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Eroding Fourth Amendment Protections at the Border:

An Analysis of *United States v. Cortez-Rocha*

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It was a great trip to Tijuana. You got two cases of real vanilla for everyone on your Christmas list, a huge bunch of real Mexican oregano, and a three-legged-pig clay sculpture to finish off your newly renovated Spanish-style living room. That pig was a great find. Already it's bringing you luck; there is hardly a line to cross back into the States, and at this rate, you will make it home in time to watch *Boston Legal*. Unfortunately, it won't work out that way. The border agents who are randomly pulling cars out of line, send you to the secondary inspection area. While you chat with the agent, he picks up the clay pig, and suddenly, he doesn't seem friendly any more. The dog circling your car has just dipped his head twice near your trunk, you are getting sweaty, and more agents seem to be taking an interest in your car. Before you know what's happening, the agent smashes the clay pig to look inside. Surely he can't do that! Surely this is an unreasonable search . . . isn't it? Unfortunately, it is probably okay.

Recently, the Ninth Circuit Court of Appeals decided the government can destroy personal property during a search at the border without restraint or probable cause.[1] The Ninth Circuit's holding in *United States v. Cortez-Rocha*[2] represents a dangerous precedent not only for border searches, but for the reasonableness standard embedded in the Fourth Amendment.[3] However, this power should not eliminate all Fourth Amendment protections against unreasonable searches.[4] Although the federal government may have the ability to conduct searches without probable cause at the border, that power does not allow federal agents to destroy personal property when agents can open a container with minimal damage and when no exigent circumstances exist.[5]

On February 16, 2003, Julio Cortez-Rocha (Cortez) attempted to enter the United States from Mexico.[6] During the routine border questioning, customs agents became suspicious of Cortez and sent him to a secondary inspection area.[7] During the search, the agents slashed open his spare tire, found several bricks of marijuana, and arrested Cortez.[8]

The Ninth Circuit determined that a destructive search of personal property at the border was reasonable under the Fourth Amendment even though the agents could have disassembled or opened the container without destroying it.[9] The decision in *Cortez-Rocha* raises troubling questions about citizens' rights, the status of the Fourth Amendment at the border, and the applicability of the exclusionary rule to border searches.

Constitutional protections are being restricted by the courts in the name of justice and national security. Although the government has a reasonable interest in regulating what crosses its borders, individuals do not lose constitutional protections at the border, and courts should affirm the substantial protections against unreasonable searches and seizures.[10] The Ninth Circuit should have encouraged government agents to conduct their investigations within the boundaries set by *United States v. Flores-Montano*,[11] rather than further weighting the balancing test in favor of the government.[12] Suppressing the marijuana in the *Cortez-Rocha* case would not have prevented agents from inspecting containers crossing the border. Rather, the Ninth Circuit should have held that the destruction of a container, absent an additional justification, is particularly offensive and

Footnotes

1. United States v. Cortez-Rocha, 394 F.3d 1115 (9th Cir. 2005).
2. *Id.* The court's decision was initially rendered September 21, 2004 and reported at 383 F.3d 1093. Nearly four months later, the court supplemented its opinion with citation to a Prohibition-era decision upholding a warrantless search for contraband whiskey in an automobile, *Carroll v. United States*, 267 U.S. 132 (1924), and a 1982 case involving the warrantless search of an automobile during a traffic stop, *United States v. Ross*, 456 U.S. 798 (1982); the *Ross* case had cited *Carroll*. *Carroll*, but not *Ross*, is briefly cited in the Supreme Court's most recent case addressing border searches of automobiles, *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004), but did not factor significantly into the court's analysis.
3. U.S. CONST. amend. IV.
4. *See* United States v. Ramsey, 431 U.S. 606, 618 n.13 (not deciding whether "a border search might be deemed unreasonable because of the particularly offensive manner in which it is carried out"); Marsh v. United States, 344 F.3d 317, 324 (5th Cir. 1965) ("Border searches are . . . not exempt from the constitutional test of reasonableness.").
5. *See* Florida v. Jimeno, 500 U.S. 248 (1991); Florida v. Wells, 495 U.S. 1 (1990); United States v. Osage 235 F.3d 518 (10th Cir. 2000).
6. Appellant's Opening Brief at 4, United States v. Cortez-Rocha.
7. Brief for Appellee at 2-3, United States v. Cortez-Rocha.
8. *Id.* at 2-3.
9. United States v. Cortez-Rocha, 394 F.3d 1115, 1125-26 (9th Cir. 2005).
10. *See* U.S. CONST. amend. IV; United States v. Ramsey, 431 U.S. 606, 618 n.13 (1977).
11. 541 U.S. 149 (2004).
12. *See* United States v. Flores-Montano, 541 U.S. 149, 155-56 (2004) (holding that reasonable suspicion may be required for the destructive search of a operational or non-operational car-part component).

makes the search unreasonable.[13] Instead of determining whether the trial judge correctly admitted the evidence, the Ninth Circuit held that the complete destruction of a person's property was not offensive, thereby further reducing an individual's protection against unreasonable searches and seizures.[14]

There is no justification for protecting searches that completely destroy an object, regardless of the object's value, when there are nondestructive methods for opening it.[15] Agents have a lower threshold to meet to justify searches at the border and the scope of those searches is nearly unlimited. However, the border search does not eliminate the restraint agents must use when conducting the search. Allowing federal customs agents to destroy personal property when they can open the container with minimal damage and common tools eliminates all Fourth Amendment protections at the border.

I. CASE DESCRIPTION

Julio Cortez-Rocha (Cortez) attempted to enter the country through the Calexico Port of Entry between California and Mexico on February 16, 2003, while smuggling 42 kilograms of marijuana in his spare tire.[16] Border customs agents were conducting a routine border check of Cortez's 1979 Chevy pickup and became suspicious when a drug dog signaled near the gas tank of Cortez's truck.[17] Agents moved Cortez to a secondary inspection area, placed him in handcuffs, and conducted a detailed search of his vehicle.[18] They placed a density meter against the spare tire, which registered a high reading.[19] The agents put the truck on a hydraulic lift, removed the spare tire, and slashed it open.[20] The agents found 42.22 kilograms of marijuana and arrested Cortez.[21]

On February 26, 2003, the government charged Cortez with one count of importing marijuana and one count of possession with the intent to distribute.[22] Prior to trial, Cortez asserted that "cutting open the spare tire . . . represented a 'non-routine' search that must be justified by reasonable, articulable suspicion."[23] Further, Cortez argued that the government had not established reasonable suspicion since it provided no evidence on the reliability of the dog or the density buster.[24] To support his suppression motion, Cortez filed discovery motions on the reliability of the dog and density buster.[25]

There is no justification for protecting searches that completely destroy an object . . . when there are nondestructive methods for opening it.

