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CRIMINAL PROCEDURE SURVEY

INTRODUCTION

During the 1994 term, the Tenth Circuit frequently addressed the Fourth Amendment implications of the stop and detention of suspects and their luggage by law enforcement officers. In *United States v. Little*,[1] the court clarified the legal standard for evaluating whether police-citizen encounters aboard public transportation constitute a seizure of the citizen. The Tenth Circuit held that the proper Constitutional test, as set forth by the United States Supreme Court in *Florida v. Bostick*[2], must consider the "totality of the circumstances," not merely the location of the encounter.[3] In doing so, the Tenth Circuit overruled any contrary opinions that would lead lower courts to apply a per se rule classifying police-citizen encounters aboard public transportation as seizures.[4] The court addressed additional personal detention questions pertaining to border patrol operations in *United States v. Lopez-Martinez*,[5] and the proper scope of a detention in *United States v. Fernandez*.[6]

In a related trend, the Tenth Circuit confronted the issue of force or show of force in conducting a "*Terry* stop"[7] of a suspect in *United States v. Melendez-Garcia*.[8] The court recognized that force may be required as a precaution in conducting a Terry stop of a dangerous suspect. However, it emphasized that the government must demonstrate that the facts available to the officer conducting the stop would warrant an officer of reasonable caution to believe that the use of force was appropriate under the circumstances.[9] Failing this justification, the use of force transforms a *Terry* stop into a full custodial arrest requiring probable cause.[10]

In *United States v. Moore*,[11] the Tenth Circuit addressed the seizure and detention of a suspect's luggage. The court held that two factors articulated by the Drug Enforcement Agency (DEA) officers established reasonable suspicion justifying the detention of the defendant's bag:[12] 1) the suspects paid extra to purchase their tickets at the last minute; and 2) they lied about their place of embarkation.[13]

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1. 18 F.3d 1499 (10th Cir. 1994).
2. 501 U.S. 429, 439 (1991).
3. *Little*, 18 F.3d at 1503-04.
4. *Id.* at 1504.
5. 25 F.3d 1481 (10th Cir. 1994).
6. 18 F.3d 874 (10th Cir. 1994).
7. *See infra* text accompanying notes 15-18.
8. 28 F.3d 1046 (10th Cir. 1994).
9. *Id.* at 1052.
10. *Id.* at 1053.
11. 22 F.3d 241 (10th Cir. 1994).
12. *Id.* at 243-44.
13. *Id.*

I. SEIZURE OF INDIVIDUALS

A. *Background*

1. *Terry* Stops and Reasonable Suspicion

The Fourth Amendment to the Constitution protects individuals from unreasonable searches and seizures not supported by probable cause.[14] In *Terry v. Ohio*,[15] the U.S. Supreme Court established the constitutionality of investigatory detentions by classifying such stops as narrow exceptions to the probable cause requirement of the Fourth Amendment. The *Terry* Court held that an officer may stop an individual reasonably suspected of criminal activity, question him briefly, and perform a limited external pat-down frisk for weapons.[16] The Court determined that short, investigatory detentions resulted in less of a personal invasion than an arrest,[17] and that they serve an important governmental interest that outweighs their minimal intrusion.[18]

Terry stops may be conducted only if the detaining officer has a reasonable and articulable suspicion that a crime is about to be committed.[19] In order to prove reasonable suspicion, the government must point to specific and articulable facts, together with rational inferences drawn from those facts, that reasonably suggest that criminal activity has occurred or is imminent.[20] Usually, the basis for reasonable suspicion stems from an officer's personal observations or the collective knowledge of several law enforcement personnel.[21] Normally, courts afford considerable deference in this area to experienced officers who often infer criminal activity from conduct that appears innocuous to a lay observer.[22] The Supreme Court has held that when considered through the eyes of a trained and experienced officer, several seemingly innocent activities may add up to reasonable suspicion.[23]

In *United States v. Brignoni-Ponce*,[24] the Supreme Court applied the standard of reasonable suspicion to border patrol operations. Reflecting the underlying principles of *Terry*, the Court found that the government's impor-

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14. The Fourth Amendment states:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

15. 392 U.S. 1 (1968).

16. *Id.* at 27.

17. *Id.* at 26.

18. *Id.* at 26-27.

19. *Id.* at 21-22.

20. *Id.* at 21.

21. *See* United States v. Hensley, 469 U.S. 221, 229, 232-35 (1985); Evelyn M. Aswad et al., *Project: Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 622, 624-25 n.112 (1994).

22. *See* United States v. Cortez, 449 U.S. 411, 418-22 (1981); Aswad, *supra* note 21, at 625-26 nn.113-14.

23. United States v. Sokolow, 490 U.S. 1, 9 (1989).

24. 422 U.S. 873 (1975).

tant interest in protecting and maintaining its borders, along with the absence of practical alternatives for policing its borders, outweighed the minimal intrusion of a brief stop.[25] The Court established a non-exhaustive, multi-factor test[26] as a guide for courts evaluating the reasonableness of a border patrol stop.[27] The experience of border patrol officers, in light of the unique characteristics of their mission, is given noticeable deference when weighing the test factors.[28]

2. Reasonableness of *Terry* Stops

A valid investigatory detention must be reasonable in scope, conducted for a legitimate investigatory purpose, and reasonably related to the circumstances that initially justified the detention.[29] This standard applies to brief stops to ask questions and ascertain the identity of a person, as well as stopping a vehicle and ordering the exit of its occupants.[30] To ensure personal safety, an officer initiating a *Terry* stop may conduct an external pat-down frisk of the detainee to locate weapons.[31] However, when an officer's actions in a *Terry* stop exceed those necessary for a minimally-intrusive investigatory detention, the seizure of an individual becomes an arrest, which must be supported by probable cause.[32]

Police can take further precautionary measures beyond a frisk to ensure their safety, provided that such measures are reasonably necessary under the circumstances.[33] If an officer's actions exceed what is necessary under the totality of the circumstances, the stop may only be justified by probable cause or consent.[34] Although the Supreme Court has readily allowed minimal intrusions on a person's liberty, such as frisks or the request to exit a vehicle,[35] it has also recognized that the use or threat of force, such as handcuffs and firearms, results in a heightened level of intrusion, thereby requiring a more

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25. *Id.* at 881.

