THE *PICKETT* SPLIT: *UNITED STATES V. PICKETT* AND THE CIRCUIT DIVIDE ON THE BORDER SEARCH EXCEPTION TO THE FOURTH AMENDMENT

Comment

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I. INTRODUCTION

Samantha's summer vacation involves a five day trip to the Florida coast: shopping, dining, sunbathing, and sailing.[1] Samantha flies from her New Orleans home to her vacation spot in Miami.[2] She is unaware that she is under investigation for a copyright violation—illegally downloading music online.[3] Additionally, during her last trip to Miami, four months prior, Samantha received a parking ticket that she has not paid.[4] On her second day in Florida, Samantha meets her friend Alexander and rents a deckboat; they spend the morning and afternoon sailing leisurely off the shore of Miami.[5] Neither Samantha nor Alexander are experienced sailors and are oblivious to the fact that that they crossed into international waters at some point during their voyage.[6] Sailing near the international maritime border, Maritime Security observes Samantha's boat floating through international waters and takes note of the rental number displayed on the right side of the vessel.[7] That evening, Samantha and Alexander return to shore and she spends the remainder of her vacation in Miami before flying home to New Orleans.[8]

Samantha, along with most Americans, is unaware that during her trip, she could have been subjected to a warrantless search or seizure.[9] Agents would have a compelling argument that the border search exception to the Fourth Amendment applies to a warrantless search of her person, belongings, luggage, and rental boat.[10] Thus, although Samantha did not begin her journey from a foreign jurisdiction and never touched down on foreign soil, the border search exception could have been exploited in this nontraditional circumstance; in other words, when inadvertent travel into international waters and international airspace constitutes a border crossing.[11] It is irrelevant that neither the unpaid parking ticket nor the illegally downloaded music relates to a border crossing.[12] Additionally, it does not matter that these violations pose no national security threat or illegal importation risk.[13] Samantha is in for a big surprise.[14]

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1. *See infra* notes 231-232 and accompanying text.
2. *See infra* text accompanying notes 253-254.
3. *See infra* note 229 and accompanying text.
4. *See infra* text accompanying notes 228-231.
5. *See infra* text accompanying note 244.
6. *See* United States v. Ramirez-Ferrer, 82 F.3d 1131, 1142 n.13 (1st Cir. 1996) (stating that there is generally a "lack of notice upon entering the United States by water" as the maritime borders are often unmarked).
7. *See infra* note 229.
8. *See infra* text accompanying notes 253254.
9. *See infra* text accompanying note 254.
10. *See* United States v. Pickett, 598 F.3d 231, 233 (5th Cir. 2010).
11. *See id.*
12. *See id.*
13. *See id.*
14. *See infra* Part X.

Following this introduction, Part II summarizes the historical context and background of the Fourth Amendment, while analyzing its central clauses: the "unreasonable search and seizure" clause and the "warrants and probable cause" clause.[15] Part III discusses the modern "exclusionary rule," which prohibits unlawfully obtained evidence from being admitted against a defendant at trial.[16] Part IV briefly describes some of the most common exceptions to the Fourth Amendment's warrant requirement, including consent, incident to a lawful arrest, and exigent circumstances.[17] Part V introduces the border search exception, also referred to as the border search doctrine, which is at the foundation of this Comment.[18] This Part also establishes the three main elements of the border search doctrine: (1) a search took place at the border or its functional equivalent, (2) the object or person has not materially changed since crossing, and (3) there is reasonable certainty that an actual border crossing occurred.[19] As *United States v. Pickett*, a recent border search case, is at the core of this Comment's analysis, Part VI reviews circuit court caselaw on the "actual border crossing" element before *Pickett* was decided in the Fifth Circuit last year.[20] These circuit decisions set the stage for the *Pickett* decision, which deviates from the general consensus that, for a border crossing to occur, there must be reasonable certainty that the defendant traveled from foreign soil.[21] Part VII summarizes the facts of *Pickett*, arguments made by the defendant and the government, and each court's holding.[22] Part VIII explores the concerns that American citizens will face as a result of the *Pickett* decision and the circuit split that followed.[23] Finally, Part IX proposes that the previous circuit court decisions should become universally controlling law through a much-needed Supreme Court decision on the border crossing issue.[24]

II. IN THE BEGINNING: A BRIEF HISTORY OF THE FOURTH AMENDMENT

The fourth provision of the Bill of Rights states in full:

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

15. *See infra* Part II.
16. *See infra* Part III.
17. *See infra* Part IV.
18. *See infra* Part V.
19. *See infra* Part V.
20. *See infra* Part VI; United States v. Pickett, 598 F.3d 231, 231 (5th Cir. 2010). *Pickett* was decided March 2, 2010. *Id.*
21. *See infra* Part VI.
22. *See infra* Part VII.
23. *See infra* Part VIII.
24. *See infra* Part IX.

affirmation, and particularly describing the place to the searched, and the persons or things to be seized.[25]

The framers of the Constitution formulated the "Fourth Amendment as a direct response to the practically unrestrained and judicially unsupervised searches associated with general warrants" that took place before the American Revolution.[26] The arbitrary and indiscriminate nature of searches and seizures under the Crown in England directly motivated the creation and careful construction of the Fourth Amendment.[27]

The plainest explanation of Fourth Amendment principles is embodied in the first clause, declaring that "[t]he right of the people . . . against *unreasonable* searches and seizures, shall not be violated[.]"[28] An individual's right to be secure and protected from unreasonable searches and seizures provides the foundation for the Fourth Amendment, in essence guaranteeing to citizens that they can safely assume their privacy will be protected unless the government provides a justifiable explanation for officials' intrusion into homes, vehicles, or persons.[29] A subjective approach to the reasonableness of a search looks at the totality of the circumstances on a case-by-case basis.[30] Thus, the Fourth Amendment does not prohibit all searches and seizures; rather, it generally denounces only those intrusions deemed unreasonable.[31] While courts have agreed that the first clause's reasonableness approach to the Fourth Amendment is appropriate, "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of [the Supreme Court]."[32]

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25. U.S. CONST. amend. IV. The Fourth Amendment to the United States Constitution, adopted in 1789 and ratified by the States in 1791, was deemed enforceable to the States through the Fourteenth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

26. BERNHARD KNOLLENBERG, GROWTH OF THE AMERICAN REVOLUTION 1766-1775, at 234 (1975) (providing a historical analysis of events leading up to the American Revolution); Chris K. Visser, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 HOUS. L. REV. 1683, 1699 (1999) (discussing the origins of the Fourth Amendment).

27. *See* Visser, *supra* note 26, at 1699.

28. *See* U.S. CONST. amend. IV (emphasis added); *see also* Cady v. Dombrowski, 413 U.S. 433, 439 (1973) ("The ultimate standard set forth in the Fourth Amendment is reasonableness.").

29. *See* State v. O'Hagen, 914 A.2d 267, 277 (N.J. 2007) (taking DNA sample from convicted felon considered a reasonable search); United States v. Thompson, 667 F. Supp. 2d 758, 762 (S.D. Ohio 2009) (holding that search was unreasonable when officers left resident outside, unclothed, for five hours without presenting their warrant). Most states have concluded that an examination of the circumstances and nature of the search or seizure best determines whether the intrusion is justified. *See* Adams v. State, 498 S.E.2d 268, 271 (Ga. 1998).

30. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (holding that to determine whether a search had appropriate consent, the court must assess the totality of the circumstances).

31. *See* Carroll v. United States, 267 U.S. 132, 147 (1925). *Compare* Brown v. Texas, 443 U.S. 47, 51 (1979) (For a determination of reasonableness, look to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."), *with* Johnson v. United States, 333 U.S. 10, 14 (1948) (stating that unless a search or seizure is executed pursuant to a warrant or recognized exception, it is *automatically* considered unreasonable) (emphasis added).

32. Camara v. S.F. Mun. Court, 387 U.S. 523, 528 (1967).

Whether a search is reasonable or unreasonable, however, requires that the court look at both the subjective nature of the first clause and the objective nature of the second clause.[33] When the Bill of Rights was developed, Fourth Amendment protection encompassed objective "general warrants, mass arrests, and promiscuous searches without warrant . . . [as well as] the reasonableness of specific warrants, [and] of probable cause[.]"[34] This reasoning remains true today, as searches or seizures conducted without a warrant or pursued without probable cause are per se unreasonable under the Fourth Amendment—that is, unless an accepted exception is appropriate.[35] Therefore, a trial court's finding on the reasonableness of a search or seizure to allow or refuse the admission of evidence often determines the verdict.[36] As such, an erroneous ruling on reasonableness can have dire consequences for either the state or the defendant.[37]

III. ENFORCING THE FOURTH AMENDMENT: THE "EXCLUSIONARY RULE"

To deter police misconduct, the current method is to exclude at trial all evidence found in the course of an unlawful search, "compelling the police to perform their investigative duties within constitutionally prescribed limits by removing any incentive they might have for violating the constitutional norms."[38] This inadmissibility is what courts term the "exclusionary rule."[39] The rule is not based on an individual's constitutional right and does not aim to make an aggrieved party whole after such a violation has occurred; rather, the rule is in place to deter future officer misconduct.[40] It is a warning to law

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33. *See id.*

34. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1971, at 734 (2009) (examining the concept of search and seizure from English law to the adoption of the Fourth Amendment). "General warrants" were warrants that did not specify the nature of the search or seizure, such as in the "*Wilkes* Cases," which took place in Great Britain in 1762. *Id.* at 440-53. The *Wilkes* Cases involved warrants "so general that [they] did not specify the persons who were subject to seizure, the places subject to search, or the object of such searches." THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 16 (2009).

