 2.5 billion vehicles with the hope of collecting data that could help to solve or prevent crime[1]. Police tout this new type of surveillance technology as a groundbreaking tool for criminal investigation. By collecting large amounts of data, cross-referencing that data with other government databases, and creating digital maps of an individual's movements, ALPR technology allows police to analyze large amounts of information about a huge population with very little time and effort.

All without a warrant.

In plain English, law enforcement uses ALPR technology to scan passing cars with the goal of searching information about those vehicles from their license plate, then seizing any data that it intends to use in a criminal investigation. Courts have been hesitant to use those words – "search" and "seizure" – and have been cautious about applying traditional Fourth Amendment protections to such cases for several reasons. There exists a strong, fairly uniform line of jurisprudence in which the courts have repeatedly refused to apply Fourth Amendment protection to an individual's public movements, especially his public movements on open roadways. The vehicle, too, has been relegated to a sphere of lesser protection under the Constitution because of its movable capabilities and reliance on public infrastructure. Finally, ALPR technology is still "new" to the arguably conservative field of criminal investigation, leaving courts to give deference to the state police rules and procedures until given a reason to proceed otherwise.

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[1] Tanvi Misra, *Who's Tracking Your License Plate?* (Dec. 6, 2018, 8:31 AM), https://www.bloomberg.com/news/articles/2018-12-06/why-privacy-advocates-fear-license-plate-readers

Criminal defense attorneys may not be the first line of defense for individuals against constitutionally suspect use of ALPR technology, but they do play an important role in establishing consequences for and curbing its misuse. When a prosecutor intends to offer evidence gathered via ALPR technology, a criminal defense attorney can file a motion to suppress that evidence, forcing the state to shine a light on its use of the technology and address, in open court, the constitutional issues surrounding it. In many cases, the facts will clearly demand application of traditional Fourth Amendment doctrines when they are put in proper context as part of a criminal investigation.

This guide is intended to provide the requisite legal research necessary to write a motion to suppress evidence gathered via ALPR technology in a Missouri state criminal proceeding. It will explain how the technology works, how use of the technology fits within existing Fourth Amendment search and seizure jurisprudence, and how to use this information to formulate a strong legal argument against the evidence's admittance at trial.

The goal of this guide is to empower criminal defense attorneys in curbing unconstitutional government surveillance and violating the privacy rights of criminal defendants. As the law in this area is continuously developing, yet still lacking clear guidelines, criminal defense attorneys are in a unique position to help create a sound and practical approach to this issue. By debating these issues in open court, defense attorneys can help provide a "deterrent effect on future unlawful police conduct" by shining a light on secretive police surveillance and investigative tactics. *United States v. Calandra*, 414 U.S. 338, 338 (1974).

# THE FOURTH AMENDMENT

"The end of law is not to abolish or restrain, but to preserve and enlarge freedom."

- John Locke, *Two Treatises of Government*

## The History and Evolution of Constitutional Search and Seizure Law

The Fourth Amendment provides for the right of all persons to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. 4, §1. This right is incorporated against the several states and supported by the Fourteenth Amendment's protection against the deprivation of "life, liberty, or property, without due process of law." U.S. Const., amend. 14, §1. The Founding Fathers recognized the importance of protecting the corporeal dignity of a person beyond his immediate self, understanding that a true guarantee of freedom would require a certain measure of distance from the state in all areas of one's life. The search prerequisite of a detailed warrant signed by a magistrate operates as a check and balance on the government's power to interfere by creating a legitimate pathway for the state to make its request.

Naturally, though, there are circumstances under which the process of obtaining a warrant is not necessary or would be such a material obstruction to the execution of justice that the courts have correctly read several exceptions into the Fourth Amendment. Some of these exceptions are common sense, even under a strict interpretation of the amendment – for example, the "plain view" exception (See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), holding that under certain circumstances, the police may seize evidence in plain view without a warrant) and the "open fields" doctrine (See *Oliver v. United States*, 466 U.S. 170 (1984), holding that the Fourth Amendment does not extend to open fields, even if they fields are private property). Other

exceptions arose as compromises to the practical difficulties facing law enforcement – for example, the "protective sweep" exception (See *Maryland v. Buie*, 494 U.S. 325 (1990), holding that no warrant is required when an officer briefly searches the area incident to an arrest, if the officer acts reasonably prudently and can state articulable facts which, taken together with rational inferences from those facts, lead the officer to believe that the search is necessary to prevent danger to those on the arrest scene) and the "emergency aid" exception (See *Kentucky v. King*, 563 U.S. 452 (2011), holding that a warrantless search is permitted when the conduct of the police preceding the exigency is reasonable in that police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment). These exceptions arose mainly from two lines of jurisprudence, with the Court either analyzing the definition of a "search" or the definition of a "seizure." The Constitution does not explicitly define either of these terms, and the Court has expanded and limited its own definition time and again over the years. This is part of the reason why Fourth Amendment law is so complex, and why many of the Court's decisions in this area rely heavily on case-specific facts. As a result, Fourth Amendment law has been essentially distilled into a series of balancing tests that provide a semi-rigid framework within which to argue the messy facts of police-civilian interactions. (See *Graham v. Connor*, 490 U.S. 386 (1989), holding that the reasonableness of an officer's use of force must be an objective inquiry balancing the facts and circumstances confronting the officer; *Delaware v. Prouse*, 440 U.S. 648 (1979), holding that on balance, the public interest in traffic enforcement is outweighed by the individual's Fourth Amendment interests implicated by the practice of stopping or detaining a vehicle in order to check a driver's license and the registration of the automobile; *United States v. Place*, 462 U.S. 696 (1983), holding that the court

must balance an individual's interest in privacy against the government's law enforcement interest, and determine whether a seizure was reasonable under the circumstances).

During the Bill of Rights' early days, courts were able to apply these balancing tests with the help of little more than a dictionary and original materials from the legislature. But after the explosion of technology brought on first by the Industrial Revolution, and again after World War II, courts needed to take a different approach to understanding the Founders' intent. As houses became cars, RVs, campers and trailers; and as written papers became telegrams, computers, phones and drones, the judiciary hastily drew delicately constructed rules around each new technological advance, rather than fully addressing the substantive meaning of the Fourth Amendment. In *Katz v. United States*, 389 U.S. 347 (1967), the Court issued its first notable decision on the subject when Justice Stewart stated that the Fourth Amendment protects people, not places. *Id.* at 88. This Civil Rights-era court purposefully took a broad view of this constitutional issue for a myriad of reasons, but still supported its expansive reading with one critical, quasi-legal element: common sense. Recalling his self-proclaimed "epiphany" regarding the case, Harvey Schneider – one of the attorneys who argued *Katz* before the Supreme Court – summarized it best: "The test for determining whether Katz's communications had been constitutionally seized was not whether the [government] engaged in a trespass (a theory that the Court had already abandoned as a necessary and sufficient element of the Fourth Amendment's protection) or whether a public telephone booth was constitutionally protected area. Rather, the test was whether a reasonable person could have expected his communication to be private."[2]

In *Graham,* 490 U.S. at 395-96, Justice Rehnquist further explained the test's application, stating: "The Fourth Amendment provides an explicit textual source of constitutional protection

