Maryland Law Review

Volume 39 | Issue 1 Article 7

Recent Decision

RECENT DECISION

EXTENDED BORDER SEARCH DOCTRINE APPLIED IN THE FOURTH CIRCUIT — *UNITED STATES v. BILIR*

In *United States v. Bilir*[1] the United States Court of Appeals for the Fourth Circuit held that a warrantless search and seizure based on reasonable suspicion conducted by a customs officer away from a United States border after nearly continuous surveillance of suspected smugglers was justifiable under the "extended border search" doctrine embodied in the statute authorizing customs officials' searches[2] for contraband material.[3] In doing so, it concluded that the extended border search doctrine had not been abrogated by the Supreme Court's decision in *Almeida-Sanchez v. United States*[4] and thus that such a search was constitutional.[5]

The events that led to the arrest and conviction of the defendants in *Bilir* began in 1977, when Drug Enforcement Agency (DEA) officials received information that two seamen aboard a Turkish ship, the *General A.F. Cebesoy (Cebesoy),* scheduled to call at several American ports, were carrying a large quantity of heroin.[6] It was reported that the two seamen, one of them the defendant Bilir, would deliver the heroin to two or more persons of Greek or Turkish origin in the United States.[7] The ship was placed under surveillance by DEA agents and customs officers in Savannah, Georgia, its first United States port of call.[8] There surveillance of two men suspected of being the recipients of the drugs began,[9] and continued intermittently from Savannah to Florida, Texas, and Louisiana, as the suspects and the federal agents followed the *Cebesoy*'s itinerary.[10] Surveil-

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1. 592 F.2d 735 (4th Cir. 1979).

2. The statute authorizes searches of baggage "wherever found," in which a customs officer has "reasonable cause to suspect" there is contraband and seizures of merchandise found that an officer has "reasonable cause to believe" was imported into the United States illegally. 19 U.S.C. § 482 (1978). *See* note 21 *infra.*

3. 592 F.2d at 741.

4. 413 U.S. 266 (1973).

5. 592 F.2d at 742. In *Almeida-Sanchez* the Court held that because a warrantless search conducted by a roving patrol of immigration officers did not take place at a border or its functional equivalent, it could only be conducted with consent or if based upon probable cause. 413 U.S. at 272-73. *See* text accompanying notes 41 to 47 *infra.*

6. 592 F.2d at 737.

7. *Id.*

8. *Id.*

9. In Savannah, the agents observed two persons, one of them later identified as defendant Akdeniz, enter the area of the ship and walk around. They did not board the ship, leaving the port area after a brief period of time. They met Bilir on a number of occasions in Savannah, under the surveillance of the agents. *Id.*

10. *Id.* The suspects were followed to Jacksonville and towards Texas, then from Galveston to New Orleans and to northern Louisiana. Because of the agents' difficulty keeping up with them, they were arrested, but released shortly thereafter, in Louisiana. *Id.*

lance of the two suspects was discontinued, and the agents regained contact with the ship in Baltimore, its last American port of call.[11] At the Baltimore docks they observed the two suspected recipients of the drugs board and subsequently leave the ship.[12] While aboard the ship one of the suspects changed his attire to a style frequently used by smugglers to "body-carry" drugs.[13] Thereafter, surveillance of the suspects was continuous except for two periods. One suspect entered a bar, in which he remained unobserved for two or three minutes, and two were out of view during a five-hour period in which they were inside their hotel room.[14]

The next morning, two of the suspects checked out of their hotel room,[15] both wearing jackets, and one carrying a suitcase, not seen before by DEA agents, took a taxicab to the Pennsylvania Railroad Station, and purchased tickets to New York City.[16] The suspects separated, one of them having recognized a DEA agent, but both were apprehended. A customs officer questioned defendant Sokum, who was carrying the suitcase, opened the suitcase, and found over thirteen pounds of what was identified as nearly pure heroin.[17]

Bilir, Akdeniz, and Sokum were tried in the United States District Court for the District of Maryland[18] and convicted of violating various federal drug laws.[19] They appealed to the Fourth Circuit, challenging the admission of the heroin found in the search of the suitcase.[20]

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11. *Id.* Uniformed customs agents were stationed visibly in each of the ship's intermediate ports of call, in an attempt to discourage delivery of the drugs before the ship reached Baltimore. *Id.* at 737-38.