35. *See* California v. Acevedo, 500 U.S. 565, 592-93 (1991); Mincey v. Arizona, 437 U.S. 385, 390 (1978); Katz v. United States, 389 U.S. 347, 357 (1967).

36. *See* Mapp v. Ohio, 367 U.S. 643, 654 (1961).

37. *See* United States v. Leon, 468 U.S. 897, 907 (1984) (stating that the exclusion of evidence can have "substantial social costs").

38. Sharon L. Davies, *The Penalty of Exclusion—A Price or a Sanction?*, 73 S. CAL. L. REV. 1275, 1275-76 (2000); *see* THOMAS K CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 610 (2008); *see also Mapp*, 367 U.S. at 655 ("[C]ases of this Court . . . [have] steadfastly held that as to federal officers, the Fourth Amendment included the exclusion of the evidence seized in violation.").

39. *See* CUDDIHY, *supra* note 34, at 758. In contrast to the modern use of the exclusionary rule, "[w]hen the colonies separated from Britain, forcible entries that ended in fruitless searches were tortious . . . . Suing the searcher was the accepted British method for punishing and deterring unreasonable searches." *Id.* at 759-60. These measures were similarly applied in American law, where "states exposed [officials] to . . . liability for [their] negligence or misconduct." *Id.* at 760.

40. *See* THOMAS K. CLANCY, *supra* note 38, at 758; *see also* United States v. Calandra, 414 U.S. 338, 347 (1974) ("[T]he ruptured privacy of the victims' homes and effects cannot be restored."). The ultimate reasoning behind the exclusionary rule thus focuses on encouraging law enforcement to follow Fourth

enforcement and prosecutors that their conduct has a direct impact on the outcome of a criminal trial.[41] The lawfulness—and consequently the admissibility—of a search or seizure will be determined on a case-by-case basis, evaluating factors such as: whether law enforcement had obtained and presented a warrant; whether law enforcement officers had probable cause; whether the search or seizure was subjectively reasonable under the circumstances; and whether one of the exceptions to the Fourth Amendment's unreasonable search and seizure requirement was applicable.[42] This form of enforcement—through objections to the admissibility of evidence—provides defendants with the opportunity to keep unlawfully obtained evidence out of the courtroom during trial.[43] Thus, illegal warrantless searches and the inadmissible fruits of such searches often lead to mistrials and not-guilty verdicts, allowing defendants to walk free regardless of guilt.[44] But the exclusionary rule, as a mechanism to deter warrantless searches, is unnecessary if the court finds that law enforcement utilized an exception to the warrant requirement in conducting their search.[45]

IV. EXCEPTIONS TO THE FOURTH AMENDMENT'S WARRANT AND PROBABLE CAUSE REQUIREMENT

While the Fourth Amendment certainly provides a level of protection and reassurance to citizens, it in no way promises that an individual is completely free from governmental invasion.[46] Rather, both the warrant and probable cause requirements of the Fourth Amendment's second clause can essentially be disregarded by law enforcement under a recognized class of circumstances where courts create exceptions to the rule.[47] Protecting the public interest generally motivates the creation of these exceptions for circumstances where

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Amendment principles when carrying out searches or seizures. Elkins v. United States, 364 U.S. 206, 222 (1960).

41. *See Elkins*, 364 U.S. at 222.

42. *See id.*; Brown v. Texas, 443 U.S. 47, 51 (1979); Camara v. S.F. Mun. Court, 387 U.S. 523, 528 (1967); Carroll v. United States, 267 U.S. 132, 147 (1925).

43. *See* Mapp v. Ohio, 367 U.S. 643, 654 (1961); *Elkins*, 364 U.S. at 222.

44. *See* CUDDIHY, *supra* note 34, at 758. Legal scholars and justices, such as Justice Antonin Scalia, have argued that the exclusionary rule should be "our last resort, not our first impulse," as it "set[s] the guilty free and the dangerous at large." Hudson v. Michigan, 547 U.S. 586, 591 (2006). *See also* United States v. Leon, 468 U.S. 897, 404-09 (1984) (reasoning that allowing guilty defendants to go free could generate disrespect for the law and administration of justice); D. Taylor Tipton, *The Dunkin' Donuts Gap: Rethinking the Exclusionary Rule as a Remedy in Constitutional Criminal Procedure*, 47 AM. CRIM. L. REV. 1341, 1342 (2010) (arguing that the exclusionary rule should be replaced with a "liability rule regime").

45. *See* Katz v. United States, 389 U.S. 347, 357 (1967).

46. *See* INGA L. PARSONS, FOURTH AMENDMENT: PRACTICE & PROCEDURE, National Institute for Trial Advocacy 2-3 (2005).

47. *See Katz*, 389 U.S. at 357. Exceptions to the warrant requirement include: airport searches, automobile searches, boat boarding, border searches, consent, exigent circumstances, hot pursuit, incident to arrest, open fields, plain feel, plain hear, plain smell, plain view, prison searches, probation searches, and school searches, among others. PARSONS, *supra* note 46, at 8-9.

obtaining a warrant would likely frustrate the governmental purpose behind the search and impose too great a burden on law enforcement.[48] But, the public interest may not be significant enough to excuse some searches.[49] For example, if police search for illicit materials in a criminal investigation, the "public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found."[50] In this situation, even with a warrant or probable cause, it is not too great a burden for officials to search only those areas where they reasonably believe such contraband will be found.[51] If the Court, however, finds that the warrant requirement is too great a burden for government agents in a particular instance, an exception may be created.[52] While there are many exceptions to the Fourth Amendment, four of the most common will be discussed in this Comment, including: (1) consent, (2) incident to an arrest, (3) exigent circumstances, and finally (4) border searches.[53]

A. Consent

Consent is an exception frequently utilized by law enforcement when attempting to conduct a search or seizure on an individual's person, home, vehicle, or other property.[54] The Supreme Court has "long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so."[55] This is so even if there is no justification for the officers' request to search.[56] Significant questions that courts face with regard to the consent requirement concern (1) whether the consent was voluntary given the circumstances and capacity of the individual; (2) whether officers engaged in coercive actions that led to a less than consensual search; (3) whether a third party gave consent to search property that is jointly owned or rented by the defendant; (4) whether the individual understood the scope of the consent given; and (5) whether police limited the

48. *See* Camara v. S.F. Mun. Court, 387 U.S. 523, 533 (1967) (holding that the need for fire inspections did not rise to the level of a public interest demanding an exception to the warrant requirement); *see also* Flippo v. West Virginia, 528 U.S. 11, 14 (1999) (holding that as there is no "murder-scene exception" to the Fourth Amendment, investigators did not have authority to search an entire cabin simply because a homicide had recently taken place on the premises).

49. *See Camara*, 387 U.S. at 535.

50. *Id.*

51. *Id.*

52. *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 1716 (2009) (holding that searches and seizures incident to an arrest are not a violation of the Fourth Amendment).

53. *See infra* Parts IV.A-C, V.

54. *See* Florida v. Jimeno, 500 U.S. 248, 250-51 (1991). Consensual searches are especially significant in vehicle searches after routine traffic stops. *See also* Visser, *supra* note 26, at 1696-97 (discussing the relaxed Fourth Amendment application to vehicle searches).

55. *See Jimeno*, 500 U.S. at 250-51 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)).

56. PARSONS, *supra* note 46, at 101 ("[O]fficers may simply walk up and ask for consent to search without any grounds justifying the request, provided that the person is not detained or seized.").

search or seizure to the scope allowed by the defendant.[57] When proper consent is given, neither a warrant nor probable cause is necessary for courts to consider the search or seizure lawful.[58]

B. Incident to a Lawful Arrest

A warrantless search or seizure made incident to a lawful arrest, as another delineated exception to the Fourth Amendment, is not per se unreasonable.[59] This exception is justified by "the need to seize weapons and other things which might be used to assault an officer or affect an escape, as well as by the need to prevent the destruction of evidence" at a crime scene.[60] Lawful arrests include those based upon an arrest warrant, an administrative warrant, or probable cause that justifies an arrest without a warrant.[61] A search incident to arrest is limited, however, to the area within the arrestee's immediate control.[62] Additionally, officers are restricted to search only those materials and areas related to the crime that resulted in the arrest and to conduct the search within a reasonable time after the arrest.[63] Accordingly, if the search is limited to these conditions, evidence obtained at that time will be considered reasonable and admissible.[64]

C. Exigent Circumstances

A warrantless search may also be carried out when exigent circumstances exist.[65] Determining what constitutes an exigent circumstance is subjective and

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57. *See, e.g.*, United States v. Matlock, 415 U.S. 164, 169-70 (1974) (stating that consent from a jointly occupied resident is valid against all co-occupants); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("[The] question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

58. *See* PARSONS, *supra* note 46, at 101.

59. *See* Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 1716 (2009) (citing United States v. Robinson, 414 U.S. 218, 230-34 (1973) (pat-down search of arrestee considered valid); Chimel v. California, 395 U.S. 752, 763 (1969) (search or seizure incident to arrest does not permit routine searches unrelated to the crime which led to the arrest); Jones v. United States, 357 U.S. 493, 499-500 (1958) (when the police officers' purpose for searching the arrestees home was to search for evidence rather than make an arrest, the incident to arrest exception did not apply); Marron v. United States, 275 U.S. 192, 199 (1927) (Searches incident to arrest "[extend] to all parts of the premises used for the unlawful purpose.").

