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Fourth Amendment Seizure: The Proper Standard for Appellate Review—United States v. McKines

Heidi M. Westby

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COMMENTS

FOURTH AMENDMENT SEIZURE: THE PROPER STANDARD FOR APPELLATE REVIEW

United States v. McKines

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I. INTRODUCTION

The Eighth Circuit Court of Appeals, like the other federal circuit courts, is caught up in a confusing debate over the correct standard for appellate review of Fourth Amendment seizure determinations. The seizure determination alone has proven to be a difficult issue.¹ Adding different standards of review into the formula has turned confusion into chaos. There is conflict both among the circuits, and within the Eighth Circuit itself.²

In *United States v. McKines*, the Eighth Circuit Court of Appeals was sharply divided on the issue, but held that the proper standard of appellate review for seizure determinations is *de novo*.³ The court made three arguments supporting the *de novo* standard of review. First, *de novo* review is consistent with United States Supreme Court decisions.⁴ Second, *de novo* review helps to ensure consistent application of the seizure test.⁵ Third, the seizure question is a “legal characterization that must be reviewed *de novo*.”⁶

This Case Note argues that *McKines* incorrectly characterized the seizure determination as a question for independent review. Instead, the seizure determination should be reviewed for clear error, with proper deference being given to the district court’s findings. Although *McKines* found otherwise, the Supreme Court has not decided that the correct standard of review is *de novo*. Likewise, there is no authority for labeling the seizure determination as a legal question. *McKines* recognizes that uniformity and predictability in the law are desirable. My theme is simple: while uniformity and predictability are desirable, they are not attainable in the area of Fourth Amendment Seizure. The Supreme Court has stated that the decision as to the proper standard of appellate review “turn[s] on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the is-

1. See *United States v. Chestnut*, 486 U.S. 567, 573 (1988) (stating that the seizure test “is necessarily imprecise because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation”); *United States v. McKines*, 933 F.2d 1412, 1416 (8th Cir.) (en banc) (stating that imprecision is inherent in the test for a Fourth Amendment seizure), *cert. denied*, 112 S. Ct. 593 (1991).

2. *McKines*, 933 F.2d at 1432 (Lay, C.J., dissenting) (“the law in this area is in total disarray”).

3. *Id.* at 1426 (Gibson, J., concurring specially). The majority of the court upheld the finding that no seizure had occurred under the application of either the clearly erroneous standard or the *de novo* review standard.

4. *Id.* at 1424 (“Although the Supreme Court has not stated [that *de novo* is the standard,] its approach and analysis demonstrate that it has applied the *de novo* standard.”)

5. *Id.* at 1425-26.

6. *Id.* at 1426.

sue in question.”⁷ It is precisely this concern for the sound administration of justice that makes the district court best suited to make the seizure determination.⁸

This Case Note examines the history of the standard of review for seizure issues, formulates a framework for determining an appropriate standard of review, and recommends adoption of the clearly erroneous standard. Part II provides background information on both standards of review and Fourth Amendment seizure. Part III outlines the divisive holding of *United States v. McKines*. Part IV explores the problem and specifically outlines why clearly erroneous is the appropriate standard of review. In conclusion, Part V recommends that the Eighth Circuit reconsider its position on this issue.

II. BACKGROUND

A. *The Purpose of Appellate Review and the Need for a Standard*

The American judicial system recognizes that judges and juries make mistakes by providing redress through appeal to higher courts. The appellate process regulates the government’s dealings with its citizens, gains their cooperation and respect, and permits the operation of a rule of law instead of a rule of men.⁹ The appellate process corrects improper dispositions by a trial court but does not guarantee that trials will be error-free.¹⁰ The appellate process also promotes harmony and uniformity among the courts¹¹ and fills gaps in the law.¹²

The need for a standard of review is obvious considering the system’s objectives of finality and efficiency.¹³ A standard of review promotes finality by ensuring that, at some point, the appeal process ends.¹⁴ For example, certainty in factual determinations is impossi-

7. *Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

8. See Keith R. Dolliver, Comment, *Voluntariness of Confessions in Habeas Corpus Proceedings: The Proper Standard for Appellate Review*, 57 U. CHI. L. REV. 141 (1990) (advancing arguments that appellate courts should abandon de novo review of habeas corpus proceedings and apply the clearly erroneous standard).

9. MARSHALL HOUTS ET AL., ART OF ADVOCACY-APPEALS § 1.11 (1991).

10. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 397 (1989).

11. HOUTS, *supra* note 9, § 1.11. The purpose of uniformity is to ensure that “a man’s justice” does not depend upon the luck of his location but, instead, upon the force of uniform law which applies to all citizens alike, regardless of the whim of the particular person sitting for the moment in the role of trial judge. *Id.* § 1.11[2].

12. *Id.* The appellate process allows appellate judges to announce new law from time to time. This allows for elaboration, clarification and expansion of existing law which may arise from social, economic, and political changes. *Id.* at § 1.11[3].

13. SHREVE & RAVEN-HANSEN, *supra* note 10, at 381.

14. *Id.*

ble,¹⁵ but limiting reversal to only those situations where clear error has been shown discourages the number of appeals.¹⁶ The standard of review also promotes efficiency.¹⁷ When the trial court and appellate court are equally competent to decide an issue, setting a standard that limits review increases respect for lower court judgments and also discourages appeals.¹⁸

A standard of review is a guidepost for appellate courts in approaching the issues before it. The standard of review frames the arguments and the court's analytical response, and defines the power distribution between the reviewing and lower courts.¹⁹ It describes approximately where, on a continuum ranging from 100% substitution of judgment to total deference, the intensity of review lies for a particular issue.²⁰

B. Standards of Review

Currently, there are four standards of review: clearly erroneous, substantial evidence, de novo, and abuse of discretion. The Federal Rules of Civil Procedure define the clearly erroneous standard²¹ and require the trial court to state separately its factual findings and conclusions of law.²² The United States Supreme Court has stated, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."²³ Where the evidence supports more than one conclusion, a choice between two permissible views is not clear error.²⁴ Thus, the appellate court may not reject the trial court's findings simply because it might have reached a different result or construed the facts differ-

15. *Id.* at 402.

16. *Id.*

17. *Id.* at 381.

18. *Id.* at 402.

19. *Id.*

20. *Id.*

21. FED. R. CIV. P. 52(a).

22. *Id.* What is clearly erroneous is a matter of interpretation. Generally an appellate court will reverse only when well persuaded, and even then, it will do so reluctantly. Steven A. Childress, "Clearly Erroneous": *Judicial Review Over District Courts in the Eighth Circuit And Beyond*, 51 MO. L. REV. 93, 107 (1986) (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945)).

23. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also* *Duke Power Co. v. Carolina Env'tl Study Group, Inc.*, 438 U.S. 59, 74 n.19 (1978); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *McAllister v. United States*, 348 U.S. 19, 20 (1954).

24. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949).

ently.²⁵ The clearly erroneous standard is strictly construed in situations where an appellate court is reviewing either demeanor testimony or documentary evidence.²⁶

The substantial evidence standard²⁷ has offered further construction of the clearly erroneous standard.²⁸ This standard is based on the theory that, if factual findings are supported by substantial evidence, they are not clearly erroneous. Some cases interpret the substantial evidence standard to be equivalent to the clearly erroneous standard,²⁹ while others interpret clearly erroneous to be a stricter standard.³⁰

The *de novo*³¹ standard is proper when the question on appeal is either a question of law or a mixed question of fact and law.³² Under the *de novo* standard, the judgment of the trial court is suspended and the reviewing court makes an independent determination of the issues.³³ The case is decided as though it originated in the reviewing

25. Childress, *supra* note 22, at 109. The appellate court should not substitute its judgment on disputed issues of fact when there is substantial credible evidence to support the findings. *Id.*

26. Prior to 1985, courts followed the rule that, where the evidence was documentary, the clearly erroneous standard was not to be strictly construed. *See Gay Lib v. University of Mo.*, 558 F.2d 848, 853 n.10 (8th Cir. 1977), (stating that appellate court is not bound by findings based on documentary evidence), *cert. denied*, 434 U.S. 1080 (1978). In 1985, however, the Supreme Court amended Rule 52(a), providing, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . ." FED. R. CIV. P. 52(a) (emphasis added).

27. This standard is similar to the lack of evidence and adequate basis standards. *See, e.g.*, *Seaton v. Sills*, 403 F.2d 710, 711 (5th Cir. 1968) (applying an adequate basis standard); *Chaney v. City of Galveston*, 368 F.2d 774 (5th Cir. 1966) (applying a weight of the evidence standard); *HOUTS ET AL.*, *supra* note 9, § 6.05.

28. Substantial evidence is often used when reviewing jury verdicts as it is directly related to a "reasonable juror" standard. *See, e.g.*, *Helene Curtis Indus. v. Pruitt*, 385 F.2d 841, 850 (5th Cir. 1967) (stating that the reasonableness test is an application of the substantial evidence requirement), *cert. denied*, 391 U.S. 913 (1968); *Midcontinent Broadcast Co. v. North Cent. Airlines, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973) (holding that sufficiency of evidence standard involves appellate court considering the entire record as presented to the jury).

29. *See e.g.*, *Franks v. National Dairy Prods. Corp.*, 414 F.2d 682, 684 (5th Cir. 1969) (implying that lack of substantial evidence equals clear error).

30. *See, e.g.*, *Dillon v. M.S. Oriental Inventor*, 426 F.2d 977, 978 (5th Cir.) (implying clearly erroneous is stricter standard than substantial evidence), *cert. denied*, 400 U.S. 903 (1970); *W.R.B. Corp. v. Geer*, 313 F.2d 750, 753 (5th Cir. 1963) (implying that clearly erroneous is stricter standard than substantial evidence).

31. "De novo" is a Latin term for "anew, afresh, a second time." BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

32. There is no controversy that pure questions of law are freely reviewable. *E.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States v. Richberg*, 398 F.2d 523, 526 (5th Cir. 1968). However, not all courts agree on whether mixed questions are freely reviewable.

33. *See, e.g.*, *Reck v. Reck*, 46 N.E.2d 429, 430 (Ohio 1942). *But see* Evan Tsen

court, and the findings and judgments of the lower court are disregarded except when they may be helpful in the reasoning.³⁴

Abuse of discretion is the standard used when an appellate court is reviewing discretionary decisions made by a trial court.³⁵ An appellate court can reverse a trial court's determination if the appellate court finds the decision "unreasonable, unconscionable or arbitrary without proper consideration of facts and law pertaining to matters submitted."³⁶ Certain matters, however, are within the discretion of the trial court because they are largely ad hoc and situation-specific.³⁷

C. Factors Influencing the Creation of a Standard

1. Labeling the Issues

Appellate courts have no single, precise rule for choosing a standard with which to review lower court decisions.³⁸ As a starting point, the threshold question in formulating the correct standard of review is whether a finding is factual or legal.³⁹ Findings of fact⁴⁰ are

Lee, *Principled Decisionmaking and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 244 (1991) (discussing how much deference an appellate court must accord district court findings on mixed questions of law and fact).