12. *Id.* at 738. Agents had seen Bilir leave the ship after it docked and meet defendants Akdeniz, who had been one of the two men earlier following the ship, and Sokum in Baltimore. The agents, unable to follow the three when they left in a taxicab, returned to the ship, where they saw the suspects board. *Id.*

13. *Id.* He changed from a tight-fitting T-shirt to a long-sleeved loose shirt worn outside his pants.

14. *Id.* The third suspect Bilir had returned to the *Cebesoy* the night before.

15. *Id.*

16. *Id.*

17. *Id.* The customs officer asked for permission to search the suitcase and received no response. When he asked for the key to the locked suitcase, Sokum gave it to him. *Id.* So far as the facts of the case reveal, it was fortuitous that the questioning of Sokum and search of the suitcase was conducted by a customs officer. DEA agents and customs officers had been working together on the case since the first surveillance of the *Cebesoy* in Savannah, *id.* at 737, and the second suspect, defendant Akdeniz, was apprehended at the train station by a DEA agent, *id.* at 738. Had the search of the suitcase been conducted by the DEA agent, it might well have been held unconstitutional. *See* United States v. Chadwick, 433 U.S. 1 (1977).

18. United States v. Biliar, Crim. No. N-77-0340 (D. Md. Aug. 21, 1977). They submitted to a joint bench trial on stipulated facts, subject only to exceptions to the admission of certain evidence. 592 F.2d at 736. A fourth suspect, Kandemier, entered a guilty plea and was not involved in the appeal.

19. The defendants were convicted of conspiracy to import heroin, 21 U.S.C. § 963 (1972); possession of heroin with intent to distribute, *id.* § 952; and conspiracy to distribute heroin, *id.* § 846. 592 F.2d at 736 & n.1.

20. The defendants also challenged the admission of information acquired incident to the arrest of Akdeniz in Louisiana some time before the warrantless search

Two related issues faced the court of appeals: whether the search was authorized by statute, and thus whether it satisfied the criteria of the extended border search doctrine,[21] and whether the Supreme Court had rejected that doctrine in *Almeida-Sanchez v. United States*.[22] Because of a strong national interest in stopping illegal importations,[23] searches conducted at the United States border are not subject to the usual fourth amendment requirement that for a search to be reasonable there must be a warrant based upon probable cause.[24] Border searches are considered reasonable simply because they occur at a border.[25] Under the "extended

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and statements made by Sokum to arresting officers after the search. Because the court found such evidence merely cumulative of other evidence it had already received, the circuit court concluded that this evidence was harmless beyond a reasonable doubt. 592 F.2d at 739 n.5.

21. The federal statute authorizing searches by customs officers, 19 U.S.C. § 482 (1978), was said by the court to express the border search exception to the warrant and probable cause requirements of the fourth amendment. 592 F.2d at 739. Any customs officer is authorized under that statute to:

> stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, *wherever found,* in which he may have a *reasonable cause to suspect* there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

19 U.S.C. § 482 (1978) (emphasis added). *See* 8 U.S.C. § 1357(a)(3) (1970) (similar authority for immigration officials).

22. 413 U.S. 266 (1973). *See* text accompanying notes 40 to 47 *infra*. Because the court concluded that the search was justified as an extended border search, it did not reach the government's alternate argument that the search was justified as one based upon probable cause and exigent circumstances. 592 F.2d at 739 n.4.

23. *See* Carroll v. United States, 267 U.S. 132 (1925). The purpose of a search by customs officers is not to apprehend persons, but to seize contraband unlawfully imported or brought into the United States. Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966).

24. *See* United States v. Ramsey, 431 U.S. 606, 619 (1977); Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); United States v. Twelve 200-Ft. Reels of Film, 413 U.S. 123, 125 (1973); United States v. Thirty-seven Photographs, 402 U.S. 363, 376 (1971); Carroll v. United States, 267 U.S. 132, 153-54 (1925); Boyd v. United States, 116 U.S. 616, 623 (1886). The border search exception has been said to apply to searches by customs officers, *e.g.,* United States v. Ramsey, 431 U.S. 606, 619 (1977), and by the Border Patrol of the Immigration and Naturalization Service, *e.g.,* Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