The government countered that the search did not require reasonable suspicion since the search was a routine border search and, therefore, reasonable.[26] Ultimately, the trial court denied both motions, determining that since the search was routine it did not require reasonable suspicion and that the discovery motion was moot.[27] After the trial court denied his motion, Cortez pleaded guilty to the importation of marijuana charge, conditioned on his appeal of the suppression motion.[28] The district court sentenced Cortez to time served and two years probation.[29] On appeal, the Ninth Circuit affirmed Cortez's conviction.[30]

II. BACKGROUND

The Fourth Amendment prevents the government from conducting unreasonable searches and seizures without probable cause.[31] Probable cause is a reasonable belief that the government will find evidence of a crime in a particular location.[32] Typically, searches and seizures require a detached magistrate to determine whether probable cause exists to support the government's warrant request.[33] If the magistrate finds probable cause, the magistrate will issue a warrant.[34] If the government conducts a warrantless search, then a defendant may keep the evidence out of the prosecutor's case-in-chief presentation through the exclusionary rule.[35] However, several exceptions to the warrant requirement allow the prosecutor to bring in evidence obtained outside the warrant process.[36] Each exception defines reasonableness differently.[37]

13. U.S. Const. amend. IV; *Ramsey*, 431 U.S. at 618 n.13.
14. Mapp v. Ohio, 367 U.S. 643, 653 (1961); Ker v. California, 374 U.S. 23, 34 (1963) ("[T]here is no formula for . . . reasonableness. Each case is to be decided on its own facts and circumstances . . . .").
15. *See* United States v. Osage, 235 F.3d 518 (10th Cir. 2000).
16. United States v. Cortez-Rocha, 394 F.3d 1115, 1118 (9th Cir. 2005).
17. *Id.*
18. *Id.*
19. *Id.* Density busters measure the density of objects. *Id.*; Appellant's Opening Brief at 4, United States v. Cortez-Rocha. Agents compare the meter reading to an acceptable range for the object tested. *Id.* If the reading is "high," the object is denser than normal and suggests a strong probability there is a something hidden within the object. *Id.*
20. *Cortez-Rocha*, 394 F.3d at 1118.
21. *Id.*
22. *Id.*
23. Appellant's Opening Brief at 4, United States v. Cortez-Rocha.
24. *Id.*
25. *Id.* at 5.
26. *Id.*
27. *Id.* at 6.
28. *Id.*
29. *Id.*
30. United States v. Cortez-Rocha, 394 F.3d 1115, 1126 (9th Cir. 2005).
31. U.S. CONST. amend. IV.
32. *See* Illinois v. Gates, 462 U.S. 213, 238-39 (1983).
33. Katz v. United States, 389 U.S. 347, 356-57 (1967) (citations omitted).
34. *Katz*, 389 U.S. at 356-57.
35. Mapp v. Ohio, 367 U.S. 643, 659 (1961) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928)).
36. Wong Sun v. United States, 371 U.S. 471, 487 (1963).
37. *E.g.,* United States v. Leon, 468 U.S. 897 (1984) (admitting evidence under "good-faith" exception); *Ramsey*, 431 U.S. 606, 616-17 (1977) (holding border searches are reasonable by virtue of their location); New York v. Belton, 453 U.S. 454 (1981) (holding a search during a custodial arrest is reasonable to prevent officer from harm).

The border-search exception allows for a search of the entire vehicle and its contents without obtaining a search warrant . . . .

A. Border Searches

The United States Supreme Court has long considered border searches reasonable without a finding of probable cause by a detached magistrate simply "by virtue of the fact that they occur at the border . . . ."[38] The border-search reasonableness definition is not rooted in the "exigent circumstance"[39] analysis used in interior[40] Fourth Amendment analyses.[41] Rather, the long-standing exception for border searches springs from the government's interest in regulating what enters the country by securing its borders from unwanted contraband and preventing illegal immigration.[42] Thus, border searches are more of a regulatory search, such as an inventory search,[43] and government agents are restricted in the manner in which they carry out the search.[44] The United States Supreme Court has reaffirmed the border-search exception numerous times.[45]

The border-search exception allows for a search of the entire vehicle and its containers without obtaining a search warrant or establishing probable cause.[46] However, the individual may rebut the presumption of validity by showing agents conducted the search in a particularly offensive manner.[47] To determine whether the government has exceeded its authority, the court must use a balancing test to determine whether agents conducted the search in a "manner which will conserve public interests as well as the interests and rights of individual citizens."[48]

For example, in *United States v. Ramsey*[49] the United States Supreme Court held that an inspection of suspicious letters was reasonable because the agent conducted the search when the letters entered the country.[50] The agent searched the letters at the point of entry into the United States for the letters, the functional equivalent of the border,[51] and the border exception made the search reasonable.[52]

Although individuals have greater constitutional protections than their property, customs agents may still detain individuals, regardless of where they enter, for a reasonable amount of time to determine whether they are smuggling contraband.[53] In *United States v. Montoya de Hernandez*,[54] customs agents suspected that Rosa Montoya de Hernandez was a "balloon swallower"[55] because of the suspicious characteristics of her story and dress.[56] During a pat-down and strip search, agents noticed Hernandez's abdomen was firm and that she was wearing two pairs of elastic underwear.[57] Agents gave Hernandez the option to have an x-ray or wait until she had a bowel movement so they could determine what was in her abdomen.[58] After 16 hours, agents obtained a court order for a rectal exam and discovered 88 balloons filled with cocaine.[59]

Hernandez moved to suppress the evidence, arguing that the search was unreasonable as it violated her privacy and dignity and that the government did not obtain a warrant until after she had been detained for 16 hours.[60] The United States Supreme Court considered the detention to be "routine" since agents confined Hernandez until they could determine whether she was smuggling drugs.[61] Defining the agents' search of Hernandez as routine would lead courts to extend the same analysis to property searched at the border.

