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Martha A. Paluch

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CRIMINAL PROCEDURE SURVEY

I. INTRODUCTION

In 1992, the Tenth Circuit challenged precedent in the areas of search and seizure and sentence enhancement. In an *en banc* opinion, *United States v. Abreu*,[1] the Tenth Circuit rejected the reasoning adhered to by six other circuits concerning the application of a sentence enhancement provision. In a panel decision, *United States v. Green*,[2] the Tenth Circuit reached the opposite result in applying a similar provision. In *United States v. Ward*,[3] the court refused to extend a Supreme Court ruling concerning the constitutionality of random bus searches to the setting of private train compartments.

This Survey examines the *Abreu* and *Green* opinions and the discrepancy between them. The Tenth Circuit's sentence enhancement doctrine is unclear because the two opinions cannot be reconciled. This Survey also analyzes the *Ward* opinion, which sets forth the Tenth Circuit's current search and seizure doctrine. An examination of the Tenth Circuit's independence in these areas defines current Tenth Circuit criminal procedure jurisprudence.

II. APPLICABILITY OF SENTENCE ENHANCEMENT PROVISIONS

A. *Background—United States v. Abreu*

Sentence enhancement involves the imposition of a greater sentence upon a defendant who has previously been convicted of criminal wrongdoing. It is a common feature of the federal and state criminal justice systems.[4] The Constitution permits sentence enhancement for a subsequent offense, contingent upon the validity of the prior conviction. The justifications for sentence enhancement include deterrence, incapacitation and the view that recidivists, or repeat offenders, are more culpable than first-time offenders.[5]

The sentence enhancement provision at issue in *Abreu* was 18 U.S.C. section 924(c).[6] Although described as a sentence enhancement provision in *Simpson v. United States*,[7] the Supreme Court held this statute creates an offense distinct from the underlying felony rather than merely

1. 962 F.2d 1447 (10th Cir. 1992) (*en banc*).
2. 967 F.2d 459 (10th Cir.), *cert. denied*, 113 S. Ct. 435 (1992).
3. 961 F.2d 1526 (10th Cir. 1992).
4. D. Brian King, Note, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. REV. 1373, 1373 (1989).
5. *Id.* at 1373-74.
6. 18 U.S.C. § 924(c) (1988). Congress passed § 924(c), an amendment to the Gun Control Act of 1968, on October 22, 1968. The Gun Control Act of 1968 was part of the Omnibus Crime Control and Safe Streets Act. United States v. Rawlings, 821 F.2d 1543, 1545-46 n.6 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987).
7. 435 U.S. 6, 10 (1978) (superseded by 1984 amendment to § 924(c)).

enhancing the sentence.[8] The second offense under section 924(c) is a distinct crime which carries a heavier penalty.[9]

Congress adopted this amendment following the assassinations of John and Robert Kennedy and Dr. Martin Luther King, Jr.[10] It provided an additional sentence of five years for anyone convicted of using a firearm in a crime of violence or drug trafficking offense.[11] In the event of a subsequent conviction under section 924(c), the statute provides an additional sentence of twenty years.[12] The sponsor of the amendment stated the purpose of this amendment was to persuade would-be felons to leave their guns at home.[13] Deterrence was of primary concern to the legislators. They stressed that a criminal who used a gun to commit a crime, and is convicted, will go to jail for a specific number of years. Courts did not have discretion in sentencing. For the deterrent to be effective, the criminal must know "he cannot beat the rap".[14]

In *Simpson v. United States*[15] and *Busic v. United States*,[16] the Supreme Court addressed whether Congress intended section 924(c) to apply when the predicate felony statute had its own enhancement provision. The Court held it did not; sentences could not be enhanced twice.[17] In response, Congress amended section 924(c) to clarify that it did authorize an enhanced sentence in addition to any enhancement provided by the underlying felony statute.[18]

In applying section 924(c), questions arose over the nature of the second offense required to trigger the 20-year enhancement provision. In *United States v. Rawlings*,[19] the defendant was convicted of two counts of bank robbery and of using a gun in connection with each count in

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8. *Id.* at 10.

9. Singer v. United States, 278 F. 415, 420 (3d Cir.), *cert. denied*, 258 U.S. 620 (1922).

10. *Rawlings*, 821 F.2d at 1545-46 n.6.

11. 18 U.S.C. § 924(c)(1) provides in pertinent part:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . *In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years* . . . . (emphasis added).

12. *Id.*

13. "Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time." 114 CONG. REC. 22,231 (daily ed. July 19, 1968)(statement of Rep. Poff). Representative Rogers agreed: "[A]ny person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. And if he does it a second time, there will be a stronger penalty." *Id.* at 22,237.

14. *Id.* at 22,243 (statement of Rep. Latta).

15. 435 U.S. 6 (1978).