34. See Lee, *supra* note 33, at 246.

35. Abuse of discretion is synonymous with a failure to exercise sound, reasonable, and legal discretion. BLACK'S LAW DICTIONARY 10-11 (6th ed. 1990). It does not imply an intentional wrong, bad faith, or misconduct. Instead, it implies a judgment that is clearly against logic. *Id.*

The Supreme Court has equated abuse of discretion with the clearly erroneous standard. "When an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous." Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2458 (1990).

36. Harvey v. State, 458 P.2d 336, 338 (Okla. 1969).

37. SHREVE & RAVEN-HANSEN, *supra* note 10, at 407.

38. Michael E. O'Neill, Note, *A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations*, 99 YALE L.J. 885, 895 (1990).

39. Courts repeatedly struggle with the distinction between fact and law. One commentator argues that the distinction does not imply the existence of static, polar opposites. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985). Rather, the categories function as constructs that permit us to understand, organize, and regulate certain forms of social experience. *Id.* The categories also serve as a means of distributing authority among various decisionmakers in the legal system. *Id.* at 234. However, the actual distribution of authority between decisionmakers has often been governed by other factors such as the nature of the substantive issue and the character of the decisionmakers. *Id.* Thus, difficulty comes when judges seek to force allocation decisions into the categories of fact and law. *Id.* at 235.

40. A factual finding is an inquiry into what happened in a particular case. The trier of fact must determine who, what, when, and where. Monaghan, *supra* note 39,

reviewed for clear error.⁴¹ Conclusions of law⁴² are subject to an independent, de novo review.⁴³ Mixed questions of law and fact are generally freely reviewable, except when controlled by underlying facts.⁴⁴ Mixed questions arise when historical facts are established and the rule of law is undisputed, or the rule of law as applied to the facts is violated.⁴⁵ The question to be resolved is whether the rule of law, as applied to the established facts, is or is not violated.⁴⁶

The Supreme Court has yet to formulate a rule that clearly distin-

at 235. Fact questions are those for which resolution is "based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960). Factual findings are not waiting somewhere for the court to find. Emmet T. Flood, Note, *Fact Construction and Judgment in Constitutional Adjudication*, 100 YALE L.J. 1795, 1808 (1991). A factual finding is an interpretation as to what the judge thinks happened. *Id.* This is perhaps most obvious in the case of a criminal trial in which judges and juries must interpret witness recollections of past perceptions. *Id.* at 1809.

41. Different kinds of factfinding chores give rise to more or less deferential review according to the relative capacities of district courts and appellate courts, the need for uniformity, the perceived importance of the dispute, and the nature of the legal rules involved. Edward H. Cooper, *Civil Rule 50(A): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 646 (1988).

42. A legal conclusion or declaration of law involves conclusions about governing legal rules, standards and principles. Monaghan, *supra* note 39, at 235. These conclusions involve formulating a proposition that affects the immediate case and all others that fall within its terms. A question of law is characterized as general and applicable to numerous factual circumstances. *Id.*

43. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984).

44. See *Childress*, *supra* note 22, at 154. The United States Supreme Court has held that deferential review of mixed questions of law and fact is warranted when the district court is "better positioned" than the appellate court to decide the issue or when probing appellate scrutiny will not contribute to the clarity of the legal doctrine. *Miller v. Fenton*, 474 U.S. 104, 114 (1985). The general approach by the court of appeals is that if the mixed question involves applying law to an undisputed fact, then the appellate court should show no deference. But if the court must draw a factual inference from either an undisputed or disputed fact, then this is clearly within the purview of the trial court and subject to the clearly erroneous standard of review. David I. Levine & Hillary J. Salans, *Exceptions to the Clearly Erroneous Test After the Recent Amending of Rule 52(a) for the Review of Facts Based Upon Documentary Evidence*, 10 AM. J. TRIAL ADVOC. 409, 429 (1987).

45. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). See also Charles R. Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of Pullman-Standard v. Swint*, 58 TUL. L. REV. 403 (1983). Professor Calleros argues that the appropriate standard of review for mixed questions depends on who is best suited to decide the issue. *Id.* at 419-20. De novo review is appropriate when the historical facts are relatively clear and the law, although undisputed, is technical, uncertain, or bound up with sensitive matters of social or political policy. *Id.* at 425. These issues are appropriate for appellate courts, which have the responsibility of formulating new legal standards. *Id.*

46. *Pullman-Standard*, 456 U.S. at 289 n.19.

guishes a factual finding from a legal conclusion.⁴⁷ Case law offers little guidance beyond specific determinations in individual situations.⁴⁸ Therefore, determining the correct standard of review depends upon more than deciding the oversimplified question of whether the issue is fact or law.⁴⁹

2. *Traditional Functions of the Trial and Appellate Courts*

An appropriate standard of review must take into account the institutional functions of the courts. Thus, formulating the correct standard of review in close cases often turns on which judicial actor is best suited to decide the issue.⁵⁰ Issues that are mostly factual are best decided by the trial court. The trial court has the advantage of hearing the evidence and observing the demeanor of witnesses.⁵¹ Certainty as to what actually happened is impossible, but the trial judge or jury is in the best position to make credibility choices and resolve conflicting testimony.⁵²

Appellate courts, on the other hand, are chiefly law courts. Their main responsibilities include correcting errors in individual cases and developing the law in ways that guide future conduct and future litigants.⁵³ Appellate courts are well suited to develop and declare legal principles that will apply beyond the case at bar and serve as precedent in future cases.⁵⁴ The appellate court is superior to the trial court in researching, interpreting, and applying the law. This superiority is due to its specialization in deciding legal questions, its customarily greater library and law clerk resources, and its habit of collegial decision making.⁵⁵ A three-judge appellate panel is in a better position to make legal determinations because it benefits from the give and take of judicial negotiation⁵⁶ and is not encumbered by

47. *See id.* at 288.

48. Childress, *supra* note 22, at 133.

49. Factors which can influence an appellate court's choice of a standard of review are explicit congressional authorization, established policy, and precedent. *See generally id.* at 895-901.

50. While Congress has not spoken, the "distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985); *see also Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990) (stating that district court is better situated than the court of appeals to decide issue in question); *Pierce v. Underwood*, 487 U.S. 552 (1988).

51. SHREVE & RAVEN-HANSEN, *supra* note 10, at 402.

52. O'Neill, *supra* note 38, at 902.

53. Cooper, *supra* note 41, at 649.

54. O'Neill, *supra* note 38, at 901.

55. SHREVE & RAVEN-HANSEN, *supra* note 10, at 402.

56. The courts of appeals "are structurally suited to the collaborative judicial process that promotes decisional accuracy." *Salve Regina College v. Russell*, 111 S.

the time-consuming process of evidentiary hearings.⁵⁷ Appellate courts provide a corrective function to guarantee that lower courts have done justice in a particular case.⁵⁸ Finally, they play a supervisory role which ensures that proper and consistent procedures have been followed throughout the circuit.⁵⁹

3. Constitutional Factfinding

Some courts find that appellate review of factual findings involving constitutional issues is “perhaps different” than appellate review of ordinary factual findings.⁶⁰ These courts deem the factual findings to be of special importance, given the constitutional issues involved, and therefore engage in independent review.⁶¹

The Supreme Court’s treatment of the constitutional fact doctrine has been inconsistent. The Court has been willing to accept a more active appellate role for review of state court decisions involving constitutional rights.⁶² When addressing issues starting in the federal

Ct. 1217, 1221 (1991); Three-judge panels “permit reflective dialogue and collective judgment.” *Id.* Furthermore,

Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions.

Dick v. New York Life Ins. Co. 359 U.S. 437, 458-459 (1959) (Frankfurter, J., dissenting).

57. O’Neill, *supra* note 38, at 901. With the record settled below, the appellate judges are able to devote their attention to legal issues. *Salve Regina College*, 111 S. Ct. at 1221.

58. O’Neill, *supra* note 38, at 901.

59. *Id.*

60. See e.g., *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 n.6 (4th Cir. 1983) (considering whether review process is “perhaps different”), *cert. denied*, 470 U.S. 1083 (1985). Constitutional facts have been characterized as a special category of factual questions that, because of their importance, must be independently reviewed by appellate courts, or as mixed questions of law and fact, because they involve the application of legal principles to facts. Louis S. Raveson, *A New Perspective on the Judicial Contempt Power: Recommendations for Reform*, 18 HASTINGS CONST. L.Q. 1 (1990).

61. Courts which apply the constitutional fact doctrine emphasize a judicial concern that federal rights not be improperly denied. Monaghan, *supra* note 39, at 245. “But if labeling something a question of constitutional fact guarantees that it will be treated like a question of law, then either party is entitled to independent appellate review.” *Id.* For the history of the doctrine of constitutional factfinding, see *id.* at 248-53.

62. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184 (1964). In *Jacobellis*, the Court reversed a state court conviction for possession and exhibition of an obscene film. *Id.* Justices Brennan and Goldberg emphasized that independent review was necessary to keep factfinders from creating widely divergent local definitions of obscenity, thereby undermining the meaning of the First Amendment. *Id.* at 193. Justices Warren and Black warned that the Court was stepping beyond its proper role as an appellate court. *Id.* at 196 (Black, J., concurring in the judgment); *id.* at 203 (Warren, C.J.,

district court, however, it does not appear that the Court has broadened review of factual issues merely because an appeal might raise constitutional issues.⁶³

Ultimate facts, like constitutional facts, have also received special consideration by the courts.⁶⁴ In *Pullman-Standard v. Swint*,⁶⁵ the Court rejected the ultimate fact doctrine, holding that the Fifth Circuit Court of Appeals erred when it conducted de novo review of a factual issue.⁶⁶ The Court rejected the theory that facts are divided into subsidiary and ultimate facts.⁶⁷ The appellate court had made an independent determination as to whether, under "the totality of the facts and circumstances," there was a discriminatory purpose.⁶⁸ The Supreme Court maintained that resolution of the issue required determining the defendants' intent.⁶⁹ The Court held that such a determination "is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard."⁷⁰

However, the Court has carved out an exception to the clearly erroneous standard of review in First Amendment libel cases. In *Bose*

dissenting). For other cases in which the Court has conducted de novo review of state court factual findings, see *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991); *Hess v. Indiana*, 414 U.S. 105 (1973); *Redrup v. New York*, 386 U.S. 767 (1967); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Fiske v. Kansas*, 274 U.S. 380 (1927); see also Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899 (1989).