B. The Ninth Circuit and the Routine/Non-Routine Analytical Framework

The Ninth Circuit has consistently held that agents must conduct border searches in a reasonable manner.[62] In 1967, 1970, and 1984, the court held that the government does not need probable cause to initiate a border search but the agent must "proceed in a reasonable manner" and support more-intrusive searches with "some level of suspicion."[63] The appel-

38. United States v. Ramsey, 431 U.S. 606, 616-17 (1977).
39. *See* Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984) (summarizing several warrant-requirement exceptions).
40. "Interior" refers to searches or seizures within the United States' borders. *Flores-Montano*, 541 U.S. at 154.
41. *Ramsey*, 431 U.S. at 622.
42. *See Carroll*, 267 U.S. at 154; United States v. Knight, 534 U.S. 112, 118-119 (2001) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
43. WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE, § 3.4 (3d ed. 2000).
44. Florida v. Wells, 495 U.S. 1, 4 (1990).
45. *See, e.g.*, *Flores-Montano*, 541 U.S. 149 (border crossings); United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (airports); *Ramsey*, 431 U.S. 606 (international mail).
46. LAFAVE, *supra* note 43 at 236.
47. *See Flores-Montano*, 541 U.S. at 155; *Ramsey*, 431 U.S. at 618, n.13; Appellant's Opening Brief at 11, United States v. Cortez-Rocha.
48. Carroll v. United States, 267 U.S. 132, 149 (1925).
49. 431 U.S. 606, 616-17 (1977).
50. *Ramsey*, 431 U.S. at 624-25. Point of entry into the United States of property or persons is the functional equivalent of the border. Almeida-Sanchez v. United States, 413 U.S. 266, 272-273 (1973).
51. *Almeida-Sanchez*, 413 U.S. at 272-273.
52. *Ramsey*, 431 U.S. at 624-25.
53. United States v. Montoya de Hernandez, 473 U.S. 531 (1985).
54. 473 U.S. 531 (1985).
55. Balloon swallowers ingest condoms or balloons filled with drugs, enter the country, and naturally expel the drugs at their destination. *Id.* at 533.
56. *Id.* Hernandez claimed to be a buyer for a store in Columbia to account for her frequent trips between Bogotá and Los Angeles. *Id.* However, the lack of substantial luggage and hotel plans discounted her story. *Id.*
57. *Id.* at 534.
58. *Id.*
59. *Id.* at 535-36.
60. *Id.* at 536-38.
61. *Id.* at 541, 543-44.
62. United States v. Des Jardins, 747 F.2d 499, 504 (1984) (citations omitted); Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).
63. *Id.*

late courts developed a test to evaluate the intrusiveness of a border search through the routine/non-routine analysis based on *Montoya de Hernandez*.[64]

The Ninth Circuit extended the routine/non-routine analysis to border vehicle searches in *United States v. Molina-Tarazon*.[65] The Ninth Circuit held that removing the gas tank from a vehicle to inspect its interior was not routine and, therefore, required particularized suspicion.[66] In *Molina-Tarazon*, the agents became suspicious of Molina's truck and searched it to determine whether he had concealed drugs in the truck.[67] The search was inconclusive.[68] Unsatisfied, the agents directed the truck to the inspection area.[69] The mechanic put the truck on a lift and removed the gas tank.[70] After disassembling the tank, the mechanic discovered drugs.[71]

The Ninth Circuit held that the border-search exception was reasonable for routine searches, creating a three-part analysis to determine whether or not the search was routine.[72] The three-part test required an evaluation of the amount of force used, the danger the search posed, and the effect of the search on the individual.[73] After determining that the search was non-routine, the court found that the agents established reasonable suspicion prior to removing the gas tank.[74] Since the agents had established reasonable suspicion to conduct the non-routine search, the court held the search was reasonable.[75]

Prior to *Cortez-Rocha*, the Ninth Circuit had considered that slashing a spare tire was a routine search under the *Molina-Tarazon* test in *United States v. Vargas-Castillo*.[76] In *Vargas-Castillo*, customs agents referred the defendant's vehicle to a secondary inspection area after becoming suspicious of the vehicle.[77] Based on the evidence established during the secondary inspection, a customs agent made a small incision into the tire, discovered marijuana, and then cut the tire completely open to uncover the rest of the drugs.[78]

In *Vargas-Castillo*, the Ninth Circuit answered a hypothetical question since neither party raised the suppression issue at trial nor did the court cite any authority to allow it to address the issue on appeal.[79] Additionally, the appellate court did not determine whether slashing the tire was routine or whether agents had established sufficient reasonable suspicion to conduct the search.[80] Thus, the Ninth Circuit used a routine/non-routine analysis to determine whether property searches conducted at the border were reasonable under the Fourth Amendment and suggested that slashing a tire might be a reasonable search.[81]

Although *Flores-Montano* eliminated [the] balancing test, it did not clarify what amount of destruction makes a search unreasonable.

C. United States v. Flores-Montano's Effect on Border Searches

In *United States v. Flores-Montano*,[82] the United States Supreme Court rejected the Ninth Circuit's routine/non-routine balancing test.[83] The facts in *Flores-Montano* were similar to those in *Molina-Tarazon*.[84] After suspecting that Flores's gas tank contained drugs, the agents sent the car to a secondary inspection area, put it on a lift, and summoned a mechanic to disassemble the gas tank.[85] After agents removed the tank, they noticed an extra plate attached to the top of the tank with bondo.[86] The agents knocked off the plate and discovered the hidden marijuana.[87]

Flores-Montano contains two important holdings for border searches. First, the United States Supreme Court reaffirmed that the government does not have to establish probable cause to conduct a border search and that the scope of a property border search is unlimited.[88] Second, the government may remove, inspect, and replace any operational part of the vehicle without probable cause or judicial oversight when the government can accomplish the process in a reasonable amount of time and with little or repairable damage to the vehicle.[89] Although *Flores-Montano* eliminated *Molina-Tarazon's* balancing test,[90] it did not clarify what amount of destruction makes a search unreasonable.[91]

On the facts presented, the Court determined the hour the agents required to summon the mechanic, complete the disassembly, search the tank, and reassemble the car was not unreasonable.[92] The Court remanded the case but refused to deter-