16. 446 U.S. 398 (1980) (superseded by 1984 amendment to § 924(c)).

17. *Busic*, 446 U.S. at 404; *Simpson*, 435 U.S. at 16.

18. Congress affected this change by including within § 924(c) the parenthetical: "(including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device)." 18 U.S.C. § 924(c) (1988). *See* United States v. Lanzi, 933 F.2d 824, 826 (10th Cir. 1991).

19. 821 F.2d 1543 (11th Cir. 1987).

violation of section 924(c).[20] The district court held that the conviction of the second section 924(c) count triggered the enhanced penalty provision, regardless of the fact both counts were charged in the same indictment.[21] On appeal, Rawlings asserted that the statute required conviction and sentencing under two separate indictments before the enhanced penalty provision applied.[22]

The Eleventh Circuit, on rehearing *en banc*, relied on its independent reading to determine the statute's applicability.[23] Giving full effect to each provision of the statute, and assuming Congress used the words as they are commonly and ordinarily understood,[24] the court pointed out that the legislature chose to use the broad phrase "second or subsequent conviction."[25] Subsequent meant "following in time, order, or place," while second only meant "one more after the first."[26] The court concluded that a second conviction under section 924(c), "even though in the same indictment as his first conviction, legitimately triggers the enhancement provision."[27]

The *Rawlings* court noted that had Congress intended to narrow the provision, it could have done so explicitly.[28] The court cited the special offender statute[29] as an example. The statute defined a special offender as a person convicted of two or more offenses and imprisoned for at least one of those convictions within five years of the current offense.[30]

In contrast, in section 924(c) Congress included none of the restrictions of the special offender statute.[31] In addition, the defendant's arguments were inconsistent with the broad purpose of the provision. Congress intended to severely punish those who commit violent crimes with firearms. Prosecutors could satisfy the separate indictment requirement merely by charging offenses in separate indictments, "thereby ensuring that one of the convictions would occur later in time than the other."[32] The court concluded: "We do not think Congress intended the enhanced penalty for a repeat offender of section 924(c) to hinge on

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20. *Id.*
21. *Id.* at 1545.
22. *Id.* at 1546.
23. *Id.* at 1545.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 1546.
29. 18 U.S.C. § 3575(e) (1982) provides in pertinent part:

A defendant is a special offender for purposes of this section if— (1) the defendant has previously been convicted in courts of the United States . . . for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, *for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony,* and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment . . . . (emphasis added).

30. *Id.*
31. *Rawlings*, 821 F.2d at 1546.
32. *Id.*

the machinations of the prosecutor."[33]

Since the *Rawlings* decision, five other circuits[34] have adopted its reasoning and held that a second conviction under section 924(c), even though charged in the same indictment as the first, legitimately triggers the enhancement provision of section 924(c).[35] In *United States v. Abreu*,[36] the Tenth Circuit, on rehearing *en banc*, disagreed. Rather than phrasing the issue as whether section 924(c) required separate indictments, the court focused on whether the statute required that the offenses be separated by an intervening conviction. The court concluded that an enhanced sentence applies only when the underlying offense was committed *after* a judgment of conviction on the prior section 924(c) offense.[37]

B. *Tenth Circuit Opinion*

1. *United States v. Abreu*[38]

The prosecution charged Orestes Abreu in one indictment with drug and conspiracy offenses and four counts of using a firearm in connection with each offense in violation of section 924(c)(1).[39] Following conviction on all counts, the trial court sentenced Abreu on the drug and conspiracy charges and two of the section 924(c) charges.[40] The sentence for the second section 924(c) conviction was enhanced pursuant to the provisions of that statute.[41]

In a companion case, the prosecution charged James Thornbrugh in one indictment with three counts of bank robbery, with each robbery occurring on a separate date, and three section 924(c) counts, one for each of the alleged bank robbery offenses.[42] Thornbrugh was convicted of all the charges and received enhanced sentences for the second and third section 924(c) convictions.[43]

On appeal, both defendants questioned the propriety of their enhanced sentences under section 924(c). The Tenth Circuit ordered rehearing *en banc* to consider the lower court's interpretation of the enhancement provision of this statute.[44] In a 7-3 decision, the court found the text of the statute and legislative history to be ambiguous with

33. *Id.*
34. United States v. Bernier, 954 F.2d 818 (2d Cir.), *petition for cert. filed*, (June 29, 1992); United States v. Raynor, 939 F.2d 191 (4th Cir. 1991); United States v. Nabors, 901 F.2d 1351 (6th Cir.), *cert. denied*, 111 S. Ct. 192 (1990); United States v. Bennett, 908 F.2d 189 (7th Cir.), *cert. denied*, 111 S. Ct. 534 (1990); United States v. Foote, 898 F.2d 659 (8th Cir.), *cert. denied*, 111 S. Ct. 112 (1990).
35. *Rawlings*, 821 F.2d at 1545.
36. 962 F.2d 1447 (10th Cir. 1992).
37. *Id.* at 1453-54.
38. 962 F.2d 1447 (10th Cir. 1992).
39. *Id.* at 1448.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

respect to the intended definition of "second or subsequent conviction."[45] Hence, the court held that an enhanced sentence under section 924(c) for a second or subsequent conviction could not be imposed "unless the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense."[46] Accordingly, the court reversed the enhanced sentences and remanded the cases for resentencing.