63. See *infra* note 76.

64. See, e.g., *Baumgartner v. United States*, 322 U.S. 665, 670 (1984) (stating that finding ultimate facts implicates application of standards of law); *Causey v. Ford Motor Co.*, 516 F.2d 415, 420 (5th Cir. 1975) (stating that appellate court is free to make an independent determination of factual issue that is the ultimate issue for resolution); *Industrial Instrument Corp. v. Foxbord Co.*, 307 F.2d 783, 787 (5th Cir. 1962) (holding that court of appeals can reverse ultimate fact questions free for clearly erroneous rule), *reh'g denied*, 310 F.2d 686 (1962); *Lehmann v. Acheson*, 206 F.2d 592, 593 (3d Cir. 1953) (stating that ultimate fact is free from clearly erroneous rule).

65. 456 U.S. 273 (1982).

66. *Id.* at 287-90.

67. *Id.* at 287. "The Fifth Circuit's rule on appellate consideration of 'ultimate facts' has its roots" in *Baumgartner*, 322 U.S. at 665. *Pullman-Standard*, 456 U.S. at 286 n.16. In *Baumgartner*, the Court discussed ultimate facts and conducted a de novo review. *Baumgartner*, 322 U.S. at 671. However, *Baumgartner* does not stand for the proposition that whenever a result in a case turns on a factual finding, an appellate court is not bound by Rule 52(a). *Pullman-Standard*, 456 U.S. at 286 n.16. *Baumgartner's* discussion of ultimate facts did not refer to pure findings of fact but to findings that clearly imply the application of standards of law. *Id.* at 287.

68. *Id.* at 283-84. The appellate court recognized that the issue of discriminatory intent was "essentially a question of fact." *Id.* at 285. It determined, however, that, since the question was "the ultimate issue for resolution," it must conduct a de novo review, even though it was bound by the district court's determination of the subsidiary facts, which were not clearly erroneous. *Id.* (emphasis added).

69. *Id.* at 289.

70. *Id.* at 287-88.

Corporation v. Consumers Union of America,⁷¹ the Court allowed an independent review of the determination of actual malice in First Amendment defamation cases despite the pure factual nature of a libel defendant's intent, knowledge, or state of mind.⁷² This, however, is only one narrow exception.⁷³ *Bose* did not indicate that it was redefining Rule 52.⁷⁴ It is unlikely that the Court meant to undermine *Swint*'s adherence to Rule 52 or to broaden review merely because an appeal might raise constitutional interests.⁷⁵ The Court has yet to invoke *Bose* in this broad way.⁷⁶

71. 466 U.S. 485 (1984).

72. *Id.* at 507-509; *see also* Childress, *supra* note 22, at 150.

73. It is important to note that *Bose* has been narrowly construed to apply only to lower court findings of actual malice, but it has been rejected in other areas of First Amendment law. *See, e.g.,* Miller v. California, 413 U.S. 15 (1973) (holding that authority to determine obscenity under the First Amendment should be left with the trial court).

74. Childress, *supra* note 22, at 151-52.

75. *Id.* at 152.

76. *Id.* The Court has neither required nor authorized de novo review of all factual findings involving other constitutional issues. *See* Hernandez v. New York, 111 S. Ct. 1859 (1991) (refusing to overturn findings on issue of discriminatory intent unless clearly erroneous); United States v. Doe, 465 U.S. 605 (1984) (deferring to the district court's determination of factual issues unless it has no support in the record); Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983) (applying clearly erroneous for review of decisions interpreting state's power of taxation under the Commerce Clause); Illinois v. Gates, 462 U.S. 213 (1983) (applying substantial basis for Fourth Amendment probable cause determinations); Rodgers v. Lodge, 458 U.S. 613 (1982) (holding that factual findings are not clearly erroneous in the area of voting); *Pullman-Standard*, 456 U.S. at 286 (reviewing factual findings concerning intent to discriminate for clear error); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (applying clearly erroneous standard for appellate review of segregation issues under the Equal Protection Clause of the Fourteenth Amendment); *Miller*, 413 U.S. at 15 (leaving authority to determine obscenity with the trial court); United States v. Phelps, 955 F.2d 1258 (9th Cir. 1992) (reviewing denial of release for clear error); United States v. McNeal, 955 F.2d 1067 (6th Cir. 1992) (reviewing factual findings underlying Fourth Amendment expectation of privacy issue); United States v. Camacho, 955 F.2d 950 (4th Cir. 1992) (reviewing factual findings regarding right to confront accusers at trial for clear error); United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992) (reviewing factual findings regarding concern regarding photographic lineup for clear error); United States v. Kane, 955 F.2d 182 (1st Cir. 1992) (reviewing district court decision concerning criminal defendant's ability to pay for counsel for clear error); United States v. Preciado-Robles, 954 F.2d 566 (9th Cir. 1992) (holding that whether district court correctly found that defendant's consent was voluntary is subject to the clearly erroneous standard); United States v. Caldwell, 954 F.2d 496 (8th Cir. 1992) (reviewing factual findings concerning whether a defendant waived his rights under the clearly erroneous standard); Jordon v. Gardner, 953 F.2d 1137 (9th Cir. 1992) (reviewing factual findings in Fourth Amendment pat search issue for clear error); United States v. 62.50 Acres of Land More or Less, 953 F.2d 886 (5th Cir. 1992) (holding whether landowner has carried burden of establishing value of land sought to be condemned will be reversed only when it is clearly erroneous); Caswell v. Ryan, 953 F.2d 853 (3d Cir. 1992) (reviewing factual findings in habeas

D. The Fourth Amendment Seizure Test

Courts have struggled to formulate the correct standard of review for Fourth Amendment seizures. The Fourth Amendment protects people from unreasonable searches and seizures by the government.⁷⁷ The purpose of the Fourth Amendment is not to eliminate all contact between the police and citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with individuals' privacy and personal security.⁷⁸

The point at which a person is seized within the meaning of the Fourth Amendment is not always clear.⁷⁹ Prior to 1980, the courts found that a seizure had occurred "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."⁸⁰ In *United States v. Mendenhall*,⁸¹ the Supreme Court redefined the seizure test.⁸² The Court stated, "We conclude that a person has been 'seized' within the meaning of the fourth

proceedings under clearly erroneous standard); *United States v. Ross*, 953 F.2d 641 (4th Cir. 1992) (reviewing voluntariness of consent to search for clear error); *Jackson v. Whitener*, 953 F.2d 640 (4th Cir. 1992) (reviewing factual findings regarding existence of Jencks Act material for clear error); *United States v. Montez*, 952 F.2d 854 (5th Cir. 1992) (holding district court's findings that there was no harassment by police not clearly erroneous); *United States v. Caba*, 955 F.2d 182 (2d Cir. 1992) (reviewing validity of *Miranda* waiver for clear error); *Wheeler v. Sims*, 951 F.2d 796 (7th Cir. 1991) (reviewing factual findings in civil rights action for clear error).

77. This amendment guarantees people the "right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides, "no warrants shall be issued but upon probable cause" and then only as to a specific place to be searched. U.S. CONST. amend. IV.

78. 1 WAYNE LAFAYE, SEARCH AND SEIZURE § 1.8(d), at 205 (2d ed. 1987).

79. Voluntary cooperation of a citizen through non-coercive questioning is outside the realm of Fourth Amendment protection. There is no violation of the Fourth Amendment when a police officer approaches an individual and asks him to answer some questions. The person approached, however, need not answer any question put to him. *Florida v. Royer*, 460 U.S. 491, 497 (1982). As long as the person reasonably feels he is at liberty to ignore the police and go about his business, there is no restraint on one's liberty and therefore the encounter is outside the realm of Fourth Amendment protection. *Michigan v. Chesternut*, 486 U.S. 567, 569 (1982). However, if a person is made to feel that she must stay and answer the question put to her, the person has been "seized". If the officer did not have lawful authority to seize the person, the seizure is considered unreasonable and therefore a violation of the Fourth Amendment. Any evidence obtained from an unreasonable seizure cannot be used in a criminal prosecution. *Mapp v. Ohio*, 367 U.S. 643 (1975).

80. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). The Court acknowledged that, under the Fourth Amendment, a seizure may occur without taking a suspect to the police station. *Id.* at 16.

81. 446 U.S. 544 (1980).

82. In *Mendenhall*, the Supreme Court was divided. Justices Stewart and Rehnquist found that no seizure had occurred and, thus, no Fourth Amendment protections were triggered. They stated that a seizure occurs only when, in view of all the surrounding circumstances, a reasonable person would have believed she was not free to leave. *Id.* at 554. They felt that there was nothing to suggest to *Mendenhall*

amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”⁸³

The Court adopted a reasonable person standard rather than attempting to determine a defendant’s subjective state of mind. This test has been reaffirmed in subsequent Supreme Court decisions and is uniformly applied by the circuit courts.⁸⁴

that she was not free to reject the agent’s questions and proceed on her way. *Id.* at 555.

Justices Powell, Burger, and Blackmun ruled that a seizure had occurred and found that it was supported by reasonable suspicion. *Id.* at 560 (Powell, J., concurring). They suggested that they would have approved of a reasonable person standard had the question been properly raised. *Id.* at 560 n.1.

Justice White’s dissent, joined by Justices Brennan, Marshall, and Stevens agreed that the seizure issue was improperly raised but stated that if a seizure was to be assumed, it clearly was not supported by reasonable suspicion. *Id.* at 570 (White, J., dissenting). The dissent also criticized the majority’s conclusion on the grounds that they could not agree on whether Mendenhall was seized. *Id.* at 566.

83. *Id.* at 554. As long as the person reasonably feels that he is free to ignore the police and go about his business, there is no restraint on his liberty and, therefore, the encounter is outside the realm of Fourth Amendment protections. *See Michigan v. Chesternut*, 486 U.S. 567, 569 (1988); *Florida v. Royer*, 460 U.S. 491, 497 (1983).

84. *See Florida v. Bostick*, 111 S. Ct. 2382 (1991); *Chesternut*, 486 U.S. at 567; *INS v. Delgado*, 466 U.S. 210 (1984); *Royer*, 460 U.S. at 491.

In *Royer*, the Court, applying the totality of the circumstances test, reached a different result on facts nearly identical to those in *Mendenhall*. *Royer*, 460 U.S. at 491. Even though there was only one significant factual difference, the Court found this enough to conclude that a reasonable person would have believed that he was not free to leave. *Id.* at 502.

