20-8057

ORIGINAL

DOCKET NO._____

IN THE SUPREME COURT OF THE UNITED STATES

Raymond I. Aigbekaen, Petitioner

v.

United States of America, Respondent

On petition for a writ of certiorari from the United States Court of Appeals for the Fourth Circuit.

Bureau of Prisons
Raymond I. Aigbekaen
Reg. No. 94655-379
33 ½ Pembroke Rd.
Danbury, CT 06811

QUESTION PRESENTED FOR REVIEW

Whether a warrantless forensic search at a border by agent of the United States of electronic cell phones and computers, lacking a reasonable suspicion, violated the Fourth Amendment?

List of Parties to Proceeding.

1. Raymond I. Aigbekaen, the petitioner.

2. The United States of America, the respondent.

Corporate Disclosure Statement

1. Disclose relationships of plaintiff to institutions involved in petition.

None

2. Disclose relationships of defendant to institutions involved in petition.

None

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Table of Authorities

Citation of Opinions

1. *United States v. Aigbekaen*, 943 F.3d 719 (4th Cir. 2019).

2. *United States v. Aigbekaen*, 17-4109 (4th Cir. Feb. 24, 2020). (pet'n for rehr. en banc) (denied).

Basis of Jurisdiction

Jurisdiction is proper in this Court pursuant to 28 USC 1254. The Court of Appeals denied Petitioner's petition for rehearing en banc on February 24, 2020, and due to the Covid-19 pandemic at Petitioner's current prison, Petitioner was unable to gain access to the law library, and therefore is seeking an out of time petition for writ of certiorari.

Constitutional Provisions

Statement of the Case

On August 25, 2015, a grand jury in the District of Maryland returned an indictment charging Raymond I. Aigbekaen, (the "Petitioner"), with conspiracy to commit sex trafficking, in violation of 18 USC 1594(c), ("Count One"); conspiracy related interstate prostitution, in violation of 18 USC 371 ("Count Two"); sec trafficking of a minor and/or by force, fraud or coercion, in violation of 18 USC 1591(a), (Count Three"); interstate transportation for prostitution, in violation of 18 USC 2421 ("Count Four"); enticement to travel interstate for purposes of prostitution, in violation of 18 USC 2422, ("Count Five"); and use of interstate facilities to promote enterprise involving prostitution offense, in violation of 18 USC 1952(a)((3), ("Count Six").

Prior to trial Petitioner moved to suppress the fruits of various warrantless searches related to the seizure of his electronic devices seized at the border on May 19, 2015, as well as the search of his arrest in Houston, TX in August 2015. Petitioner also moves to suppress the warrantless search of his historical cell site date.

After a hearing held on August 11, 2017, the district court denied all Petitioner's motions. On September 29, 2016, after a nine-day trial, a jury found Petitioner guilty of all six counts of the indictment. As to Count Three, the jury found that sex trafficking of a minor applied in this case, but trafficking by force, fraud, or coercion did not.

On February 9, 2017, the district court sentenced Petitioner to a total term of 180 months of imprisonment. Petitioner filed a timely notice of appeal on February 9, 2017.

Reasons for Granting the Writ

The Court should grant the writ and review Petitioner's claim because there is a current split between the Courts of Appeals in regard to the legal standard to be applied regarding a warrantless border searches of vital personal communication device electronics.

In May of 2018, in ***U.S. v. Kolsuz***[1], the Fourth Circuit Court of Appeals has held that it is unconstitutional for US border officials to subject visitors' devices to forensic searches without individualized suspicion of criminal wrongdoing. Just five days later, in ***U.S. v. Touset***[2], the Eleventh Circuit Court of Appeals split with the Fourth and Ninth Circuits[3], ruling that the Fourth Amendment does not require suspicion for forensic searches of electronic devices at the border. The existence of a circuit split is one of the factors that the Supreme Court of the United States considers when deciding whether to grant review of a case.

Two circuits, the fourth and the ninth, have concluded that investigators need at least reasonable suspicion to conduct forensic device searches in light of the stark privacy interests at stake—interests the Supreme Court recognized in ***Riley v. California***[4]. The Eleventh Circuit rejected that approach, ruling in ***United States v. Touset*** that suspicion is never required for device searches at the border and opening a circuit split that may draw the Supreme Court's attention.