25. *See* United States v. Ramsey, 431 U.S. 606 (1977). Even at a border, however, the scope of the search and the manner in which it is carried out must meet a reasonableness standard. *See generally* Note, *From Bags to Body Cavities: The Law of Border Searches,* 74 COLUM. L. REV. 53 (1974).

border search" doctrine, courts have applied this rule to certain searches conducted away from an actual border.[26]

In an opinion by Judge Phillips, the court of appeals initially explained and defined the extended border search doctrine.[27] Unlike searches at regular customs stations literally "on the border,"[28] those conducted at

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26. *E.g.*, United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978); Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970); United States v. McGlone, 394 F.2d 75 (4th Cir. 1968). The Supreme Court has not expressly ruled on the propriety of the "extended border search" doctrine. *See* United States v. Ramsey, 431 U.S. 606, 615 n.11 (1977). Because the Mexican-American border is within their jurisdictions, the Fifth and Ninth Circuits have been by far the most influential in developing the doctrine.

The Fifth Circuit has ruled that where the search is removed from the border, the customs investigator must have a *reasonable suspicion* that the object of the search has crossed the border or has been in contact with those who have done so. *E.g.*, United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978). Unless the object of the search has an overall "nexus" with the border, the suspicion of the customs investigator will not be upheld as reasonable. *See* United States v. Flores, 531 F.2d 222 (5th Cir. 1976), *cert. denied*, 429 U.S. 976 (1977). In determining whether the object of the search has a nexus with the border, the Fifth Circuit has considered such factors as the time that has elapsed since the border crossing and the distance from the border, United States v. Martinez, 481 F.2d 214 (5th Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); the extent of surveillance of the suspects subsequent to the border crossing, United States v. Martinez, 577 F.2d 960 (5th Cir.), *cert. denied*, 439 U.S. 914 (1978); the behavior of the suspects at the border itself, United States v. Maya, 549 F.2d 341 (5th Cir. 1977); and the behavior of the suspects after the border crossing, United States v. Flores, 531 F.2d 222 (5th Cir. 1976).

The Ninth Circuit has determined that in cases in which the border search is not made at the actual border, the customs officer must be *reasonably certain* that any contraband which might be found has in fact crossed the border. *E.g.*, United States v. Weil, 432 F.2d 1320 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 355 U.S. 977 (1966). As in the Fifth Circuit, the legality of the search is tested by the surrounding circumstances, including the time and distance that has elapsed since the border crossing as well as the manner and extent of surveillance. *See id.* at 382. It is no longer required that the vehicle or person to be searched has actually crossed the border, so long as the customs officer is reasonably certain that an object smuggled across the border will be discovered. *See* United States v. Vigil, 448 F.2d 1250 (9th Cir. 1971). Constant surveillance is not necessary, United States v. Solmes, 527 F.2d 1370 (9th Cir. 1975), nor must the actual border crossing of the contraband be observed, United States v. Weil, 432 F.2d 1320, 1335 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). However, where the amount of contraband is small, even a very brief lapse in surveillance may prevent the customs officer from having the requisite reasonable certainty. *See* United States v. Anderson, 509 F.2d 724 (9th Cir. 1975), *cert. denied*, 420 U.S. 910 (1976).

27. Finding only one applicable Fourth Circuit case, United States v. McGlone, 394 F.2d 75 (4th Cir. 1968), the court looked to other circuits for guidance.

28. Searches at the borders are reasonable per se under the fourth amendment, and the controlling standards are statutory and not constitutional. *See* United States v. Ramsey, 431 U.S. 606, 616-19 (1977). Despite the statute's assertion of an authority to conduct a search "wherever [certain items may be] found," the *Bilir* court posited that this authority is "assuredly subject to ultimate constitutional constraints." 592 F.2d at 739 n.6 (citing United States v. Ramsey, 431 U.S. 606, 615 n.11 (1977)).

points physically away from an actual border and removed in time from the precise moment of importation are not reasonable per se: "The test of validity is one of reasonableness under the circumstances."[29] Customs officials must have a reasonable basis for the suspicion that the material seized is dutiable or contraband[30] and that it has illegally crossed a border within a reasonably recent time.[31]