[2] Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 McGeorge L. Rev. (2016)

against…physically intrusive governmental conduct… [It requires the] balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." This was plenty of guidance for courts to work with at the time; remember, the search and seizure in *Katz* took place in a phone booth, and that was considered a groundbreaking case at the time. However, over the next several years, the Court began to realize that the simplicity of the *Katz* test was becoming more of a burden than a blessing. The Court began to roll back its permissive stance on the Fourth Amendment in cases like *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that the use of a pen register by a telephone company does not constitute a "search") and *United States v. Knotts*, 460 U.S. 276 (1983) (holding that monitoring the signal of a beeper placed in a container of chemicals that were being transported to the owner's cabin did not invade any legitimate expectation of privacy on the cabin owner's part and, therefore, there was neither a "search" nor a "seizure"). The Court's view on the Fourth Amendment regressed in these years in that the Justices deliberately created a narrow scope of Fourth Amendment protection by allowing technological surveillance to expand the public sphere within which an individual's privacy expectations are considered. In other words, the reasonable man suddenly had a lesser realm in which he had a constitutional expectation of privacy.

In the aftermath of the Cold War and with the acceleration of the War on Terror in the late 1990s and early 2000s, the Court lacked a real chance to progress in a classically liberal reading of the Fourth Amendment, mostly for political reasons. Only in recent years – and primarily due to broad public support for enhanced scrutiny of the government more generally – has the Court been able to revive discourse around these types of questions. In *United States v. Jones*, 565 U.S. 400, 406 (2012), the Court held that the "Fourth Amendment rights do not rise

or fall with the *Katz* formulation," and neither does *Katz* at all narrow the scope of the Amendment. This 21st century understanding of an individual's right to privacy, though not all-encompassing, weighs heavily the traditional trespass elements of that right in a way that *Katz* did not. *Katz*, in fact, explicitly overruled two previous cases (*Olmstead v. United States*, 277 U.S. 438 (1928), holding that the Fourth Amendment cannot be extended and expanded to include telephone wires reaching to the world from the defendant's house or office; and *Goldman v. United States*, 316 U.S. 129 (1942), holding that the use of the detectaphone by government agents was not a violation of the Fourth Amendment) that had emphasized the trespass element in Fourth Amendment cases to the exclusion of other factors. However, Justice Scalia's own words in another opinion support the use of those values propositions of *Katz* in a modern Fourth Amendment analysis: "The Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The modern rule, then, must include a trespass element insofar as those considerations do not unreasonably expand the "public sphere" where a person would not expect to have a right to privacy.

The Modern Test: A Reasonable Expectation of Privacy

This qualification is especially important when applying the Fourth Amendment rule to cases involving warrantless technological surveillance, like those searches performed via ALPR technology. There is seldom evidence of a physical or even digital trespass in these cases, meaning that the argument turns on whether a "search" can be established to have occurred by other means, two of which stand out. First, *Katz* asks whether the data collected invades an individual's reasonable expectation of privacy which society is also prepared to recognize as

objectively reasonable. (See also *California v. Greenwood*, 486 U.S. 35 (1988), holding that an expectation of privacy does not give rise to Fourth Amendment protection unless society is prepared to accept that expectation as objectively reasonable). Second, and to help establish the first point, *Jones* and *Carpenter v. United States*, 201 L. Ed. 2d 507, 138 S. Ct. 2206, 2217 (2018) ask whether the volume and quality of the data collected create "an all-encompassing record of the holder's whereabouts" or a "detailed and comprehensive record of the person's movements." By demonstrating that the state's use of ALPR technology was so excessive and invasive that it exposed data the average person would reasonably have expected to remain private while traversing the public roads, a criminal defense attorney can establish the use of technology as a search under the Fourth Amendment.

The modern Fourth Amendment balancing is effective, in that it more-or-less answers the immediate legal question before the court in most Fourth Amendment cases, but it is the result of a piecemeal operation. The Court continues to hesitate in creating one clear rule to deal with the expansive reach of technology into the criminal justice system more generally. Creating such a rule would be no easy task, doubtlessly, and mere discussion thereof raises questions as to whether this kind of broad-strokes reform is an appropriate task for the courts at all. However, the judiciary has a long history of using litigation and the long arm of the judiciary to force social change. (See *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), holding that public schools must be racially integrated; *Reed v. Reed*, 404 U.S. 71 (1971), holding that gender is a protected class under the Fourteenth Amendment; *Obergefell v. Hodges*, 576 U.S. 644 (2015), holding that states may not deny the right of marriage to individuals on the basis of their sexuality). Of particular note, the majority of major criminal justice reforms to be enacted in the United States in the last fifty years have been come from criminal cases. (See *Roper v. Simmons*,

543 U.S. 551 (2005), holding that the death penalty is unconstitutional for individuals who committed their crimes while they were a juvenile; *Strickland v. Washington*, 466 U.S. 668 (1984), holding that competent assistance of counsel is required under the Sixth Amendment; *Miller v. Alabama*, 567 U.S. 460 (2012), holding that mandatory life sentences without the possibility of parole are unconstitutional for individuals who committed their crimes while they were a juvenile). Courts are uniquely situated not only to decide these issues, but also to maintain the health and well-being of the judicial ecosystem by taking on these difficult tasks and facilitating the social change that begs to emerge. An added benefit of using the judicial branch as the forum for criminal justice reform is that it will logically force practical change. After all, the nature of the courts is turned toward efficiency and "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement,* 326 U.S. 310 (1945). Abiding by this established understanding of a judge's role, we can therefore expect that courts will primarily advance criminal justice reforms where it is necessary, proper, and generally tends to support a more just system.

While the tests formulated in *Katz* and *Jones* are still the law of the land, they become less and less useful as they are applied to government abuses born of greater and greater technological feats. Some legal advocates argue that the Court needs to adopt an original, clear test to address these issues, one comprised of standardized rules and elements. Others argue the opposite, claiming that the Court will never be able to keep up with the demands of technology and should decide these issues on a case-by-case basis. The best answer lies somewhere in the middle and is supported by the long and inclusive jurisprudential history that already exists. The *Katz* test and the *Jones* test are imperfectly perfect, together. Reading both decisions along with

the text of the Fourth Amendment provides all the necessary tools for creating a comprehensive legal strategy for approaching issues of technology-enhanced surveillance.

Technology and the Fourth Amendment: Catching Up With the Law

The *Katz* test, while praised for its simplicity and broad applicability, suffers under the weight of the facts of modern life. The reasonable man in 2023 likely conducts nearly all of his business online via some form of smart technology. The reasonable man in 1967, however, did not even know of the word "Internet". This test made good sense fifty years ago, when the risk of the government obtaining a reasonable man's private "papers and effects" was infrequent and limited by the sheer logistics of such a task. But in the 21st century, this risk is greatly increased in both frequency and severity. The reasonable man assumes this risk every time he logs into work, picks up the phone to call his family, tracks his workout, or drives his car. And each time that he assumes this risk, he is assuming it in total, in that he is risking a large-scale loss of a large amount of data even for the smallest task on his cell phone or computer. In 1789, the idea that nearly all of one's most intimate and confidential information would be contained on a chip smaller than a man's finger was unthinkable. The very process of obtaining such quantity and quality of information, even in 1967, necessarily required a trespass to the degree that the Court dismissed need to for the lesser included offense when formulating its test.