a. *Majority Opinion*

Judge Seymour, writing for the majority, ruled that the phrase "second or subsequent conviction" was ambiguous because it was subject to more than one definition.[47] The majority found the legislative history ambiguous as well.[48] Statements made by Representatives, which referred to severe penalties for offenders who use guns and even more severe penalties for second offenders, did not compel a particular interpretation of "second or subsequent conviction."[49]

Given the ambiguity, the majority applied rules of statutory construction, specifically the rule of lenity.[50] The rule requires strict construction "to avoid and protect against unintended applications."[51] The Supreme Court in *Ladner v. United States*[52] stated that courts may not interpret statutes "so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."[53]

The majority examined other enhancement provisions for guidance.[54] Many statutes require enhancement when a second offense is committed after a prior conviction.[55] In particular, the court pointed to 21 U.S.C. section 962(b), which states, "a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of him for a felony . . . have become final."[56] The court noted the government failed to identify any federal enhancement statute that did not require a prior convic-

45. *Id.* at 1450.
46. *Id.* at 1453.
47. *Id.* at 1449-50.
48. *Id.* at 1450.
49. *Id.*
50. *Id.* at 1451.
51. *Id.* (citing Rogers v. United States, 325 F.2d 485, 487 (10th Cir. 1963), *rev'd on other grounds and remanded for resentencing*, 378 U.S. 549 (1964)).
52. 358 U.S. 169 (1958).
53. *Id.* at 178.
54. *Abreu*, 962 F.2d at 1451. In ascertaining congressional intent, the Supreme Court has indicated that reference to other statutes may be appropriate. *See, e.g.*, United States v. American Trucking Ass'ns, 310 U.S. 534, 534-44 (1940).
55. *See* 18 U.S.C. § 3575(e) (1982) (special offender statute); 21 U.S.C. §§ 841(b)(1) (commission of drug crime after prior drug conviction), 844(a) (simple possession of drugs after two or more prior convictions), 845(a) (engaging in continuing criminal enterprise after prior conviction), 859(b) (distributing drugs to minor after prior conviction), 860(b) (distributing or manufacturing drugs near a school after prior conviction), 861(c) (employing minors to violate drug laws after prior conviction) (1988 & Supp. III 1992).
56. 21 U.S.C. § 962(b) (1988).

tion before a sentence could be enhanced.[57]

The majority asserted that the government's interpretation of section 924(c) defeated the legislative purpose behind subsequent offense statutes.[58] "Reformation and retribution theories of punishment are the primary reasons for imposing greater penalties on the repeater."[59] Drafted as a deterrent, the statute made clear that a second offender, who apparently had not learned from the initial penalty, would receive more severe treatment.[60] The majority maintained that until the initial penalty has had an opportunity to effect the desired reformation, a subsequent offense statute may not be applied to that offender.[61] Therefore, as neither Abreu or Thornbrugh had the opportunity to learn from their mistakes, their sentences should not have been enhanced.

b. *Dissenting Opinion*

The dissent accused the majority of rewriting section 924(c) to include limitations not specified by Congress.[62] The dissent found the analysis employed by the other six circuits that addressed this issue persuasive.[63] The dissent argued that the plain meaning of the statute supported the conclusion that a second firearms conviction, even if charged in the same indictment, gave rise to an enhanced sentence.[64]

The dissent asserted that the majority's application of the rule of lenity was unwarranted.[65] A statute was not ambiguous "for purposes of lenity merely because it [is] possible to articulate a construction more narrow than that urged by the Government."[66] Six other circuits found the statute unambiguous.[67] The dissent pointed out that the rule of lenity is reserved "for those situations in which a reasonable doubt persists about a statute's intended scope."[68] Consequently, the majority placed premature emphasis on the rule of lenity as lenity applies only "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."[69]

Finally, the dissent echoed the concern expressed by the other circuits over inefficient prosecution. Requiring the second or subsequent conviction to be the result of a separate indictment will do nothing more than require prosecutors to charge repeat offenders in separate indict-