The court noted that it was examining a "deliberately delayed search," one intentionally conducted away from the actual border after officers had observed a border crossing by known suspects.[32] The most important factor in assessing the reasonableness of a delayed search is the extent to which continuous surveillance of the suspects has been maintained from the border crossing to the location of the search.[33] Continuous surveillance, the court reasoned, assures that the customs search will not be employed against persons or objects that have never been the legitimate targets of a border search.[34] Two less relevant factors, the time that has elapsed since the border crossing and the distance from the actual border, must also be considered.[35]

Applying these criteria to the case before it, the court concluded that the search at the Pennsylvania Railroad Station was reasonable, and thus constitutionally permissible under the fourth amendment. First, it noted that the time that had elapsed since the border crossing — seven hours — and the distance from the border — three to four miles — were both well within acceptable extended border search limits.[36] More importantly, the court found the customs officer's suspicion that the suitcase might contain heroin, and that if so it had recently crossed the border at the Baltimore docks, was reasonable under the circumstances. The officer knew of the month-long pursuit of both the ship and the suspects and the corroborating

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29. 592 F.2d at 740.

30. *Id.* at 740 & n.7.

31. *Id.* at 740. The majority employed a standard similar to that presently used in the Fifth Circuit. *See* note 26 *supra*. *Cf.* United States v. Weil, 432 F.2d 1320 (9th Cir. 1970) (requiring reasonable certainty that contraband crossed the border), *cert. denied*, 401 U.S. 947 (1971).

32. 592 F.2d at 740–41. *See* United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978). The court recognized another type of extended border search, one in which the first contact with the suspect and the first opportunity to search occur away from the actual border. *See, e.g.*, United States v. Beck, 483 F.2d 203 (3rd Cir. 1973) (suspect observed leaving border area; search after short chase), *cert. denied*, 414 U.S. 1132 (1974); United States v. McGlone, 394 F.2d 75 (4th Cir. 1968) (suspects first encountered in parking lot near dock area).

33. 592 F.2d at 741.

34. *Id.*

35. *Id.*

36. *Id.* (citing United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978) (constitutional search 254 miles and 20 hours from observed border crossing); United States v. Martinez, 481 F.2d 214 (5th Cir. 1973) (search 150 miles and 142 hours from observed border crossing)).

information acquired in the course of that pursuit.[37] The court also was persuaded by the virtually continuous surveillance from ship to railroad station and found it provided assurance that if contraband were to be disclosed by the search, it had indeed been in the defendants' possession when they came across the border from the ship seven hours earlier.[38]

The court rejected the contention that the Supreme Court had directly or indirectly disapproved of the extended border search doctrine in *Almeida-Sanchez v. United States*.[39] The *Bilir* defendants had argued that by failing to include "extended border searches" along with those "at the border itself" and "at its functional equivalents" in describing permissible warrantless searches, the Court had rejected the extended border search exception.[40]

In *Almeida-Sanchez* the Court held that a warrantless search of an automobile, based upon neither probable cause nor reasonable suspicion, conducted by a roving patrol of immigration officers twenty-five air miles north of the Mexican-American border violated the fourth amendment.[41] Finding the search could not be justified as an automobile or an administrative search,[42] the Court considered whether a statute, together with implementing regulations, authorizing warrantless searches by immigration officials of automobiles within 100 air miles of a United States

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37. *Id.* This information included the predicted contact between the seaman and the suspects of Turkish extraction on the mainland, and the convergence on Baltimore by all the suspects. The officers' developing suspicion was confirmed by the suspects' behavior at the railroad station immediately prior to the search: the purchase of tickets for New York, the sudden attempt to flee upon recognition of the DEA agents, and the false answers given by one of the suspects. *Id.*

38. The degree of continuity in the surveillance was questioned by Judge Winter in his dissent. *See* notes 55 to 59 and accompanying text *infra*.

39. 413 U.S. 266 (1973).

40. 592 F.2d at 741.

41. 413 U.S. at 273. Almeida-Sanchez was convicted of receiving and transporting marijuana, which was found when the border patrol stopped and searched his automobile in a check for illegal aliens. *Id.* The United States Border Patrol conducts several types of surveillance along inland roadways, all in the asserted interest of detecting illegal importation of aliens: the maintenance of permanent checkpoints at certain intersections, temporary checkpoints at others, and the use of roving patrols such as the one in *Almeida-Sanchez*. *Id.* at 268.