26. The Court listed several factors that officers may consider: 1) characteristics of the area in which the vehicle is encountered; 2) proximity of the area to the border; 3) "usual patterns of traffic on the particular road"; 4) the agent's "previous experience with alien traffic"; 5) "information about recent illegal crossings in the area"; 6) driver's behavior, including any obvious attempts at evasion; 7) vehicle characteristics, such as cargo space; and 8) appearance that vehicle is heavily loaded. *Id.* at 884-85.

27. The test has been applied, for example, in United States v. Lopez-Martinez, 25 F.3d 1481, 1483-84 (10th Cir. 1994) and in United States v. Monsisvais, 907 F.2d 987, 990 (10th Cir. 1990).

28. *Lopez-Martinez*, 25 F.3d at 1483-84; *Monsisvais*, 907 F.2d at 990.

29. *See* United States v. Sharpe, 470 U.S. 675, 682 (1985); *Terry*, 392 U.S. at 20.

30. *See* Pennsylvania v. Mimms 434 U.S. 106, 111 (1977); Adams v. Williams, 407 U.S. 143, 146 (1972); *Terry*, 392 U.S. at 6-7, 22-23.

31. *Terry*, 392 U.S. at 22-26.

32. Florida v. Royer, 460 U.S. 491, 502-03 (1983).

33. "Since police officers should not be required to take unnecessary risks in performing their duties, they are 'authorized to take such steps as [are] reasonably necessary to protect their personal safety and maintain the status quo during the course of [a Terry] stop.'" United States v. Perdue, 8 F.3d 1455, 1462 (10th Cir. 1993) (quoting United States v. Hensley, 469 U.S. 221, 235 (1985) (alteration in original)).

34. *Id.*

35. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977); *Terry*, 392 U.S. at 27.

careful evaluation of its justification.[36] The government must demonstrate that the facts available to an officer using force would warrant a person of reasonable caution to believe that such action was appropriate under the circumstances.[37]

3. Determining Seizure of an Individual

In recent years, the Supreme Court has frequently tried to determine when seizure of an individual occurs incident to a *Terry* stop. The *Terry* Court itself maintained that not all police-citizen encounters result in a seizure of the citizen.[38] A seizure only occurs when an officer restrains an individual's liberty by show of authority or physical force.[39]

In cases following *Terry*, the Court clarified that a seizure requiring Fourth Amendment analysis does not occur unless a reasonable person would have believed that he was not free to leave.[40] In making this determination, the Court stated that the totality of the circumstances should be considered.[41]

A seizure occurs when a person's belief that his freedom is restricted results from direct police action and cannot be attributed to other causes.[42] The conduct of the police must be intimidating or coercive enough to convince a reasonable person that he could not disregard the police and go about his business.[43]

The Court tightened its seizure determination criteria in *California v. Hodari D.*[44] The Court held that Hodari, while being chased by a police officer, was not seized until the officer tackled him.[45] Rejecting Hodari's argument that a reasonable person being chased by a police officer would not feel free to leave, the Court maintained that although a reasonable feeling of

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36. *Terry*, 392 U.S. at 21-22.

37. *Id. See also Perdue*, 8 F.3d at 1463 (use of firearms justified because officers had information suspects may be armed); United States v. King, 990 F.2d 1552, 1563 (10th Cir. 1993) (officer acted unreasonably when she drew firearm and handcuffed defendant after noticing defendant lawfully had firearm in his car); United States v. Merkley, 988 F.2d 1062, 1064 (10th Cir. 1993) (use of firearms and handcuffs warranted when police were informed suspect had threatened to kill someone and displayed violent behavior when stopped); United States v. Merritt, 695 F.2d 1263, 1273-74 (10th Cir. 1982) (police acted reasonably in pointing weapons at a suspected murderer whom they believed to be heavily armed).

38. *Terry*, 392 U.S. at 19 n.16.

39. *Id.*

40. *See* INS v. Delgado, 466 U.S. 210, 218-19 (1984) (stationing INS agents at exits raised possibility of questioning on attempt to exit, but did not amount to seizure); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (asking drug suspect in airport to accompany federal agents for questioning was not a seizure).

41. *See Mendenhall*, 446 U.S. at 555 (facts that agents did not exhibit weapons, merely requested cooperation, and encounter took place in a public area, supported finding of no seizure).

42. *See, e.g., Delgado*, 466 U.S. at 218-19 (employees were restricted not by police, but by voluntary employment obligations).

43. *See* Michigan v. Chesternut, 486 U.S. 567 (1988) (holding that a defendant who ran from a cruising marked police car and discarded evidence while the police car followed him at a normal speed was not seized). The Court found that the police actions did not communicate "to the reasonable person an attempt to capture or otherwise intrude upon the [defendant's] freedom of movement." *Id.* at 575.

44. 499 U.S. 621 (1991).

45. *Id.* at 629.

restricted freedom is a prerequisite of a seizure, it does not, without more, define a seizure.[46] A seizure requires either compliance with a show of authority or actual physical restraint.[47]

The Supreme Court addressed police-citizen encounters aboard public transportation in *Florida v. Bostick*.[48] Bostick was aboard a bus during a scheduled layover when he was approached by officers who asked to search his luggage.[49] Bostick reluctantly complied and the officers discovered that the luggage contained cocaine.[50] The Supreme Court rejected the state supreme court's finding that a reasonable person would not have felt free to leave, and that a police-citizen encounter aboard a bus constituted a seizure per se.[51] The Court reasoned that Bostick's restricted mobility resulted from his voluntary decision to travel by bus, rather than from any direct police action.[52] In situations where a restriction of mobility does not result from police conduct, the applicable seizure test is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.[53] Echoing prior cases, the Court maintained that the totality of the circumstances must be considered in applying this modified test.[54]

B. *Stops Aboard Public Transportation:* United States v. Little

1. Facts

After noticing a large blue suitcase in the public baggage area of a train and detecting a suspicious chemical odor, a DEA agent approached the suspected owner (Little) in a roomette aboard the train.[55] Noticing that Little had paid cash for her one-way ticket, the agent asked her if she possessed drugs.[56] Following Little's denial, the agent asked for her consent to a search a blue nylon bag in the roomette.[57] The agent advised Little that she was not under arrest and did not have to consent, so she refused.[58] After Little admitted that the large blue suitcase belonged to her, the agent asked to search the suitcase and again informed her that she did not have to consent.[59] Little replied that she did not own the suitcase and did not know of its contents.[60] The agent subjected the suitcase to a canine sniff.[61] When the dog alerted the