In *Chesternut*, the Court reaffirmed and restated the *Mendenhall* test. *Chesternut*, 486 U.S. at 574. The Court refused to find that a seizure occurs whenever police are involved in a chase. Instead, the Court found that the crucial test was whether, taking into account all of the circumstances surrounding the encounter, the police conduct would “have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Id.* at 569. The Court also emphasized that the reasonable person standard ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached. *Id.* at 574.

In *Delgado*, the Court addressed the fine line between voluntary interaction and seizure:

What is apparent . . . is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps to obtain an answer then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

Delgado, 466 U.S. at 216-17 (citations omitted).

In *Bostick*, the Court answered a certified question to determine whether police,

E. Circuit Courts and Developing Standards of Review

Although the United States Supreme Court has repeatedly reaffirmed the *Mendenhall* seizure test, it has not provided a standard for appellate review of seizure determinations. Nor has the Court agreed on which standard is correct.⁸⁵ Consequently, a sharp division among the circuits has arisen. Of the twelve circuits, six circuits apply *de novo*, while five apply clearly erroneous. The Third Circuit has yet to take a stand on the issue.

1. Circuits Using the Clearly Erroneous Standard

The First,⁸⁶ Fourth,⁸⁷ Fifth,⁸⁸ Sixth,⁸⁹ Seventh⁹⁰ and Eleventh⁹¹

without articulable suspicion, could board a bus and ask at random for, and receive, consent to search passengers' luggage. *Bostick*, 111 S. Ct. 2382. The Court held that random bus searches conducted pursuant to passengers' consent are not per se unconstitutional. *Id.* The Court adhered to the *Chesternut* rule and found that, in determining "whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 2389.

85. See *infra* note 147 and accompanying text.

86. See *United States v. Karas*, 950 F.2d 31 (1st Cir. 1991); *United States v. West*, 651 F.2d 71, 73-74 (1st Cir. 1981) (holding that district court's conclusion that no seizure occurred was not clearly erroneous).

87. See *United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991) (holding that determination whether a seizure had occurred was subject to reversal only if clearly erroneous); *United States v. Gordon*, 895 F.2d 932, 937 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990); *United States v. Gray*, 883 F.2d 320 (4th Cir. 1989); *United States v. Gooding*, 695 F.2d 78, 82 (4th Cir. 1982).

88. *United States v. Cooper*, 949 F.2d 737 (5th Cir. 1991) (holding that ultimate question of legality of search and seizure is question of law and thus subject to *de novo* review); *United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1097 (5th Cir. 1991) (holding that determination that a seizure has or has not occurred is a finding of fact subject to reversal only for clear error); *United States v. Elmore*, 595 F.2d 1036, 1041-42 (5th Cir. 1979) (stating seizure determination is not easy and calls for a refined judgment by the trial court), *cert. denied*, 447 U.S. 910 (1980).

89. See *United States v. Wakefield*, 943 F.2d 53 (6th Cir. 1991); *United States v. Rose*, 889 F.2d 1490, 1495 (6th Cir. 1989) (holding that district court's seizure determination not clearly erroneous); *United States v. Fulton*, 830 F.2d 194 (6th Cir. 1987); *United States v. Morgan*, 743 F.2d 1158, 1162 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985); *United States v. Collis*, 699 F.2d 832, 835 (6th Cir.), *cert. denied*, 462 U.S. 1119 (1983).

90. See *United States v. Williams*, 945 F.2d 192 (7th Cir. 1991) (stating that reviewing court will not overturn denial of motion to suppress unless decision was clearly erroneous); *United States v. Ferguson*, 935 F.2d 1518, 1522 (7th Cir. 1991); *United States v. Berke*, 930 F.2d 1219, 1221 (7th Cir. 1991) (holding that whether a particular encounter is voluntary is a factual question; therefore, the "standard of review is a limited inquiry into whether the decision of the district court was clearly erroneous"); *United States v. Edwards*, 898 F.2d 1273, 1276 (7th Cir. 1990); *United States v. Dunigan*, 884 F.2d 1010, 1014 (7th Cir. 1989); *United States v. Teslim*, 869

Circuits currently apply the clearly erroneous standard of review to seizure determinations. These courts have advanced several reasons for using the clearly erroneous standard. First, these courts are convinced that the factual nature of the *Mendenhall* test requires a clearly erroneous standard of review.⁹² Second, these courts stress that the district court judge is in the best position to make the decision.⁹³ The determination that a seizure has occurred is a close call that requires a refined judgment.⁹⁴ The district court hears all the evidence and testimony and, thus, is in the best position to assess witness credibility and to evaluate whether, under the totality of the circumstances, the defendant has been seized.⁹⁵ Third, these courts argue that *de novo* review improperly transforms a factual determination—whether the defendant was seized—into a legal issue. Simply because resolution of a factual issue is dispositive does not mean it should lose its factual nature.⁹⁶

2. Circuits Using the *De Novo* Standard

The Second,⁹⁷ Eighth,⁹⁸ Ninth,⁹⁹ Tenth¹⁰⁰ and District of Colum-

F.2d 316, 321 (7th Cir. 1989) (holding that the determination of a seizure is highly factual and requires clearly erroneous standard); *United States v. Espinosa-Alvarez*, 839 F.2d 1201, 1205 (7th Cir. 1987); *United States v. Eighty-Four Thousand Dollars U.S. Currency*, 717 F.2d 1090, 1095 (7th Cir. 1983); *United States v. Black*, 675 F.2d 129, 138-139 (7th Cir. 1982).

91. *See United States v. Hammock*, 860 F.2d 390, 393 (11th Cir. 1988) (holding that district court did not clearly err when it found that a reasonable person would have felt free to leave the bus).

92. *See United States v. Berke*, 930 F.2d 1219, 1221 (7th Cir. 1991); *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989); *United States v. Teslim*, 869 F.2d 316, 321 (7th Cir. 1989).

93. *See Edwards*, 898 F.2d at 1276; *United States v. Maragh*, 894 F.2d 415, 418 (D.C. Cir.), *cert. denied*, 111 S. Ct. 214 (1990); *Espinosa-Alvarez*, 839 F.2d at 1205; *Eighty-Four Thousand Dollars U.S. Currency*, 717 F.2d at 1095.

94. *See United States v. Elmore*, 595 F.2d 1036, 1041-42 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

95. *See United States v. Karas*, 950 F.2d 31, 35 (1991) (stating that the district court's findings were "fact specific and based on credibility determinations Because they were neither clearly erroneous nor amounted to an abuse of discretion, we are not free to overrule them"); *Maragh*, 894 F.2d at 420 (Mikva, J., dissenting) (stating that the court of appeals should not disregard the trial judge's premier role in difficult evaluation of the constitutional claims), *United States v. Teslim*, 869 F.2d 316, 321 (7th Cir. 1989) (holding that standard of review is limited and requires that deference be given to the district judge who had the opportunity to observe the testimony and demeanor of the witnesses); *United States v. Black*, 675 F.2d 129, 134 (7th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983).

96. *See Teslim*, 869 F.2d at 316.

97. *See United States v. Springer*, 946 F.2d 1012, 1015 (2d Cir. 1991); *United States v. Thompson*, 941 F.2d 66, 70 (2d Cir. 1991); *United States v. Madison*, 936 F.2d 90, 92 (2d Cir. 1991); *United States v. Hooper*, 935 F.2d 484, 489 (2d Cir. 1991); *United States v. Montilla*, 928 F.2d 583, 588 (2d Cir. 1991) (noting that find-

bia¹⁰¹ Circuits apply the de novo standard when reviewing a seizure determination. The courts which have addressed the issue have focused on the language of previous Supreme Court decisions and are persuaded that the Court has adopted the de novo standard.¹⁰² The District of Columbia Circuit has even stated that de novo review is a firmly entrenched standard required by the Supreme Court.¹⁰³

These courts also found that the objectivity of the reasonable person standard requires uniform application of Fourth Amendment protection. The courts assert that de novo review helps to ensure consistent application.¹⁰⁴ A related reason given by the courts applying de novo review is that appellate judges have a constitutional responsibility that cannot be delegated to the trier of fact.¹⁰⁵

ings as to what various parties said or did was subject to clearly erroneous standard, but the question of whether those statements and acts resulted in seizure is one of law subject to de novo review).

98. *See* United States v. McKines, 933 F.2d 1412 (8th Cir.) (en banc), *cert. denied*, 112 S. Ct. 593 (1991).

99. United States v. Davis, 932 F.2d 752, 756 (9th Cir. 1991) (stating that the question of whether a defendant has standing to assert a Fourth Amendment claim should be reviewed de novo); United States v. Mines, 883 F.2d 801, 803 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 552 (1990); United States v. Iglesias, 881 F.2d 1591, 1522 (9th Cir. 1989); United States v. Linn, 880 F.2d 209, 214 (9th Cir. 1989); United States v. Mitchell, 812 F.2d 1250, 1253 (9th Cir. 1987). *But see* United States v. Erwin, 803 F.2d 1505, 1508 (9th Cir. 1986) (reviewing seizure determination for clear error); United States v. Patino, 649 F.2d 724, 728 (9th Cir. 1981) (holding that determination of whether such contact constitutes a seizure within the meaning of the Fourth Amendment turns largely on factual issues; proper deference should be given to the trial court judge and therefore should not be reversed unless clearly erroneous).

100. *See* United States v. Ibarra, 955 F.2d 1405 (10th Cir. 1992) (holding that defendant's seizure is a question of law to be reviewed by the appellate court de novo); United States v. Morgan, 936 F.2d 1561, 1565-66 (10th Cir. 1991); United States v. Pena, 920 F.2d 1509, 1513-14 (10th Cir. 1990) (holding that ultimate determinations of reasonableness concerning Fourth Amendment issues and other questions of law are reviewed de novo); United States v. Butler, 904 F.2d 1482, 1484 (10th Cir. 1990).

101. United States v. Jordan, 951 F.2d 1278 (D.C. Cir. 1991) (holding that the district court's conclusion that seizure of defendant in bus depot was subject to de novo review); United States v. Maragh, 894 F.2d 415, 417 (D.C. Cir.) (reviewing seizure determination de novo), *cert. denied*, 111 S. Ct. 214 (1990).

102. *See* United States v. Montilla, 928 F.2d 583, 588 (2d Cir. 1991); *Maragh*, 894 F.2d at 417-18.

103. *Maragh*, 894 F.2d at 417. In *Maragh*, the court stated that the District Court's seizure determination was reviewable de novo, and that such review was "firmly entrenched doctrine in this court" and required by the Supreme Court. *Id.* (emphasis added).

104. *Id.*; *See* Michigan v. Chesternut, 486 U.S. 567, 574 (1988); United States v. McKines, 933 F.2d 1412, 1425 (8th Cir. 1991) (en banc) (Gibson, J., concurring).