Yet when *Jones* was decided in 2012, social circumstances were much different. In the time that had passed since the Court had last made a substantial dent in Fourth Amendment jurisprudence, the government had made considerable progress in its mission to expand the public sphere around each individual. The *Jones* test is beneficial because it created a modern, parallel standard to the trespass requirement by holding that the Fourth Amendment also

prohibits the State's "meaningful interference with an individual's possessory interests in that property." *Jones*, 565 U.S. at 419. Although the Court in *Jones* relied heavily on the state's physical intrusion on the respondent's property in coming to its ultimate conclusion, it qualified that reliance by stating that trespass alone does not qualify as a search under Fourth Amendment. *Id.* at 409. Justice Scalia's distillation of a Fourth Amendment "search" to the category of suspect government actions performed "for the purpose of obtaining information" is exactly the segue needed to link the reasoning *Katz* with that of *Jones*. *Id*. at 404. The *Katz* test holds that a person may invoke her Fourth Amendment protections where a "reasonable person could have expected her communication to be private."[3] However, the extent of that expectation has resulted in much debate. It was not until the Court decided *Jones* that the full protections of *Katz* could be realized. Using this logic, a reasonable person can expect her communications to be private from any unwarranted government attempt to meaningfully interfere with her possessory interest in that property.

The above understanding of the relationship between the *Katz* and *Jones* tests is the best test suited for issues arising from the government's collection, collation, and analysis of data obtained via technology and without a warrant. In that sense, both tests are necessary for the courts to have a complete framework for Fourth Amendment evaluations. In another sense, though, this understanding is a like a completely new rule that usurps the majority opinion in both cases. When the logic in *Katz* is worked into the *Jones* rule, as is proper under the doctrine of stare decisis, the result in a case can be markedly different than if *Jones* was applied alone. Without the context of *Katz*, it is impossible to determine the full meaning of *Jones*'s "meaningful" standard. *Jones*, 565 U.S. at 419. The Court's opinion in *Katz* provides the

[3] Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 McGeorge L. Rev. (2016)

parameters for the rule set out in *Jones*, while at the same time respecting the boundaries set out within the same. Without it, the *Jones* opinion becomes inoperably vague and gains the dangerous potential to narrow each American's Fourth Amendment interest in favor of the State.

The Root of the Fourth Amendment: The Separation of the Individual and the State

Re-incorporating the words of the Court from nearly fifty years ago is sure to be no easy task, but the logic of the pre-internet age offers an excellent foundation for modern courts to evaluate new Fourth Amendment cases. Justice Stewart stated that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Katz*, 389 U.S. at 350. In other words, the Fourth Amendment is best seen as less of a positive right to individual seclusion and more of a negative right against unlawful or improper government interference. What the Founding Fathers intended to protect was not the right of all Americans to operate in secrecy, but the right of Americans to live free from fear that the government may be watching or otherwise prying. The Court in *Jones* elaborated on this idea, emphasizing the physical boundaries of that freedom. The trespass element heralded in *Jones* must be incorporated into the refined, modern test for two important reasons. First, procedural history of the issue requires that this common-law principle be included. The new, final test for technology-enhanced surveillance must address the basic, common-law concept of a "search" in order for the test to elaborate, in the future, on searches that involve no physical trespass. This callback to property rights as the touchtone for Fourth Amendment rights is foundation for theoretical analysis on intangible searches. (See *Jones*, 565 U.S. at 404-05). Second, Justice Scalia stated in his majority opinion that the very definition of "reasonable expectation of privacy…has a source outside of the Fourth

Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Jones*, 565 U.S. at 408. Incorporating a trespass element into the revised test, therefore, ensures that all judicial "bases" are covered; refusing to limit the final test to solely that trespass element and the "reasonable expectation of privacy" sphere set out in *Katz* ensures complete protection of one's "person[,] houses, papers and effects." U.S. Const. amend. IV, §1

There is great incentive for the state to expand its use of technology-enhanced surveillance. This type of policing requires less manpower, is inherently less dangerous, and is often more "effective" at "solving" crime than traditional methods. These benefits are balanced, or perhaps outweighed, by the constitutional issues presented by the use of enhanced search methods and techniques. Further, these modern methods are not nearly as perfect as one might be led to believe. In 2019, American police "cleared" (charges were brought against a suspect in) only 45.5% of violent crimes – not even half.[4] Coupled with the statistics presented above on the prevalence of surveillance technology in most jurisdictions, the implied conclusion is not promising. Fancy new gadgets and powerful computers do not make for or replace competent policing. A standardized, narrowly constructed rule by which courts may review the application of these technologies against citizens is the best way to prevent discretionary abuses and constitutional blunders. In the decade since the Court handed down its opinion in *Jones*, circumstances have changed almost as quickly as they had in the forty-five years after *Katz*. If the Court waits another ten years, the damage may already have been done. The Supreme Court takes less than one hundred cases per year; only a fraction of those cases deals with Fourth

[4] *Clearances*, Federal Bureau of Investigation: Criminal Justice Information Services Division (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/clearances

Amendment issues, and even then, some of those cases are decided on other grounds. On the other hand, Americans use technology all day, every day. Law enforcement operates 24/7, gathering information and interacting with the population. Immediate and comprehensive guidance is required not only for academics and law students, but for those directly impacted by the consequences of this limbo.

## AUTOMATIC LICENSE PLATE READER (ALPR) TECHNOLOGY

Automatic license plate reader (ALPR) technology allows law enforcement to remotely scan the license plates of vehicles passing through a certain area, much like an ordinary traffic camera might surveil a busy intersection or a red-light camera might photograph the license plates of speedy motorists. However, ALPR cameras give law enforcement much more detailed information about a vehicle than similar, older technologies. Using the same photographic angle and the same short span of time, an ALPR camera can capture the license plate of a passing vehicle and cross-reference the data it obtains to provide law enforcement with a complete history of that vehicle. Working through a simple three-step process, these cameras allow law enforcement to learn about the vehicle's registration (title owner, insurance details, tax payments), its distinguishing body characteristics (after-market wheels, custom hubcaps, cracked windows, missing mirrors), and even create a map of where the vehicle has traveled.[5]



*Image (1): A Flock brand automatic license plate reader camera installed near a busy intersection.*

[5] Randy L. Dryer & S. Shane Stroud, *Automatic License Plate Readers: An Effective Law Enforcement Tool or Big Brother's Latest Instrument of Mass Surveillance? Some Suggestions for Legislative Action,* 55 Jurimetrics J. 225, 231 (2015)

The "Search": How Does an ALPR Camera Function?