64. *See* United States v. Flores-Montano, 124 S. Ct. 1582, 1584-85 (2004).
65. 279 F.3d 709 (9th Cir. 2002).
66. United States v. Molina-Tarazon, 279 F.3d 709, 712 (9th Cir. 2002) *overruled in part*, United States v. Flores-Montano, 541 U.S. 149, 151-52 (2004).
67. *Molina-Tarazon*, 279 F.3d at 711.
68. *Molina-Tarazon*, 279 F.3d at 712.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 713. The court acknowledged that there may be additional factors that would add to the analysis. *Id.*
73. *Id.* at 713-16.
74. *Id.* at 717-18.
75. *Id.* at 717-18.
76. 329 F.3d 715, 722-23 (9th Cir. 2003).
77. *Id.* at 717.
78. *Id.*
79. *See id.*; Appellant's Opening Brief at 17, *Cortez-Rocha*.
80. *Id.*
81. *See Vargas-Castillo*, 329 F.3d at 722-23; United States v. Molina-Tarazon, 279 F.3d 709, 713 (9th Cir. 2002).
82. 541 U.S. 149 (2004).
83. United States v. Flores-Montano, 541 U.S. 149, 152 (2004).
84. *See id.* at 150-51; *Molina-Tarazon*, 279 F.3d at 711-12.
85. *Flores-Montano*, 541 U.S. at 151.
86. *Id.* Bondo is "a putty-like hardening substance that is used to seal openings . . ." *Id.*
87. *Id.*
88. *Id.* at 153.
89. *Id.* at 154-55 (commenting the search took approximately one hour and suggesting that a wait of two hours to enter the country would not be unreasonable).
90. *Id.* at 152-53.
91. *Id.* at 154 n.2 (refusing to discuss what type of manner might make a search unreasonable).
92. *Id.* at 155.

Reasonableness has different standards depending on the type, location, and circumstances of the search.

mine what level of destruction during a search made it unreasonable.[93] Thus, although the United States Supreme Court overruled the routine/non-routine balancing test, it did not determine what level of destruction makes a border search unreasonable.[94]

D. Defining Reasonable Manner in Destruction of Property

Reasonableness has different standards depending on the type, location, and circumstances of the search.[95] Government agents may establish reasonableness through exigent circumstances or by developing additional reasonable suspicion to widen the scope of the search.[96] However, a search may become unreasonable depending on the manner in which agents conduct the search[97] or when the scope of the search exceeds the basis for the search.[98]

In federal cases where a court has determined the government established reasonable suspicion beyond the justification for the initial search, it has admitted evidence obtained through destructive searches.[99] Conversely, courts have suppressed the evidence when the government failed to show sufficient reasonable suspicion to justify the destructive search.[100] Additionally, courts have admitted evidence uncovered during a nondestructive search.[101]

For example, the United States Supreme Court has held that agents conducted a reasonable search when they slashed open the interior of a car to determine whether suspects had hidden contraband in the seats because the government had established reasonable suspicion during the search.[102] Thus, although the manner of the search may appear unreasonable, the courts determined the agents established reasonable suspicion to widen the scope of the search and did not base the reasonableness of the search on the probable cause to stop the car.[103]

Additionally, the majority of federal appellate courts to address destructive border searches have required the government to establish reasonable suspicion before destroying a container while conducting an otherwise reasonable search.[104] In each of the cases, the government drilled small holes or made small incisions to determine the contents of the "container."[105] These cases presented the question whether the government had conducted a routine or non-routine search based on the interpretation of *Montoya de Hernandez*.[106] However, where courts allowed the evidence, it determined the agents had established reasonable suspicion to believe the container contained contraband.[107] By establishing reasonable suspicion, the agents were able to justify the continued intrusion into the property and greater latitude to conduct the drilling.[108]

Even though reasonableness is a shifting standard, the government can conduct a wide array of searches through a warrant-requirement exception.[109] Further, when in doubt, obtaining a warrant gives an agent great latitude to conduct a seemingly unreasonable search.[110]

III. ANALYSIS

A. Parties' Arguments

United States v. Cortez-Rocha required the Ninth Circuit to determine whether the destructive force used to open the spare tire was unreasonable under *Ramsey*[111] and *Flores-Montano*.[112] After the government submitted its brief, the United States Supreme Court ruled on *Flores-Montano*, which required the parties to adjust their arguments.[113] The Ninth Circuit ruled that *Flores-Montano* applied only to operational parts of the

93. *Id.*
94. *Id.*
95. *See supra* notes 33-39.
96. *Id.*
97. United States v. Ramsey, 431 U.S. 606, 618 n.13 (1977).
98. Florida v. Wells, 495 U.S. 1 (1990).
99. *See e.g.,* United States v. Ramirez, 523 U.S. 65, 71 (1998) (holding that reasonable suspicion suspect was armed and dangerous supported exigent circumstances to justify seizure); United States v. Bennett, 363 F.3d 947, 952 (9th Cir. 2004) (holding agents had established probable cause to justify destructive search); Carroll v. United States, 267 U.S. 132, 153 (1925) (holding that reasonable suspicion justified slashing into car upholstery).
100. *See e.g.,* United States v. Rivas, 157 F.3d 364 (5th Cir. 1998) (holding the government did not establish reasonable suspicion to justify drilling). *Cf.* United States v. Osage, 235 F.3d 518 (10th Cir. 2000) (holding the officer did not have sufficient reasonable suspicion to exceed the scope of consent by destroying the container).
101. *See* United States v. Flores-Montano, 541 U.S. 149 (2004); United States v. Pena, 920 F.2d 1509 (10th Cir. 1990) (holding that removing a vent cover is a nondestructive search); United States v. Torres, 663 F.2d 1019 (10th Cir. 1981) (holding that using a screwdriver to remove a panel is a nondestructive search). *See cf.* Florida v. Wells, 495 U.S. 1, 4-5 (1990) (forcing open container absent existing police procedures was an unreasonable search).
102. *Carroll*, 267 U.S. at 153. A similar search would currently fall under the automobile exception.
103. *Carroll*, 267 U.S. at 162.
104. *See Flores-Montano*, 541 U.S. at 154 n. 2.
105. *Bennett*, 363 F.3d at 952; *Rivas*, 157 F.3d 364; United States v. Weinbender, 109 F.3d 1327, 1329 (8th Cir. 1997); *Robles*, 45 F.3d 1; *Carreon*, 872 F.2d 1436.
106. *See, e.g.*, *Rivas*, 157 F.3d at 367; *Robles*, 45 F.3d at 5.
107. *Compare Rivas*, 1257 F.3d at 368 (holding the government did not meet its burden to establish reasonable suspicion) *with Robles*, 45 F.3d at 5 (holding the government met its burden of reasonable suspicion).
108. *Id.*
109. *See* cases cited *supra* note 37.
110. *See, e.g.*, *Bennett*, 363 F.3d at 952 (holding that agents had established probable cause to justify search).
111. United States v. Ramsey, 431 U.S. 605, 618, n. 13 (1977).
112. 541 U.S. 149.
113. *Compare* Appellant's Opening Brief, United States v. Cortez-Rocha Brief for Appellee, United States v. Cortez-Rocha *with* Appellant's Reply Brief, United States v. Cortez-Rocha.