105. *Maragh*, 894 F.2d at 418.

3. Standard Used by the Eighth Circuit

The Eighth Circuit has not consistently applied one standard when reviewing seizure determinations. Several Eighth Circuit decisions apply the clearly erroneous standard¹⁰⁶ while others apply the de novo standard.¹⁰⁷ Yet others review seizure determinations without using any standard.¹⁰⁸

III. UNITED STATES V. MCKINES

Sitting en banc, the Eighth Circuit Court of Appeals attempted to clarify the issue. In *United States v. McKines*, the court held that factual findings of the district court are to be reviewed for clear error, but the ultimate seizure determination is a "legal characterization" that must be reviewed de novo.¹⁰⁹

A. Background

United States v. McKines began when an official from the Drug Enforcement Administration observed James A. McKines in an airport and suspected he was a drug courier.¹¹⁰ The agents obtained con-

106. See *United States v. Jefferson*, 906 F.2d 346, 348 (8th Cir. 1990); *United States v. Archer*, 840 F.2d 567, 571 (8th Cir.), cert. denied, 488 U.S. 941 (1988); *United States v. Hendrix*, 726 F.2d 433, 434 (8th Cir. 1984).

107. See, e.g., *United States v. Condelee*, 915 F.2d 1206, 1209 (8th Cir. 1990); *United States v. Hernandez*, 854 F.2d 295, 297 (8th Cir. 1988); *United States v. Campbell*, 843 F.2d 1089, 1092 (8th Cir. 1988).

Campbell held that the ultimate conclusion of the seizure's constitutionality was reviewable de novo. *Id.* Judge Beam's opinion in *McKines* pointed out that a careful reading of *Campbell* reveals that it does not directly support de novo review. *United States v. McKines*, 933 F.2d 1412, 1420 n.7 (8th Cir.) (en banc) (Beam, J., dissenting), cert. denied, 112 S. Ct. 593 (1991). Whether the Fourth Amendment has been violated is not the same question as whether a seizure occurred. *Id.* If there is a seizure, the ultimate conclusion that the Fourth Amendment has been violated depends on whether the seizure was supported by reasonable suspicion. *Id.*

108. In *United States v. Dennis*, 933 F.2d 671, 673 (8th Cir. 1991), the court concluded that an encounter did not result in a seizure. "After reviewing the totality of the circumstances, we conclude that the encounter between Dennis and the officers did not result in his seizure. We also conclude that the district court's finding that Dennis voluntarily consented to the search of his person was not clearly erroneous." *Id.* In reaching its conclusion that no seizure occurred, there is no reference to any standard. The court does use clearly erroneous for the consent issue, but this is a separate issue and this standard is not controversial. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (stating that the voluntariness of a person's consent to a search is a question of fact to be reviewed under the clearly erroneous standard).

109. *McKines*, 933 F.2d at 1426 (Gibson, J., concurring specially).

110. *Id.* at 1414 (Beam, J.). Agent Hicks from the Drug Enforcement Administration, accompanied by two detectives from the Platte County Sheriff's Office observed the defendant, James A. McKines, deplane in Kansas City. McKines was casually dressed in black trousers, a white pullover shirt and loafers or sandals without socks. He was bearded and wore sunglasses. McKines walked directly to a telephone, made

sent,¹¹¹ searched his two suitcases, found PCP concealed in a Mountain Dew bottle, and arrested McKines.¹¹² Prior to trial, McKines

a call and then proceeded to the baggage claim area, where he was observed "glancing about." He claimed two suitcases and left the terminal building in search of a cab. Based on these observations, Hicks suspected McKines was a drug courier. *Id.*

Hicks' suspicions were due to the fact that McKines exhibited characteristics consistent with the drug courier profile. The drug courier profile consists of a list of characteristics which the DEA believes are typical of drug couriers in a given transportation and geographical setting. See Mark G. Ledwin, *The Use of the Drug Courier Profile in Traffic Stops: Valid Police Practice or Fourth Amendment Violation?*, 15 OHIO N.U. L. REV. 593 (1988). The most prominent application of the profile is by the DEA as a tool to combat drug traffic on domestic airlines. Joseph P. D'Ambrosio, Note, *The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?*, 12 NOVA L. REV. 273, 275 (1987).

There has been a substantial amount of litigation regarding the constitutionality of the profile. *Id.* The profile has been widely criticized as a means which invites police violation of the Fourth Amendment. See Charles L. Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, As All Look Yellow to the Jaundic'd Eye,"* 65 N.C. L. REV. 417 (1987) (analyzing inconsistencies and empirical inadequacies that adhere to the DEA's profile); Ledwin, *supra*, at 593 (stating that use of profile raises obvious and significant Fourth Amendment concerns); Steven K. Bernstein, Note, *Fourth Amendment—Using the Drug Courier Profile to Fight the War on Drugs*, 80 J. CRIM. L. & CRIMINOLOGY 996 (1990) (addressing the hazards of relying on profile that has no predictive value); D'Ambrosio, *supra*, at 273 (concluding that when used in connection with the drug courier profile, the Mendenhall seizure standard invites arbitrary police conduct); Alec Farmer, Note, *Criminal Procedure—"Drug Courier" Characteristics are Sufficient to Establish Reasonable Suspicion of Criminal Conduct*, 12 U. ARK. LITTLE ROCK L.J. 407 (1990) (stating that the Court's acceptance of the "drug courier" profile causes practical problems).

Airport drug search cases can involve up to six separate issues. Does the initial stop of the suspect constitute a seizure? Does the drug courier profile provide a constitutionally permissible basis to make an investigative stop? When do DEA agents have reasonable suspicion to stop the airline traveler in the first place? When, after the initial encounter, does reasonable suspicion arise? When does a traveler voluntarily consent to an interview or to relocate to a private office? If the traveler is seized illegally, but then voluntarily consents to a search, must the court exclude the seized contraband from evidence at trial? See Farmer, *supra*, at 413-19.

111. *McKines*, 933 F.2d at 1414 (Beam, J.). Outside the terminal, Hicks approached McKines and identified himself as a police officer. Hicks asked if he could talk to McKines. McKines agreed. At Hicks' request, McKines gave Hicks his airplane ticket, issued to John McKines, and his driver's license issued in the name of James McKines. McKines shrugged off this discrepancy. Hicks returned the driver's license and identified himself as a DEA agent and told McKines that he was watching for drugs being smuggled into Kansas City. *Id.* at 1414. He also asked McKines if he had any drugs concealed in his suitcases. McKines denied possessing drugs. The district court found that McKines voluntarily consented for Hicks to search his suitcase. *Id.* at 1423. The court of appeals held this finding was not clearly erroneous. *Id.*

112. *Id.* In the larger suitcase, Hicks thought he smelled PCP and examined an eight-pack of sixteen-ounce Mountain Dew bottles. Since the bottle caps appeared not to have been removed, Hicks concluded the interview, and McKines left to get a cab. Detective Kessler, one of the detectives accompanying Hicks, said he was certain that the bottles did not contain Mountain Dew, as Mountain Dew is opaque, while the liquid in the bottles appeared to be clear. Kessler also mentioned that it was possible

moved to suppress the evidence seized from the suitcase.¹¹³ The district court denied the motion to suppress, finding that the encounter between the DEA agent and McKines did not violate the Fourth Amendment, and that McKines voluntarily consented to the search.¹¹⁴ Following a jury trial, McKines was convicted on three counts of possession of PCP.¹¹⁵

McKines appealed the conviction, arguing that the encounter with the DEA agent was not supported by reasonable suspicion.¹¹⁶ The Eighth Circuit Court of Appeals affirmed the conviction, holding that a seizure did not occur and that McKines voluntarily consented to the search of his suitcase.¹¹⁷

The majority and concurrence both applied a clearly erroneous standard of review.¹¹⁸ However, the court failed to distinguish the separate issues of seizure and consent. After blurring the two tests, the court stated that the question of consent is factual and requires clearly erroneous review.¹¹⁹ Next, the court concluded that McKines was not seized within the meaning of the Fourth Amendment, thus never specifically stating a standard of review for the seizure issue. This opinion was vacated and the court, sitting en banc, reheard the issue.¹²⁰

to reseal a bottle to make it look as if it had never been opened. With that information, Hicks again approached McKines outside the terminal, obtained consent, took a bottle, unsealed it, and immediately detected a strong odor of PCP. McKines was then arrested. *Id.* at 1414 n.1.

113. *Id.* at 1415.

114. *Id.*

115. *Id.* at 1412. McKines was convicted of conspiracy to possess with intent to distribute PCP, possession with intent to distribute PCP, and traveling in interstate commerce with intent to possess PCP. *Id.*

116. *Id.* at 1415.

117. *United States v. McKines*, 917 F.2d 1077 (8th Cir. 1990) *vacated and reh'g granted* (8th Cir. Dec. 28, 1990). The court also held that imposition of mandatory life sentence was not cruel and unusual punishment for Eighth Amendment purposes. *Id.*

118. *Id.* at 1080, 1083.

119. When addressing the seizure issue, the court applied the *Mendenhall* test. *Id.* at 1080. The court then stated that consent, not seizure, is a question of fact and therefore is reviewed under the clearly erroneous standard. The court then addressed the seizure issue and concluded there was no seizure. *Id.*

120. In the original court of appeals decision, Judge Beam noted the difficulty that airport-stop drug cases involve. *Id.* at 1083. His concern was that the issues should be clarified by the whole court.

These airport-stop drug cases involve difficult factual questions with which district courts often struggle in suppression hearings. Their conclusions should not be overturned as clearly erroneous on the basis of a few factors, drawn not from Supreme Court jurisprudence but from a few circuit cases, and reduced to a sentence or a paragraph, which masquerade as a rule that will provide unarguable answers. . . . [I]t is time for this circuit to reconsider this issue en banc.

Id. (quoting *Florida v. Royer*, 460 U.S. 491 (1983)).

B. Rehearing En Banc

1. The Conviction

At the rehearing, the court again affirmed McKines' conviction.¹²¹ In reaching its decision, however, the court was sharply divided. There are four separate opinions and two different majorities, one deciding whether to affirm McKines' conviction and the other deciding the standard of review for seizure determinations.¹²² By a six to four margin, the court held that McKines was not seized, his consent was voluntary, and thus, his conviction on all three counts was affirmed.¹²³

Judge Magill dissented, arguing that the encounter between Agent Hicks and McKines constituted an illegal seizure of McKines.¹²⁴ He argued that the PCP should be suppressed because it was obtained in a manner inconsistent with the Fourth Amendment.¹²⁵

Judge Lay also dissented, agreeing with Judge Magill that McKines' conviction should be reversed.¹²⁶ However, the Judge wrote separately, criticizing the majority for stating that previous Eighth Circuit decisions should be overruled.¹²⁷ Judge Lay also argued that

121. *United States v. McKines*, 933 F.2d 1412 (8th Cir.) (en banc), cert. denied, 112 S. Ct. 593 (1991). The court was divided as to the proper standard for reviewing McKines' conviction. Judges Beam, Bowman, and Wollman affirmed the conviction based on a clearly erroneous standard of review. *Id.* at 1422-24. Judges Gibson, Fagg, and Loken concurred specially, affirming the conviction based on a de novo standard of review. *Id.* at 1424-26 (Gibson, J., concurring specially).