46. *Id.* at 628.
47. *Id.* at 626.
48. 501 U.S. 429 (1991).
49. *Id.* at 431.
50. *Id.* at 432.
51. *Id.* at 435-36.
52. The Court found that any confinement was "the natural result of [Bostick's] decision to take the bus." *Id.* at 436.
53. *Id.* at 439. The Court found this test appropriate because a refusal to cooperate, without additional suspicious factors, does not justify lawful detention by the police. *Id.* at 437.
54. *Id.* at 439-40.
55. United States v. Little, 18 F.3d 1499, 1501 (10th Cir. 1994).
56. *Id.* at 1501-02.
57. *Id.* at 1502.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

agent to the presence of drugs in the suitcase, the agent arrested Little and searched both bags after obtaining warrants.[62] The search yielded a total of thirty kilograms of cocaine.[63]

Little was indicted for possession with intent to distribute more than five kilograms of cocaine.[64] She pled not guilty and filed a motion to suppress the evidence on the grounds that it was obtained from her luggage through an illegal seizure without a warrant and search without probable cause.[65] The district court granted the motion, reasoning that a person has a higher expectation of privacy in a small room aboard a train.[66]

The district court also concluded that the agent's detection of a chemical odor was insufficient to establish reasonable suspicion that Little's luggage contained illegal drugs; therefore detaining the luggage for the purpose of a canine sniff was unjustified.[67] The government appealed, arguing that the encounter between the agent and Little was consensual, and that the agent had reasonable suspicion to detain the luggage.[68]

2. Majority Opinion

The Tenth Circuit, sitting en banc, reversed the district court and remanded the case.[69] Citing *Florida v. Bostick*'s "totality of the circumstances" test, the court held that the district court employed the wrong legal standard.[70] Just as the Supreme Court rejected the application of a per se rule that any police-citizen encounter aboard a bus constituted a seizure, the Tenth Circuit rejected the argument that the location of the encounter was determinative as to seizure.[71] The court conceded that application of the totality of the circumstances test was "necessarily imprecise," but maintained that the focus of the test—"'the coercive effect of police conduct, taken as a whole,' on a reasonable person"—would be "defeated by rules which give determinative weight to the location of a police-citizen encounter."[72]

The Tenth Circuit went even further regarding the expectation of privacy issue. Holding that train roomettes do not confer an expectation of privacy to the same degree as does a home or hotel room,[73] the court explicitly over-

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* The trial court explained that the private, confined space of the roomette produced a situation where Little felt that she was not permitted to decline answering questions. *Id.* The court also believed that the pointed, incriminating questions and the agent's failure to advise Little that she was free to terminate the encounter at-will, contributed to the coercive nature of the encounter. *Id.*
67. *Id.* at 1503.
68. *Id.*
69. *Id.* at 1506.
70. *Id.* at 1503-04. Because the case was remanded, the court did not decide whether the agent had reasonable suspicion to detain the luggage and subject it to a canine sniff. *Id.* at 1506. It did find, however, that the agent's detection of an unidentified chemical odor did not amount to a reasonable suspicion prior to his encounter with Little. *Id.*
71. *Id.* at 1504.
72. *Id.*
73. *Id.* at 1504-05 (quoting United States v. Whitehead, 849 F.2d 849, 853 (4th Cir. 1988),

ruled any contrary statements in previous cases, particularly *United States v. Dimick*.[74]

The court criticized the district court's emphasis on the agent's failure to advise Little of her right to refuse to answer questions, noting that there is no per se rule requiring such an advisement.[75] Rejecting the district court's reliance on the fact that the agent asked very pointed and incriminating questions, the court found no support that such conduct was relevant to the totality of the circumstances surrounding the encounter.[76]

3. Concurring and Dissenting Opinions

Judge Kelly concurred with the majority's opinion, except the portion overruling his statement in *Dimick* that private rooms "on passenger trains can be comparable to hotel rooms where an occupant enjoys a heightened expectation of privacy."[77] While Judge Kelly agreed that location is not determinative of a seizure, he believed it inappropriate to categorically reject the notion that a person cannot expect a comparable level of privacy in a train compartment as in a hotel or motel room.[78] According to Judge Kelly, the majority erred in its decision to reject the issue of privacy without considering its implications on other aspects of Fourth Amendment protection.[79]

In a detailed dissent, Judge Logan, joined by Chief Judge Seymour and Judge McKay, maintained that the district court did not apply a per se test with regard to location, nor did it apply an erroneous test in determining that the encounter between the agent and Little constituted a non-consensual seizure.[80] He believed that the district court simply applied a balancing test, in which it weighed as coercive the failure of the agent to advise Little that she could refuse to answer questions, the confines of a the small, private roomette with only one exit, and the agent's persistent, accusatory questioning.[81] Because he believed that *Bostick* represented the extreme limit of constitutional behavior, Judge Logan believed that the district court permissibly found the additional factors coercive enough to tip the balance toward non-consensual seizure.[82]

Judge Logan agreed that *Bostick* was the guiding decision in *Little*, but he cautioned that *Bostick* should be read narrowly.[83] He pointed out that the Supreme Court did not decide that a seizure had not occurred under the facts

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cert. denied, 488 U.S. 983 (1988)).

74. *Id.* at 1504. In *Dimick*, 990 F.2d 1164, 1166 (10th Cir. 1993), the Tenth Circuit held that private sleeper cars on passenger trains are comparable to hotel rooms, thereby enjoying a heightened expectation of privacy and requiring probable cause for intrusive police searches.

75. *Little*, 18 F.3d at 1505.

76. *Id.* at 1505-06.

77. *Id.* at 1506 (Kelly, J., concurring in part and dissenting in part); *see supra* note 74.

78. *Little*, 18 F.3d at 1507.

79. *Id.*

80. *Id.* at 1513-14 (Logan, J., dissenting).

81. *Id.* at 1514.