60. Preston v. United States, 376 U.S. 364, 367 (1964).

61. *Search Incident to Lawful Arrest*, 8A Fed. Proc., L. Ed. § 22:210, *available at* Westlaw 8A Fed. Proc., L. Ed. (discussing generally searches incident to lawful arrest).

62. *Chimel*, 395 U.S. at 763.

63. *Id.*; *Preston*, 376 U.S. at 367 (holding that the search of arrestee's vehicle after he was taken into custody at the police station was too remote in time to be a valid search incident to arrest); *Marron*, 275 U.S. at 198-99 ("The officers were authorized to arrest for crime being committed in their presence . . . . They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise.").

64. *See Gant*, 556 U.S. 332 129 S. Ct. at 1716.

65. *See* Adams v. Williams, 407 U.S. 143, 145 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his

thus more difficult to discern than whether consent was given or whether a valid arrest took place.[66] An officer's duty "to protect or preserve life or avoid serious injury is justification for what would otherwise constitute an illegal search absent an exigency or emergency."[67] Exigent circumstances generally include situations when law enforcement reasonably believe that an individual is in need of immediate aid, when there is no time to get a warrant, when substantial harm to another person is imminent, or when destruction of crucial evidence is likely to take place if the search is not swiftly executed.[68] Courts generally look to how officers acted under the circumstances as they understood them at the time of the search rather than carry out a hindsight-based evaluation of reasonableness at trial.[69]

The remainder of this Comment will examine in greater depth another commonly utilized exception to the Fourth Amendment prohibition against searches and seizures conducted without a warrant or probable cause—the border search exception.[70] This exception remains controversial in light of the ongoing national immigration debate.[71] Additionally, it has great significance for border states, which are implementing a variety of policies to guard national borders and prevent the importation of illegal drugs, weapons, and immigrants.[72] Likewise, the border search exception is pertinent to citizens who travel not only internationally but also domestically.[73]

V. TRAVELER'S EXCEPTION: THE BORDER SEARCH DOCTRINE

As discussed above, courts have held that the protection from warrantless searches is not absolute and allows for exceptions that may be applied under certain limited circumstances, such as consent, exigent circumstances, and

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shoulders and allow a crime to occur or a criminal to escape."); United States v. Marshall, 157 F.3d 477, 482 (7th Cir. 1998) (stating that exigent circumstances existed when officers had reason to believe that evidence could be destroyed before a warrant was secured).

66. *See supra* note 64.

67. Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (citing Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963)).

68. *See* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 623 (1989); *Mincey*, 437 U.S. at 392-93.

69. *See Marshall*, 157 F.3d at 482. To decide whether the circumstances were actually exigent, the situation should be viewed under "the perspective of the officers at the scene. Accordingly, we ask not what the police *could* have done but rather whether they had, at the time, a reasonable belief that there was a compelling need to act and no time to procure a search warrant." *Id.*

70. *See infra* Part V.

71. *See* Dennis J. Loiacono & Jillian Maloff, *Be Our Guest: Synthesizing a Realistic Guest Worker Program as an Element of Comprehensive Immigration Reform*, 24 HOFSTRA LAB. & EMP. L.J. 111, 115-16 (2006) (discussing the opposing sides of the immigration debate).

72. *See* Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 169-70 (2007) (stating that Arizona Immigration law "provisions are still under debate at the federal, state, and local levels."); *see also State Enforcement of Federal Immigration Laws*, Texas Conservative Coalition Research Institute (Jan. 7, 2011, 12:50 PM), http://www.txccri.org/publications/LawEnforcement.pdf (providing an overview of border state responses to illegal human and drug trafficking).

73. *See* discussion *supra* Part V.

searches incident to a lawful arrest.[74] The border search doctrine applies to searches or seizures that take place at national borders.[75] The state's authority to utilize this exception "has a history as old as the [F]ourth [A]mendment itself."[76] Under the border search doctrine, the mere fact that an individual is crossing the border justifies use of a search without a warrant or probable cause.[77] In these situations, law enforcement officials do not need to present a warrant or show probable cause because the border crossing itself provides the level of suspicion sufficient to go ahead with the search.[78]

"Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[79] Generally, at the border an individual's Fourth Amendment rights carry less weight while the government's interest in protecting the border is at its highest degree.[80] In an evaluation of this balance between individual privacy and the government's interest, two categories of border searches exist—routine searches and non-routine searches.[81] A routine border search can be executed without any level of suspicion at all, while the more intrusive non-routine border search calls for only reasonable suspicion.[82] The reasonable suspicion required for non-routine searches or seizures is not a strict standard, but rather, only requires a "particularized and objective basis for suspecting the particular person."[83] This standard is much lower than the

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74. *See* discussion *supra* Part IV.

75. *See* United States v. Flores-Montano, 541 U.S. 149, 152-53 (2004); United States v. Montoya de Hernandez, 473 U.S. 531, 554 (1985); United States v. Ramsey, 431 U.S. 606, 619 (1977); Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973).

76. *Ramsey*, 431 U.S. at 616 (referring to the Act of July 31, 1789, which "granted customs officials 'full power and authority' to enter and search 'any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed . . . .'"); John Duong, *The Intersection of the Fourth and Fifth Amendments in the Context of Encrypted Personal Data at the Border*, 2 DREXEL L. REV. 313, 319 (Fall 2009) (discussing the history of the border search exception, dating back to the 1789 customs statute); *see also* Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961) ("[D]ifferent rules of law are applicable, and for over a hundred years have been applicable with respect to the plenary power to search at the border and the more circumscribed power existing anywhere else within the country's boundaries.").

77. *Ramsey*, 431 U.S. at 616; *Flores-Montano*, 541 U.S. at 152-53; *See also* 19 U.S.C.A. § 482 (West 2010) (allowing "officers or persons authorized to board or search vessels [to] stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person . . . . "); 19 U.S.C.A. § 1581(a) (West 2010) (providing that officers may go aboard any vessel or vehicle at the border to inspect "any person, trunk, package, or cargo on board").

78. *See* PARSONS, *supra* note 46, at 165.

79. Carroll v. United States, 267 U.S. 132, 143 (1925).

80. United States v. Gonzalez-Rincon, 36 F.3d 859, 864 (9th Cir. 1994) (citing *Montoya de Hernandez*, 473 U.S. at 539-40 (1985)).

81. *See* United States v. Whitted, 541 F.3d 480, 485 (3d Cir. 2008).

82. *See Whitted*, 541 F.3d at 485 (stating that routine border searches involve those that do not seriously invade upon a traveler's privacy); *Flores-Montano*, 541 U.S. at 152 (rejecting the argument that reasonable suspicion was required for removal of a vehicle's gas tank, which was considered routine).

83. United States v. Montoya de Hernandez, 473 U.S. 531, 541-42 (1985) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). *See also* Gregory L. Waples, *From Bags to Body Cavities: The Law of*

probable cause requirement, which would be necessary in a search that does not take place at the border.[84]

It is irrelevant whether the search is routine or non-routine if the border search exception has not been appropriately applied to the search that took place.[85] When the government cannot show that the border search exception elements are met, neither a routine nor a non-routine search is justified without a warrant or probable cause.[86] For officials to employ the border search doctrine, three elements must be satisfied: (1) the search must take place at the border or a functional equivalent of the border; (2) the search must occur before an object or person crossing has an opportunity to materially change condition; and (3) there must be reasonable certainty that a border crossing has actually taken place.[87]

A. Search Must Take Place at the Border

Law enforcement officials may not employ the border search doctrine if the search or seizure does not actually take place at the border or shortly thereafter.[88] If an individual is searched too far from the physical border, it is more difficult for officials to discern whether the suspect actually crossed the border, and at that point, officials should obtain a warrant by some other means.[89] Conversely, agents have practically "unfettered discretion" when the search is conducted at the border.[90] Courts have held that searches or seizures may not only be executed at physical borders; rather, officials may use their

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Border Search, 74 COLUM. L. REV. 53, 66-67 (1974) ("[T]he Fifth Circuit has been satisfied with showings of suspicion scarcely greater than those that trigger port-of-entry searches.").

84. *See* State v. Mordowanec, 788 A.2d 48, 57 (Conn. 2002) (defining probable cause as having "such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred").

85. *See* United States v. Ramsey, 431 U.S. 606, 616 (1977); Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); United States v. Fogelman, 586 F.2d 337, 343 (5th Cir. 1978).

86. *See, e.g.*, United States v. Ortiz, 422 U.S. 891, 896-97 (1975) (holding that the border search doctrine is inapplicable if the search takes place at a location too far removed from the border such that it is not a functional equivalent of the border); United States v. Santiago, 837 F.2d 1545, 1548 (11th Cir.1988) (reasoning that if the material change element has not been met, the border search doctrine does not apply); United States v. Ivey, 546 F.2d 139, 142 (5th Cir. 1977) ("Before Customs agents may legitimately conduct a border-type search of an aircraft, there must be a 'high degree of probability that a border crossing took place'.").