Although *Almeida-Sanchez* involved a search by immigration officers, courts have found it applicable to searches by customs officers as well. *E.g.*, United States v. Gallagher, 557 F.2d 1041 (4th Cir. 1977), *cert. denied*, 434 U.S. 870 (1978); United States v. Brennan, 538 F.2d 711 (5th Cir. 1976). Many of the customs searches conducted near the Mexican-American border begin as searches by immigration officials looking for illegal aliens. The immigration officers are entitled to assume a role as customs agents once a search discloses incriminating evidence which indicates violations of the customs laws. *See generally* Note, *Extended Border Searches by Immigration Officers*, 31 COLUM. J. TRANS. L. 143 (1974).

42. 413 U.S. at 269–72.

boundary was constitutional.[43] It recognized the power to exclude aliens and to conduct border searches in order to do so,[44] but concluded that whatever the permissible scope of searches occurring at a border or its "functional equivalent,"[45] the search in question violated the fourth amendment.[46] Such a search must be made with consent or supported by probable cause.[47]

Almeida-Sanchez seems to have had only a limited effect on the "extended border search" doctrine. Although most of the Ninth Circuit decisions have employed its "functional equivalent" of the border language, the courts have nevertheless not significantly altered the established extended border search doctrine.[48] The status of the doctrine in the Fifth Circuit is less clear. Although the Fifth Circuit's pre-*Almeida-Sanchez* standard[49] continues to be applied,[50] it has been rejected by one panel in light of *Almeida-Sanchez*.[51]

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43. Section 287(a)(3) of the Immigration and Naturalization Act authorized such searches within a reasonable distance of the border, 8 U.S.C. § 1357(a)(3) (1970), as authorized in regulations promulgated by the Attorney General. The regulations define "reasonable distance" as within 100 air miles of an external boundary of the United States. 8 C.F.R. § 287.1 (1978). The Court gave special consideration to the fact that the search was authorized by statute because of its "duty to construe the statute, if possible, in a manner consistent with the Fourth Amendment." 413 U.S. at 272.

44. 413 U.S. at 272.

45. *Id.* at 273. The Court offered two examples of "functional equivalents":

> [S]earches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. . . . [A] search of the passengers and cargo of an airplane arriving at a St. Louis airport after a non-stop flight from Mexico City would clearly be the functional equivalent of a border search.

Id.

46. *Id.*

47. *Id. Almeida-Sanchez* has been applied to a search of an automobile at a fixed checkpoint removed from the border or its functional equivalent, United States v. Ortiz, 422 U.S. 891 (1975), but has been distinguished in cases involving less intrusion on fourth amendment rights, such as routine stops for questioning by roving patrols, United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (specific articulable facts that reasonably warranted suspicion vehicle contained illegal aliens necessary), and at fixed checkpoints, United States v. Martinez-Fuerte, 428 U.S. 1116 (1976) (no individualized suspicion necessary at reasonably located checkpoints, referral to secondary inspection area may be based on grounds less than required for roving patrol stops).

48. *See, e.g.*, United States v. Tilton, 534 F.2d 1363 (9th Cir. 1976). For the application of the doctrine in the Ninth Circuit, see note 26 *supra*.

49. *See* note 26 *supra*.

50. *E.g.*, United States v. Whitmore, 595 F.2d 1303 (5th Cir. 1979); United States v. Beck, 484 F.2d 203 (3d Cir. 1973), *cert. denied*, 414 U.S. 1132 (1974).

51. In United States v. Johnson, 588 F.2d 147 (5th Cir. 1979), in finding a search conducted well after a border crossing unconstitutional, a panel of the Fifth Circuit rejected the pre-*Almeida-Sanchez* standard of "reasonable suspicion" and "nexus with the border," *see* note 26 *supra*, as "overly broad by *Almeida-Sanchez* standards." 588 F.2d at 154. It held that a search would not be a valid border search "unless it appears by a preponderance of the evidence, direct or circumstantial, that a border crossing

The *Bilir* court distinguished *Almeida-Sanchez*.[52] The roving border search examined in that case would not have qualified as an extended border search by immigration or customs officers: the officers who conducted it did not have a reasonable suspicion that material recently illegally imported would be disclosed by the search.[53] The *Bilir* court concluded that *Almeida-Sanchez* had not "directly or by necessary implication" abrogated the extended border search doctrine.[54]