Understanding how this technology works is key to formulating an effective argument against its use in a criminal proceeding. First, the ALPR camera "localizes" a license plate.[6] Essentially, once the camera is placed near a road that law enforcement wishes to surveil, it begins to take photographs of passing vehicles' license plates. Advanced camera models can capture thousands of plates per minute, and some are even able to capture images of the area around the vehicle, to include data such as people getting in and out of the car.[7]

Second, the ALPR camera's computer "segments" the data points it has collected, cataloguing them into a searchable format that can be cross-referenced with other databases to uncover specific, identifying information.[8] While the camera itself is unable to tell law enforcement much about the captured image besides what is visible in the photograph, this second step digitally analyzes the image for certain data points that may interest law enforcement. The computer may create segmented data points identifying the vehicle's make, model, license plate number, color, and more, depending on the other databases that law enforcement can access.

Third, the ALPR camera's computer engages in "character recognition."[9] The computer uses machine learning algorithms to cross-reference the data points collected and refined in the

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[6] Gan Vi Vi & Ahmad Afif bin Mohd Faudzi, *A Study on Different Techniques in ALPR System: The Systems Performance Analysis*, Recent Trends in Mechatronics Toward Industry 4.0, 617-627 (July 16, 2021)
[7] *Automated License Plate Readers (ALPRs)*, Electronic Freedom Foundation (Aug. 28, 2017), https://www.eff.org/pages/automated-license-plate-readers-alpr#:~:text=They%20can%20collect%20thousands%20of%20plates%20per%20minute.,direction%20and%20speed%20a%20person%20traveled%20through%20triangulation
[8] Gan Vi Vi & Ahmad Afif bin Mohd Faudzi, *A Study on Different Techniques in ALPR System: The Systems Performance Analysis*, Recent Trends in Mechatronics Toward Industry 4.0, 617-627 (July 16, 2021)
[9] *Id.*

"segmentation" stage to produce leads for law enforcement, depending on the information requested. For example, say that the camera captures an image of a red SUV going through an intersection one afternoon. Next, the computer will create data points based on what it finds in that image: the car is red, the model is an SUV, the car passed through the intersection at a certain time. In this third stage, law enforcement can search for more information about those data points using a variety of government databases, as well as private ALPR company databases in some cases. In this example, the information collected in the second stage could produce a number of "hits" in a referenced database, such as the name of a driver who registered a red SUV with that license plate number, the registered status of the car, and where the car had previously traveled and been captured by other cameras in the system. Using a split-second photograph of a speeding car, law enforcement can retrieve massive amounts of data that a driver might not even be aware he is sharing.

The "Seizure": What Happens to the Data?

Under current law, law enforcement need not obtain a warrant before collecting and analyzing this data. Motorists might not even know that their information was collected by one of these discrete cameras, and there are no assurances as to what law enforcement does with the thousands of petabytes of data that it chooses not to investigate further. In fact, most law enforcement agencies must outsource some of data storage and protection duties to private companies, an onerous and expensive task that requires careful attention to regulatory compliance laws and other administrative rules.[10] Private companies regularly partner with law

[10] Randy L. Dryer & S. Shane Stroud, *Automatic License Plate Readers: An Effective Law Enforcement Tool or Big Brother's Latest Instrument of Mass Surveillance? Some Suggestions for Legislative Action*, 55 Jurimetrics J. 225, 231 (2015)

enforcement agencies to share data, which weakens an individual's constitutional privacy protections. While law enforcement agencies are subject to certain privacy rules in their capacity as state actors, private companies have much more discretion when it comes to collection, storage, and even the sale of personal data.[11] Individual legal remedies for private violations of data privacy regulations, too, are narrower and less complete than those available for state violations.

Regular implementation and use of ALPR technology poses significant risks to the general public, risks that are not outweighed by the technology's purported efficacy. Recent studies show that almost 2/3 of larger American police forces utilize this technology, but only a fraction of the states have legislation on the books to regulate this practice.[12] The result is that most ALPR camera programs operate with little administrative overhead, supervision, or a clear set of guidelines. Because so much of the data collected by these cameras is ultimately discarded, it is difficult to fully assess the extent of this type of surveillance network. This, too, creates a separate problem, because the discarded data are not wiped clean from the computer. Even data that do not generate a "lead" for law enforcement or otherwise suggest evidence of criminal activity become part of the ALPR technology "system" because each data point teaches the machine learning algorithm something. The computer absorbs, interprets, and utilizes every piece of data its cameras capture, regardless of whether law enforcement chooses to do so as well. Under other circumstances, providing an algorithm with extensive and varied data

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[11] *Criminal Procedure: Fourth Amendment: Massachusetts Supreme Judicial Court Holds That Use of Automated License Plate Readers May Constitute a Search*, 134 Harvard Law Review, 2887-2894 (Feb. 12, 2017)

[12] Mariana Oliver & Matthew B. Kugler*, Surveying Surveillance: A National Study of Police Department Surveillance Technologies*, 54 ARIZ. St. L.J. 103 (2022)

improves the accuracy and efficacy of the system. The more the machine learns, in other words, the more "intelligent" it becomes. Unfortunately, the same cannot be said for ALPR computers.

Machine Learning and The Fourth Amendment: Working With Technology

The technology is only as smart as the human operating it. And there must be a human operating it, or at least supervising it, as a practical matter and a legal one in many jurisdictions. The ALPR computer can learn to distinguish SUVs from compact cars, red from blue and blue from black, a four-door sedan from a two-door. However, when the computer cross-references those data points against other systems, a human necessarily must externally evaluate the usefulness of the computer's output. The computer can tell law enforcement that a red SUV crossed through a certain intersection at a certain time, and that a certain individual was driving it or owned the car, but it is ultimately up to law enforcement to decide whether that information is useful to the prevention or solving of crime. The computer does not know what crime is, nor is it able to distinguish innocent activity from suspect. The value judgment passed on the data output by law enforcement is what turns a photo of a license plate into an evidentiary exhibit in court. And law enforcement, as humans, are not infallible in this respect. It is easy to see, then, how human error can enter into the algorithmic equation and "teach" an otherwise value-neutral machine to analyze data not by a mathematical equation, but by human judgment.

The result is clearly visible in the statistics. Between 2016-2017, ALPR cameras scanned more than 2.5 billion license plates - and on average, 99.5% of scans belonged to cars that were not associated with crimes.[13] That means law enforcement is only getting a "hit rate" - the

[13] Tanvi Misra, *Who's Tracking Your License Plate?* (Dec. 6, 2018, 8:31 AM), https://www.bloomberg.com/news/articles/2018-12-06/why-privacy-advocates-fear-license-plate-readers

percent of license plates captured that were associated with criminal activity - of 0.5%.[14] To get an idea of how ineffective this technology is in practice, drug detection dogs have a "hit rate" of approximately 44%, and courts have been reluctant to allow this type of evidence to be presented without additional, corroborating statements.[15] (See *State v. Howard*, 169 Idaho 379, 496 P.3d 865 (2021), cert. denied, 214 L. Ed. 2d 118, 143 S. Ct. 271 (2022) and *People v. Burns*, 2015 IL App (4th) 140006, 25 N.E.3d 1244, aff'd, 2016 IL 118973, 50 N.E.3d 610). This means that law enforcement is creating vast databases of information about motorists, spending thousands of dollars on computer equipment and man hours, for very little result. In other words, "the nature and quality of the intrusion on the individual's Fourth Amendment interests" significantly outweighs the "countervailing governmental interests at stake." *Graham*, 490 U.S. at 396. While the efficacy – or lack thereof – of ALPR technology is not the touchstone for evaluating the constitutionality of its use, dramatic statistics such as these can help the court to understand the extensive and intrusive nature of these searches.