87. *See Ramsey*, 431 U.S. at 616; *Almeida-Sanchez*, 413 U.S. at 272; *Fogelman*, 586 F.2d at 343; *see also* Ralph V. Seep, Annotation, *Validity of Warrantless Search Under Extended Border Doctrine*, 102 A.L.R. FED. 269 § 11 (1991) (noting that "reasonable certainty" is more than probable cause but less than beyond a reasonable doubt).

88. *See* United States v. Soria, 519 F.2d 1060, 1063 (5th Cir. 1975) (stating that when the suspect is searched, there must be a "direct connection with the border, considering such factors as the cause for the initiation of the search, the distance from the border and the original point of entry, and the time elapsed since entry").

89. *See* United States v. Niver, 689 F.2d 520, 525-26 (5th Cir. 1982); *Almeida-Sanchez*, 413 U.S. at 272.

90. *Soria*, 519 F.2d at 1063.

discretion to search at a functional equivalent of the border.[91] The functional equivalent of the border is generally the first point that an individual can physically be searched or detained after crossing the border.[92] A search or seizure at the functional equivalent of the border "is in essence no different than a search conducted at the border; the reason . . . is the practical impossibility of requiring the subject searched to stop at the physical border."[93] For instance, it is not feasible that a suspect flying from Rome to New York can be searched at the exact moment the plane crosses the border; instead, officials are permitted to search the suspect when the suspect arrives at the airport.[94] Circuit courts are divided over how stringent the test should be for determining functional equivalency after a border search has taken place and have rationalized what the functional equivalent should mean in a variety of ways.[95] But no matter the court, if functional equivalency is proven, the government is one step closer to proving that no probable cause or warrant was required.[96]

B. No Material Change

After determining that the search has taken place at the border or the functional equivalent, it naturally follows that the search must take place almost immediately after the border crossing has occurred to ensure that the second element is met—the object or person had no opportunity to materially change after the border crossing.[97] For example, it is unlikely that an object has materially changed after crossing the border if its container had not been tampered with, was closed with a seal, or was viewed by surveillance at the point of crossing.[98] When there has been an opportunity for the object or

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91. *See Almeida-Sanchez*, 413 U.S. at 272.

92. *See id.* at 272-73. "[P]orts of entry constitute functional equivalents of the border under the appropriate circumstances," allowing for warrantless searches of vessels in inland waters. Ralph V. Seep, Annotation, *What Constitutes Functional Equivalent of Border for Purposes of Border Exception to Requirements of Fourth Amendment*, 94 A.L.R. FED. 372 § 2[a] (1989).

93. United States v. Cardenas, 9 F.3d 1139, 1147-48 (5th Cir. 1993).

94. *See id.*

95. *Compare* United States v. Bowen, 500 F.2d 960, 965 (9th Cir. 1974) (arguing that no checkpoint beyond that of the immediate border can be regarded as the functional equivalent of the border), *with* United States v. Alvarez-Gonzalez, 561 F.2d 620, 625 (5th Cir. 1977) (applying a more lenient test to functional equivalency by analyzing "relative permanence, relatively minimal interdiction of domestic traffic, and a capability to monitor portions of international traffic not otherwise practically controllable"), *and* United States v. Clay, 581 F.2d 1190, 1192-93 (5th Cir. 1978) (holding that a location nine miles from the Mexico border constituted a functional equivalent). While *Bowen* and *Alvarez-Gonzalez* were later indirectly disavowed by the Supreme Court's decision in *Almeida-Sanchez*, their rationale demonstrates the differing views on how long after a defendant has crossed the border law enforcement may utilize a search under the border search exception. *See* United States v. Jackson, 825 F.2d 853, 854 (5th Cir. 1987) (citing *Almeida-Sanchez*, 413 U.S. at 272-73).

96. *See supra* note 93 and accompanying text.

97. *See* United States v. Santiago, 837 F.2d 1545, 1548 (11th Cir. 1988) (holding that a search taking place in the airport after an international flight ensured that the person had just crossed the border and was searched almost immediately).

98. *See* Seep, *supra* note 92, at §§ 8 - 9[a].

person to materially change since the initial crossing, the border search doctrine is inappropriate, and as a result, law enforcement must have probable cause or a lawful warrant to conduct the search.[99] To the contrary, if the search takes place immediately after the suspect crosses the border, the likelihood of a material change is low and the element is satisfied.[100]

C. Actual Border Crossing

The final element of the border search exception—whether there is reasonable certainty that an actual border crossing has occurred—will be the exclusive focus of the remainder of this Comment.[101] It is rational to require that the border search doctrine only apply to warrantless searches that take place when agents are reasonably certain that the border has actually been crossed.[102] Yet, the border crossing element has caused much confusion in recent years as courts grapple with modern advances in travel and transportation and the concerns that follow.[103] Most courts, however, will only establish a border crossing if the suspect has traveled from a physical foreign location.[104] The location at issue is often termed the "point-of-origin."[105] Circuit courts have looked at whether the point-of-origin is domestic or foreign to determine if the border was actually crossed.[106] Generally, under this element, officers are prohibited from conducting a warrantless search or seizure when the suspect has not come from a foreign point-of-origin.[107] This logically leads to the conclusion, as will be discussed later, that for a crossing to occur, the defendant must have started from a foreign location before crossing the national border.[108] Significant circuit court decisions will be examined before introducing the most recent border crossing case—*United States v. Pickett*.[109]

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99. *See* United States v. Hill, 939 F.2d 934, 937 (11th Cir. 1991).
100. *See id.*; *Santiago*, 837 F.2d at 1548.
101. *See infra* Parts VI-IX.
102. *See* United States v. Ivey, 546 F.2d 139, 142 (5th Cir. 1977) (stating that officers must "be 'reasonably certain' that the object of the search has just entered from a *foreign country*") (emphasis added).
103. *See infra* Parts VI-VIII.A.
104. *See* United States v. Cabaccang, 332 F.3d 622, 625 (9th Cir. 2003); *Ivey*, 546 F.2d at 142.
105. *See Ivey*, 546 F.2d at 142.
106. *See id.*
107. *See id.*
108. *See id.*
109. *See infra* Part VI.

VI. SMOOTH SAILING: "BORDER CROSSING" JURISPRUDENCE BEFORE *UNITED STATES V. PICKETT*

The United States Supreme Court has decided many cases analyzing the border search exception.[110] But the Court has given the third element—whether a true border crossing has taken place—less attention because in past cases it was not difficult to discern whether an individual had physically crossed an international border.[111] Yet, as technology has advanced, the border crossing element has raised new questions, particularly among the circuit courts.[112] Each has continued to apply the traditional balance between individual privacy and national sovereignty while also supplying practical considerations relevant to modern travel.[113] Although many circuits have addressed the border crossing element, the Eleventh, Ninth, First, and Fifth Circuits have given it the most thought.[114]

A. Eleventh Circuit: United States v. Garcia

The facts of *United States v. Garcia* are typical of a border search—a conventional drug importation case.[115] In *Garcia*, suspects were spotted flying an unidentified airplane off the coast of Florida.[116] Air Force personnel tracked the vessel as it landed at an airport, clumsily took off again, and then finally landed in a mangrove area.[117] Customs officers saw the suspects as they threw maps and packages containing a "white powdery substance" from the craft.[118] Approximately one and a half hours after the suspects fled, officers found and detained them in mangrove bushes located about a quarter mile from the plane.[119]

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110. *See, e.g.*, United States v. Montoya De Hernandez, 473 U.S. 531, 563 (1985); United States v. Ramsey, 431 U.S. 606, 608 (1977); Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973); Carroll v. United States, 267 U.S. 132, 143 (1925).

111. *See, e.g.*, *Ivey*, 546 F.2d at 142 (before the aircraft landed in the United States, it was last seen flying over a foreign point-of-origin); United States v. Potter, 552 F.2d 901, 906 (9th Cir. 1977) (because an airplane left the El Paso Airport, flew over Mexican territory, and returned to an airport in Las Vegas, agents were reasonably certain that a border crossing occurred).

112. *See infra* Parts VI.A-D, VII.

113. *See infra* Parts VI.A-D, VII.

114. *See, e.g.*, United States v. Cabaccang, 332 F.3d 622, 625 (9th Cir. 2003); United States v. Ramirez-Ferrer, 82 F.3d 1131, 1142 (1st Cir. 1996); United States v. Garcia, 672 F.2d 1349, 1357 (11th Cir. 1982); United States v. Stone, 659 F.2d 569, 570 (5th Cir. 1981). Each of these circuits represent border states, which is probably why they address the border crossing issue more frequently than other circuits. *See Court Locator*, UNITED STATES COURTS, http://www.uscourts.gov/court_locator.aspx (last visited Jan. 15, 2011) (United States map of circuit courts).

115. *See Garcia*, 672 F.2d at 1352.

116. *Id.*

117. *Id.* at 1353.