57. *Abreu*, 962 F.2d at 1452.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1452-53.
62. *Id.* at 1454 (Brorby, J., dissenting) (Judges Tacha and Baldock joined Judge Brorby in dissent).
63. *Id.* at 1454-55.
64. *Id.*
65. *Id.* at 1455.
66. *Id.* (citing Moskal v. United States, 111 S. Ct. 461, 465 (1990)).
67. *Id.* at 1454. *See supra* note 33 and sources cited therein.
68. *Abreu*, 962 F.2d at 1455 (citing *Moskal*, 111 S.Ct. at 465).
69. *Id.* 962 F.2d at 1455 (citing Chapman v. United States, 111 S. Ct. 1919, 1926 (1991)).

ments.[70] Accordingly, the dissent maintained that the only legitimate interpretation of section 924(c) allowed a second or subsequent conviction charged in the same indictment as the first to trigger the enhancement provisions of that statute.[71]

Surprisingly, neither the *Abreu* majority nor dissent referred to *United States v. Tisdale* [72] or *United States v. Bolton*.[73] Those cases involved the interpretation of a similar sentence enhancement provision, in which the Tenth Circuit held intervening convictions were not a prerequisite to sentence enhancement.

C. *Background*—U.S. v. Green

The sentence enhancement statute at issue in *United States v. Green* [74] was 18 U.S.C. section 924(e),[75] an amendment to the Armed Career Criminal Act (Career Criminal Act). The amendment provided that a convicted felon who possesses, receives or transports a firearm in interstate commerce may be fined up to $25,000 and shall be imprisoned not less than fifteen years.[76] Congress aimed the amendment at career criminals—for example, burglars and robbers who make up "one person crime waves."[77]

The original theory behind the amendment was that once the career criminal became a "three-time loser"—acquired three previous convictions—the only reasonable solution required permanent incarceration.[78] Subsequently, the length of the incarceration was changed to a 15-year minimum because the drafters recognized hypothetical circumstances wherein a life sentence might be extreme.[79]

The Career Criminal Act may be characterized as a recidivist statute because it imposes an increased sentence upon a repeat offender.[80] Recidivism is defined as "the reversion of an individual to criminal behavior after he or she has been convicted of a prior offense, sentenced, and (presumably) corrected."[81] The Second Circuit in *United States v. Ber-*

70. *Id.* 962 F.2d at 1455.

71. *Id.*

72. 921 F.2d 1095 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 596 (1991).

73. 905 F.2d 319 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 683 (1991).

74. 967 F.2d 459 (10th Cir.), *cert. denied*, 113 S. Ct. 435 (1992).

75. 18 U.S.C. § 924(e) (1988). The predecessor statute, 18 U.S.C. § 1202(a), became § 924(e) as a result of the Firearms Owners' Protection Act in 1986.

76. 18 U.S.C. § 924(e)(1) provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years . . . .

77. *United States v. Balascsak*, 873 F.2d 673, 681 (3d Cir. 1989).

78. *Id.* at 680.

79. *Id.*

80. *See* Jill C. Rafaloff, Note, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REVIEW 1085, 1094 (1988). Courts are split on this issue. Some characterize § 924(e) as an enhancement statute while others have held it creates a new federal offense. *Id.* at 1087 n.10.

81. King, *supra* note 4, at 1373 n.2.

nier[82] pointed to the specificity of the statute as proof that "when Congress intends to require prior convictions as a predicate for enhanced sentencing, it uses clear language to effectuate its intent."[83]

As the bill targeted "revolving door felons,"[84] the language of the statute has been read to require intervening convictions between the first and second conviction, as well as between the second and third before enhancement of the fourth conviction.[85] Legislative history supported this interpretation.[86] Despite the statute's wording and the legislative history, the Tenth Circuit, as well as six other circuits, interpreted the Career Criminal Act to require only that the multiple criminal episodes be distinct in time, not that the offenses be separated by intervening convictions.[87]

In *Abreu*, the Tenth Circuit defined a second or subsequent conviction in the enhancement statute context to mean "commission of a second offense after a prior conviction."[88] The Tenth Circuit, therefore, defined prior conviction as a conviction that is rendered prior to a subsequent offense.[89] Two months later, the Tenth Circuit, in a panel decision, handed down *United States v. Green*.[90] In *Green*, the court affirmed its holdings rendered in 1990 in *United States v. Bolton*[91] and *United States v. Tisdale*.[92] In those cases[93] the Tenth Circuit held that the Career

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82. 954 F.2d 818 (2d Cir. 1992).

83. *Id.* at 820.

84. *Balascsak*, 873 F.2d at 682.

85. *Id.*

86. A statement made by Assistant Attorney General Stephen Trott supported the reading that intervening convictions are necessary to trigger sentence enhancement.

> These are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture we should say, "That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again."

Armed Career Criminal Act: Hearing on H.R. 1627 and S.52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 64 (1984).