122. The court was divided on whether to affirm the conviction and which standard of review to apply. The opinion, written by Judge Beam and joined by Judges Bowman and Wollman, consisted of a majority vote to affirm McKines' conviction but included an argument in favor of a clearly erroneous standard of review. *Id.* at 1412-22 (Beam, J.). The opinion of the court on the issue of the standard of review was a special concurrence written by Judge Gibson and joined by Judges Fagg and Loken that consisted of a majority vote to affirm McKines' conviction, but held that de novo is the standard of review. *Id.* at 1424-26 (Gibson, J., concurring specially). A third opinion was a dissent written by Judge Magill and joined by Chief Judge Lay and Judges McMillian and Arnold, which voted to reverse McKines' conviction but agreed with Gibson's opinion that de novo is the correct standard of review, thus making de novo the standard. *Id.* at 1427-30 (McGill, J., dissenting). A fourth opinion was another dissent written by Chief Judge Lay and joined by Judge McMillian which also voted to reverse the conviction. *Id.* at 1430-33 (Lay, C.J., dissenting).

123. Judges Gibson, Fagg, Bowman, Wollman, Beam and Loken voted to affirm McKines' conviction. *Id.* at 1424 (Beam, J.); *Id.* at 1426 (Gibson, J., concurring specially). Chief Judge Lay and Judges McMillian and Arnold voted to reverse McKines' conviction. *Id.* at 1430 (Lay, C.J., dissenting).

124. *Id.* at 1427 (Magill, J., dissenting).

125. *Id.* at 1430. Judge Magill argued that when McKines was illegally seized, his Fourth Amendment rights were violated. The violation tainted McKines' subsequent consent to the search of his luggage and therefore the liquid PCP should have been suppressed and McKines' conviction reversed. *Id.*

126. *Id.* at 1430 (Lay, C.J., dissenting).

127. *Id.*

a policy to control illegal drug use is not a sufficient reason for violating a person's Fourth Amendment rights.¹²⁸

2. Standard of Review

a. Majority: *De Novo*¹²⁹

(1) Judge Gibson's Special Concurrence

By a seven to three margin, *McKines* held that *de novo* was the appropriate standard of appellate review for Fourth Amendment seizure.¹³⁰ First, *McKines* reasoned that the Supreme Court's approach and analysis demonstrate that it has applied the *de novo* standard.¹³¹ The majority also found compelling the reasoning of the District of Columbia Circuit,

I am bothered by the statement in Judge Beam's opinion that portions of several well reasoned cases of this court should no longer be followed. Each of these cases turned on its facts and well-reasoned legal evaluations by different panels of the court, adhering to the contextual approach mandated by the Supreme Court. In my judgment, none of these cases were decided erroneously and each should continue as viable precedent in this circuit.

Id.

128. *Id.* at 1433. "Random invasions of an individual's privacy cannot be justified by the necessity of extinguishing illegal drug use." *Id.*

129. Three of the votes favoring *de novo* review were from the special concurrence written by Judge Gibson which was joined by Judges Fagg and Loken. *See id.* at 1424-26 (Gibson, J., concurring specially). The other four votes in favor of *de novo* were from the dissent written by Judge Magill and joined by Chief Judge Lay, and Judges McMillian and Arnold, which joined in Part I of Judge Gibson's special concurrence adopting a *de novo* standard of review. *See id.* at 1427 (Magill, J., dissenting). Chief Judge Lay wrote a separate dissent, which was joined by Judge McMillian, offering further analysis for adopting a *de novo* standard. *See id.* at 1431 (Lay, C.J., dissenting).

130. *Id.* at 1412 (Beam, J.). *McKines* adopted the approach used by the Second Circuit in *United States v. Montilla* which held that factual findings as to what the various parties to the encounter said or did are reviewed for clear error, but whether those acts resulted in a seizure is a question of law subject to *de novo* review. 928 F.2d 583 (2d Cir. 1991). The *McKines* court stated, "We believe the reasoning in *Maragh* and *Montilla* is compelling and it accords with our reading of *Mendenhall*, *Royer*, *Chesternut*, and *Hodari D.*" *McKines*, 933 F.2d at 1426 (Gibson, J., concurring specially).

131. *Id.* at 1425 (Gibson, J., concurring specially). The court referred to Justice Stewart's concurrence in *Mendenhall*, where he concluded, "the correctness of the legal characterization of the facts appearing in the record is a matter for this court to determine" and that "as a matter of law," certain conduct does not amount to a seizure. *Id.* at 1424-25 (quoting *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (Stewart, J., concurring) (emphasis omitted)). The court pointed to other cases to demonstrate that the Supreme Court approached the seizure issue as a question of law. *See Michigan v. Chesternut*, 486 U.S. 491 (1983); *Florida v. Royer*, 460 U.S. 491 (1983). In response to these cases, the Eighth Circuit stated, "there is no indication in these cases that the Court . . . granted any deference to the lower courts' determinations [I]t is also significant that the Supreme Court . . . used the words 'conclude' or 'conclusion' which indicates a determination of a legal issue rather than

which held that *Mendenhall* set forth an objective legal test which was to be consistently applied from one police encounter to the next.¹³² Finally, the court held that the question of a seizure is a legal characterization that must be reviewed de novo.¹³³

(2) Judge Lay's Concurrence

Although he voted to reverse McKines' conviction, Judge Lay agreed that the correct standard of review for seizure determinations is de novo.¹³⁴ He criticized the court, however, for its esoteric discussion of the correct standard¹³⁵ stating, "the ultimate question of whether the facts constitute an arrest or seizure under the Constitution always has been and always will be a question of law for a reviewing court."¹³⁶

b. Judge Beam's Dissent: Clearly Erroneous

Judge Beam maintained that the correct standard of review is clearly erroneous.¹³⁷ He disagreed with the majority's finding that the vague references made by the Supreme Court demonstrate that it had decided that de novo was the appropriate standard.¹³⁸ Instead, the fact-intensive nature of the seizure test is the only consistent, dominant theme in each of the Supreme Court cases.¹³⁹ Judge Beam correctly noted that approaches used by other circuits, including past

a review of a factual issue." *McKines*, 933 F.2d at 1425 (Gibson, J., concurring specially) (citations omitted).

132. *United States v. Maragh*, 894 F.2d 415, 417-18 (D.C. Cir.), cert. denied, 111 S. Ct. 214 (1990). The *McKines* court never explicitly stated that de novo review ensures consistent application, but it discussed and adopted the reasoning in *Maragh*, which held that de novo review helps to ensure consistent application. See *McKines*, 933 F.2d at 1425-26 (Gibson, J., concurring specially).

133. *McKines*, 933 F.2d at 1426 (Gibson, J., concurring specially).

134. *Id.* at 1431 (Lay, C.J., dissenting).

135. *Id.* at 1431 n.2 (stating that the court should not "engage in obfuscating debate about what standard of review governs these cases.").

136. *Id.* at 1431. "Justice Stewart was not espousing new constitutional doctrine when he observed 'the correctness of the legal characterization of the facts appearing in the record is a matter for this court to determine.' This is simply a passing legal truism which has been taught to first year law students ever since law schools began." *Id.* (citation omitted).

137. *Id.* at 1422 (Beam, J., dissenting).

138. *Id.* Judge Beam argued that nothing in the Supreme Court cases indicated that a majority of the justices had concluded that the seizure issue was a mixed question of law and fact necessarily subject to de novo review. *Id.* Any attempt to conclude what standard of review the Supreme Court must have silently applied is fraught with danger. Although other circuits have found this sort of analysis persuasive, it is little more than speculation. *Id.* at 1419-20. See *infra* note 147.

139. *Id.* at 1420.

Eighth Circuit decisions, are inconsistent.¹⁴⁰ Judge Beam then concluded that the district court's determination was essentially one of fact and that the district court was better able to make the seizure determination.¹⁴¹

Judge Beam also rejected the idea that the objectivity of the *Mendenhall* test transforms the inquiry into a legal one. Instead, the objectivity of the *Mendenhall* test is similar to a finding of negligence which is subject to clearly erroneous review.¹⁴²

IV. ANALYSIS

A. *The Problem*

Despite clear opportunity, the Supreme Court has not decided the proper standard of review for a seizure determination.¹⁴³ Courts facing the issue, appropriately, are concerned with the need to preserve the precious liberties established by the Constitution. Appellate courts are reluctant to extend too much deference to a district court's findings for fear that justice will not be done. However, appellate courts also wish to avoid an unending review of factual patterns too peculiar to recur.¹⁴⁴

As the issue currently stands, individuals receive varying degrees of constitutional protection depending upon where they live. Defendants who live in the Second, Eighth, Ninth, Tenth or District of Columbia Circuits are likely to appeal because an appellate judge

140. *Id.* For a discussion of Eighth Circuit decisions, see *supra* notes 106-108 and accompanying text.

141. *McKines*, 933 F.2d at 1421-22 (Beam, J., dissenting) (the seizure inquiry "addresses a fact-bound question with a totality-of-circumstances assessment that is best left in the first instance to the trial court") (citing *United States v. Mendenhall*, 446 U.S. 544, 569 (1980) (White, J., dissenting)).

142. *McKines*, 933 F.2d at 1421 (Beam, J., dissenting). "Judge Gibson's concurrence would contend that this objective standard transforms the inquiry into a legal one . . . To the contrary, we think that the *Mendenhall* test is much like a finding of negligence, which, the Supreme Court has held, is subject to clearly erroneous review." *Id.* (citations omitted). Judge Beam also noted that the problem of determining whether mixed questions of law and fact are to be treated as questions of law or of fact for purposes of appellate review, sometimes turns on a determination that, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). The dissent then referred to *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2458-59 (1990), where the Supreme Court held that the appropriate standard of review raised by a Rule 11 violation is the abuse of discretion standard. *McKines*, 933 F.2d at 1421 (Beam, J., dissenting). "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard." *Id.* (quoting *Cooter & Gell*, 110 S. Ct. at 2459).