## SEARCHES AND SEIZURES

It is unrealistic, at least at the present moment in time, to expect the courts to allow a lawsuit from every individual who has had his information scanned, collected, and analyzed by an ALPR camera, even if every individual could prove that his information was improperly searched and seized according to the court's definition, and even if society at large generally accepted that ALPR cameras infringe on one's reasonable expectation of privacy. The question of

[14] Tanvi Misra, *Who's Tracking Your License Plate?* (Dec. 6, 2018, 8:31 AM), https://www.bloomberg.com/news/articles/2018-12-06/why-privacy-advocates-fear-license-plate-readers

[15] Jane Yakowitz Bambauer, *How the War on Drugs Distorts Privacy Law*, 64 Stanford Law Review. 131-138 (May 9, 2012)

how to articulate a case for improper use of ALPR technology is still difficult to answer. This guide is intended for use by criminal defense attorneys and is meant to provide the legal background research and argument outline necessary to bring a motion to suppress evidence captured via ALPR technology. Constitutional issues that may be relevant on appeal such as standing, ripeness, and mootness are beyond the scope of this paper.

Motion to Suppress: Missouri Ann. Stat. § 542.296

Missouri Ann. Stat. § 542.296 states the rule for filing a motion to suppress evidence from an unlawful seizure:

> "A person aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may file a motion to suppress the use in evidence of the property or matter seized. For the purposes of this section, a pending criminal proceeding shall mean any criminal investigation being conducted with the intention of using the seized subject matter in seeking an indictment or information or when an information has been issued or an indictment returned…The motion to suppress may be based upon any one or more of the following grounds: (1) That the search and seizure were made without warrant and without lawful authority…(5) That in any other manner the search and seizure violated the rights of the movant under Section 15 of Article I of the Constitution of Missouri, or the fourth and fourteenth amendments of the Constitution of the United States…The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The burden of going forward with the evidence and the risk of non-persuasion shall be

upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled."

In order to succeed on such a motion when evidence from ALPR technology is at issue, an attorney must demonstrate that (1) his client suffered injury (2) due to a warrantless, unlawful seizure of his property (3) the fruits of which are now being offered as evidence against him in a pending criminal proceeding (4) in violation of his Fourth Amendment right to be free from unconstitutional search and seizure at the hands of law enforcement.

As to the first and third elements, injury is easily demonstrated by the state's proposed use of improperly obtained evidence in a criminal proceeding against a defendant. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). The second and fourth elements will present the most difficulty, with argument based heavily on the facts of the case at hand. As to the second element, argument should center on the extent of the seizure and the means by which it was carried out. Important facts to consider are the amount of times the client's vehicle's plates were scanned, the length of time that law enforcement tracked or recorded the client's movements, the size of the geographic area wherein the search was conducted, the amount of data offered into evidence that was seized as a direct result of information provided by the ALPR camera, and the extent of the other evidence which the state intends to offer against the defendant.

As to the fourth element, a brief literature review of current Fourth Amendment jurisprudence can help to refresh the court's memory as to the touchstone doctrines of constitutional search and seizure law. In addition, citing to well-known and well-litigated Fourth Amendment cases and using that law to draw parallels to the seizure conducted in your present case can help the court to bridge the intellectual gap between the kind of technology used in the cases on record and this newfangled technology. It is important to emphasis in your motion how

a search conducted via ALPR technology differs vastly from a traditional search, not only in form and function, but also in the quality and quantity of data seized. One of the most persuasive techniques to use in legal writing is to compare and contrast the facts of the present case with other cases the court has already heard with a similar fact pattern or cause of action. However, because ALPR technology is so new, it has not been litigated thorough in any court, and Missouri courts have not yet addressed its use head-on. To resolve this issue, it can be helpful to draw comparisons with other, past-generation technological surveillance tools that have already been litigated. Do not get bogged down in describing the ins-and-outs of the technology in your brief. While such an explanation may be helpful to an appellate court reviewing the constitutionality of the technology, at the trial level, it will only distract from the core of your argument: that in your client's specific case, law enforcement unreasonably used ALPR technology to invade your client's reasonable expectation of privacy. Attempting to generalize the unconstitutional use of ALPR technology may distract the court from the facts of your client's case that clearly demonstrate his injury.

# MODEL MOTION TO SUPPRESS

Note to the Attorney

This model motion is based on a fictional set of facts, drawn heavily from real cases, namely *Commonwealth v. McCarthy*, 484 Mass. 493 (2020)**.** The fact pattern used here was designed to reflect the average prosecutor's offer of proof using ALPR evidence. Many real cases that you may encounter will come with fewer facts or less specific facts, or even facts that are less favorable to your client. However, this model is still useful in that it provides a framework for approaching the constitutional and evidentiary concerns that this type of evidence presents.

Note, ALPR technology has been known to implicate other legal issues, such as First Amendment and Eleventh Amendment concerns. (See *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952 (8th Cir. 2015)). These issues are beyond the scope of this guide, and, in addition, are not likely properly raised in a motion to suppress in a criminal proceeding. This model motion deals only with the Fourth Amendment concerns raised by the introduction of ALPR evidence under Missouri evidentiary authorities.

Finally, Missouri does not have a traditional evidentiary code or statute. Rather, the Missouri Bar publishes a "deskbook" entitled Evidence Restated (2021) which summarizes the major sources of Missouri evidentiary rules from a variety of relevant "cases, statutes, and other authorities." This motion is intended to comply with those rules, as well as Missouri statutes.

Statement of Facts

This model motion is set in the fictional township of Derry, Missouri. Below is a map of Derry that corresponds to the locations discussed in the statement of facts.