Judge Winter dissented, reading *Almeida-Sanchez* to establish that "in the interest of national protection, warrantless searches may be conducted only at the border or at its functional equivalent."[55] Because the search did not occur at an actual border, its validity depended upon the characterization of the site of the search as the functional equivalent of a border. The location of a search can be considered the functional equivalent of a border only if the factors that make the border search reasonable are present: a certainty that the objects of the search have come from outside the country and a diminished expectation of privacy because of the regularity of the inspection procedure.[56] Judge Winter concluded that these factors were not present. Because there were significant gaps in surveillance subsequent to the actual border crossing, it was not reasonable to assume that the defendants were carrying goods that had quite recently crossed the border at the Baltimore docks.[57] Moreover, the search was removed both in time and

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has occurred." *Id.* (footnotes omitted). The court criticized two other post-*Almeida-Sanchez* decisions in the Fifth Circuit, United States v. Brom, 542 F.2d 281 (5th Cir. 1976), and United States v. Flores, 531 F.2d 222 (5th Cir.), *cert. denied*, 429 U.S. 976 (1976), that had continued to apply the old standard:

> With all due respect to the panels that decided those cases, we do not see how they can be squared with *Almeida-Sanchez* and the other Supreme Court border search cases discussed in this opinion. Both cases involved searches conducted well after *Almeida-Sanchez* was decided, yet neither even mentions, let alone discusses, that case. Both were decided entirely on the basis of pre-*Almeida-Sanchez* case law. We can see no principled way to distinguish these cases from the one before us, but we have an overriding obligation to follow Supreme Court precedent.

588 F.2d at 156 (footnote omitted).

52. 592 F.2d at 742. The court assumed *Almeida-Sanchez* applied to searches by customs officials as well as immigration officers. *See* note 41 *supra*.

53. 592 F.2d at 742.

54. *Id.* at 742 (citing United States v. Beck, 483 F.2d 203, 208 (3rd Cir. 1973), *cert. denied*, 414 U.S. 1132 (1974); United States v. Fogelman, 586 F.2d 337, 339 n.4 (5th Cir. 1978) (Brown, C.J., concurring)).

55. *Id.*

56. *Id.* These factors were employed by the Fifth Circuit in United States v. Brennan, 538 F.2d 711, 716-19 (5th Cir. 1976).

57. 592 F.2d at 743. Judge Winter's primary disagreement with the majority was based on its characterization of the surveillance as "practically continuous." *Id.* at 741. After analyzing the facts, he pointed to three "breaks" in the chain of surveillance. *See id.* at 743. Because of these breaks, Judge Winter believed that while the agents may have had a strong *suspicion* that the defendants were transporting goods that had been recently carried across the border in Baltimore, there were not grounds for a *reasonable belief* that this was true. Judge Winter's standard of belief

in distance from the actual border crossing, and thus did not occur under circumstances comparable to a customary border search where the entrant has a diminished or nonexistent expectation of privacy.[58] Even if *Almeida-Sanchez* were not to be applied, Judge Winter contended, the majority's standard was not satisfied by the facts of the case. Due to the breaks in surveillance, he concluded that the agents' belief that the goods seized had recently come from outside the country was not reasonable.[59]

Bilir does not satisfactorily resolve the issue of what effect *Almeida-Sanchez* has on the extended border search doctrine. Although the court concluded that the Supreme Court had not completely rejected the doctrine in *Almeida-Sanchez*, it did not determine to what extent the doctrine had been altered by that case.[60] The case's major significance is that it establishes an analytical structure for the application of the extended border search doctrine in the Fourth Circuit.

The *Bilir* court recognized that there are two fact patterns in which the extended border search doctrine may be applied; the categorization of a case as involving one of these two fact patterns determines the factors to be applied in testing the constitutionality of a search. The first fact pattern is one involving a so-called "deliberately delayed" search, as in the *Bilir* case itself.[61] The second is a case in which the first contact with the suspect and the first opportunity to search occur away from the border.[62] The court cited *United States v. McGlone*,[63] an earlier Fourth Circuit decision, as an example of a case involving the second fact pattern.

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was the same as that required by the Ninth Circuit in the extended border search context: the customs investigator must be *reasonably certain* that contraband is entering the United States. *See* note 26 *supra*. District Judge Northrop also used this standard in his opinion in the *Bilir* case. United States v. Biliar, Crim. No. N-77-0340 (D. Md. Aug. 21, 1977), slip op. at 4. Although it affirmed the lower court, the *Bilir* majority used a different standard. *See* text accompanying notes 30 & 31 *supra*. *See also* United States v. Diaz-Segovia, 457 F. Supp. 260 (D. Md. 1978).

