

CLIENT ALERT

Another Circuit Weighs in on Border Search Authority Creating Circuit Split

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No Reasonable Suspicion Required for Forensic Searches of Electronic Devices at the Border

On May 23, 2018, the Eleventh Circuit, in *United States v. Touset*, held that reasonable suspicion is not required to perform a forensic search of an electronic device at a U.S. border. Appellant, who was convicted of numerous counts based on evidence recovered from a search of his electronic devices, relied on the U.S. Supreme Court's decision in *Riley v. California* – which held that a warrantless search and seizure of contents of a cellphone during an arrest violates the Fourth Amendment – to argue that reasonable suspicion was required for the forensic searches of his laptop and external hard drives at the Atlanta airport following an international flight. The Eleventh Circuit disagreed.

Splitting from the Fourth and Ninth Circuits, which have held that the Fourth Amendment requires at least reasonable suspicion for forensic searches of electronic devices at a U.S. Border or equivalent (i.e., an international airport), the Eleventh Circuit distinguished *Riley* as a case proscribing the scope of the search-incident-to-arrest exception to the Fourth Amendment warrant requirement, which does not apply to searches at the Border. The Eleventh Circuit reasoned that the rationale for *Riley's* limitation on the search-incident-to-arrest exception—searching electronic devices did not advance the exception's purpose of protecting the arresting officers from harm—did not apply to border searches, where searching electronic devices in fact advances the purposes of identifying contraband. The Eleventh Circuit also relied on its precedent holding that searches at the Border never require probable cause or a warrant and “saw no reason why the Fourth Amendment would require suspicion for a forensic search of an electronic device when it imposes no such requirement for a search of other personal property.” The Court also explained that “it does not make sense to say that electronic devices should receive special treatment because so many people now own them or because they can store vast quantities of records or effects.”

This decision comes months after the U.S. Customs and Border Protection, a component of the Department of Homeland Security, released the [fiscal year 2017 statistics](#) showing an increase in warrantless border searches of electronic devices. The Eleventh Circuit's holding in *Touset* sets up a potential Supreme Court resolution on what standard of proof is necessary for a border search. Until it does, the standard of proof the government must meet to conduct warrantless forensic searches at the border will differ based on where a person crosses the border.

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