82. *Id.*

83. *Id.* at 1508-09.

of *Bostick*.[84] Rather, the Court merely required the state court to apply a totality of the circumstances evaluation instead of a per se rule.[85] Judge Logan asserted that a broad reading of *Bostick* led lower courts to balance conduct that looked more like coercion against conduct that could be considered non-intimidating.[86] To him, any conduct that is no more coercive than that in *Bostick* is not a violation of the Fourth Amendment.

4. Analysis

The Tenth Circuit's decision in *Little* is noteworthy for two reasons. First, it broadly interpreted *Bostick* as holding that non-forceful police-citizen confrontations aboard confined public transportation are not seizures solely by virtue of their location.[87] In order to become seizures, law enforcement personnel in these situations must exhibit a much more intimidating, forceful, and custodial posture to invoke a situation where the individual feels compelled to cooperate.

A serious problem with *Bostick*'s premise, as applied in *Little*, lies with the court's perception of how a reasonable person views encounters with police.[88] The court gave too much credit to the average person's knowledge of her rights in these situations and her ability to feel secure enough to disregard law enforcement officers.[89] In reality, few people are fully aware of their Fourth Amendment rights, most are fearful of the police, and the police know how to exploit this to their advantage.[90] It has also been shown that a person's refusal to cooperate often increases police suspicion and intensifies their investigations.[91] In light of these observations, it is difficult to understand how a reasonable person in Little's situation could know that she was free to ignore the agent without fear of further harassment.

The Tenth Circuit has fallen in line with other circuits, but has notably modified prior opinions, such as *United States v. Ward*[92] and *United States v. Bloom*.[93] In those cases, decided after *Bostick*, the Tenth Circuit gave significant weight to location in evaluating police-citizen encounters aboard

84. *Id.* at 1508.
85. *Id.*
86. *Id.* at 1508-09.
87. *Id.* at 1504; *see also* United States v. Carhee, 27 F.3d 1493, 1497 (10th Cir. 1994); United States v. Girolamo, 23 F.3d 320, 326 (10th Cir. 1994) (applying *Little*), *cert. denied*, 115 S. Ct. 640 (1994).
88. Michael J. Reed, Jr., Comment, Florida v. Bostick: *The Fourth Amendment Takes a Back Seat to the Drug War*, 27 NEW ENG. L. REV. 825, 846 (1993).
89. *Id.*
90. *Id.* (quoting Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1301 (1990)).
91. *Bostick*, 501 U.S. at 447 (Marshall, J., dissenting).
92. 961 F.2d 1526 (10th Cir. 1992).
93. 975 F.2d 1447 (10th Cir. 1992). In United States v. Kim, 27 F.3d 947 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995), the Third Circuit specifically cited the Tenth Circuit's departure from *Ward* and *Bloom*, both of which Kim relied upon as controlling in his case regarding an encounter with police on-board a train. *Id.* at 951 n.1. The court pointed to the *Little* decision in holding that the fact that Kim's encounter took place in a train roomette was but one factor in considering the totality of the circumstances, and was not determinative as to whether a seizure had occurred. *Id.* at 952.

trains, finding that each encounter resulted in a seizure of the individual without reasonable suspicion.[94]

As pointed out in both dissents, the Tenth Circuit has categorically refused to extend the same expectation and protection of privacy to rooms aboard trains that it extends to hotel/motel rooms.[95] By overruling previous holdings and dicta recognizing a heightened expectation of privacy in private train compartments, the Tenth Circuit has reduced the degree of police justification required for future intrusions into such compartments. The standard of justification that the court will employ regarding searches and arrests remains unclear. As Judge Kelly pointed out, it seems wholly inappropriate to reject out of hand a heightened expectation of privacy in train compartments merely to emphasize that location is not determinative in evaluating police-citizen encounters. The refusal of the court to recognize a heightened expectation of privacy aboard train roomettes illustrates the diminished significance of location as a factor in the totality-of-circumstances test, a factor which held noticeable significance for the Tenth Circuit only two years ago.

C. *Border Patrol Stops:* United States v. Lopez-Martinez

1. Facts

A U.S. Border Patrol agent observed a van and sedan travelling in tandem on the highway.[96] The agent noticed four Hispanic passengers in the sedan, but could not see well inside the van.[97] The agent became more suspicious when he noted that both vehicles were driving twenty-five miles an hour below the speed limit.[98] The agent also saw an individual peer out the rear window of the van and then disappear from view.[99] A check of the van's license plates revealed "nothing extraordinary."[100] Nevertheless, the agent stopped the van, driven by Roberto Lopez-Martinez, and verified the driver's U.S. citizenship.[101] Upon searching the van, the agent promptly discovered four undocumented aliens.[102]

Charged with transporting illegal aliens and aiding and abetting, Lopez-Martinez filed a motion to suppress the evidence gathered at the stop.[103] He

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94. "The setting of the encounter . . . inside and within the immediate vicinity of a small private roomette on a train, although not dispositive by itself, supports a determination that a reasonable person . . . would have felt unable to decline the officers' requests or terminate the encounter." *Ward*, 961 F.2d at 1531. "In *Ward*, the location of the encounter in the confines of a small private train compartment weighed heavily in our analysis." *Bloom*, 975 F.2d at 1453.

95. *See supra* notes 77-79 and accompanying text.

96. United States v. Lopez-Martinez, 25 F.3d 1481, 1482 (10th Cir. 1994). This particular stretch of highway is frequently used to circumvent an important U.S.-Mexico border checkpoint. *Id.*

97. *Id.* at 1482, 1486-87.

98. *Id.* at 1482.