143. See *infra* note 147 and accompanying text.

144. *Lee, supra* note 33, at 236.

will make an independent judgment as to whether there was a seizure.¹⁴⁵ Individuals who live in the First, Fourth, Fifth, Sixth or Seventh Circuits, however, are faced with the task of convincing the appellate court that the district court made a clear error.¹⁴⁶

The crux of the problem is that the Supreme Court has not decided the issue.¹⁴⁷ The stakes are high as defendants' fundamental constitutional rights are at stake. Although charged with a crime, offenders still retain constitutional rights. These rights include consistent treatment by the court system and uniform constitutional protection. Thus, it is time for the Supreme Court to give much needed clarification and guidance.

B. *The Solution: Clearly Erroneous Standard*

It is undisputed that the seizure determination requires the district court to find the historical facts and that these findings are reviewed for clear error. The controversy arises over the review of factual inferences and the characterization of historical facts. *McKines* incorrectly characterized the seizure determination as a question for independent review. Instead, the seizure determination should be reviewed for clear error with proper deference being given to the district court.

1. *The Seizure Determination Is a Question of Fact*

The Supreme Court should review seizure determinations for

¹⁴⁵ See *supra* notes 97-105.

¹⁴⁶ See *supra* notes 86-96 and accompanying text.

¹⁴⁷ Despite ample opportunity, the Supreme Court has not adopted one standard of review. However, there are various Supreme Court opinions which illustrate the point of view of individual justices on the issue. For example, in *United States v. Mendenhall*, Justice Stewart stated that certain conduct "cannot, as a matter of law, amount to a seizure of that person." 446 U.S. 544, 554-55 (1980) (Stewart, J., concurring). In *INS v. Delgado*, Justice Powell stated that the determination of whether a reasonable person would think himself free to leave "turns on a difficult characterization of fact and law." 466 U.S. 210, 221 (1984) (Powell, J., concurring). However, there are other statements indicating that other justices would treat the issue as a question of fact. For example, Justice White has referred to the seizure question as a question of fact that should be decided by the district court. See *Mendenhall*, 466 U.S. at 569 (White, J., dissenting) (stating that the seizure question is "a fact-bound question . . . that is best left in the first instance to the trial court"). Justice Blackmun has referred a seizure finding as a factual finding. See *Florida v. Royer*, 460 U.S. 491, 516 n.1 (1983) (Blackmun, J., dissenting) (referring to Royer's possible belief that he was free to leave as a "finding"). Thus, in reality, the Court has not decided the issue.

In *McKines*, Chief Judge Lay criticized the Court's attempt to sort out precedent by debating whether the Supreme Court used the term "find" or "conclude." *McKines*, 933 F.2d at 1431 n.2. (Lay, C.J., dissenting). "To me, this is nothing more than semantic tilting at windmills. These are terms that judges use interchangeably in legal discussion." *Id.*

clear error because the issue is a question of fact. The Court has long recognized that the primary responsibility for making factual determinations lies with the district court, even when the process requires more than findings about historical events.¹⁴⁸ Federal Rule of Civil Procedure 52(a) provides little guidance to distinguish law from fact. Yet treating issues that are purely factual in nature as factual questions is commonplace.¹⁴⁹

The seizure determination involves a case-specific inquiry into what happened. The district court judge must decide the who, what, when, and where by resolving conflicting testimony, determining witness credibility, and then assessing the coercive effect of police conduct as a whole. This inquiry involves making a characterization based on historical facts and inferences. This characterization is nontechnical in nature and is made without any reference to the law. Factual inferences, if purely factual, are questions of fact.¹⁵⁰ Thus, the seizure determination is not a conclusion of law, but a question of fact.

2. *Constitutional Issues Do Not Amount to Legal Issues*

Clearly erroneous is the correct standard because the mere presence of constitutional issues does not authorize de novo review. In *McKines*, Judge Lay asserted that the ultimate question of whether there has been a seizure under the Constitution always has been, and always will be, a question of law.¹⁵¹ However, no clear authority ex-

148. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960).

149. See note 150.

150. Inferences drawn from the facts are reviewed for clear error. See *Inwood Laboratories, Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982) (stating that drawing inferences from the facts should be done by the trial court); *Pullman-Standard v. Swint*, 456 U.S. 273, 286-87 (1982) (holding that broad factual inferences which are determinative of a case are not questions of law); see also, *Childress*, *supra* note 22, at 143. "Even those inferences which aren't easily pegged as 'law' or 'fact' are likely to be treated as mixed questions, though often greater deference is given where it's more fact than law." *Id.* An exception exists for cases which are based on purely documentary evidence, in which case, appellate courts have a general power to draw inferences. But when courts phrase the issue as a factual inference, proper deference should be accorded the trial court. *Id.* at 144.

151. *McKines*, 933 F.2d at 1431 (Lay, C.J., dissenting). Judge Lay's exact words were: "Whether there is a seizure turns on the totality of the factual circumstances involved, but the ultimate question of whether the facts constitute an arrest or seizure under the Constitution always has been and always will be a question of law for a reviewing court." *Id.*

There is no difference between "[w]hether there is a seizure based on the totality of the factual circumstances" and the question of whether the "facts constitute an arrest or seizure under the Constitution." It is the same question. As Judge Beam pointed out, the ultimate constitutional question is whether the Fourth Amendment has been violated, not whether the facts constitute a seizure. If there has been a

ists to support Judge Lay's assertion that the seizure determination is, and always has been, a question of law. Indeed, courts disagree about how to characterize the seizure question.¹⁵² It is unlikely that the circuit courts would repeatedly debate the proper standard of review if it were as self-evident as Judge Lay asserts.

Judge Lay also used the words "ultimate" and "under the constitution."¹⁵³ Simply because a factual finding is dispositive of a constitutional issue does not mean that the finding is a legal question. Past decisions illustrate that the mere presence of constitutional issues does not mandate de novo review.¹⁵⁴ *Pullman-Standard v. Swint* specifically rejected the notion that facts are divided into ultimate and subsidiary categories.¹⁵⁵ Thus, there is no authority for labeling the seizure determination a legal question merely because it is ultimately dispositive of the seizure issue.

Moreover, the seizure issue does not fall within the limited exception carved out in *Bose*. In *Bose*,¹⁵⁶ the Supreme Court held that independent review of First Amendment actual malice findings is appropriate even though the underlying issues are essentially factual.¹⁵⁷ *Bose* offered a comprehensive rationale for the independent judgment rule asserted peculiar to the First Amendment that does not apply to Fourth Amendment seizure.¹⁵⁸ In *Bose*, the Supreme Court stated that some factual questions should be subject to de novo review because their impact on future cases is too great to en-

seizure, a finding that the Fourth Amendment has been violated depends upon whether the seizure is supported by reasonable suspicion. See *id.* at 1420 n.7. (Beam, J., dissenting).

152. Courts are struggling to label these issues. One court applied the de novo standard to statements and acts of parties that resulted in the seizure, labeling the issue as a question of law. While other courts adopting a "clearly erroneous" standard labeled the same determination a question of fact. See *United States v. Montilla*, 928 F.2d 583 (2d Cir. 1991); *United States v. Maragh*, 894 F.2d 415, 421 (D.C. Cir.), cert. denied, 111 S. Ct. 214 (1990) *United States v. Gray*, 883 F.2d 320 (4th Cir. 1989).

Other de novo courts have found the question of law to be whether the Fourth Amendment was violated. See *United States v. Campbell*, 843 F.2d 1089, 1092 (8th Cir. 1988). Yet another court found the legal conclusion to be whether the seizure was lawful. *Maragh*, 894 F.2d at 421.

In *McKines*, the court labeled the question of seizure to be a legal characterization. *McKines*, 933 F.2d at 1424 (Gibson, J., concurring specially). The dissent in *McKines* argued that the district court's determination was essentially one of fact, therefore, the proper standard of review was clearly erroneous. *Id.* at 1422 (Beam, J., dissenting).

153. *Id.* at 1431 (Lay, C.J., dissenting).

154. See *supra* note 76.

155. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 nn.14-16 (1982).

156. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

157. *Id.* at 508.

158. Monaghan, *supra* note 39, at 230.

trust them finally to the judgment of the trial court.¹⁵⁹ First Amendment libel cases are decided, not on the totality of the circumstances, but on controlling First Amendment norms. The courts examine the evidence, marshal the facts, and then apply First Amendment norms that are dispositive of the case.¹⁶⁰

On the other hand, the seizure determination is case-specific. The process involves examining the evidence in that particular case. The judge or jury does not compare the facts to controlling Fourth Amendment norms but instead makes a judgment on the facts as presented.¹⁶¹ In seizure cases, the decision that the judge or jury reaches has an impact on that criminal defendant alone. The decision does not, and properly should not, affect future seizure cases. There is no risk of a judge or jury erroneously deciding a case that will bind future cases. Thus, the reasoning of *Bose* does not apply to seizure cases.

3. District Court Is Best Suited to Determine Seizure Questions

The Supreme Court should adopt the clearly erroneous standard because the district court judge is best suited to determine whether a seizure occurred.¹⁶² The distinction between fact and law often turns on a determination that one judicial actor is better positioned than another to make the decision.¹⁶³ The judicial system allocates responsibility based on which court is best able to decide the issues. This allocation reflects the need for judicial efficiency within the system. There is no imperative that a properly fixed characterization control allocation of functions.¹⁶⁴ The real issue is allocative: which decision maker should decide the issue.¹⁶⁵

159. *Bose*, 466 U.S. at 505.

160. *Id.* at 509-10 n.28.

161. *See, e.g.*, *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), where the Court noted certain factors which might indicate a seizure:

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id.

But, as the Court suggested, these factors *might* indicate a seizure. They are factors to be considered in the totality of the circumstances. The presence of one or more of these factors does not indicate a seizure per se.

162. *See* *United States v. McKines* 933 F.2d at 1412, 1422 (8th Cir.) (en banc) (Beam, J., dissenting), *cert. denied*, 112 S. Ct. 593 (1991) (arguing that the district court is best suited to determine whether a seizure occurred).

163. *Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988); *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

164. Monaghan, *supra* note 39, at 234.

165. *Id.* at 237.