vehicle and not to non-operational parts of the vehicle.[114] Therefore, the holding in *Flores-Montano* did not cover the destructive search of the spare tire.[115] This ruling was wrong because it ignored United States Supreme Court precedent requiring the Fourth Amendment to be "liberally construed" to preserve the integrity of Constitutional protections[116] and because of the offensive manner of the search.[117] Finally, the Ninth Circuit's decision ignored analogous United States Supreme Court precedent and similar interpretations of other circuit courts requiring agents to establish reasonable suspicion before conducting destructive searches of property.[118]

1. Julio Cortez-Rocha

During the course of the appeal, the United States Supreme Court ruled on *United States v. Flores-Montano*,[119] which changed the emphasis of the parties' arguments. Initially, Cortez argued that slashing the spare tire was a non-routine search because the search completely destroyed the container.[120] Additionally, Cortez argued the destruction of the tire significantly reduced his sense of safety and caused him to be fearful of completing his journey without a spare tire.[121] Cortez's last argument in his opening brief attempted to discount the holding from *United States v. Vargas-Castillo*, since the Ninth Circuit had refused to consider the suppression motion because the parties had not raised the issue at trial.[122] Cortez's arguments all contained the same theme: the Fourth Amendment protects individuals against "unreasonable destruction of property," regardless of whether the seizure occurs at the border or inside the country and that any destructive force used during a search requires agents to establish reasonable suspicion or lose the evidence to the exclusionary rule.[123]

Following the United States Supreme Court's decision in *Flores-Montano*, which struck down the routine/non-routine analysis, [124] Cortez revised his argument. Cortez argued that slashing the spare tire was the kind of destructive force the United States Supreme Court suggested was unreasonable.[125] However, in *Flores-Montano* the Court specifically refused to identify the level of destruction that would make an otherwise legal search unreasonable by the manner in which agents conducted the search.[126]

Incorporating *Flores-Montano* into his reply brief, Cortez contended that a destructive search required individualized suspicion and that *Flores-Montano* did not address whether a destructive search was unreasonable.[127] Cortez further asserted that although the routine/non-routine framework had been eliminated, the United States Supreme Court did not hold that an individual loses all possessory interests in property, or that a Fourth Amendment reasonableness analysis was eliminated.[128] Cortez urged the Ninth Circuit to join the majority of circuits requiring that government agents establish reasonable suspicion before using destructive force to carry out a border search.[129] Finally, Cortez requested that the court suppress the evidence since the government could have obtained it using other "least-intrusive" means.[130]

Cortez requested that the court suppress the evidence since the government could have obtained it using other "least-intrusive" means.

2. United States

The government argued that the ruling in *United States v. Vargas-Castillo* was binding and asserted that the holding of that case classified the cutting open of a spare tire as a routine search that did not require reasonable suspicion.[131] Additionally, the government focused on limiting *Montoya de Hernandez* to the intrusive search of a person and argued that the balancing test established in *Molina-Tarazon* was inconsistent with *Montoya de Hernandez*.[132]

Further, the government identified several cases within the Ninth Circuit and from other circuits in which courts had held that minimal destructive force was reasonable and routine when the government conducted the search at the border.[133] For example, the government argued that the Eleventh Circuit has allowed searches, initially using minimal destructive force, to destroy large portions of a boat during a border search.[134] Finally, the government cited cases in the Seventh and Tenth

114. United States v. Cortez-Rocha, 394 F.3d 1115, 1119-20 (9th Cir. 2005).
115. *Id.*
116. Mapp v. Ohio, 367 U.S. 643, 647 (1961) (citing Boyd v. United States, 116 U.S. 616, 635 (1886)).
117. *Ramsey*, 431 U.S. at 618 n.13.
118. *See* Florida v. Jimeno, 500 U.S. 248 (1991); *and* cases cited *supra* note 37.
119. 541 U.S. 149 (2004).
120. Appellant's Opening Brief at 6-8, 12-15.
121. *Id.* at 15-16.
122. *Id.* at 17.
123. *Id.* at 6-7.
124. *Flores-Montano*, 541 U.S. 149, 152-53 (2004).
125. *Id.* at 154 n.2, 156.
126. *Id.*
127. Appellant's Reply Brief at 4-5
128. *Id.* at 5-6.
129. *Id.* at 6.
130. *See id.* at 2-4.
131. Brief for Appellee at 4.
132. *Id.* at 8-10.
133. *Id.* at 8-11 (citing United States v. Ramos-Saenz, 36 F.3d 59 (9th Cir. 1994) (limiting non-routine searches to body or strip searches and holding the destructive force to remove the sole of the shoe was reasonable); United States v. Most 789 F.2d 1411 (9th Cir. 1986) (inserting a beeper into a paperweight was a reasonable search).
134. Brief for Appellee at 15-17 (citing United States v. Puig, 810 F.2d 1085, 1086-87 (11th Cir. 1987) (holding that drilling a small hole into the hull of ship which could easily be repaired was reasonable); United States v. Sarda-Villa, 760 F.2d 1232 (11th Cir. 1985) (holding that "reasonable suspicion justified using an axe and a crowbar" to search underneath the deck for drugs); United States v. Moreno, 778 F.2d 719, 721 (11th Cir. 1985) (drilling two small holes in a gas tank to insert a probe to determine the contents was a reasonable border search).

In his dissenting opinion, Judge Sidney Thomas argued that the majority had created an overbroad and unnecessary power within the border-search exception.

circuits, in which minimal destructive force to establish the contents of luggage or a camper shell and in which both circuits determined that the searches were reasonable border searches.[135]

The government concluded that by limiting *Montoya de Hernandez's* routine/non-routine analysis to body searches and strip searches, the United States Supreme Court permitted the government greater freedom to use some destructive force to carry out a border search.[136] The government requested that Cortez's conviction stand because the search of the tire was reasonable and that *Montoya de Hernandez* did not apply to property searches.[137]

B. Ninth Circuit Court of Appeals Majority Opinion

The Ninth Circuit specifically distinguished *Flores-Montano* as pertaining only to the vehicle itself.[138] According to the majority, because the spare tire was unnecessary for immediate travel and destruction of the spare tire did not damage or destroy the vehicle, the search was reasonable, and no cause or suspicion was necessary to search the spare tire.[139] Although a destructive search of property may require reasonable suspicion, the Ninth Court held that since the United States Supreme Court had focused its analysis on the vehicle, the spare tire was not significant enough to be protected.[140] Further, the court held that it was unworkable to require agents to establish reasonable suspicion before opening any locked container and that to do so would impair the government's ability to protect its border.[141] Additionally, the Ninth Circuit distinguished the "drilling cases"[142] as irrelevant because those cases were based on a similar routine/non-routine determination specifically overruled in *Flores-Montano*.[143]