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[1] 890 F.3d 133 (4th Cir. 2018)
[2] 890 F.3d 11227 (11th Cir. 2018)
[3] United States v. Cano, 934 F.3d 1002 (9th Cir. 2019)
[4] 134 S. Ct. 2473 (2014)

Recently in ***United States v. Vergara***[5], the Eleventh Circuit again rejected a child pornography defendant's argument that device searches require a warrant in the wake of ***Riley***.

The panel emphasized that ***Riley*** "expressly limited its holding to the search-incident-to-arrest exception." Judge Jill Pryor stressed in dissent that ***Riley's*** reasoning sweeps more broadly. The Supreme Court's description of the privacy concerns raised by device searches applies as much to travelers as arrestees. And its key question in ***Riley***—whether "application of the [warrant exception] to a particular category of effects would untether the rule from the justifications underlying the exception"—could be asked at the border too. The dissent emphasized that the border exception is usually grounded in the need to intercept contraband, a rationale that loses much of its force when applied to data that could just as well enter the country through the internet. However, the court's majority was not moved by that reasoning.

The defendant in this latest case, Karl Touset, first came to law enforcement's attention because of a series of payments he made to other individuals suspected of child pornography distribution. When he returned to the United States after an international trip, Customs and Border Protection seized several of his electronic devices, conducted a forensic analysis, and uncovered illegal pornographic material. At an evidentiary hearing, the parties—and the magistrate judge—agreed that forensic device searches at the border require reasonable suspicion but disagreed whether the government had met that burden. Touset's last questionable payment had been made a year and a half before the search of his devices; he argued that the evidence of the payments was therefore stale and could not provide reason to

[5] 884 F.3d 1309 (11th Cir. 2018)

suspect that anything illicit would be found on his devices. The district court ultimately disagreed with that argument, denying Touset's motion to suppress the files that were found. Touset then pleaded guilty to a child pornography offense but appealed the denial of his suppression motion.

On appeal, the government pressed a new argument: that it had not needed individualized suspicion in the first place, notwithstanding its position in the district court. And in an opinion by Judge William Pryor, who also wrote the panel opinion in *Vergara*, the Eleventh Circuit agreed.

The opinions that have imposed a reasonable suspicion requirement for forensic device searches rely on a distinction between "routine" border searches—which are permissible when suspicionless—and invasive, "nonroutine" searches that require more. But the Eleventh Circuit emphasized that the only Supreme Court opinion requiring reasonable suspicion for a border search, *United States v. Montoya de Hernandez*[6], involved the search of a person rather than property. The panel pointed to the Supreme Court's 2004 opinion in *United States v. Flores-Montano*[7], which rejected an effort to "determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person," as decisive support for the argument that whatever routine/nonroutine divide exists doesn't apply to property searches.

Other courts have continued to apply such a tiered approach on the theory that *Flores-Montano* only expressly speaks to vehicles, not categories of effects that might implicate more significant privacy interests (the Ninth Circuit has analogized a forensic device search to "a computer strip search," for instance). But Eleventh Circuit precedent is "unwilling to distinguish

[6] 473 U.S. 531 (1985)
[7] 541 U.S. 149 (2004)

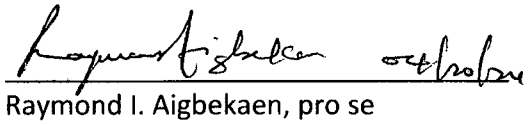
between different kinds of property" and measures a search's intrusiveness "in terms of the indignity that will be suffered by the person being searched, in contrast with whether one search will reveal more than another." In that light, the panel reasoned, suspicion is no more required to search for child pornography on a computer than it is to rummage through luggage for printed photos.

The Fourth Amendment commands that searches and seizures be reasonable, and generally requires the government to secure a warrant based on probable cause before arresting or searching an individual. But the Supreme Court has long recognized that the government may conduct routine inspections and searches of individuals entering at the U.S. border without a warrant or any individualized suspicion of criminal activity. Thus, the critical inquiry in the 21st century information age is: Is it reasonable for the Government to be authorized under the Fourth Amendment to conduct a nonroutine forensic search at the border of an entrant's electronic devices without a warrant or reasonable suspicion? The current split amongst the Courts of Appeals regarding this national issue, given the border of the United States are national borders rather than state local, is paramount for uniformity in the application of the laws, and for consistency in their application.

Conclusion

This issue is ripe for this Court to review and set the legal standard to be applied in these circumstances. The Court should grant Petitioner's petition, reverse the decision of the Court of Appeals, and set a briefing schedule.

Respectfully submitted by:



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