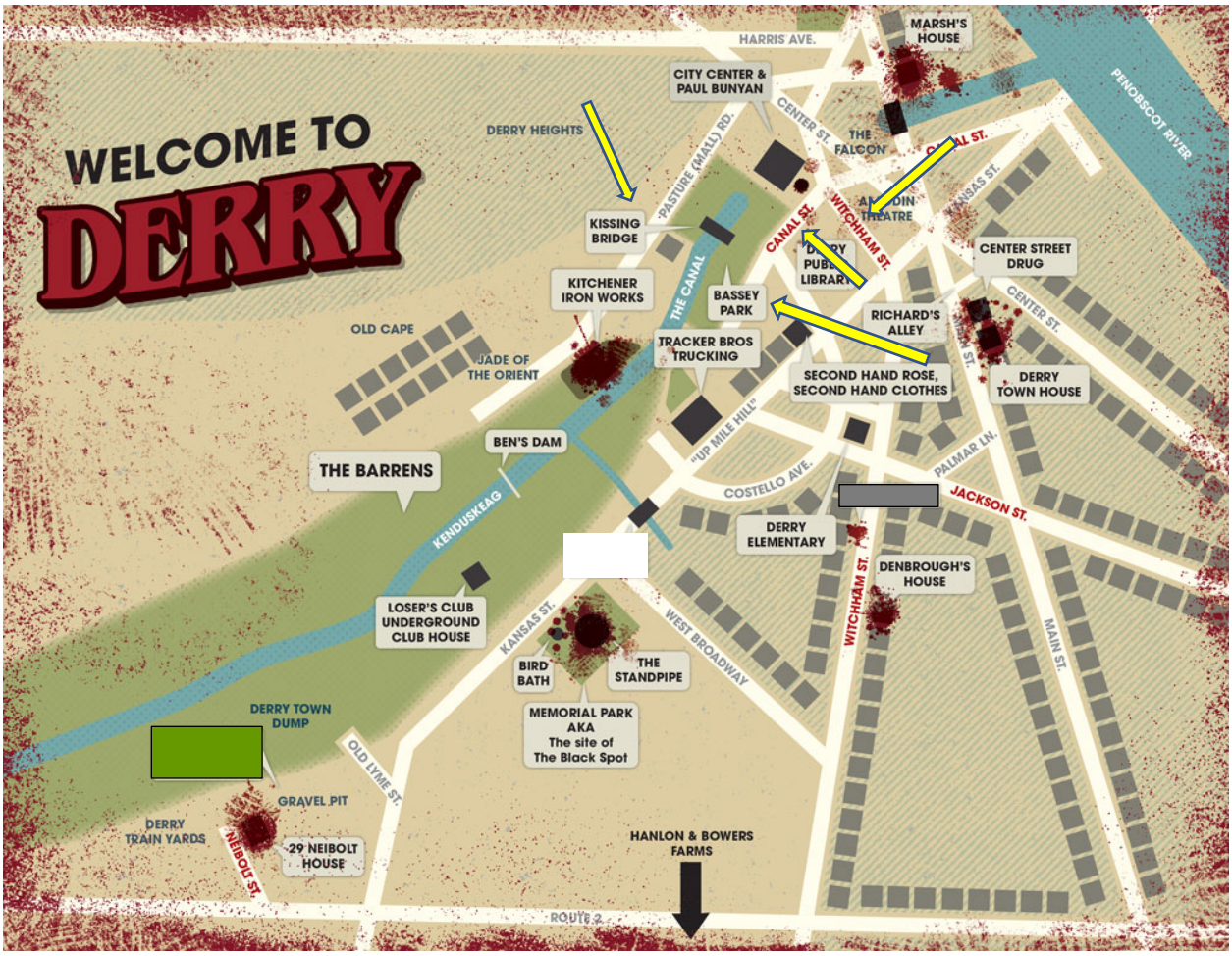



*Image (2): Map of the Fictional Township "Derry, Missouri"*

**IN THE COURT OF DERRY TOWSNHIP, MISSOURI**

**APRIL 2023**

**STATE of MISSOURI,**

Prosecution,

v.

**RICHARD "RICHIE" TOZIER,**

Defendant.

Motion to Suppress Evidence in a Criminal Proceeding

and

Memorandum of Law in Support of the Motion

**BRIEF FOR DEFENDANT**

## INTRODUCTION

In the case of *State of Missouri v. Richard Tozier*, the State of Missouri intends to offer evidence against Tozier which was obtained through an unconstitutional search and seizure in violation of Tozier's Fourth Amendment rights. Pursuant to Missouri Ann. Stat. § 542.296, we respectfully ask this Court to grant Tozier's Motion to Suppress as to [Evidence Item #s].

## STATEMENT OF FACTS

Law enforcement ("law enforcement" or "police officers") for the city of Derry, Missouri ("Derry") suspected that drug trafficking activity was occurring at a residence frequented by Defendant Richard "Richie" Tozier's ("Tozier"). Through surveillance, several "controlled buys," and information from four confidential informants, the Derry police developed evidence that a co-defendant in this case, Edward "Eddie" Kaspbrak ("Kaspbrak"), was distributing heroin from this residence. During that surveillance, police observed a red Chevrolet Corvette vehicle appear briefly at Kaspbrak's residence. After further surveillance, and a tip from a confidential informant, police observed Tozier driving the same vehicle, and they began to suspect that he was supplying heroin to Kaspbrak.

On February 1, 2022, Derry police added the license plate number of the red Chevrolet to the automatic license plate reader (ALPR) "hot list," and specified officers to be notified when it was detected crossing the Kissing Bridge. The "hot list" is a designation for license plate numbers, retrieved from an ALPR camera, that are suspected to be involved in criminal activity. Defendant Tozier's vehicle's addition to this list is the product of Derry law enforcement suspicion that he was supplying heroin to Kaspbrak.

On February 8, 2022, several police officers received an alert that the Chevrolet had been driven over the Kissing Bridge into Bassey Park. Officers subsequently traveled to Kaspbrak's house and then followed him to Canal Street. At the same time, another officer found Tozier after he drove into Bassey Park and followed him to Witcham Street. The officers watched Tozier and Kaspbrak meet, but no physical exchange was observed. Both vehicles left after approximately thirty seconds.

Police also generated a spreadsheet indicating every time that the Chevrolet had passed over the Kissing Bridge between December 1, 2021, and February 12, 2022. The spreadsheet contained the dates, times, directions, and specific lanes that the Chevrolet had traveled on the Bridge. The ALPR spreadsheet showed that the vehicle traveled into Bassey Park on eight days in February, twenty-one days in January, and nineteen days in December. On a multiple number of these days, the defendant made more than one trip on the same day. To law enforcement, this appeared consistent with their theory that Tozier was routinely bringing heroin into the Park for distribution by Kaspbrak.

On February 22, 2022, Derry police received another alert that the Chevrolet had traveled over the Kissing Bridge into Bassey Park. Police again followed both Tozier and Kaspbrak as they drove to Witcham Street. The officers observed a meeting but did not see an exchange of any materials. Both vehicles departed thirty seconds later. This time, police stopped both vehicles on suspicion that a drug transaction had taken place.

After stopping Kaspbrak, police handcuffed him, read him his *Miranda* rights, and questioned him at the side of the road. He made incriminating statements, and officers found heroin on his person. Police also ordered Tozier out of his vehicle, handcuffed him, and read him his *Miranda* rights.

At the police station, Tozier waived his *Miranda* rights and made various incriminating statements. Officers also seized two cell phones and cash from Tozier's person. Tozier's brother, Wentworth, brought more money to pay the bail for the defendant, but police seized almost all of the cash on the belief that it was the proceeds of illegal drug activity.

Tozier then instructed his legal team to file a motion to suppress the ALPR data.

## ARGUMENT

The Fourth Amendment provides "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, §1. As interpreted by the Supreme Court, this rule balances the government's interest in the proper exercise of its police powers with the individual's reasonable expectation of privacy. *Graham*, 490 U.S. at 396. This balancing test is influenced by several factors, including the severity of the crime in question, the reasonableness of the individuals' expectation of privacy under the circumstances, and the methods used by the government to execute the alleged search and seizure. *Id.* Traditionally, when the government exceeds the scope of its powers, the Court remedies the violation for the individual defendant by excluding, or suppressing, the evidence obtained by improper means. *Mapp*, 367 U.S. at 656. For this Court to properly grant a motion to suppress, Tozier must demonstrate that (1) incriminating evidence was found; and (2) the government wishes to charge the defendant with a crime that the evidence tends to prove.