87. *See* United States v. Hayes, 951 F.2d 707 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1694 (1992); United States v. Tisdale, 921 F.2d 1095 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 596 (1991); United States v. Bolton, 905 F.2d 319 (10th Cir. 1990) *cert. denied*, 111 S. Ct. 683 (1991); United States v. Towne, 870 F.2d 880 (2d Cir.), *cert. denied*, 490 U.S. 1101 (1989); United States v. Herbert, 860 F.2d 620 (5th Cir. 1988), *cert. denied*, 490 U.S. 1070 (1989); United States v. Gillies, 851 F.2d 492 (1st Cir.), *cert. denied*, 488 U.S. 857 (1988); United States v. Wicks, 833 F.2d 192 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); United States v. Greene, 810 F.2d 999 (11th Cir. 1986).

88. United States v. Abreu, 962 F.2d 1447, 1451 (10th Cir. 1992).

89. *Id.* at 1453.

90. 967 F.2d 459 (10th Cir. 1992).

91. 905 F.2d 319 (10th Cir. 1990).

92. 921 F.2d 1095 (10th Cir. 1990).

93. The facts of *Bolton* and *Tisdale* are nearly identical to *Green*. Bolton was convicted of four counts of armed robbery in a single judicial proceeding. Each robbery occurred at a separate time. Bolton appealed the enhancement of his sentence for a subsequent conviction of possession of a firearm by a former felon. *Bolton*, 905 F.2d at 319. Tisdale was convicted in a single judicial proceeding of three counts of burglary. Each burglary occurred at a separate time. Tisdale appealed the enhancement of his sentence for a subsequent conviction of possession of a firearm by a former felon. *Tisdale*, 921 F.2d at 1095. In both cases, the Tenth Circuit denied the appeals and affirmed this application of § 924(e)(1). *Tisdale*, 921 F.2d at 1101; *Bolton*, 905 F.2d at 324.

Criminal Act only required that felonies be "committed on occasions different from one another,"[94] and that it did not require that the offenses be separated by intervening convictions.[95]

D. *Tenth Circuit Opinion*

1. *United States v. Green*[96]

Two months after the *Abreu* decision, a Tenth Circuit panel, which included two of the three dissenting justices of *Abreu*, decided *Green*.[97] In *Green*, the Tenth Circuit panel affirmed its prior decisions that sentence enhancement under the Career Criminal Act was proper even when the requisite "three prior convictions" were the result of a single judicial proceeding. While *Abreu* and *Green* addressed separate provisions of section 924, both involved the definition of "prior conviction" for purposes of sentence enhancement with each arriving at different conclusions.

On July 26, 1979, in one judicial proceeding, Green was convicted of three armed robberies occurring on separate occasions.[98] On August 12, 1991, Green was convicted of possessing a firearm after a prior felony conviction.[99] The government filed a notice for an enhanced penalty pursuant to the provisions of the Career Criminal Act. Green urged the district court to find that the simultaneous convictions of July 26, 1979 did not meet the requirements of the Career Criminal Act.[100] The district court rejected Green's argument and consequently enhanced Green's sentence.[101]

On appeal, Green acknowledged that the Tenth Circuit recently held that the enhancement provision of the Career Criminal Act could be triggered even if the three prior convictions were the result of a single judicial proceeding,[102] but sought reconsideration in light of *United States v. Balascsak*.[103] In *Balascsak*, the Third Circuit held 18 U.S.C. section 1202(a), the predecessor statute to the Career Criminal Act, required that the first conviction must have been rendered prior to the commission of the second crime.[104] However, the deciding vote in *Balascsak* concurred in the result, yet agreed with the dissent's analysis of section 1202(a).[105] The *Balascsak* dissent argued that Congress in-

94. *Green*, 967 F.2d at 461.
95. *Id.*
96. 967 F.2d 459 (10th Cir. 1992).
97. Justices Tacha and Baldock joined Justice Brorby in dissent in *Abreu*. *Abreu*, 962 F.2d at 1454. Justice Joseph T. Sneed, Circuit Justice for the United States Courts of Appeals for the Ninth Circuit, sitting by designation, joined in the opinion with Justices Tacha and Brorby in *Green*. *Green*, 967 F.2d at 460.
98. *Id.* at 460.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. 873 F.2d 673 (3d Cir. 1989)(en banc), *cert. denied*, 111 S. Ct. 173 (1990).
104. *Id.* at 682.
105. *Id.* at 684-85 (Becker, J., concurring).

tended section 1202(a) to apply when the convictions arose from separate criminal episodes regardless of the date of the convictions.[106] Because the majority and dissent each received six votes, the precedential authority of *Balascsak* was unclear.