118. *Id.*

119. *Id.*

The defendants in *Garcia* were charged with possession and intent to distribute methaqualone in violation of federal statute 21 U.S.C. § 841(a)(1).[120] Each defendant moved to suppress the evidence found after the landing, arguing that the border search was unlawful.[121] Their motions were denied, and the district court subsequently found each guilty.[122] Both defendants appealed.[123]

The Eleventh Circuit held that if an aircraft's point-of-origin is unknown, agents must show with reasonable certainty that the defendants actually crossed the border.[124] In *Garcia*, the court stated that it "would not be prepared to uphold as a border search, however, a search of [a craft] whose *known* points or origin and landing were within the United States simply by virtue of the fact that the [craft] had passed over international waters en route."[125] While *Garcia* dealt with crossing international airspace rather than international waters—in contrast to the *Pickett* case discussed below—the same reasoning can be applied when agents know with absolute certainty that a ship's point-of-origin is domestic, rather than in circumstances when officials are making an educated guess.[126] As such, in a border search, there must always be a substantial likelihood that the vessel has traveled from a foreign location, not simply from abstract foreign "space."[127]

B. Ninth Circuit: United States v. Cabaccang

In *United States v. Cabaccang*, the Ninth Circuit interpreted a federal statute that made it illegal to "import into the customs territory of the United States *from any place outside thereof* . . . any controlled substance."[128] There, the defendants transported methamphetamine from Guam to California, both points within United States territory.[129] They illegally imported the drugs by concealing the drugs beneath their clothing and, additionally, through United States mail.[130] Each defendant moved to have the evidence of possession suppressed, arguing that the transport of drugs did "not constitute importation merely because the drugs traveled through international airspace."[131] The government argued that the international airspace constituted a place outside the United States, while defendants maintained that when the point-of-origin, in

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 1355 n.6.
125. *Id.* at 1357 (emphasis added).
126. *See id.*
127. *See id.* at 1358.
128. United States v. Cabaccang, 332 F.3d 622, 625 (9th Cir. 2003) (citing 21 U.S.C. § 952 (2006)) (emphasis in original).
129. *Id.* at 624.
130. *Id.* at 626.
131. *Id.* at 624.

this case Guam, is within United States jurisdiction, the fact that international airspace is covered does not matter.[132]

The Ninth Circuit agreed with the defendants and held that international airspace was "merely something through which an aircraft must pass on its way from one location to another."[133] Like *Garcia*, *Cabaccang* distinguished its fact pattern from previous circuit court cases that held differently, such as *United States v. Phillips*, which reasoned that a border crossing had taken place when international airspace was crossed.[134] *Cabaccang* pointed out that in *Phillips* and similar cases, the government had sufficient evidence that the vessels had in fact come from a foreign jurisdiction, while in *Cabaccang*, there was no such evidence; rather, officials knew that the point-of-origin was domestic.[135] The domestic point-of-origin concern comes up again and again in international airspace fact patterns like *Garcia* and *Cabaccang*, but for purposes of this Comment, international waters cases are more on point and have been most intimately addressed by the First Circuit.[136]

C. First Circuit: United States v. Ramirez-Ferrer

United States v. Ramirez-Ferrer is similar to *Garcia* and *Cabaccang*, as each involved domestic locations. The main distinguishing factor is that the previous circuits addressed international airspace, while *Ramirez-Ferrer* dealt with international waters.[137] In *Ramirez-Ferrer*, the defendants planned to carry cocaine by boat from Mona Island to Puerto Rico.[138] Although both Mona Island and Puerto Rico are under United States jurisdiction, the voyage required that the defendants cross international waters because the distance between the islands is thirty-nine miles—approximately fifteen miles of which are outside of the twelve-mile territorial boundary.[139] After Puerto Rico police received an anonymous call with information about the defendants' plan, law enforcement officials intercepted the boat approximately a mile off the coast of Puerto Rico.[140] The defendants were indicted under a federal importation statute and consequently appealed.[141]

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132. *Id.* at 626.

133. *Id.* at 626 ("[D]rugs do not [simply] come from international airspace.").

134. *See* United States v. Phillips, 664 F.2d 971, 987 (5th Cir. 1981).

135. *Cabaccang*, 332 F.3d at 634 ("*Phillips* therefore does not provide support for the contention that § 952(a) prohibits the domestic transport of drugs through international airspace."); United States v. Leuck, 678 F.2d 895, 904-05 (11th Cir. 1982).

136. United States v. Ramirez-Ferrer, 82 F.3d 1131, 1132 (1st Cir. 1996).

137. *Id.* at 1136 n.4 ("International waters . . . are 'international' in the sense that the vessels of other nations have a right of free navigation through them.").

138. *Id.*

139. *Id.* at 1132-33. The United States boundary offshore extends twelve miles and "given the [twelve] mile limit, to travel from Mona Island to the main island of Puerto Rico requires that a vessel cross international waters." *Id.* at 1133.

140. *Id.* at 1133.

141. *Id.*; *see also* 21 U.S.C. § 952 (1994 & Supp. 2010).

The First Circuit held that merely crossing international waters from one domestic location to another was not sufficient to establish a border crossing for purposes of either the border search doctrine or the importation statute, which required that the illicit drugs originate from a place outside United States territory.[142] Because the drugs were transported between two United States jurisdictions, the defendants' actions did not fall within the importation statute.[143] Similar to the international airspace in *Cabaccang*, international waters do not constitute a place outside United States territory.[144] As the *Ramirez-Ferrer* court was principally concerned with the effects that a broadened interpretation of "border crossing" could have on travelers and maritime workers, the court applied the international airspace reasoning of other circuits to a case with international waters.[145]

D. Fifth Circuit: United States v. Stone

United States v. Stone is the case most cited by the *Pickett* majority opinion, discussed below.[146] The defendant in *Stone* was spotted flying from the Bahamas toward Florida when his plane nearly collided with another aircraft.[147] After Customs officers pursued the craft, the defendant was detained and his plane searched at Orlando International Airport.[148] He was subsequently convicted of possession and importation of marijuana.[149]

The defendant argued that, because officials did not have evidence that his point-of-origin was foreign, no border crossing was proven.[150] Stone contended that, as a result of the unlawful border search, the incriminating evidence found in his aircraft should have been suppressed at trial.[151] The Fifth Circuit held that, because Stone's plane was seen flying over the Bahamas on its journey to Florida, there was reasonable certainty that a border crossing had occurred and thus, the border search was valid under the border search doctrine.[152] The court stated that "[i]n no case has a border search been invalidated because the object's departure from foreign soil was not demonstrated," referring to the fact that officers were not absolutely certain whether the defendant had come from a foreign location—that the defendant's craft was discovered traveling from the Bahamas inferred a border crossing.[153]

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142. *Ramirez-Ferrer*, 82 F.3d at 1135-36.
143. *Id.* at 1135-41.
144. *See id.* at 1135-36.
145. *See id.* at 1142-43.
146. *See* United States v. Pickett, 598 F.3d 231, 233-35 (5th Cir. 2010).
147. United States v. Stone, 659 F.2d 569, 570 (5th Cir. 1981).
148. *Id.* at 570-72.
149. *Id.* at 570.
150. *Id.* at 570, 573.
151. *Id.* at 570.
152. *Id.* at 572.
153. *Id.* at 573.

At first glance, *Stone* appears to depart from the previously discussed circuit's holdings; however, *Stone* is in line with the Eleventh, Ninth, and First circuits as the domestic points-of-origin in the former cases were known by officials, whereas Stone's point-of-origin was inferred to be foreign.[154] Rather than creating conflicting precedent, *Stone* aligned with the reasoning of each case but held in favor of the government because there was no domestic point-of-origin known or inferred.[155]

VII. *UNITED STATES V. PICKETT*: THE TIDES HAVE TURNED

The recent case that will cause disarray among circuits, *United States v. Pickett*, is unusual in light of the common circumstances under which the border search exception is utilized: illegal drug importation.[156] *Pickett*, in contrast, dealt with the illegal subscription and possession of child pornography that was downloaded and purchased in the defendant's home on United States soil.[157] Just as its facts are atypical of a border search case, the *Pickett* majority decision stands out when compared to most circuit decisions that reviewed this issue.[158]

A. Facts

In *United States v. Pickett*, Defendant Antonnio Pickett was a "commercial diver on the CM15, a pipelay/bury barge which was stationed at an oil and gas production site thirty miles off the coast of Louisiana," located in international waters.[159] Immigration and Customs Enforcement (ICE) received information that Pickett had subscribed to child pornography on his laptop in both December 2006 and January 2007.[160] In response, ICE agents waited for Pickett at the border in Venice, Louisiana, when he returned ashore after a shift at the CM15 on July 2, 2007.[161] The ICE agents, along with customs officers and two local sheriff's deputies, conducted a secondary customs inspection with

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154. *See id.* at 570.

155. *See id.* at 570, 573.

156. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 532-33 (1985) (alimentary canal smuggler searched at the airport); United States v. Ramirez-Ferrer, 82 F.3d 1131, 1145 (1st Cir. 1996) (cocaine dealer searched on the main island of Puerto Rico after sailing between small islands of the same municipality); United States v. Garcia, 672 F.2d 1349, 1353 (11th Cir. 1982) (unmarked plane carrying methaqualone tablets searched after flying through international airspace).

157. United States v. Pickett, 598 F.3d 231, 233 (5th Cir. 2010).

158. *See* discussion *supra* Part VI.

159. *Pickett*, 598 F.3d at 232-33. The Bureau of Ocean Energy Management, Regulation & Enforcement leases offshore areas for oil and gas production which are federally owned and monitored submerged lands off the coast. BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION & ENFORCEMENT (BOEMRE) http://www.boemre.gov (last visited Oct. 7, 2010). Like the defendant in *Ramirez-Ferrer*, Pickett was in international waters because the oil rig was more than twelve miles from United States soil. *Ramirez-Ferrer*, 82 F.3d at 1133; *see* Pickett, 598 F.3d at 232-33.

160. *Pickett*, 598 F.3d at 233.