### This Court has the power to properly grant Tozier’s Motion to Suppress because the State wishes to offer incriminating evidence against Tozier in a criminal proceeding.

As to element (1), the state of Missouri obtained evidence of Tozier's vehicle's movements by using an ALPR tracking camera system. This evidence tended to incriminate Tozier in the sale and distribution of heroin, as the ALPR system placed Tozier with other suspected drug traffickers and also traced a pattern of what Derry law enforcement terms "suspicious movements" consistent with what police know of drug trafficking patterns. As to element (2), the state of Missouri wishes to use this evidence to charge Tozier with crimes related to the sale and distribution of heroin. The state intends to rely on the incriminating evidence gathered via ALPR technology in proving its case against Tozier.

Therefore, if Tozier can further demonstrate that this evidence was improperly obtained under Missouri evidentiary rules and the Constitution, this Court has the power to properly grant Tozier's motion to suppress.

This Court must grant Tozier's Motion to Suppress under Missouri Statute because Tozier suffered an injury due to the warrantless, unlawful seizure of his property, the fruits of which are now being offered against him in a pending criminal proceeding in violation of Tozier's Fourth Amendment right to be free from unconstitutional search and seizure at the hands of Derry law enforcement.

Missouri Ann. Stat. § 542.296 states the specific rule for relief from the proposed use of improperly obtained evidence:

> "A person aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may file a motion to suppress the use in evidence of the property or matter seized. For the purposes of this section, a pending criminal proceeding shall mean any criminal

> investigation being conducted with the intention of using the seized subject matter in seeking an indictment or information or when an information has been issued or an indictment returned…The motion to suppress may be based upon any one or more of the following grounds: (1) That the search and seizure were made without warrant and without lawful authority…(5) That in any other manner the search and seizure violated the rights of the movant under Section 15 of Article I of the Constitution of Missouri, or the fourth and fourteenth amendments of the Constitution of the United States…The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The burden of going forward with the evidence and the risk of non-persuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled."

The evidence in the record demonstrates that Tozier (1) suffered an injury (2) due to the warrantless, unlawful seizure of his property, (3) the fruits of which are now being offered against him in a pending criminal proceeding (4) in violation of his Fourth Amendment right to be free from unconstitutional search and seizure at the hands of Derry law enforcement.
As a result, this Court must exclude [Evidence Item #s] from the discovery record in this case, so as to preserve Tozier's constitutional rights and the possibility of a fair trial.

As to element (1), Tozier's suffered injury is the criminal indictment against him in the case of *Missouri v. Tozier.* If this evidence is offered against him in a criminal proceeding, Tozier faces a term of confinement of up to ten years. Tozier has a "legally protected interest" in his freedom from unlawful confinement by the state, and his interest in remaining free is concrete, particularized, and actual. *Huyer v. Van de Voorde*, 847 F.3d 983, 986 (8th Cir. 2017) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

As to element (3), parties do not dispute that the state of Missouri wishes to offer the evidence in question against Tozier in a criminal proceeding, *Missouri v. Tozier*.

As to element (2), parties agree that Derry law enforcement gathered information using ALPR technology without a warrant, but parties disagree as to the lawfulness of that action. The legality of the warrantless use of ALPR technology in a criminal investigation depends on element (4), whether the collection and analysis of Tozier's information using ALPR technology can be considered a violation of his Fourth Amendment right to be free from unconstitutional search and seizures.

The state of Missouri claims that its collection of Tozier's information and its use of ALPR technology to accomplish this goal was not a violation of Tozier's Fourth Amendment right. Rather, Missouri asks this Court to apply a widely accepted exception to the Fourth Amendment's warrant requirement: the "public thoroughfare" doctrine, first articulated in *Knotts*, 460 U.S. 276 (1983). In *Knotts,* the Court 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." *Id.* at 281. Missouri's argument is premised on the idea that this lack of privacy protections for motorists driving on public roads authorizes its law enforcement to freely use ALPR cameras to capture license plates.

What Missouri fails to take into consideration, however, is the weight of the word "reasonable." The Court in *Knotts* did not foreclose all avenues of privacy protection for motorists on public roads; rather, it simply recognized that in 1983, society was not prepared to recognize a heightened expectation of privacy for motorists, as opposed to pedestrians or dog walkers or park-goers. The technology available to law enforcement at the time *Knotts* was decided was decidedly limited. In other words, "[v]isual surveillance [by law enforcement] from

public places along [Knotts' co-defendant's] route or adjoining Knotts' premises would have sufficed to reveal all of these [incriminating] facts to the police." *Id.* at 282. The *Knotts* court was also quick to dismiss the nascent GPS technology that police used to augment their visual search of Knotts' vehicle, stating that "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them *in this case*." *Id.* at 282. (Emphasis added).

Much has changed, legally and technologically, since *Knotts* was decided. The Supreme Court, without yet addressing ALPR technology directly, has become more reticent to green light searches and seizures propelled primarily by high-tech gadgetry. In *Kyllo*, 533 U.S. at 33–34, the Court explicitly stated 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." As technology advances, and the reach of police investigation tools becomes more extensive, society is increasingly prepared to recognize a greater expectation of privacy even in areas like public roadways which were once thought to be entirely unprotected.

In *Carpenter,*138 S. Ct. 2206 at 2211, the Court laid out new considerations for government use of technology in search and seizures. The Court recognized that the invasive nature of new technologies has fundamentally altered the field of criminal investigation: "Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so…for any extended period of time was difficult and costly and therefore rarely undertaken…For that 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.* at 2217.

That type of monitoring and cataloguing is exactly what ALPR cameras were designed to do, and in fact did do in Tozier's case.[16] Derry police uncovered initial evidence of Tozier's alleged connection with Kaspbrak's drug operation through a traditional combination of visual surveillance and tips from confidential informants. However, the bulk of the evidence against Tozier - the digital, historic map of his movements through Derry – was obtained via ALPR cameras. Derry law enforcement would not have been able to construct this comprehensive history of Tozier's movements and meetings but for the technology that substantially enhanced the "sensory faculties bestowed upon them at birth." In order for this technology to have tracked Tozier's movements, each camera needed to be constantly "searching" for segmented data points that law enforcement instructed it to look for - in this case, Tozier's red Chevrolet Corvette with the known license plate number. Each time the camera "recognized" Tozier's vehicle, it "searched" its computer database to identify Tozier as the driver and turned this information over to law enforcement. Further, each "search" for those data points associated with Tozier returned to police a slew of information about Tozier, meaning that even a relatively short or attenuated search revealed an expansive variety of information.

This type of near-constant, far-reaching, and subtle technological surveillance invaded Tozier's "reasonable expectation of privacy in the whole of his physical movements." *Carpenter,* 138 S. Ct. 2206 at 2219. Without deciding if a single captured ALPR image or single APLR recognition constitutes a constitutional search or seizure, it is clear that the "detailed chronicle of [Tozier's] physical presence" that these cameras produced in the process of a criminal investigation does fit that definition. *Id.* at 2220. Tozier's reasonable expectation of privacy was

[16] *See page 13 of this guide for a review of ALPR technology functionality and effectiveness.*

violated because law enforcement closely targeted and tracked his movement over a period of several months.