The Third Circuit resolved this ambiguity in *United States v. Schoolcraft*,[107] which held that the Career Criminal Act did not require the separation of the three predicate offenses by intervening convictions, but rather that the criminal episodes be distinct in time.[108] This multiple episodes approach has been adopted by every federal court of appeals that has considered this issue.[109]

The *Green* court found the reasoning of *Schoolcraft* persuasive, in addition to the wording of the Career Criminal Act. Because the statute "only requires that the felonies be 'committed on occasions different from one another,' "[110] it was clear that it did not require that the offenses be separated by intervening convictions. Accordingly, the court found the enhancement of Green's sentence under the Career Criminal Act proper.[111] The *Green* panel did not mention its recent *Abreu* decision.

E. *Analysis*

The discrepancy between *Abreu* and *Green* warrants examination. In both cases appropriate application of enhancement provisions was at issue. The Tenth Circuit determined whether Congress drafted these statutes primarily for their deterrent effect to discourage criminals from committing multiple crimes, regardless of prior convictions, or whether the statutes solely targeted those who fail to reform after an initial conviction. If inherent in the concept of "enhancement" is the notion of "second time through the system," then no additional statutory mention of such intent is necessary, as suggested by the *Abreu* majority. Congress offered and passed section 924(c) on the same day, hence, congressional reports and committee reports do not exist.[112] Consequently, the court must resort to the "sparse pages of the floor debate"[113] to interpret legislative intent. Absence of language in these pages of opportunity to reform can hardly be conclusive. In contrast, Congress did not offer and pass the Career Criminal Act in one day. Congressional and committee reports do exist offering more insight into the drafters' intent. The legislative history behind the Career Criminal Act consistently referred to "repeat offenders," "revolving door" offenders and "inability to rehabilitate."[114]

106. *Id.* at 685 (Greenberg, J., dissenting).
107. 879 F.2d 64 (3d Cir. 1989).
108. *Id.* at 73.
109. United States v. Towne, 870 F.2d 880, 889-90 (2d Cir. 1989) (citing cases).
110. United States v. Green, 967 F.2d 459, 461 (10th Cir. 1992) (citing § 924(e)(1)).
111. *Id.* at 462.
112. United States v. Abreu, 962 F.2d 1447, 1450 (10th Cir. 1992).
113. *Id.*
114. United States v. Balascsak, 873 F.2d 673, 682 (3d Cir. 1989).

In construing statutes, words not specifically defined will be interpreted as having their ordinary, common meaning.[115] Courts are not devoid of their common sense when interpreting legislative intent. Although section 924(c) is headed "Penalties," courts describe it as an enhancement provision.[116] Webster's Dictionary defines "enhance" as to "raise," "to make greater," or to "heighten."[117] Common sense dictates that enhancement attaches to the sentence for a crime committed *after* a previous conviction for a previous crime committed at a previous time.

However, a fine line exists between a court employing its common sense and a court interjecting terms it perceives as necessary to effectuate statutes.[118] For example, the *Abreu* majority relied on the specific language of other sentence enhancement statutes to assert that if limitations were included there, so too must Congress have intended them to apply to section 924(c).[119] This logic of inferring from parts of various enhancement statutes to the whole of every enhancement statute strips the legislature of its decision-making authority. Such logic also assumes Congress acted carelessly in the drafting of section 924(c) and inadvertently left out not merely one word, but full sentences which would significantly narrow the statute's scope. While the court "should strive to interpret a statute in a way that will avoid an unconstitutional construction,"[120] the court is not given a license to "rewrite language enacted by the legislature."[121]

Therefore, the court must exercise caution in asserting its common sense. "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' "[122] Courts should not speculate, much less act, on whether Congress would have altered its stance,[123] had particular situations been anticipated, because "[i]f corrective action is needed, it is the Congress that must provide it."[124]

The divergent circuit opinions exist due to imprecise and inconsistent statutory drafting by the legislature. To assert, however, that the legislature chose words in one statute and therefore deliberately left those words out of a similar statute is to assume the same legislature drafted each statute. Congress does not refer to a lexicon of statutory language. Use of certain words is not mandatory to convey certain

115. Perrin v. United States, 444 U.S. 37, 42 (1979).

116. *Abreu*, 963 F.2d at 1448; United States v. Rawlings, 821 F.2d 1543, 1544 (11th Cir. 1987).

117. WEBSTER'S NEW COLLEGIATE DICTIONARY 375 (1981).

118. United States v. Raynor, 939 F.2d 191, 193 (4th Cir. 1991).

119. *Abreu*, 963 F.2d at 1451-52.

120. Chapman v. United States, 111 S. Ct. 1919, 1927 (1991).

121. *Id.*

122. Busic v. United States, 446 U.S. 398, 410 (1980) (citing TVA v. Hill, 437 U.S. 153, 195 (1978)).

123. *Id.* at 405.

124. *Id.*

meanings. Rather, the wording of a statute hinges on the personalties of its sponsors, purposes of the legislation, time allowed for debate, revisions and amendments. Consequently, statutes enacted to effect the same result may possess little uniformity.