99. *Id.* at 1483.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

contended that the agent did not have reasonable suspicion to stop the van.[104] The district court denied the motion and Lopez-Martinez conditionally pled guilty.[105]

2. Majority Opinion

On appeal, the Tenth Circuit affirmed the district court's ruling, holding that the agent had made a reasonable inference of suspicion in light of the circumstances and his observations.[106] The court relied on the *Brignoni-Ponce* test to evaluate the factors that determine reasonable suspicion.[107] In examining the totality of the circumstances, the Tenth Circuit noted that a border patrol agent is "entitled to assess the facts in light of his experience in detecting illegal entry and smuggling,"[108] and that an officer's articulable facts when viewed individually, "will often comport with general notions of innocent travel."[109] Taken together, however, these facts can amount to reasonable suspicion in the eyes of a trained and experienced officer.[110] Accordingly, in evaluating the facts with respect to each of the *Brignoni-Ponce* factors, the court determined that the agent's observations established that a reasonable officer would suspect that the van driven by Lopez-Martinez contained illegal aliens.[111]

3. Dissent

In his dissent, Judge McKay criticized the majority for its imprecise analysis of the justification for a Terry stop. "When the layers of gloss are removed and the facts are analyzed accordingly, it is clear to me that [the agent] acted on a mere hunch rather than on such articulable facts sufficient to vest him with objective, reasonable suspicion."[112] Judge McKay identified what he perceived to be three doctrinal errors in the majority opinion. First, he believed the majority placed undue reliance on the *Brignoni-Ponce* factors.[113] According to Judge McKay, seemingly suspicious facts, when properly viewed against the backdrop of the circumstances as a whole, tend to lose significance unless they are given the status of a factor in a test.[114] Second, he criticized

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104. *Id.*
105. *Id.*
106. *Id.* at 1487.
107. *Id.* at 1483-84. *See also supra* notes 24-28 and accompanying text.
108. *Lopez-Martinez*, 25 F.3d at 1484 (quoting *Brignoni-Ponce*, 242 U.S. 873 (1975)).
109. *Id.*
110. *Id.*
111. *Id.* at 1485-87.
112. *Id.* at 1487 (McKay, J., dissenting).
113. *Id.*
114. Judge McKay wrote:

> When viewed in relation to the totality, arguably suspicious facts can take on more significance when viewed together with other related facts—thus, the whole can equal more than the sum of its parts. Other seemingly suspicious facts, however, can lose significance when properly viewed against the backdrop of the circumstances as a whole, and this I believe to be the fate of many of the generic *Brignoni-Ponce* factors in this case.

Id. at 1487-88.

the majority's failure to perform a "rational inference" test of each factor before considering it in the context of the holistic picture.[115] Third, he believed that the majority excessively deferred to the agent's experience when that experience could not be a decisive factor in making a rational inference of suspicion.[116] "[T]o allow [the agent] to make inferences of suspicion from the wide-lens totality viewpoint . . . comes close to granting [him] powers of extrasensory perception."[117]

4. Analysis

The *Lopez-Martinez* decision gives border patrol officers great latitude to stop vehicles reasonably suspected of transporting illegal aliens. In recognizing the unique mission of border patrol agents, the court deferred to the judgment of these agents by allowing the piecing together of seemingly innocuous facts and observations to create an inference of suspected criminal activity. Although the agent's justification was evaluated by the totality of circumstances, the "totality," pointed out by the dissent, was viewed through a very wide lens.[118]

If courts were not somewhat deferential to the judgment of border patrol agents, it would be difficult for agents to justify most highway stops. Vehicles travelling particular routes, the manner in which they travel, and the race of the driver and passengers do not immediately conjure impressions of suspicious behavior. Indeed, in situations not involving suspected illegal immigration, these factors would hardly serve to establish reasonable suspicion. Basing reasonable suspicion on certain "profiles" has not found favor with courts, which insist on the articulation of specific facts and how they point to suspicious activity.[119] The Tenth Circuit, realizing the difficulty faced by border patrol agents in executing their duties without violating the Constitution, allowed the training, experience, and judgment of these agents to be the crucial link between innocent facts and the formulation of reasonable suspicion.

D. *Exceeding the Scope of Detention:* United States v. Fernandez

1. Facts

A Utah state trooper pulled over a vehicle driven by Edimiro Fernandez after observing that it had difficulty staying in its lane, and was in probable violation of state window-tint standards.[120] The trooper, when asking for Fernandez's license and registration, noticed the driver's nervousness and felt

115. *Id.* at 1488.
116. *Id.* at 1489.
117. *Id.*
118. *Id.*; *see also* United States v. Martin, 15 F.3d 943, 951 (10th Cir. 1994) ("[R]easonable suspicion cannot be reduced to a 'neat set of legal rules,' and . . . law enforcement officers, like jurors, are permitted to formulate 'certain common sense conclusions about human behavior. . . .'" (citation omitted)).
119. *See, e.g.*, Reid v. Georgia, 448 U.S. 438 (1980) (factors in drug courier profile did not articulate reasonable suspicion).
120. United States v. Fernandez, 18 F.3d 874, 875 (10th Cir. 1994).

a "tension in the air."[121] After completing an NCIC computer check of the driver, passenger and vehicle, the trooper radioed for back-up and again approached the vehicle on the driver's side.[122] Still holding Fernandez's license and registration, as well as the passenger's identification, the trooper asked if there were any weapons, drugs, or other contraband in the vehicle.[123] Fernandez and the passenger replied that there were not.[124] Noticing escalated nervousness in the two men, the trooper asked to search the vehicle.[125] The two men exited the vehicle and Fernandez consented to a search of the interior, which yielded 123 kilograms of cocaine.[126]

Fernandez was indicted for possession of cocaine with intent to distribute.[127] The district court denied his motion to suppress the evidence obtained from the search on Fourth Amendment grounds and he conditionally pled guilty.[128]

2. Opinion

On appeal, the Tenth Circuit reversed the ruling of the district court and remanded the case.[129] The court held that Fernandez had been unlawfully seized when the trooper detained him without reasonable suspicion beyond that necessary to issue a citation.[130] Citing its previous decision in *United States v. Guzman*,[131] the court reiterated the rule that a reasonable detention must be related in scope to the circumstances that initially justified the stop.[132] Although a police officer may request a license and registration during the course of a routine traffic stop, he must allow the driver to proceed on his way without further questioning once the documents have been satisfactorily produced.[133] Because the trooper retained Fernandez's license and registration while he continued to question him about weapons or drugs, the court held that Fernandez unquestionably had been seized.[134] According to the court, in order for the seizure to be lawful, there had to be "'specific and articulable facts and rational inferences drawn from those facts [giving] rise to reasonable suspicion' of additional criminal activity."[135] The court found that the reasons given by the trooper to justify further detention of Fernandez—irregular lane travel, nervousness of the men, and the startled nature of the passenger upon awakening to the trooper's presence—were insuf-