58. 592 F.2d at 744.

59. *Id.*

60. *Compare Bilir with* United States v. Johnson, 588 F.2d 147 (5th Cir. 1979), discussed in note 51 *supra*.

61. *See* note 32 and accompanying text *supra*.

62. *See* note 32 *supra*.

63. 394 F.2d 75 (4th Cir. 1968). The Fourth Circuit has been faced with only one other extended border search case which even remotely touched upon the problem presented in *Bilir*. In United States v. Gallagher, 557 F.2d 1041 (4th Cir. 1977), *cert. denied*, 434 U.S. 870 (1978), the defendant was convicted for importing drugs in a vehicle shipped from Portugal to Norfolk, Virginia. The vehicle entered the United States at Baltimore, but was not searched until its arrival several days later at Norfolk, the final destination. Defendant maintained that the search violated the fourth amendment. The *Gallagher* court concluded that the camper, although physically within the territorial confines of the United States, never left the official custody of the customs officers. Thus, when the camper arrived at Norfolk, it remained at "the border" for purposes of fourth amendment analysis. The court did not grapple with defining the *Almeida-Sanchez* concept of "functional equivalent of the border."

In *McGlone,* the court tested the validity of a search conducted at the parking lot of a Baltimore dock. While aboard a ship discharging cargo from Japan a customs inspector discovered that 600 radios, upon which duty had not yet been paid, were missing. A customs investigator at the Baltimore dock was notified of the missing radios. He stopped the defendants, longshoremen who were leaving the dock's adjacent parking area in their automobiles, and conducted a warrantless search of each automobile. The defendants were convicted of theft, and appealed.

The Fourth Circuit recognized that no rigid formula for testing the reasonableness of a search could be prescribed.[64] Rather, the validity of a search depends upon whether all the facts establish reasonable cause to suspect that merchandise is presently being illegally introduced into the United States by the person the officer proposes to search.[65] The determination of reasonableness depends upon the distance of the search from the point where goods could be introduced by the suspects into the United States, the time that has elapsed since the suspects had an opportunity to bring in the goods, and the circumstances upon which the searching officers based their suspicions.[66] The search in question was performed immediately after the discovery of the missing goods and before the longshoremen left the area. Moreover, the search was confined to the enclosed, guarded parking area adjacent to the pier. Finally, the investigator's suspicion was based upon both his knowledge that the goods were missing and his prior experience with longshoremen. The court concluded that the factors of time, place, and opportunity for smuggling, together with the facts known to the investigators, provided reasonable cause to suspect that the defendants were introducing dutiable goods into the United States without the payment of customs duty, and affirmed the convictions.[67]

Although the circumstances in *Bilir* were quite different than those in *McGlone,* the *Bilir* court did not change the underlying concepts that were applied in the earlier decision. In both opinions the court concluded that before conducting a warrantless search, the customs officer must have a reasonable suspicion that materials are illegally being introduced into the United States.[68] As in *McGlone,* the *Bilir* court isolated time, distance, and surrounding circumstances as factors that must be considered in determining the reasonableness of an extended border search. In *Bilir,* however, the significance of these factors was minimized and a new factor stressed. Because it was examining a "deliberately delayed" search, the court found continuity of surveillance of the suspects to be the single most important

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64. 394 F.2d at 78.
65. *Id.*
66. *Id.*
67. *Id.* at 79. *See* United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968) (warrantless search valid under similar circumstances), *cert. denied,* 393 U.S. 1121 (1969).
68. *See* 592 F.2d at 740; 394 F.2d at 78.

factor in assessing the reasonableness of the search. The difference in emphasis between *McGlone* and *Bilir* may be explained by distinguishing the fact patterns of the two cases. In the *McGlone* situation, the first contact with a suspect, hence the first opportunity to search, occurs away from the actual border.[69] The suspicion that the defendant possesses material that has recently crossed a border will ordinarily be wholly circumstantial,[70] and the time and distance factors, therefore, may be quite crucial in assessing reasonableness of suspicion.[71] A search in the *Bilir* situation is conducted away from the border by design. The delay occurs either to bolster by further observation of the suspects' activities a suspicion that is arguably marginal at the time of the border crossing, or to allow the apprehension of accomplices inland of the border.[72] Because in these cases the reasonableness of the search depends upon the assurance that the object of the search crossed the border, the most important factor is the extent to which surveillance has been maintained from the border crossing to the location of the search.