Because of inept drafting, the courts of this country face the dilemma of either adhering to a strict construction approach or using their judgment and common sense. A strict construction approach risks illogical and unjust results in an effort to keep the doctrine of separation of powers intact. A common sense approach may result in the nonliteral interpretation of the language used by the legislature, thereby risking erosion of the separation of powers. Congress's failure to clearly announce its intent results in courts balancing this equation.

The pursuit of that balance engaged these circuits in their attempts to interpret the applicability of enhancement provisions. Not only do there exist opposing views between circuits as to which approach should be adopted, but within circuits as well. The *Abreu* majority employed common sense and judicial discretion while the *Abreu* dissent and the *Green* court adhered to a strict and putatively literal statutory construction approach. A better approach would require courts to enforce the laws as written and resort to a common sense interpretation only when clearly necessary, for example, when failure to do so would yield absurd or illogical results.

However, it appears the Supreme Court will not decide which of these approaches was correct. A petition for certiorari was denied in *Green* on November 2, 1992.[125] A petition for certiorari was filed in *Abreu* on July 9, 1992. The petition has not been granted or denied.[126] Rather, the Supreme Court granted certiorari in an identical case, *United States v. Deal*,[127] on due process grounds rather than based upon statutory construction, and presumably will dispose of *Abreu* upon resolution of *Deal*.[128] On October 21, 1992, the Federal Public Defender's Office filed a supplemental memorandum in hopes of consolidating *Abreu* with *Deal*.[129]

125. 113 S. Ct. 435 (1992).

126. The Supreme Court denied a petition for certiorari as to Thornbrugh's convictions. United States v. Thornbrugh, No. 92-5053, 1992 WL 171156 (U.S. Oct 5, 1992).

127. 954 F.2d 262 (5th Cir.), *cert. granted*, 113 S. Ct. (1992). Deal was charged and convicted in a single judicial proceeding of six counts of bank robbery, six violations of § 924(c) and one violation of § 922(g). *Id.* The trial court held the six separate convictions of § 924(c) triggered the enhancement provisions of that section, thereby resulting in a consecutive sentence amounting to 105 years. *Id.* The Fifth Circuit affirmed, holding that the second or subsequent conviction language provided for enhanced penalties for a crime of violence even if charged in the same indictment as the first. *Id.* at 263.

128. Telephone interview with Vicki Mandell-King, Asst. Federal Public Defender for the Districts of Colorado and Wyoming (Nov. 18, 1992).

129. *Id.* The supplemental memorandum was filed pursuant to Sup. Ct. R. 15.7, 28 U.S.C.A. § 15.7 (Supp. 1992).

III. Testing the Scope of *Bostick* as Applied to Police-Passenger Encounters on Trains

A. *Background*

Discussion concerning the constitutionality of police field interrogation — police authority to stop, question, and frisk suspicious persons who cannot be arrested — first appeared in 1960.[130] The Supreme Court issued landmark opinions on police field interrogation in *Terry v. Ohio*,[131] and *Sibron v. New York*.[132] At the time these cases were decided, the exclusionary rule[133] was the most frequently invoked remedy to control and limit police activities.[134] Once the Supreme Court applied the exclusionary rule to the states in 1961,[135] it became important to more precisely define what constituted a seizure that required probable cause.

The *Terry* Court recognized that not all interaction between police officers and citizens involved seizures. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[136] In *Terry* and its companion cases, the Supreme Court attempted to further define acceptable police practices[137] by categorizing police-citizen encounters as falling into one of three types: (1) voluntary encounters—"nonseizures," which require no evidentiary predicate at all, and therefore, do not implicate the Fourth Amendment; (2) investigative deten-

130. Frank J. Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General,* 51 J. Crim. L., Criminology & Police Science 386 (1960).

131. 392 U.S. 1 (1968).

132. 392 U.S. 40 (1968). *Sibron* was a consolidation of two cases, the other being Peters v. New York.

133. Weeks v. United States, 232 U.S. 383 (1914), *overruled by*, Elkins v. United States, 364 U.S. 206 (1960) *on other grounds.*

134. However, its function was, and still is, limited. Courts only invoke the exclusionary rule 1) if the illegally obtained evidence is needed for conviction; and 2) if an appropriate motion is made at the appropriate time. The state may indirectly use illegally obtained evidence, for example, for impeachment purposes. A major flaw of the exclusionary rule is that it is geared solely toward conviction and fails to account for the fact that police illegality is still utilized in the bargaining process. Lawrence P. Tiffany, *The Fourth Amendment and Police-Citizen Confrontations,* 60 J. Crim L., Criminology & Police Science 442, 452 (1969).