As of January 2023, there are no cases in Missouri dealing directly with ALPR technology. The Eighth Circuit has tackled the issue only once in *Digital Recognition Network, Inc.*, 803 F.3d at 956, refusing to enjoin enforcement of Arkansas Automatic License Plate Reader System Act. However, *Digital Recognition Network, Inc.* was decided primarily on procedural grounds related to the company's standing to bring suit and did not address Fourth Amendment issues of ALPR technology.

Other states and circuits have attempted to address the issue, but procedural concerns often stand in the way of substantive challenges in court. In addition, where the state has other, significant evidence of a defendant's guilt, there is little opportunity to seriously argue ALPR issues. If the information that law enforcement received from ALPR technology is too far attenuated from the final version of the evidence offered in court, it can be difficult to challenge its admissibility. Finally, ALPR technology is often used to prosecute petty crimes like theft, vandalism, and drug possession. The vast majority of these types of cases are resolved via plea agreement, leaving no opportunity to challenge the admissibility of ALPR evidence in front of a judge.

The United States District Court of the Northern District of California denied a defendant's motion to suppress the fruits of an ALPR technology-powered search in *USA v. Rubin*, 556 F. Supp. 3d 1123, 1125 (N.D. Cal. 2021). Unlike the facts in *Tozier,* law enforcement in *Rubin* conducted a single search using ALPR technology; they did not continue to track Rubin's movements over a lengthy period of time using ALPR technology, but with a separate GPS device authorized by warrant. (Sergeant…entered the partial plate into an Automated

License Plate Reader (ALPR) database...The database located a blue Jaguar with the license plate 7CJX676…Rubin was the vehicle's registered owner…The database also contained entries revealing the Jaguar's location at various points in time). *Id.* at 1125. In contrast, in *Tozier*, police relied on continuous searches by the ALPR cameras to constantly track and follow Tozier's movements.

The Court of Appeals of Minnesota affirmed the suppression of ALPR evidence in *State v. Lelyukh*, No. A21-0699, 2021 WL 5872306, at *5 (Minn. Ct. App. Dec. 13, 2021), review denied (Feb. 23, 2022). Similar to *Tozier,* law enforcement in *Lelyukh* used ALPR technology to identify and track a vehicle, including providing updated information that allowed law enforcement to locate Lelyukh twenty minutes after he had left the location of the first camera. While the court relied heavily on a protective Minnesota statute, Minn. Stat. Ann. § 13.824 (West), to support its findings, the logic of the decision is still applicable to the case at hand. The state statute created a presumption that a warrant is necessary "to monitor or track an individual who is the subject of an active criminal investigation," which can only be overcome if "exigent circumstances justify the use without obtaining a warrant." Previous argument already demonstrates that Derry law enforcement's use of ALPR technology in Tozier's case was so extensive and invasive as to constitute a constitutional search. Therefore, the Fourth Amendment would also require a warrant before its use. The question in both cases is whether exigent circumstances made that requirement moot. In *Lelyukh,* the Court said no, because "the totality of the circumstances…including whether the officer reasonably could have obtained a warrant" suggested that there was no "compelling need for official action" in chasing down a drunk driver. *Lelyukh*, No. A21-0699, 2021 WL 5872306, at 4. It may be true, statutorily, that drug trafficking is a more serious crime than drunk driving, but the circumstances in *Tozier* do not suggest any

level of urgency in the location and arrest of Tozier and Kaspbrak that would practically preclude getting a warrant. The record shows no violence or actual danger presented by Tozier, no impending deadline to the investigation, and no risk of flight or attempt to evade arrest. In fact, police in *Tozier* were so content with a length investigation that they followed Tozier and let him go several times. Clearly, the circumstances were not so dire that law enforcement could not have obtained a warrant before tracking Tozier.

The totality of the information collected by automatic license plate readers in this case constitutes a warrantless search and seizure by the state. The evidence should not be admissible against Tozier in the present criminal proceeding.

PRAYER FOR RELIEF

Wherefore we respectfully ask this Court to grant Tozier's Motion to Suppress as to [Evidence Item #s] and prohibit the State of Missouri from offering these items into evidence in the case of *Missouri v. Tozier*.

X_____

Counsel for Defendant

APPENDIX: STATUTES AND CONSTITUTIONAL PROVISIONS

Missouri Ann. Stat. § 542.296

1. A person aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may file a motion to suppress the use in evidence of the property or matter seized. For the purposes of this section, a pending criminal proceeding shall mean any criminal investigation being conducted with the intention of using the seized subject matter in seeking an indictment or information or when an information has been issued or an indictment returned.

2. The motion to suppress shall be in writing. It shall be filed with the court in which there is pending against the moving party a criminal proceeding growing out of the subject matter of the seizure.

3. The motion shall be made before the commencement of the trial of the moving party on the charge arising out of the seizure unless he was unaware of the grounds or had no opportunity to do so before the trial. In that event the motion may be made during the trial. However, the trial judge may in his discretion entertain a motion any time during trial.

4. Notice shall be given to the prosecuting attorney of the date, time, place and nature of the hearing.

5. The motion to suppress may be based upon any one or more of the following grounds:

(1) That the search and seizure were made without warrant and without lawful authority;

(2) That the warrant was improper upon its face or was illegally issued, including the issuance of a warrant without proper showing of probable cause;

(3) That the property seized was not that described in the warrant and that the officer was not otherwise lawfully privileged to seize the same;

(4) That the warrant was illegally executed by the officer;

(5) That in any other manner the search and seizure violated the rights of the movant under Section 15 of Article I of the Constitution of Missouri, or the fourth and fourteenth amendments of the Constitution of the United States.

6. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The burden of going forward with the evidence and the risk of non-persuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled.

7. If the motion is sustained, the judge shall order the property or matter delivered to the moving party, unless its retention is authorized or required by section 542.301, or by any other law of this state.

Minn. Stat. Ann. § 13.824 Subd. 2

(a) Data collected by an automated license plate reader must be limited to the following:

(1) license plate numbers;

(2) date, time, and location data on vehicles; and

(3) pictures of license plates, vehicles, and areas surrounding the vehicles.

Collection of any data not authorized by this paragraph is prohibited.

(b) All data collected by an automated license plate reader are private data on individuals or nonpublic data unless the data are public under section 13.82, subdivision 2, 3, or 6, or are active criminal investigative data under section 13.82, subdivision 7.

(c) Data collected by an automated license plate reader may only be matched with data in the Minnesota license plate data file, provided that a law enforcement agency may use additional sources of data for matching if the additional data relate to an active criminal investigation. A central state repository of automated license plate reader data is prohibited unless explicitly authorized by law.

(d) Automated license plate readers must not be used to monitor or track an individual who is the subject of an active criminal investigation unless authorized by a warrant, issued upon probable cause, or exigent circumstances justify the use without obtaining a warrant.

Constitution of Missouri: Article I § 15

That the people shall be secure in their persons, papers, homes, effects, and electronic communications and data, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, or access electronic data or communication, shall issue without describing the place to be searched, or the person or thing to be seized, or the data or communication to be accessed, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

Constitution of the United States: Amendment I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States: Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States: Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Constitution of the United States: Amendment XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.