121. *Id.* The trooper was also struck by how startled the sleeping passenger appeared upon awakening and finding a trooper near the car. *Id.*
122. *Id.*
123. *Id.* at 875-76.
124. *Id.* at 876.
125. *Id.*
126. *Id.*
127. *Id.* at 875.
128. *Id.*
129. *Id.* at 883.
130. *Id.* at 880.
131. 864 F.2d 1512 (10th Cir. 1988).
132. *Fernandez*, 18 F.3d at 876-77.
133. *Id.*
134. *Id.* at 878.
135. *Id.* (quoting United States v. Werking, 915 F.2d 1404, 1407 (10th Cir. 1990)).

ficient to establish reasonable suspicion.[136] The court maintained that these reasons, along with the trooper's testimony regarding his "sixth sense," "tension in the air," and his belief that something was "afoot," suggested that the trooper was "acting more on an unparticularized hunch than on reasonable and objective suspicion."[137]

3. Dissent

In his dissent, Judge Brown argued that the court did not adequately consider the totality of the circumstances with deference to the unique viewpoint of the law enforcement officer.[138] He thought that the district court relied upon the appropriate test and properly determined that the series of facts pointed out by the trooper, when considered together, warranted further investigation.[139] Judge Brown noted that the district court found that the defendant's nervousness went beyond that which most people demonstrate during a routine traffic stop, and that only a law enforcement officer could make such an evaluation at the time it occurred.[140] By viewing the totality of the circumstances through the eyes of the trooper with deference to the trooper's judgment and experience, the district court, in Judge Brown's opinion, came to a more accurate conclusion about the situation.[141]

4. Analysis

In *Fernandez*, the Tenth Circuit made it clear that in traffic stops, any detention of an individual beyond the scope of the traffic violation requires objective, reasonable suspicion of additional criminal activity.[142] In viewing the totality of the circumstances offered by the police officer, the court focused on the rational connection of those circumstances to the formulation of reasonable suspicion. While the court still gives considerable deference to an officer's training and experience, an officer is still required to offer substantive facts that point to suspicion of criminal conduct beyond the facts which served as the basis for the initial stop. Otherwise, the detention will constitute an unconstitutional seizure. When the substance of the holistic picture is weak, the court is likely to find that reasonable suspicion was lacking.[143]

The degree of deference given to police by the Tenth Circuit in this situation appears to be more limited than that given in border patrol stops. Unlike border patrol stops, the court refused to allow the experience and judgment of

136. *Id.* at 880.
137. *Id.*
138. *Id.* at 883-87 (Brown, J., dissenting).
139. *Id.* at 886-88.
140. *Id.* at 886.
141. *Id.* at 886-88.
142. *Id.* at 877-78; *see also* United States v. McSwain, 29 F.3d 558, 561-62 (10th Cir. 1994); United States v. Sandoval, 29 F.3d 537, 540 (10th Cir. 1994).
143. The Tenth Circuit was not the only circuit last year to address this issue. In United States v. Ramos, 20 F.3d 348, 352 (8th Cir. 1994), the Eighth Circuit held that detaining a driver beyond the period necessary to issue a traffic citation constituted a seizure which required reasonable suspicion of additional criminal activity beyond that of the traffic offense. *Id.*

an officer to bridge the gap between facts of questionable substance and criminal suspicion. While it appears that the experience and judgment of an officer is the key to determining reasonable suspicion in border patrol encounters, the substance of the facts articulated by an officer is the key to *Fernandez*-type encounters. Although *Fernandez* addressed the reasonable suspicion necessary to prolong an investigatory stop, it illustrated that deference to police judgment is limited.

E. *Use or Threat of Force in a* Terry *Stop:* United States v. Melendez-Garcia

1. Facts

Melendez-Garcia ("Melendez") and two other men suspected of transporting marijuana, were under surveillance by the DEA and the Las Cruces, New Mexico police.[144] The officers had also been informed of the suspects' location and travel arrangements.[145] When the suspects left a motel and proceeded on the highway in two cars, the officers followed and stopped them.[146] When the officers pulled over the two vehicles, they conducted what they termed a "felony stop."[147] The officers handcuffed each suspect, frisked them and strapped them with seatbelts into separate police cars.[148] A DEA agent asked one of the suspects for consent to search the car belonging to Melendez, but in which Melendez had not been riding.[149] The suspect answered that the agent could search the vehicle but would find nothing.[150] Although a visual search revealed nothing, a canine sniff resulted in the dog alerting the officers to the presence of drugs in the car.[151] The officers read all three suspects their rights, and in a second search of the car, found twenty-one pounds of marijuana in the gas tank.[152]

Melendez was indicted for conspiracy, possession with intent to distribute marijuana, and aiding and abetting.[153] He filed a motion to suppress the evidence, arguing that he had been arrested without probable cause and that the consent to search the car had been tainted by the illegal arrest.[154] The district court ruled that reasonable suspicion justified the stop of the three men and, despite the potentially coercive nature of the stop, Melendez voluntarily

144. United States v. Melendez-Garcia, 28 F.3d 1046, 1049-50 (10th Cir. 1994).
145. *Id.* at 1049.
146. *Id.* at 1050.
147. *Id.* The officers drew their weapons, pointed them at the vehicles, ordered that the ignition keys be thrown from the windows, and ordered the suspects to put their hands outside, exit the vehicles one at a time, and walk backward toward the officers. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 1049.
154. *Id.* at 1050.

consented to a search of the vehicle.[155] Melendez conditionally pled guilty and appealed.[156]

2. Opinion

The Tenth Circuit reversed the district court and remanded the case.[157] The Tenth Circuit held that conducting a "felony stop" exceeded the scope of reasonable suspicion that justified the stop, and therefore the men had been arrested without probable cause.[158] The court agreed with the district court that the information the officers obtained and corroborated with their observations was sufficient to establish reasonable suspicion to conduct an investigatory stop of the two vehicles.[159] However, the court held that the government did not demonstrate that the circumstances justified the use of weapons or confinement.[160]