161. *Id.*

the sole intention of searching Pickett's electronic devices.[162] Agents proceeded—without a warrant—to search his thumb drives, hard drives, and laptop memory card.[163] On the dock, agents eventually discovered the suspected illicit images on one of the devices.[164] After the images were uncovered at the dock, Pickett waived his *Miranda* rights and admitted to subscribing to child pornography, which led to a full warranted search that revealed more illegal images and provided enough evidence to charge Pickett with possession of child pornography.[165]

B. Arguments

At the trial court, Pickett moved to suppress the images discovered and the statement given on July 2nd, as well as the additional materials found subsequent to the dock search, claiming that they were the "fruits of an 'illegal warrantless search.'"[166] Pickett then countered the government's initial assertion that a warrant was unnecessary under the border search exception by arguing that the exception did not apply because the CM15 was a "federal enclave"—a domestic location—under the Outer Continental Shelf Lands Act (OCSLA), and as a result, there was no border crossing for purposes of the border search doctrine.[167] Pickett contended that when the point-of-origin, in this case the CM15, is known to be a domestic location, the border search doctrine should not be triggered.[168] Additionally, Pickett argued that *United States v. Stone*, on which the government heavily relied, was distinguishable from his case because in *Stone* the government agents did not know the defendant's point-of-origin and could "infer a foreign point of origin based on

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* (noting that OSCLA "extends adjacent state law as adopted federal law" beyond the mainland). The OCSLA statute states that:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and *artificial islands and fixed structures erected thereon*, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

43 U.S.C. § 1333(a)(2)(A) (1988) (emphasis added).

168. Br. of Def.-Appellant at 6-7, *Pickett*, 598 F.3d at 235 "There is no more justification for searching the aircraft or passengers who make . . . flights [from New Orleans to Miami] than there would be for searching those whose domestic flights do not happen to take them over the ocean on the way." Br. of Def.-Appellant at 7. When exploring the domestic point-of-origin issue in this Comment, it should be assumed that Pickett's point-of-origin was domestic. If Pickett had traveled from Mexico to Louisiana, it would be unquestionable that his point-of-origin was foreign; however, there are arguments on both sides of the debate concerning oil rigs that are in international waters but built upon or permanently anchored to sea beds under United States jurisdiction. For purposes of the Pickett debate, this Comment is concerned with and how the *Pickett* decision will affect American citizens whose point-of-origin is undoubtedly domestic.

the attendant circumstances."[169] In contrast, officials in *Pickett* knew the defendant traveled to and from the CM15 and had knowledge that the oil rig was a federal enclave.[170] In the government's brief, it contended that traveling through international waters, whether from a domestic or foreign location, was enough to establish a border crossing.[171] Because Pickett crossed a "seaward boundary" when he sailed to and from the CM15, the border crossing requirement was satisfied, and thus, ICE agents appropriately utilized the border search doctrine.[172] Additionally, ICE briefly asserted that the CM15 was not a federal enclave under OCSLA and was therefore a foreign location.[173]

C. The Courts

The trial judge accepted the government's argument, simply concluding that Pickett was "*outside the country, headed in"* and crossed the border by traveling through international waters.[174] Accordingly, the judge denied Pickett's motion to suppress and allowed the government to admit the confession, laptop discoveries, and home investigation.[175] Consequently, Pickett was found guilty of possessing child pornography and sentenced to eighty-seven months in prison.[176] Pickett appealed.[177]

Neither the District Court nor the Fifth Circuit Court of Appeals considered whether the CM15 was a federal enclave under OCSLA.[178] Instead, each court examined whether the defendant's point-of-origin—be it domestic or foreign—was material for purposes of the doctrine's border crossing requirement.[179] According to both courts, the point-of-origin was irrelevant.[180] Specifically, the courts expressly claimed that they aligned with *United States v. Stone* and held that it was irrelevant whether the CM15 was a federal enclave (domestic) or a foreign point-of-origin.[181] What mattered, the Fifth Circuit Court of Appeals stated, in direct contrast with other circuit decisions, was that

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169. *Id.*

170. *Pickett*, 598 F.3d at 233.

171. Br. of Pl.-Appellee at 15-16, *Pickett*, 598 F.3d at 235.

172. Br. of Pl.-Appellee 14-15 (stating that "[i]n this instance, the 'seaward boundary' is the border at issue: '[t]he seaward boundary of each original coastal state' has been determined to be a line three geographical miles distant from its coast line" under 43 U.S.C. § 1312 (2010)).

173. *Id.* at 19.

174. *Pickett*, 598 F.3d at 233 (emphasis added).

175. *Id.*

176. *Id.*

177. *See id.* at 233-35. When reviewing an appeal for suppressing evidence, courts "view the evidence presented at the suppression hearing in the light most favorable to the prevailing party." *Id.* at 233-34 (quoting United States v. Harris, 566 F.3d 422, 433 (5th Cir. 2009)).

178. *See id.* at 233-35.

179. *See id.*

180. *Id.* at 234 ("[T]he 'critical fact' we must look to in determining whether the border search exception applies is whether or not a border crossing has occurred, *not the point of origin* of the defendant's journey.") (emphasis added).

181. *See id.* at 235; United States v. Stone, 659 F.2d 569, 573 (5th Cir. 1981).

the vessel crossed through international waters on its journey (i.e. a seaward boundary); whether it was from a domestic-to-domestic or a foreign-to-domestic location had no bearing on the court's conclusion.[182] The court did not acknowledge the defendant's *Ramirez-Ferrer* argument that an expansion of the border crossing element would lead to a large number of unnecessary border searches.[183]

Pickett's concurring opinion is as important to the border crossing discussion as the majority decision because it stresses the unnecessary circuit split created by the majority decision.[184] The concurring justice in *Pickett* pointed out that the factual situations in *Pickett* and *Stone* were at odds on what he believed to be an important issue; the government did not know the point-of-origin in *Stone*, and thus, the majority's reliance on that case was misplaced.[185] Unlike *Stone*, in *Pickett* the agents knew the exact point-of-origin.[186] Moreover, the point-of-origin discussion in *Stone* was dicta.[187] In the end, however, the concurring justice joined the judgment of the majority because he concluded that the CM15 oil site was not a federal enclave under OCSLA and was thus a foreign point-of-origin.[188] As a result, the concurring judge kept in line with the previous circuit decisions and refused to deviate from the constitutional question that he believed the majority failed to avoid.[189]

VIII. MODERN IMPLICATIONS OF THE *PICKETT* SPLIT

A. Questions & Concerns

The *Pickett* decision may open up a Pandora's Box, leading to a multitude of questions about when and under what circumstances government agents can search individuals at the border.[190] Should the average American citizen fear crossing into an abstract foreign zone when traveling by air or sea?[191] Was the border search doctrine meant to apply to American citizens who begin on American soil and merely cross into international airspace or waters without landing on foreign soil before returning to the mainland?[192] Should the border

182. *Pickett*, 598 F.3d at 235.

183. *See id.* at 235.

184. *See id.* The concurring justice stated, "I would hold that CM15 is not an OCSLA situs and affirm the district court on this ground, without reaching the question whether we may consider point of origin in Fourth Amendment border search cases." *Id.* at 235-36 (Clement, J., concurring).

185. *Id.* at 237-38. According to the concurrence, because the facts of *Pickett* and *Stone* are quite distinguishable and as *Stone*'s holding was not based on point-of-origin, *Stone* did not cause the circuit split; rather, it was not until the *Pickett* decision that a clear split developed between the circuits. *See id.*

186. *Id.* at 235.

187. *Id.*

188. *Id.*; *see also supra* note 168 (discussing the justification for searches of trans-oceanic flights).

189. *Pickett*, 598 F.3d at 235.

190. *See* United States v. Ramirez-Ferrer, 82 F.3d 1131, 1135 (1st Cir. 1996).

191. *See infra* text accompanying notes 212-239.

192. *See* United States v. Garcia, 672 F.2d 1349, 1357 (11th Cir. 1982).

search doctrine be utilized to search an individual suspected of committing a crime that has no relationship to border crossing or importation?[193] Is it acceptable for government agents to invoke the border search doctrine because they know that a potential suspect will be traveling rather than complete a customary investigation that would eventually lead to a warrant?[194] These concerns should be kept in mind when considering whether the *Pickett* decision will have an impact on border search cases in the future, and, in turn, whether the decision will affect the lives of average Americans who travel.[195]

B. Validity in Pickett's *Reasoning*

While the *Pickett* decision does not align with other circuits, *Pickett*'s reasoning is often on point.[196] First, in dicta, the *Pickett* majority cited *United States v. Garcia* to distinguish between international airspace and international waters, stating that "it is not difficult to imagine picking up contraband while crossing open waters," while it is less likely that an airplane would meet with another craft in flight to exchange such contraband.[197] Particularly in importation cases, if the aircraft or sea vessel begins and ends at a domestic point-of-origin (e.g., Los Angeles) it would be more reasonable to conclude that the vessel made an illegal exchange on the high seas before its return to land and less believable that the aircraft stopped mid-air before landing.[198] While this dictum did not ultimately affect the court's decision, the sea versus air distinction may have some justification in situations where a defendant likely received contraband in international waters.[199] As a practical matter, courts can make a legitimate determination that these two modes of transportation should be treated differently, not only by the physical difference and likelihood of meeting with another vessel, but also by the government's burden to obtain the level of suspicion required for a boat border search as opposed to an airplane border search.[200] Airports generally allow for routine searches as a national security matter whereas border searches on boats must always meet the three elements of the exception before any kind of search can proceed.[201] It follows

193. *See Pickett*, 598 F.3d at 233; United States v. Arnold, 533 F.3d 1003, 1007 (9th Cir. 2008).