The court justified its position as adhering to the admonition from the United States Supreme Court in *Flores-Montano* to avoid creating additional balancing tests to determine reasonableness.[144] The court noted the spare tire was a favored smuggling area for both drug runners and terrorists.[145] The court suggested that accepting Cortez's argument would encourage smugglers to conceal contraband in the spare tire and allow contraband and terrorists into the country unchecked.[146] Finally, the court held that although the search may have resulted in a constitutional tort or taking, the agents' actions were not severe enough to justify suppressing the evidence.[147] The majority implicitly decided that a civil suit against the government was a sufficient remedy for the complete destruction of the tire.[148] The Ninth Circuit determined that the search was reasonable and affirmed the guilty plea.[149]

C. Dissenting Opinion

In his dissenting opinion, Judge Sidney Thomas argued the majority had created an overbroad and unnecessary power within the border-search exception.[150] Judge Thomas anchored his opinion on the United States Supreme Court acknowledgment that the facts in *Flores-Montano* showed that the search was nondestructive and that a destructive search may lead to a different result.[151] Since the search in *Cortez-Rocha* was completely destructive, Judge Thomas argued that the existing totality-of-the-circumstances test was the appropriate test.[152] The dissent identified three factors to consider in the analysis: "the degree of destruction, the ease [of repair], and the convenience, cost, and efficiency of non-destructive or less-destructive methods that were available . . . ."[153] Applying his method, Judge Thomas determined the agents should have established reasonable cause before cutting into the tire.[154]

Judge Thomas next attacked the majority's characterization of the tire as a nonessential component of a vehicle since the spare tire is a safety feature.[155] Finally, Judge Thomas warned against the majority's war-on-terrorism justification stating, "[t]he challenge in such times is not to allow our fear to overcome our values."[156]

135. Brief for Appellee at 17-18; United States v. Johnson, 991 F.2d 1287, 1287 (9th Cir. 2001) (holding that the agent had established probable cause that contraband was hidden in a suitcase's hardshell before removing the interior liner); United States v. Carreon, 872 F.2d 1436 (10th Cir. 1989) (holding that drilling a small hole to determine the contents of a camper shell was a reasonable search).
136. Brief for Appellee at 22 (summarizing the holdings of the cases it cited in evaluating whether the use of destructive force makes a search non-routine or unreasonable).
137. *Id.* at 22-23.
138. United States v. Cortez-Rocha, 394 F.3d 1115, 1119-20 (9th Cir. 2005).
139. *Id.*
140. *Id.*
141. *Id.* at 1120.
142. *See* cases cited *supra* note 105 and accompanying text.
143. *Cortez-Rocha*, 394 F.3d at 1119.
144. *Id.* at 1122.
145. *Id.* at 1122-25.
146. *Id.* at 1125.
147. *Cortez-Rocha*, 394 F.3d at 1128 (Thomas, J., dissenting) (noting that "[a]ny damage caused would result from accident or negligence, not an unreasonable search . . ., and would therefore be properly cured by a tort").
148. *Id.*
149. *Id.* at 1126.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 1126.
154. *Id.* at 1126-27.
155. *Id.* at 1127.
156. *Id.* at 1128.

COMMENTARY

Constitutional protections do not evaporate at the border.[157] Although the government may have broad power to conduct general searches at the border, this power should not allow the destruction of personal property when nondestructive methods exist to open the container.[158] The Ninth Circuit wrongly protected the evidence for trial to supposedly avoid creating another balancing test.[159] However, the Ninth Circuit failed to recognize that all Fourth Amendment cases are balancing tests, and suppressing the evidence would not have created a new exception or protected area.[160] Rather, the Ninth Circuit would have affirmed that Fourth Amendment protections do exist at the border. Instead, *Cortez-Rocha* represents a quiet, yet dangerous erosion of Fourth Amendment protections against unreasonable searches and seizures.

The decision in *Cortez-Rocha* was wrong for three reasons. First, the Ninth Circuit ignored United States Supreme Court precedent that requires Fourth Amendment protections be liberally construed to preserve the integrity of the Constitution.[161] Second, the Ninth Circuit failed to conduct a reasonable-suspicion analysis even though it had conducted a reasonable-suspicion analysis to justify a "potentially destructive" border search prior to *Cortez-Rocha*.[162] Finally, analogous United States Supreme Court decisions and decisions from other federal circuits do not support the Ninth Circuit's holding.[163]

The first error committed by the Ninth Circuit was its failure to conduct a balancing test to evaluate the search.[164] The court must interpret the Fourth Amendment in favor of the individual rather than the government.[165] When applying the Fourth Amendment to the facts, the government must prove either that probable cause existed to conduct the search or that the search fell within a well-delineated exception.[166] Because the United States Supreme Court has twice avoided the decision of whether a destructive search is reasonable,[167] the boundaries of the border exception are blurry and the presumption should have gone to the individual rather than the government.[168] By resolving the "tie" in favor of the government, the Ninth Circuit violated precedent and further reduced Fourth Amendment protections at the border.[169]

Expanding searches at the border creates the possibility for abuse that falls outside the scope of judicial review.

Expanding searches at the border creates the possibility for abuse that falls outside the scope of judicial review.[170] Absent a judicial ruling supporting Fourth Amendment protections, the Ninth Circuit has created a dangerous precedent for future cases regarding the government's ability to destroy property at the border. The spare tire in this case is not the concern. Under the authority of *Cortez-Rocha*, an agent could destroy a three-legged clay pig to conduct a search for no reason other than the laziness of an agent. Further, *Cortez-Rocha* suggests that the court would not suppress the evidence obtained in an offensive search.