It is this very difference in fact patterns between *McGlone* and *Bilir* that may be the dividing line between warrantless searches away from a border that are constitutional and those that are not. In *Almeida-Sanchez v. United States,*[73] the Supreme Court stated that warrantless searches may be conducted at the border and at its "functional equivalents."[74] However, the term "functional equivalent" remains undefined. There are two possible interpretations: that a particular *place* removed from the border may be the functional equivalent of the border;[75] and that a particular *search* may be the functional equivalent of a search at the border.[76] The two examples of functional equivalents to border searches given in *Almeida-Sanchez,*[77] a search at an established station near the border at the junction of two or more roads leading from the border and one at the destination of a non-stop

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69. *See* 592 F.2d at 740 n.8.

70. *Id.* at 740.

71. *Id. See also* United States v. Glaziou, 402 F.2d 8, 14 (2d Cir. 1968), *cert. denied,* 393 U.S. 1121 (1969).

72. *See* 592 F.2d at 740 n.9 (citing examples of each type of case). Although the *Bilir* court expressed no opinion regarding the issue, it noted that some judicial concern has been expressed as to the constitutionality of a delayed search where the suspicion is sufficiently strong to justify a search at the actual border, but it is nevertheless delayed in order to apprehend accomplices. *Id. See* United States v. Fogelman, 586 F.2d 337, 350–52 (5th Cir. 1978) (Godbold, J., dissenting); United States v. Mitchell, 525 F.2d 1275, 1278–79 (5th Cir.), *vacated on the extended border search point,* 538 F.2d 1230, 1234 n.4 (5th Cir. 1976) (en banc).

73. 413 U.S. 266 (1973).

74. *Id.* at 273.

75. *See, e.g.,* United States v. Reyma, 572 F.2d 515 (5th Cir. 1978); United States v. Alvarez-Gonzalez, 542 F.2d 226 (5th Cir. 1976).

76. *See, e.g.,* United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978). This dichotomy was suggested in United States v. Johnson, 588 F.2d 147, 154 (5th Cir. 1979). *See* note 51 *supra.*

77. *See* note 45 *supra.*

flight from Mexico City, seem to support the place theory. Each can be described as occurring at a location at which it is first possible or practical to search after the United States border has been crossed.[78]

If the term is limited to the first interpretation — that "functional equivalent" includes only locations — then the type of search conducted in *McGlone* will be constitutional, while that in *Bilir* will not. This interpretation means, ostensibly, that customs searches must take place at specified sites, where an entrant has no reasonable expectation of privacy and where it is certain that the objects of the searches have come from outside the country.[79] The search in *McGlone* took place at such a site, an enclosed, guarded area adjacent to a port-of-entry to the United States.[80] The search in *Bilir,* however, occurred at the Pennsylvania Railroad Station, a location having no international connections.

If, however, the second interpretation is accepted — that a search away from the border can be the functional equivalent of a border search — the types of searches in both *McGlone* and *Bilir* are permissible under the fourth amendment. Under this interpretation, regardless of where a search takes place, it will be constitutional so long as the facts and circumstances assure that fourth amendment guarantees have been preserved. It is only this second interpretation that permits the extended border search doctrine as applied in *Bilir* to continue.

The question that was not fully answered in *Bilir* is how the Supreme Court's "functional equivalent" language affects the extended border search doctrine. Given the different approaches taken by the circuits,[81] the time may be ripe for the Court to provide guidance as to the propriety of that doctrine.

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78. Other cases in which searches have been found by the Court not to occur at the functional equivalent of the border also support the place theory. United States v. Martinez-Fuerte, 428 U.S. 1116 (1976) (checkpoint 62 air miles north of border); United States v. Ortiz, 422 U.S. 891 (1975) (same); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving patrol stop near same).

79. Examples would be international airports and seaports. *See* United States v. Brennan, 538 F.2d 711 (5th Cir. 1976).

80. *See* text accompanying notes 63 to 67 *supra.*

81. *See* note 26 *supra.*