The court noted that no bright-line rule exists to determine whether police conduct exceeds the scope of an investigatory stop, and that the evaluation is "guided by 'common sense and ordinary human experience.'"[161] The court also pointed out that the use of firearms, handcuffs, or other forceful techniques does not automatically transform a Terry stop into a full custodial arrest requiring proof of probable cause.[162] The use or threat of force, however, must be warranted under a "reasonable person" evaluation of the circumstances.[163] The court found that drugs, guns, and violence often go together and may be a factor in considering the actions of the officers; however, there was no evidence or testimony that would reasonably lead the officers to believe that the suspects were armed or dangerous, or that the circumstances warranted such inordinate intrusiveness.[164] The court found no satisfactory explanation for the officers' "felony stop" when the officers outnumbered the suspects, the officers executed the stop on an open highway in daylight, the officers had no information or observations that the suspects were armed or dangerous, and the suspects fully complied with police orders.[165]

3. Analysis

The decision in *Melendez-Garcia* clearly illustrates the Tenth Circuit's position on the use of force during an investigatory stop. The court permits greater latitude to police to ensure their personal safety when arresting sus-

155. *Id.*
156. *Id.* at 1051.
157. *Id.* at 1056. With regard to the question of the voluntariness of the consent to search the vehicle, the court remanded the issue to the district court with guidance as to the proper constitutional standard, based on the Tenth Circuit's determination that the defendant had been subjected to an illegal arrest.
158. *Id.* at 1053.
159. *Id.* at 1051.
160. *Id.* at 1052-53.
161. *Id.* at 1052 (quoting United States v. King, 990 F.2d 1552, 1562 (10th Cir. 1993)).
162. *Id.*
163. *Id.*
164. *Id.* at 1052-53. The court pointed out that "the naked fact that drugs are suspected will not support a per se justification for use of guns and handcuffs in a Terry stop." *Id.* at 1053.
165. *Id.*

pected felons. Drawn guns, handcuffs, and confinement in vehicles are not considered by the court to be over-intrusive, provided that the officers can establish a reasonable basis for their actions.[166] The most important factors in justifying forceful actions appear to be the officers' knowledge of the defendant and his criminal background (armed, dangerous, or propensity for violence), the environment at the scene of the seizure (rural or residential), and the actions of the defendant (combative or cooperative).[167] However, some articulable support for an officer's belief that the situation warrants the use of force must exist.[168] Otherwise, absent probable cause, such an intrusion on personal liberty constitutes an illegal custodial arrest.[169]

II. SEIZURE OF LUGGAGE

A. *Background*

Under the Fourth Amendment, the seizure of personal property requires probable cause.[170] In *United States v. Place*,[171] the Supreme Court held that police may briefly detain a traveler's luggage if reasonable suspicion exists that the bag contains contraband or other criminal evidence.[172] Citing *Place*, the Tenth Circuit held in *United States v. Hall*[173] that "[l]aw enforcement officers may seize and briefly detain . . . luggage provided that the officers have reasonable articulable suspicion that [it] contains narcotics."[174] Because seizure of personal baggage from an individual's immediate possession is particularly intrusive on both the individual's possessory interest in property and liberty interest in proceeding with his travel plans, brief seizures of personal property must be reasonable.[175] The reasonableness of the seizure depends upon the diligence of the police in conducting the investigation quickly, the duration of the seizure, and whether the police transported the luggage to a different location from where it was originally seized.[176] As with individuals, personal property may not be subjected to an intrusive search without probable cause.[177]

166. *See supra* notes 162-64 and accompanying text.
167. *See Melendez-Garcia*, 28 F.3d at 1052-53.
168. *Id.*
169. *See* United States v. Eylicio-Montoya, 18 F.3d 845, (10th Cir. 1994) (officers did not have probable cause to arrest vehicle occupants prior to discovery of evidence in the vehicle).
170. U.S. CONST. amend. IV; *see supra* note 14.
171. 462 U.S. 696 (1983).
172. *Id.* at 706. The holding reflects that the same standards governing investigatory detentions of persons also apply to detentions of personal effects. *Id.* at 708-09.
173. 978 F.2d 616 (10th Cir. 1992).
174. *Id.* at 620 (citing *Place*, 462 U.S. at 706).
175. *See Place*, 462 U.S. at 708-10.
176. *Id.*
177. Smith v. Ohio, 494 U.S. 541, 542 (1990).

B. United States v. Moore

1. Facts

DEA agents conducting routine surveillance of a train station were informed that three people who boarded the train in San Bernardino, California, made a cash purchase of tickets from the conductor.[178] An agent approached two of the men, one of whom was Michael Moore, and asked to speak with them.[179] Moore immediately left for the rest room.[180] In Moore's absence, the other passenger claimed that the two had boarded the train in Los Angeles and were returning to Chicago.[181] The agent noted that the ticket indicated that the men boarded the train in San Bernardino and had paid a penalty in the purchase price because the ticket was purchased on board while the ticket office was open.[182] The agent received permission to search the passenger's bag, which contained no contraband.[183] The passenger told the agent that the other bags in the compartment belonged to Moore.[184]

The agent located Moore, who told the agent he was traveling from Los Angeles to Chicago.[185] They returned to Moore's seat, and Moore consented to a search of his garment bag but refused consent to search the duffle bag under his seat.[186] The agent seized the bag and told Moore that the bag would be sent to Chicago before Moore arrived if it contained nothing incriminating.[187] The agent then removed the bag from the train and subjected it to a canine sniff.[188] After the dog alerted the agent to the presence of drugs in the bag, the agent obtained a search warrant and discovered two kilograms of cocaine in the bag.[189]

Moore was indicted on charges of possession with intent to distribute cocaine and aiding and abetting.[190] He filed a motion to suppress the evidence obtained from the bag on the grounds that the bag was seized without reasonable suspicion.[191] The district court denied the motion and Moore conditionally pled guilty.[192]

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178. United States v. Moore, 22 F.3d 241, 242 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 238 (1994).
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 242-43. The train departed a few minutes after the bag was removed by the agent. *Id.* at 247.
189. *Id.* at 243.
190. *Id.* at 242.
191. *Id.* at 243.
192. *Id.* at 242.