To justify the search, the Ninth Circuit did not need to conduct a complex analysis.[171] It could have adopted the test urged by Cortez himself: whether the entire situation, conditions, and actions of the agents sufficiently established reasonable suspicion to justify the destruction of his property.[172] Using a totality-of-the-circumstances approach would allow a court to evaluate whether agents established sufficient cause to use destructive force to open the container.[173] Agents should be required to attempt to open the container without employing destructive force.[174] If the container is completely closed, the officer should be required to establish reasonable suspicion before causing any damage to the property.[175]

Such a test acknowledges existing precedent that allows government agents to conduct exploratory drilling into camper shells or to open packages entering the country.[176] In those cases, the courts evaluated the evidence the officer had and determined that the officer had articulable facts to support a reasonable suspicion for the exploratory drilling.[177] This essential analysis was missing in *Cortez-Rocha*.[178] Failing to conduct the reasonable suspicion analysis, regardless of the

157. *See* United States v. Ramsey, 431 U.S. 605, 618 n.13 (1977); Marsh v. United States, 344 F.3d 317, 324 (5th Cir. 1965) ("Border searches are . . . not exempt from the constitutional test of reasonableness . . . .").
158. *See Ramsey*, 432 U.S. at 618 n.13; United States v. Flores-Montano, 541 U.S. 149 (2004); *Marsh*, 344 F.3d at 324. *Cf.* Osage v. United States, 235 F.3d 518 (10th Cir. 2000) (holding the search was unreasonable because a reasonable person would not consent to the complete destruction of a container).
159. *Cortez-Rocha*, 394 F.3d at 1122.
160. *See* United States v. Ramirez, 523 U.S. 65, 71 (1998).
161. *See* cases cited *supra* note 105.
162. *Cf.* United States v. Bennett, 363 F.3d 947, 952 (9th Cir. 2004) (holding that agents had established probable cause to justify the destructive search).
163. *See* cases cited *supra* note 37.
164. Mapp v. Ohio, 367 U.S. 643, 647 (1961) (citations omitted).
165. *Id.*
166. Katz v. United States, 389 U.S. 347, 357 (1967).
167. *See Flores-Montano*, 541 U.S. at 154 n. 2, 155-56; United States v. Ramsey, 431 U.S. 606, 618 n.13 (1977).
168. *Cf. Mapp*, 367 U.S. at 647; *Katz*, 389 U.S. at 357 (emphasizing courts should construe Fourth Amendment protections in favor of the individual).
169. *See id.*
170. *See Katz*, 389 U.S. at 356-57.
171. *See* United States v. Flores-Montano, 541 U.S. 149 (2004) (overruling the *Molina-Tarazon* test).
172. United States v. Cortez-Rocha, 394 F.3d 1115, 1118 n.1, 1119-20 (9th. Cir. 2005).
173. United States v. Banks, 540 U.S. 31, 36 (2003) (citations omitted).
174. The agents could have used reasonable force, such as using demounting tools to remove the tire from the wheel.
175. *See* cases cited *supra* note 118.
176. *See* Wyoming v. Houghton, 526 U.S. 295, 300 (1999).
177. *Id.*
178. *See* Appellant's Opening Brief at 6, *Cortez-Rocha*.

The Ninth Circuit erred by failing to consider the evaluation of destructive force in other federal appellate decisions.

initial justification for the search, defeats the purpose of judicial oversight.[179] Thus, the trial court and the Ninth Circuit failed to perform their constitutional function.

The Ninth Circuit also erred in its decision when it held, against its own precedent, that reasonable suspicion was not required when conducting a potentially destructive search.[180] The Ninth Circuit did not acknowledge that it reviews a district court's "determination of the legality of a search de novo."[181] By raising the issue of a destructive search pretrial and requesting the district court to conduct an evidentiary hearing, Cortez preserved the issue for review.[182]

De novo review required the Ninth Circuit to apply existing precedent to the Cortez case.[183] By failing to conduct a reasonable-suspicion analysis, the Ninth Circuit violated the rule of *stare decisis* and incorrectly applied existing law. The Ninth Circuit error has two facets. First, the Ninth Circuit failed to distinguish *United States v. Bennett* from the facts in *Cortez-Rocha*, which creates an inconsistency in the Ninth Circuit. Instead, the Ninth Circuit cited *Bennett* to acknowledge that a destructive search may be offensive and, therefore, unreasonable without acknowledging that in *Bennett* the court found reasonable suspicion to conduct an arguably destructive search.[184] Failing to distinguish *Bennett* from *Cortez-Rocha* deprives district courts a clear interpretation to use in similar cases.

Second, the Ninth Circuit incorrectly applied *United States v. Vargas-Castillo*.[185] The Ninth Circuit cited *Vargas-Castillo* to demonstrate that the search of a spare tire did not rise to the level of intrusiveness to make a search unreasonable.[186] The Ninth Circuit erred by citing *Vargas-Castillo*, a legal justification that the United States Supreme Court rejected in *Flores-Montano*.[187] In *Vargas-Castillo*, the Ninth Circuit merely determined that had Vargas raised the issue at trial, it would have found slashing the tire open to be a routine and reasonable search.[188] Thus, the precedent cited should have been unavailable to the court to use as support for its conclusion.

Finally, the Ninth Circuit incorrectly justified the entire search based on the border-search exception without determining whether or not the manner of the search was reasonable.[189] The United States Supreme Court has emphasized that the touchstone of any Fourth Amendment analysis is reasonableness.[190] Reasonableness requires a probable-cause determination by a detached magistrate unless it falls within one of the few well-delineated exceptions.[191] The border search is one of those exceptions.[192] However, a border search is similar to a regulatory search, such as an inventory search, therefore restricting agents in the manner in which they carry out a search.[193] Excessive destruction can make an otherwise legal search unreasonable under both *United States v. Ramsey*[194] and *United States v. Ramirez*.[195] The question is what level of destruction is reasonable?[196] The government cannot justify the destruction of the spare tire without an additional finding of reasonable suspicion.

The slashing of the tire was excessive and unnecessary. It was reasonable for the border agents to conduct an extensive search of the vehicle because Cortez was attempting to enter the country.[197] Border agents were entitled to use force to remove the spare tire from its secured location on the vehicle under the *Flores-Montano* analysis.[198] Under *Flores-Montano*, agents would have been within the boundaries of the Fourth Amendment to call a mechanic to the scene to dismount the tire from the wheel, or if properly trained, to dismount the tire themselves since the search would have been nondestructive. However, instead of proceeding with caution and restraint, the agents slashed open the tire to ascertain its contents and destroyed the tire beyond repair.[199] The United States Supreme Court's dicta in *Ramsey* and *Flores-Montano* regarding the potential unreasonableness of a search caused by the destruction of property is not limited to the operational parts of a vehicle, but rather to property as an entire class.[200]

The Ninth Circuit erred by failing to consider the evaluation of destructive force in other federal appellate decisions. A comparison of similar cases from other jurisdictions demonstrates that the Ninth Circuit's holding is inconsistent with