194. *See Pickett*, 598 F.3d at 235; Br. of Pl.-Appellee at 18, United States v. Pickett, 598 F.3d 231 (5th Cir. 2010). The government conceded that "it was inevitable that ICE would have located images of child pornography on Pickett's computers . . . because ICE would have sought and obtained a federal search warrant for Pickett's computers and electronic media." Brief of Pl.-Appellee at 18 n.9 United States v. Pickett, 598 F.3d 231, 235 (5th Cir. 2010).

195. *See infra* Parts VIII.B-C, IX.

196. *See infra* notes 195209 and accompanying text.

197. *See Pickett*, 598 F.3d at 235; *Garcia*, 672 F.2d at 1357.

198. *See Pickett*, 598 F.3d at 235 n.5.

199. *See id.*

200. *See id.*

201. *See id.*

that the government must rely on the border search exception for boat searches more than airport searches.[202]

Additionally, the *Pickett* court, citing to *Stone*, emphasized the inference that a suspect has traveled from a foreign point-of-origin when the suspect crosses through international airspace or international waters.[203] Allowing this inference arguably falls in line with the government's established duty to maintain "territorial integrity" when protecting the borders; if officials' hands are tied because they are not certain that a suspect has come from a foreign land, the ability to protect the nation's borders may be undermined.[204] Thus, the government should not bear the burden of obtaining conclusive evidence that the suspect traveled from a foreign place before proceeding with a search.[205] To effectively utilize the border search exception, *Pickett* stated that there should be no distinction made between whether officials lack knowledge of the point-of-origin or whether officials have full knowledge of the point-of-origin.[206] As a result, *Pickett* understandably concluded that government agents should be permitted to proceed with a border search without any knowledge requirement.[207]

Finally, the *Pickett* decision stands for the principle that, no matter the point-of-origin, traditional border security concerns remain and should therefore be given first priority in a modern society often threatened by terrorism, contraband importation, and illegal immigration.[208] These risks are greater than those imagined by the framers, calling for a more flexible application of the border search doctrine.[209] As a result, when vessels cross international airspace or international waters, it may be more convenient for officials to utilize the border search exception because the possibility of a foreign point-of-origin is high.[210] *Pickett*'s holding illustrates why there are exceptions to the Fourth Amendment's warrant and probable cause requirements as the court favored the government's convenience and the public interest in border security over the privacy rights of travelers who enter international waters.[211]

C. Why Pickett *Sinks*

While *Pickett*'s arguments are valuable to furthering the debate about the border-crossing element of the border search doctrine, these arguments

202. *See id.*
203. *See id.*
204. United States v. Flores-Montano, 541 U.S. 149, 153 (2004).
205. *See Pickett*, 598 F.3d at 234-35.
206. *See id.*
207. *See id.*
208. *See id.*
209. *See supra* text accompanying notes 110111.
210. *See Pickett*, 598 F.3d at 234-35.
211. *See supra* Parts IV-V.

ultimately fall short when viewed in light of other circuits' analyses of this element and conclusions about its application.[212] The Eleventh, Ninth, and First Circuits considered the concerns expressed in *Pickett* but nonetheless refused to dilute the border crossing element to avoid a constitutional slippery slope that could, for all practical purposes, eliminate travelers' Fourth Amendment rights at the border.[213]

The *Pickett* majority suggested that Pickett's travel *by boat* constituted a border crossing; this, the majority argued, further justified the dock search because it was more likely that contraband could have been exchanged by boat than by plane.[214] But in actuality, the majority did not consider this a concern at all.[215] The air versus sea distinction has never been explicitly decided, but rather, has only been discussed in dicta; *Pickett* could have taken the opportunity to clarify this undecided issue but openly dismissed it.[216] Thus, the air versus sea distinction discussed in *Pickett* appears to be hot air, only mentioned to rationalize its conclusion—that the defendant was a "bad guy" who conveniently worked in the Gulf of Mexico.[217]

Additionally, the *Pickett* majority relied heavily on *United States v. Stone* to conclude that it is irrelevant whether agents know the defendant's point-of-origin, that is, whether the point-of-origin was domestic or foreign.[218] This reasoning is not helpful in a case in which the point-of-origin is conclusively known to be domestic.[219] *Stone* involved defendants who were spotted traveling over another country before flying into United States territory; the agents, however, did not have conclusive evidence that the defendants departed from a foreign jurisdiction.[220] The *Stone* court concluded that in this instance it would be reasonable to infer from the evidence that the plane came from a foreign place.[221] *Pickett* incorrectly interpreted *Stone*, stating: "*Stone* holds that defendant's point of origin is *irrelevant* to the constitutionality of a border search so long as a border crossing has occurred."[222] In contrast to this conclusion, *Stone* merely addressed a specific scenario in which the point-of-origin is inferred to be foreign and consequently concluded that if the point-of-origin is not conclusively known, officials can assume a border crossing by the surrounding circumstances and proceed with a border search.[223] When the

212. *See supra* Part VI.
213. *See supra* Part VI.
214. *See Pickett*, 598 F.3d at 235 n.5.
215. *See id.*
216. *See supra* note 194.
217. *See supra* note 194.
218. *See Pickett*. 598 F.3d at 234-35.
219. *See* discussion *supra* Part VI.B-D.
220. United States v. Stone, 659 F.2d 569, 572 (5th Cir. 1981).
221. *Id.*
222. *Pickett*, 598 F.3d at 235 (emphasis added).
223. *See Stone*, 659 F.2d at 572.

government knows the domestic point-of-origin, *Stone'*s analysis should not apply.[224]

There is an aspect of *Pickett*'s reasoning that does not diverge from the general Supreme Court and circuit court consensus: border searches are consistent with the "long-standing right of the sovereign to protect itself . . . "[225] Border protection was, in fact, a critical objective as the American Revolution approached, years before the development of the Fourth Amendment.[226] *Pickett* accurately explained this enduring principle as an exception to the Fourth Amendment's warrant requirement.[227] But the majority failed to interpret the fundamental purpose of the border search exception as it has historically been applied—in cases of national security, illegal entry, drug importation, and human trafficking.[228] The use of warrantless searches is clearly in line with the border search doctrine when protection and control of what comes into and out of the country are its primary application.[229] The *Pickett* court, however, expanded this goal to non-traditional crimes unrelated to border protection.[230] Possessing child pornography in *Pickett* and illegally downloading music in this Comment's hypothetical provide examples of how the government may use the border search doctrine when it is unrelated to national security or contraband importation concerns.[231]

Furthermore, the *Pickett* majority was not troubled by the effects that such an expansion of the border-crossing element will have on travelers' rights.[232] To the contrary, the court dismissed the defendant's fear that expanding the element would permit previously forbidden border searches and result in dire costs to citizens who will soon think twice before sailing or fishing.[233]

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224. *See supra* text accompanying notes 152153.

225. *See* United States v. Ramsey, 431 U.S. 606, 614 (1977) (stating that "searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border . . . ").

226. *See* KNOLLENBERG, *supra* note 26, at 234 (American Revolution began in 1775); MCINNIS, *supra* note 34, at 20 (Fourth Amendment ratified in 1791).

227. *Pickett*, 598 F.3d at 234.

228. *See* discussion *supra* Part VI.

229. *See* United States v. Flores-Montano, 541 U.S. 149, 153 (2004) (holding that border searches are within the government's "authority to protect, and a paramount interest in protecting, its territorial integrity.").

230. *See id.*

231. *See Pickett*, 598 F.3d at 233; *see also* United States v. Arnold, 533 F.3d 1003, 1005 (9th Cir. 2008) (child pornography on laptop searched at airport). U.S. Customs and Border Protection (CBP) sets forth "guidelines within which officers may search, review, retain, and share certain information possessed by individuals who are encountered by CBP at the border":

> [E]xaminations of documents and electronic devices are a crucial tool for detecting information concerning terrorism, narcotics smuggling, and other national security matters; alien admissibility; contraband including *child pornography*, monetary instruments, and *information in violation of copyright or trademark laws* . . . .

Policy Regarding Border Search of Information, U.S. CUSTOMS AND BORDER PROTECTION (July 16, 2008), http://www.cbp.gov/linkhandler/cgov/travel/admissibility/search_authority.ctt/search_authority.pdf (emphasis added). The wording of CBP's policy demonstrates the government's use of border search principles to execute searches for materials unrelated to border security, e.g., child pornography and copyright violations. *See id.*

232. *See supra* notes 176181 and accompanying text.

233. *See supra* notes 176181 and accompanying text.