2. Majority Opinion

The Tenth Circuit affirmed the district court's ruling, holding that the facts enumerated by the district court adequately supported the conclusion that the agent had reasonable suspicion to detain Moore's luggage and subject it to a canine sniff.[193] In considering the totality of the circumstances, the court held that the defendant's lie regarding his boarding location, coupled with his cash ticket purchase in the face of a penalty, were sufficient for the agent to formulate reasonable suspicion.[194]

3. Dissenting Opinion

In his dissent, Judge Logan detailed two bases for reversal. First, he believed that there was no reasonable suspicion to justify the seizure of Moore's bag after he denied consent to its search.[195] Second, "probable cause was required to hold [the] bag for a period extending beyond the train's departure, and no such probable cause existed."[196] Judge Logan disagreed with the majority's finding that the defendant's lie about where he boarded the train and the penalty factor in purchasing the ticket on board provided an objective basis for establishing reasonable suspicion.[197] He also argued that the lie about the defendant's point of origin could be "reasonably interpreted as merely a reference to the general area from which [Moore] and his companions were coming", and in any event, did not give rise to reasonable suspicion.[198]

Judge Logan referred to three Tenth Circuit cases—*Hall*, *Ward*, and *Bloom*—where "more egregious" facts than those in *Moore* were found not to constitute reasonable suspicion.[199] Judge Logan's skepticism of the majority's deference to the judgment of law enforcement officers was evident:

> The government asks that we rely upon the expertise of experienced lawmen and the alleged infallibility of unidentified train personnel. But such reliance gives unreviewable discretion to law officers; the only cases that get to the courts are those in which the officers find contraband. . . . As I read the majority opinion any three ordinary-looking retirees who board a train in a suburb but identify their origination as the city and who pay cash for their tickets on board, can have their luggage seized against their will. . . . I am unwilling to rely upon the tacit assumption that such a thing will not happen to

193. *Id.* at 243-44.
194. *Id.*
195. *Id.* at 244 (Logan, J., dissenting).
196. *Id.*
197. *Id.* Judge Logan maintained that there could be many reasons why the ticket was purchased with cash, and that a person arriving late to the train station may consider the penalty for an on-board ticket purchase trivial in comparison to the inconvenience of waiting in line at the ticket office. *Id.*
198. *Id.* Judge Logan pointed out that an admission that Moore boarded the train in Los Angeles should have "generate[d] more suspicion than a reference to San Bernardino." *Id.*
199. *Id.* at 244-45; *see Hall*, 978 F.2d at 621; *Bloom*, 975 F.2d at 1458-59; *Ward*, 961 F.2d at 1529.

> you or me, our innocent children, or people like us—that only the guilty are accused.[200]

Finally, Judge Logan contended that because the agent did not have probable cause at the time he seized the bag or when the train departed, he exceeded the scope of a permissible detention authorized by *Place*.[201]

4. Analysis

Like the border stop in *Lopez-Martinez*, and unlike the prolonged detention in *Fernandez*, the *Moore* decision gives police great latitude in establishing the existence of reasonable suspicion. As Judge Logan's dissent points out, however, the decision conflicts with *Hall*, *Ward*, and *Bloom*, where the court rejected factors that appeared to be nothing more than drug-courier profiles.[202] The court expressed no concern that police officers in these situations cannot convincingly distinguish unusual legitimate conduct and unusual suspicious conduct. Instead the court accepted the police premise that unusual conduct is by definition suspicious.

The court's decision not to address the issue of detaining Moore's luggage until after the train's departure ignores Moore's most compelling defense. Requiring a traveler to abandon his luggage in order to continue with his itinerary, exceeds the brief and minimally-intrusive detention authorized in *Place*.[203] While the fact that Moore was not personally detained may mitigate the intrusive effect of seizing his luggage, the intrusive effect on his possessory interest was greatly enhanced.[204] Arguably, the government's interest in controlling drug trafficking does not outweigh the substantial inconvenience of depriving an individual of his possessory interest in his personal property for several hours or days.

Other courts, however, support the Tenth Circuit's position. The Third Circuit in *United States v. Frost*[205] held that an eighty-minute delay of the defendant's luggage to subject it to a canine sniff was not unreasonable because the police were diligent in their efforts to procure a canine unit.[206] The court placed primary emphasis on the diligence of the police and discounted as

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200. *Moore*, 22 F.3d at 246 (Logan, J., dissenting).

201. *Id.* at 248. Judge Logan also argued that the court should have addressed the issue of the excessive time of detention of the luggage, despite the fact that it was not sufficiently raised by defense counsel at trial. *Id.* at 246. He reminded that the court could consider such an issue if "consideration is necessary to prevent manifest injustice." *Id.* Judge Logan maintained that Moore, although a criminal engaged in drug trafficking, was a "victim of unconstitutional police behavior." *Id.*

202. *Id.* at 244-45. The Tenth Circuit had found no reasonable suspicion in these cases; all three defendants had purchased a one-way ticket in cash. *Id.*

203. *Id.* at 246-48. *See* United States v. Scales, 903 F.2d 765, 769 (10th Cir. 1990) (seven-hour luggage detention exceeds *Place*'s briefness requirement); United States v. Cagle, 849 F.2d 924, 927 (5th Cir. 1988) (ninety-minute detention unreasonable); Moya v. United States, 761 F.2d 322, 327 (7th Cir. 1984) (three-hour detention of bag unreasonable); United States v. Puglisi, 723 F.2d 779, 790 (11th Cir. 1984) (140-minute detention unreasonable).

204. *Moore*, 22 F.3d at 248.

205. 999 F.2d 737 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 573 (1993).

206. *Id.* at 742.

minimal the inconvenience caused to the defendant by having to depart on his flight without his luggage.[207]

CONCLUSION

The 1994 Tenth Circuit decisions pertaining to seizure of individuals and their property in the course of investigatory detentions provide police with wide latitude in formulating reasonable suspicion. In situations where seizure has occurred, the court still requires articulable facts, not suppositions, that rationally point to a conclusion of reasonable suspicion. It appears, however, that these facts are usually viewed in a light more favorable to the police.

The totality of circumstances surrounding a police-citizen encounter determines whether a seizure has occurred. Emphasis on any single factor, such as location, conflicts with the court's current "totality of circumstances" analysis. Specifically, the court diminished the significance of location as a factor in evaluating police-citizen encounters, and limited the areas in which an individual enjoys a heightened expectation of privacy from government intrusion.

Anthony J. Fabian

207. *Id.* at 741-42. *But see* United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1060 (9th Cir. 1994) ("Even if government agents were perfectly diligent . . . a seizure without probable cause could still last too long to pass muster under the Fourth Amendment.").