179. *See* cases cited *supra* notes 34-39 and accompanying footnote text.
180. *Compare* United States v. Cortez-Rocha 394 F.3d 1115 (9th Cir. 2005) *with* United States v. Bennett, 363 F.3d 947, 951-52 (9th Cir. 2004), *and* United States v. Des Jardins, 747 F.2d 499, 504 (9th Cir. 1984) (citations omitted).
181. *United States v. Bennett*, 363 F.3d at 950.
182. *Id.*
183. *See id.*; Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 833 (9th Cir. 1999).
184. *United States v. Bennett*, 363 F.3d at 951-52.
185. *See* United States v. Cortez-Rocha, 394 F.3d 1115, 1119 (9th Cir. 2005) (citing United States v. Vargas-Castillo, 329 F.3d 715 (9th Cir. 2003).
186. *Vargas-Castillo*, 329 F.3d at 722-23 (suggesting hypothetically that slashing the tire was a routine search).
187. United States v. Flores-Montano, 541 U.S. 149, 152-53.
188. *Vargas-Castillo*, 329 F.3d at 722-23.
189. *Cortez-Rocha*, 394 F.3d at 1118 n.1.
190. United States v. Ramirez, 523 U.S. 65, 71 (1998).
191. *See* cases cited *supra* notes 34-39 and accompanying text.
192. *Ramsey*, 431 U.S. at 616-17.
193. *See* Florida v. Wells, 495 U.S. 1, 4-5 (1990); *Ramsey*, 431 U.S. at 620; LaFave, *supra* note 43, at 236.
194. *See Ramsey*, 431 U.S. at 618 n.13; Marsh v. United States, 344 F.3d 317, 324 (5th Cir. 1965).
195. 523 U.S. 65, 71 (1998).
196. United States v. Flores-Montano, 541 U.S. 149, 154 n. 2, 155-56 (2004).
197. Carroll v. United States, 267 U.S. 132, 154 (1925).
198. *Flores-Montano*, 124 S. Ct. at 1587 (removing, disassembling, and reassembling a vehicle part is reasonable).
199. *See* United States v. Cortez-Rocha, 394 F.3d 1115, 1118 (9th Cir. 2005).
200. *See Flores-Montano*, 541 U.S. at 154 n. 2, 155-56; United States v. Ramsey, 431 U.S. 606, 618 n.13 (1977).

United State Supreme Court precedent and other circuit courts.[201] Additionally, the Ninth Circuit's holding is inconsistent with the balancing test used to determine the reasonableness of a regulatory search.[202] Comparing these holdings demonstrates the Ninth Circuit unnecessarily increased the exceptions to the reasonableness requirement.

The Ninth Circuit dismissively rejected other circuit opinions without carefully considering the holdings or fact patterns.[203] When the other circuits admitted evidence from destructive searches, the courts held that reasonable suspicion justified the destructive force.[204] The United States Supreme Court's rejection of the routine/non-routine analysis is immaterial because the circuit courts employed reasonable suspicion in analyzing destructive searches.[205] While the border-search exception justified the initial stop, the court found reasonable suspicion to allow the destructive search.[206]

The failure of the Ninth Circuit to see the reasonable-suspicion determination in the other circuits' opinions demonstrates that the Ninth Circuit unnecessarily dismissed persuasive authority. Considering the holdings from the other circuits and the specific findings of reasonable suspicion to justify the exploratory drilling, the agents in *Cortez-Rocha* should have limited the amount of destructive force used to dismounting the tire or making a small repairable incision.[207] The agents could have dismounted the tire without using destructive force and accomplished the search, which would have been as reasonable as removing the lid from a container or opening the folds of a paper bag.[208]

The Ninth Circuit was thus obligated to find reasonable suspicion to justify the destructive search or to justify the destructive search based on the agents' safety or the likelihood that the evidence would disappear.[209] The court could have accomplished this analysis by determining whether the search was subject to the automobile exception or whether it was subject to the limitations of a regulatory search.

The automobile exception, justified by the ease evidence can be moved, would have been unavailable. For all practical purposes, Cortez was detained. He was handcuffed and being held away from his vehicle.[210] His vehicle was in a secondary-inspection area, removed from the main entry point into the country.[211] Further, the government was exercising complete control over the vehicle, and there was no reason to believe that Cortez's truck would be stolen or that the evidence would disappear.[212] Thus, the agents could have easily called in a telephone warrant and established probable cause for a detached magistrate to issue a warrant to open the tire.[213] Alternatively, the government could have justified the search during the suppression motion both on the border exception for the initial search and reasonable suspicion to believe that contraband existed in the tire to justify the slashing open of the tire.[214]

Because the Ninth Circuit ignored Fourth Amendment interpretation precedent, its own border-search precedent, and analogous case law from the United States Supreme Court and other circuits, the Ninth Circuit unnecessarily fashioned a new rule of law. The Ninth Circuit had multiple tools to admit the evidence without creating a dangerous precedent for future border searches. Because the Ninth Circuit failed to use these tools, it reduced the constitutional protections at the border without sufficient justification.

IV. CONCLUSION

The rejection of the non-routine/routine analysis in *Flores-Montano* requires courts to reevaluate their assessment of border searches. Cases prior to *Cortez-Rocha* have allowed searches when agents cause some, but repairable, damage to an individual's property. However, the facts in *Cortez-Rocha* demonstrate the search exceeded the bounds of reason when agents completely destroyed the tire. It is reasonable to expect agents to use only the amount of force necessary to conduct the search.[215] Any force greater than necessary to safely open the container is unreasonable per se and courts should suppress the evidence obtained from a destructive search absent an additional finding of reasonable suspicion.[216]

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201. *See supra* notes 99-101.
202. LAFAVE, *supra* note 43 at 236.
203. *Cortez-Rocha*, 394 F.3d at 1119-20 (commenting those searches used the routine/non-routine analysis).
204. *See, e.g.*, *Robles*, 45 F.3d at 5; *Carreon*, 872 F.2d at 1444.
205. *Id.*
206. *Id.*
207. *See Rivas,* 157 F.3d at 368; *Robles,* 45 F.3d at 6; *Carreon,* 872 F.2d at 1441.
208. *See supra* note 118 and accompanying text.
209. *See* United States v. Acevedo, 500 U.S. 565 (1991); New York v. Belton, 453 U.S. 454 (1981).
210. United States v. Cortez-Rocha, 394 F.3d 1115, 1118 (9th Cir. 2005).
211. *Id.*
212. *Id.*
213. *See* FED. R. CRIM. P. 41(d)(3).
214. Reasonable suspicion could have been asserted through the drug dog's alert and the density buster. 383 F.3d at 1118.
215. *See, e.g.,* United States v. Pena, 920 F.2d 1509 (10th Cir. 1990); United States v. Torres, 663 F.2d 1019 (10th Cir. 1981).
216. *See* Katz v. United States, 389 U.S. 347, 357 (1967).