The seizure determination is a close call.¹⁶⁶ The *McKines* court was split six to four.¹⁶⁷ The Supreme Court cases were similarly split.¹⁶⁸ When the moment comes for determining whether, under the totality of the circumstances, a reasonable person would have felt she was free to leave, the district court judge is best suited for the job. She has heard the evidence, viewed the demeanor of the witnesses, and is in the best position to assess what happened. The seizure determination is based on the record as a whole, not on one or more specific articulable facts.¹⁶⁹ The issue depends on the multiplicity of relevant factual elements and their various combinations. The Supreme Court has found this justification for deference to the trial court.¹⁷⁰ Thus, primary weight in the seizure determination should be given to the district court's findings.¹⁷¹

The approach adopted by *McKines* breaks the seizure determination into a two-step process. The historical facts are established by the district court. *McKines* asserts that these facts, taken as a whole, become a question of law to be reviewed de novo.¹⁷² Simply characterizing a collection of facts as a legal issue does not force those factual findings into the "law" category.¹⁷³ Nevertheless, regardless of

166. See *McKines*, 933 F.2d at 1415 (Beam, J.) (defining Fourth Amendment seizure as difficult); *INS v. Delgado*, 466 U.S. 210, 221 (1984) (Powell, J., concurring) (stating that whether an incident resulted in a Fourth Amendment seizure to be a close one).

167. *McKines*, 933 F.2d at 1412 (Beam, J.).

168. See *Michigan v. Chesternut*, 486 U.S. 567 (1988) (unanimous Court); *INS v. Delgado*, 466 U.S. 210 (1984) (7-2 decision); *Florida v. Royer*, 460 U.S. 491 (1983) (6-3 decision); *United States v. Mendenhall*, 446 U.S. 544 (1980) (5-4 decision).

169. See generally, Cooper, *supra* note 41, at 650-51. This article justifies leaving certain issues in the trial court because trial judges are unable to make findings sufficiently detailed to communicate the full factual basis for the decision of the court of appeals. It argues that conclusions spring more from the trial judge's familiarity with the entire record rather than from any specific articulable fact. *Id.*

170. In a much quoted passage, the Supreme Court stated that the issue of whether a transfer constitutes a gift is a question of fact that should be decided by the lower court:

Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the main-springs of human conduct to the totality of the facts of each case. The non-technical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.

Commissioner v. Duberstein, 363 U.S. 278, 289 (1960).

171. In *McKines*, a magistrate made the initial determination and these findings were adopted by the district court. *McKines*, 933 F.2d at 1426 (Gibson, J., concurring specially).

172. *Id.*

173. If characterizing the facts as legal issues pushes factual questions into the law category, many areas of law are being erroneously reviewed. See, e.g., *Schneckloth v.*

the label attached to these facts, the district court is still in the best position to make the determination. There is no way for a district court to sufficiently detail its findings to communicate the full factual basis for its decision to the court of appeals.¹⁷⁴ The judge cannot spell out each portion of the testimony of each witness. The record cannot adequately reflect a witness' tone of voice or demeanor.¹⁷⁵

Moreover, sifting through the evidence to make an assessment of the facts is a departure from the appellate court's traditional role of interpreting the law.¹⁷⁶ This departure is justified when the law is technical, uncertain, needs interpretation, or includes sensitive issues of social or political policy, areas which an appellate court is particularly suited to decide.¹⁷⁷ Instead of making a searching inquiry into case-specific matters of fact, the appellate court's time is better spent developing the law.¹⁷⁸ Thus, based on allocating responsibility where it belongs, the seizure determination should be left with the district court that is charged with making factual determinations.

4. Clearly Erroneous Standard Promotes Judicial Efficiency

The clearly erroneous standard would avoid duplication of the district court's efforts by the court of appeals. The duplication of effort resulting from application of the *de novo* standard would divert a large amount of judicial resources. The potential for a favorable result in the appellate court will undoubtedly increase the rate of appeals. Increasing the number of appeals mandates a balancing of functions between judicial actors.¹⁷⁹

Moreover, the approach adopted by *McKines* will result in an extra burden on the district court judge. It is reasonable to assume that courts of appeals will insist on more elaborate findings in order to

Bustamonte, 412 U.S. 218, 248-49 (1973) (determining whether the totality of the circumstances indicates that consent is voluntary is reviewed for clear error); *Dubers-stein*, 363 U.S. at 291 (determining whether transfers amount to a gift is reviewed for clear error).

174. See Cooper, *supra* note 41, at 654. "The chore of such articulation would itself be considerable. More important, the tasks of assessing credibility and drawing inferences are not independent." *Id.*

175. Realistically, when an appellate court makes an independent seizure determination, it can only assess the totality of the *record* preserved for appeal.

176. See *supra* notes 50-59 and accompanying text.

177. See *supra* notes 50-59 and accompanying text.

178. This is especially true in light of the rule that district court opinions are not binding on other district courts, even in the same district. See Lee, *supra* note 33, at 250 n.100.

179. See Cooper, *supra* note 41, at 649. Mere reduction in the number of appeals is not in itself a virtue. *Id.* at 651. But if the judiciary cannot increase appellate capacity to the point needed, then it should adopt a standard of review that sifts out all but the extreme claims of error. See *id.* at 651-52.

exercise a more searching review. The district court judge would have to make specific findings regarding every detail of the evidentiary hearing.¹⁸⁰ Thus, for the preservation of judicial resources, the Supreme Court should adopt the clearly erroneous standard.

5. *Independent Review Does Not Ensure "More Correct" Decisions*

Clearly erroneous is the correct standard of review because there is no benefit from federal appellate courts second-guessing district court seizure determinations. Appellate courts are not charged with deciding cases as well as possible. De novo review of the seizure determination does not ensure correct, or "more correct," decisions, nor is there any guarantee that the appellate court decisions will produce greater satisfaction among the litigants.¹⁸¹

There is a false notion that the greater the number of courts that look at an issue, the greater the possibility of a "correct" decision.¹⁸² In reality, this review only adds, at a minimum, three more judicial actors who are not as familiar with the facts and who could just as likely reach the wrong result. The Supreme Court has specifically rejected the theory that findings of an appellate court are likely to be any more reliable than the findings reached by the trial judge.¹⁸³ Determining whether a person was seized requires the same process in both the district and appellate courts. Thus, duplication of the district court's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost of judicial resources.¹⁸⁴

180. See *supra* note 174-75 and accompanying text.

181. There is commentary on both sides of this proposition. Compare Paul D. Carrington, *The Power of District Judges and the Responsibility of the Courts of Appeals*, 3 GA. L. REV. 507, 527 (1969) (asserting that the tempo of work of appellate courts allows for reflection and instruction not available to trial court judges) with Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781 (1957) (asserting that appellate judges as a group are not wiser than trial judges).

182. See Monaghan, *supra* note 39, at 268.

183. In *Bose Corp. v. Consumers Union*, Justice Rehnquist argued, it is not clear to me that the "de novo" findings of appellate courts . . . are likely to be any more reliable than the findings reached by trial judges I believe that the primary result will be [the majority carved out a narrow exception for first amendment libel cases] . . . only lessened confidence in the judgments of lower courts and more entirely factbound appeals. 466 U.S. 485, 520 (1984) (Rehnquist, J., dissenting).

184. In *Anderson v. Bessemer City*, the Supreme Court held that a finding of discrimination is a finding of fact and therefore should be reviewed only for clear error. The Court observed, the "rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. . . . Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination . . ." *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985).

6. *De Novo Standard Does Not Ensure Consistent Application*

McKines recognized that uniformity in the law is desirable, but the factual nature of the seizure test makes uniformity unattainable. As the Supreme Court cases demonstrate, imprecision in determining whether a person has been seized is unavoidable since the test is purely contextual.¹⁸⁵ “Fact bound resolutions cannot be made uniform through appellate review, de novo or otherwise.”¹⁸⁶ What constitutes a restraint on one’s liberty which leads a person to conclude that he is not free to leave will vary with the police conduct involved and with the setting in which the conduct occurred.¹⁸⁷ The standard of appellate review for seizure determinations should be deferential precisely because it is so unlikely that there will be two identical cases.

Some courts strongly argue that de novo is required to ensure consistency among decisions.¹⁸⁸ The circuits adopting this argument have yet to establish just how de novo would ensure consistent decisions. An independent assessment of the facts by the appellate court does not guarantee consistency. Indeed, a primary responsibility of appellate courts is to maintain uniformity and coherence of the law. This responsibility is not triggered, however, if the only question before the court is the significance of a particular and non-recurring set of historical facts.¹⁸⁹

The courts have not developed uniform, principled rules of law for Fourth Amendment seizure determinations. Neither the district court nor appellate court can dispose of a case by making reference to a rule of law.¹⁹⁰ The Supreme Court has warned against trying to formulate rules which guide the court in disposing of a case, stating:

We do not suggest that there is a litmus-paper test for distinguish-

185. This imprecision is inherent in the *Mendenhall* test. See *McKines*, 933 F.2d at 1416 (Beam, J.) (stating that Supreme Court cases themselves are not consistent); see also Edwin Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988); Thomas K. Clancy, *The Supreme Court’s Search for a Definition of a Seizure, What Is a “Seizure” of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619 (1990).

186. *McKines*, 933 F.2d at 1422 (Beam, J., dissenting) (quoting *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2460 (1990)).

187. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

188. See, e.g., *McKines*, 933 F.2d at 1426 (Gibson, J., concurring specially) (finding *Maragh’s* reasoning compelling); *United States v. Maragh*, 894 F.2d 415, 417-18 (D.C. Cir.) (holding that seizure test is an objective legal test and that de novo ensures consistent application), *cert. denied*, 111 S. Ct. 214 (1990).

189. See *Rexnord, Inc. v. United States*, 940 F.2d 1094, 1097 (7th Cir. 1991) (“considerations which favor a de novo standard, such as the desire to create a uniform rule, are not present here since no single rule could embrace the varied fact patterns which may arise); *Mucha v. King*, 792 F.2d 602, 605-06 (7th Cir. 1986) (discussing deferential review of mixed questions).

190. *McKines*, 933 F.2d at 1419 (Beam, J.).

ing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop [T]here will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.¹⁹¹

Any rule formulated by an appellate court would be highly contextual and thus have no precedential value. It is inconceivable that a future case would contain identical facts. A future court would be left clueless.¹⁹²

The more appropriate role of the appellate court is to play a supervisory role, ensuring that proper and consistent procedures are being used throughout the circuit. The appellate court should review the decision to ensure that the district court has examined the totality of the circumstances and has considered the circumstances as a reasonable person would. This will eliminate the possibility of arbitrary decisions.

V. CONCLUSION

The time has come for the Supreme Court to grant certiorari and put this issue to rest. If the Supreme Court is to resolve the conflict in a manner consistent with the proper understanding of the appellate function, it must adopt the clearly erroneous standard for appellate review of district court seizure findings.¹⁹³ However, until it does so, the Eighth Circuit Court of Appeals is free to reconsider its position. For the reasons discussed above, it would be wise for them to do so.

Heidi M. Westby

191. *Florida v. Royer*, 460 U.S. 491, 506-07 (1983).

192. *Lee*, *supra* note 33, at 265 (posing a similar argument in the case of making a determination of discriminatory intent).

193. *Id.* at 291.