Ramirez-Ferrer expressed this concern for the average citizen who is not aware that merely crossing into international airspace or waters could result in a warrantless search upon return to the mainland.[234] In fact, the First Circuit predicted a case with the *Pickett* fact pattern, pointing out the illogical nature of such a search: A worker "traveling to and from an oil rig on international waters in the Gulf of Mexico off Louisiana . . . would be" inappropriately subject to a warrantless search.[235]

Travel on the high seas after departing from a United States port often involves crossing into international waters before returning to a United States port without ever touching down on a foreign location, in contrast with "a border crossing *on land* [that] necessarily involves contact with a foreign jurisdiction and thus a possibility of illegal entry [.]"[236] While in the latter scenario, crossing the border by land, the border search doctrine is at the height of its authority, the same cannot be said for suspects who unintentionally wander into international waters.[237] It is not only inappropriate to apply the exception to such voyages; it is—as *Ramirez-Ferrer* pointed out—absurd:

> A sailboat tacking up the coast would engage in an act of "importation" every time it reentered domestic territory, if it had contraband aboard when it tacked out of domestic territory. The height of absurdity, [is that the] sailboat tacking twenty times up the East Coast of the United States from Miami to New York, which had aboard illegal substances acquired in Miami, would be subject to being charged with twenty violations of exportation . . . and twenty violations of importation . . . one for each time it tacked out to and from international waters.[238]

When citizens inadvertently or casually cross into international waters without actually touching down on a foreign location, their Fourth Amendment rights should not be subject to the same level of reduction that one experiences upon traveling from a physical foreign location to the United States.[239]

IX. GRANT THE WRIT: PROPOSALS FOR FUTURE COURTS

On November 29, 2010, Pickett's writ of certiorari was denied.[240] While the United States Supreme Court will not hear this particular case, related

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234. *See* United States v. Ramirez-Ferrer, 82 F.3d 1131, 1136 (1st Cir. 1996) ("[F]ishing vessels and private yachts commonly navigate interchangeably in international and domestic waters when making local trips, paying little attention to where the one ends and the other begins, and with no thought that they are making some kind of reentry into the United States" when they return to the coast.).

235. *Id.* at 1142.

236. Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725, 736 (1980) (emphasis added).

237. *See id.* at 733.

238. *Ramirez-Ferrer*, 82 F.3d at 1142.

239. *See id.* at 1136.

240. Pickett v. United States, 131 S. Ct. 637 (2010) (denying Pickett's writ).

border search cases will certainly arise in the future as the requirements of the border crossing element are applied more loosely.[241] As a result of the *Pickett* split, circuits that have not yet decided the border crossing issue will be required to sort through inconsistent circuit caselaw, and in all probability, will further confuse the element's now expanded interpretation.[242] The unpredictability caused by *Pickett* should soon lead the Supreme Court to grant certiorari and hear a case involving the domestic point-of-origin issue.[243]

Of the cases discussed, *United States v. Ramirez-Ferrer* most aligns with a proper interpretation of the border crossing element.[244] As *Ramirez-Ferrer* specifically addressed international water crossings between domestic locations, it was best able to predict the repercussions that *Pickett'*s rule will have on average American citizens.[245] Fourteen years before the *Pickett* decision, *Ramirez-Ferrer* foresaw *Pickett* facts and comparable others—maritime workers, commercial fishermen, and vacationing amateur sailors would all be exposed to warrantless searches without ever stepping foot on foreign land.[246] Likewise, *Pickett'*s concurring opinion recognized the First Circuit's concern and refused to give such little meaning to the border crossing requirement.[247]

Other circuits should follow the First Circuit *Ramirez-Ferrer* decision and the *Pickett* concurrence to avoid the grave diminution in citizens' Fourth Amendment rights that the *Pickett* majority encourages.[248] More importantly, the Supreme Court should hear a future case involving similarly situated defendants to stress the importance of the border crossing requirement and swiftly dismiss the Fifth Circuit's erroneous decision that throws a wrench in border crossing precedent.[249] To accomplish this objective, courts should require that the government show reasonable certainty that the suspect began their journey from a foreign point-of-origin to fulfill the border crossing element.[250] The border crossing element demonstrates the limits to application of the border search exception.[251] While there is indeed an inconvenient burden on law enforcement to be "reasonably certain" that a border crossing has occurred, courts have nonetheless maintained that the Fourth Amendment protections at the border are not outweighed by this burden.[252] Because warrants are a long-standing and legitimate tool to obtain the authority necessary for a lawful search, law enforcement should continue to conduct

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241. *See id.*

242. *See Pickett*, 598 F.3d at 233; *Ramirez-Ferrer*, 82 F.3d at 1144; United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008).

243. *See Pickett*, 598 F.3d at 233.

244. *See supra* notes 140143, 230237 and accompanying text.

245. *See* discussion *supra* Part VI.C.

246. *See supra* text accompanying note 233.

247. *See supra* notes 182187 and accompanying text.

248. *See* discussion *supra* Part VI.C.

249. *See* discussion *supra* Parts VI.C, VII.A.

250. *See supra* notes 140-143 and accompanying text.

251. *See* discussion *supra* Part V.C.

252. *See* discussion *supra* Parts V-VI.

investigations promoted by the Fourth Amendment.[253] This is illustrated in *Pickett* as the government conceded that, through an investigation, it would have obtained a warrant to search Pickett's electronic devices in due time.[254]

For all practical purposes, *Pickett* dismissed the border crossing element and instead invented an "international space crossing" element that will have harsh outcomes for citizens who will likely have difficulty identifying international water boundaries and for travelers who frequently pass through international airspace when flying.[255] If the *Ramirez-Ferrer* court's reasoning is followed, American citizens will understand the predictable search rules that apply when they return from a foreign jurisdiction—such as routine airport security searches—but will not have to fear arbitrary border searches that, under *Pickett*'s holding, would allow agents to conduct warrantless searches when citizens may not themselves be aware that they have crossed into an international zone.[256]

X. CONCLUSION: THE VACATION IS OVER

How does Samantha's vacation end? Under the *Pickett* decision, officials are permitted to search Samantha and all of her belongings at two points during her vacation.[257] In the first instance, Samantha and Alexander return to the Miami shore and are greeted by law enforcement as they turn off the deckboat engine and step onto the dock.[258] These officers were informed of Samantha's location by Maritime Security, who had run a check on the rental boat.[259] The check turned up Samantha's information and, through a quick search, the unpaid parking ticket.[260] At the dock, officers inform Samantha and Alexander that they have crossed international waters and are therefore subject to a routine search, including a pat down and a search of their personal belongings.[261] Officials discover a USB drive attached to Samantha's keychain and confiscate it.[262] Hundreds of illegally downloaded songs are on the USB drive.[263] Because this form of copyright violation is a federal crime, Samantha is arrested.[264]

In another scenario, Samantha flies back to New Orleans after her much needed vacation in Miami.[265] Upon landing and exiting the aircraft, law

253. *See supra* note 34 and accompanying text.
254. *See supra* note 192.
255. *See* United States v. Pickett, 598 F.3d 231, 233 (5th Cir. 2010).
256. *See supra* notes 140-44, 230-237 and accompanying text.
257. *See Pickett*, 598 F.3d at 233.
258. *See supra* text accompanying note 159.
259. *See supra* text accompanying note 158.
260. *See supra* text accompanying notes 160161.
261. *See supra* text accompanying notes 160161.
262. *See supra* text accompanying note 161.
263. *See supra* text accompanying note 162.
264. *See supra* text accompanying note 163.
265. *See supra* text accompanying note 236.

enforcement officials ask Samantha to step aside for a routine search.[266] This search is uncharacteristic of airport searches—which generally take place at the security checkpoint—but officials state that Samantha has crossed international airspace and is subject to a border search.[267] As in the first hypothetical, Samantha's keychain reveals the USB drive that officials suspect is storing illegally downloaded music files.[268] After officers seize the USB drive and discover the files, Samantha is arrested.[269]

As a result of *Pickett*'s holding, in either hypothetical, local law enforcement or customs officers may choose to search Samantha at the "border" rather than begin a traditional investigation that would lead to a lawful warrant for her computer and USB drive.[270] Like Antonnio Pickett, Samantha crossed into an international zone without ever touching down on foreign soil.[271] Despite this fact, which other circuits have held is a relevant and essential element to the border search doctrine, the Fifth Circuit would decide Samantha's case in favor of the government without ever considering the domestic versus foreign point-of-origin issue.[272]

The Fifth Circuit has jurisdiction over three border states that each have a legitimate interest in a relaxed interpretation of the border crossing rules.[273] Although illegal importation and immigration are recurring problems among these states, the border search doctrine should not be stretched so far as to remove the protections guaranteed by the Fourth Amendment.[274] The everyday implications of *Pickett*'s expansion of the border crossing element are unsettling and, as *Ramirez-Ferrer* stated, allow government officials to take advantage of the border search doctrine when it is inappropriate.[275] *Pickett*'s holding that it is unnecessary to determine the point-of-origin for the border crossing element has little endorsement by surrounding circuits and should not be tolerated if presented before the Supreme Court.[276] Until then, travelers beware.

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266. *See supra* text accompanying note 92.

267. *See supra* text accompanying note 254.

268. *See supra* text accompanying note 162.

269. *See supra* text accompanying note 163.

270. *See* United States v. Pickett, 598 F.3d 231, 233 (5th Cir. 2010).

271. *See id.*

272. *See* discussion *supra* Parts VI, VII.C.

273. *See Court Locator*, UNITED STATES COURTS, http://www.uscourts.gov/court_ locator.aspx (last visited Jan. 30, 2011) (Mississippi, Louisiana, and Texas).

274. *See State Enforcement of Federal Immigration Laws*, Texas Conservative Coalition Research Institute (Jan. 7, 2011, 12:50 PM), http://www.txccri.org/ publications/LawEnforcement.pdf.

275. *See supra* text accompanying note 233.

276. *See* discussion *supra* Parts VI, VIII.C, IX.