135. The Supreme Court extended the exclusionary rule to the state courts in Mapp v. Ohio, 367 U.S. 643 (1961).

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

137. Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins,* 79 J. Crim. L. & Criminology 437 (1988). *Terry* was not the first occasion the Supreme Court had to address this question. In Rios v. United States, 364 U.S. 253 (1960), the Court had to determine the legality of a seizure. Two police officers approached a cab stopped at a light driven by Rios. *Id.* at 256. The issue was whether an arrest occurred when the officers took their positions at the doors of the cab, which would have been illegal; or whether the arrest took place after one of the officers saw the defendant drop what turned out to be narcotics to the floor of the cab. *Id.* at 262. The Court remanded the case to the trial court to determine when the arrest occurred, but provided no significant guidelines, nor addressed the question of whether police officers may properly detain individuals for questioning without reasonable suspicion. *Id.* at 262. The state court avoided these issues as well, determining that the officers' actions were justified as part of routine interrogation. Rios v United States, 192 F. Supp. 888, (S.D. Cal. 1961).

tions — seizures which must be supported by reasonable suspicion, an evidentiary requirement less than probable cause; and (3) arrests, which must be supported by probable cause.[138]

Analyzing search and seizure cases with three questions in mind proves helpful. The first question asks whether the police seized the suspect, and if so, whether the seizure occurred lawfully. The second question asks whether the search occurred lawfully. The third question addresses consent. The only circumstance under which evidence obtained from an unlawful search may be admissible is if the suspect voluntarily consented to the search of his person or belongings. In order for consent to be voluntary, it must be sufficiently attenuated from any illegal detention.[139] Answers to these questions can only be derived from an examination of the totality of the circumstances of each case.

In *Terry*, a police officer observed Terry and another man, Chilton, repeatedly walking back and forth in front of a store window.[140] The officer, suspecting the men of "casing a job, a stick-up," confronted the men. The officer frisked Terry and found a gun. Defense counsel moved to suppress the weapon. In an 8-1 decision,[141] the Court affirmed the denial of the motion to suppress. The Court held the officer had reasonable grounds to support his belief that the two men acted suspiciously and that they might be armed, thereby justifying the pat-down search.[142]

The Court drew a distinction between an investigatory stop and an arrest. An arrest required probable cause to believe a crime had been committed and that the suspect committed it. An investigatory stop required "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[143] The Court also distinguished between a "frisk" and a full-blown search. The Court held an officer may frisk a suspect for dangerous weapons if the officer has evidence that reasonably lead him to believe that the suspect is armed and dangerous.[144] In contrast, a full-blown search is justified only by probable cause.

Because the officer physically seized Terry almost immediately, the Court did not need to address at what point a seizure took place.[145] The scope of *Terry* was narrow. It held only that when an officer investigates a suspicious person, the officer may frisk that person for danger-

138. *See* United States v. Cooper, 733 F.2d 1360, 1363 (10th Cir.), *cert. denied*, 467 U.S. 1255 (1984).

139. United States v. Turner, 928 F.2d 956, 958 (10th Cir.), *cert. denied*, 112 S. Ct. 230 (1991). In 1975, the Supreme Court identified the factors to consider in determining whether voluntary consent exists. A reviewing court must look at 1) the closeness in time between the illegal detention and the "consent;" 2) the existence of intervening circumstances; and 3) "the purpose and flagrancy of the official misconduct." Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

140. Terry v. Ohio, 392 U.S. 1, 5-6 (1968).

141. *Id.* (Justice Douglas dissented).

142. *Id.* at 30-31.

143. *Id.* at 21 (footnote omitted).

144. *Id.* at 30.

145. Butterfoss, *supra* note 135, at 437 n.4.

ous weapons if the officer has evidence that reasonably leads him to believe that the suspect is armed and dangerous.[146] Consequently, the *Terry* Court left undefined the precise contours of an arrest, a non-seizure and an investigatory detention.

The scope of *Sibron*[147] was equally narrow. In *Sibron*, a police officer observed defendant Sibron over an eight-hour period in conversation with people known to the officer as narcotic addicts.[148] The officer observed Sibron speaking with three more known addicts that evening inside a restaurant.[149] The officer approached him and told him to come outside. Outside, the officer said to Sibron, "You know what I am after."[150] The officer testified Sibron "mumbled something and reached into his pocket."[151] Simultaneously, the officer thrust his hand into the same pocket and discovered several glassine envelopes, which were later determined to contain heroin.[152] The trial court held the officer had probable cause to arrest Sibron.[153] Accordingly, it held that the search was properly incident to that arrest.[154] The New York Court of Appeals affirmed without opinion.[155]

The Supreme Court, in five opinions,[156] reversed Sibron's conviction. Chief Justice Warren, writing the majority, defined the frisk of Sibron as the intrusion that had to be justified as the record was unclear whether Sibron had been seized prior to the search.[157] The Court found no elements of a self-protective search and therefore, concluded that the intrusion was unconstitutional.[158]

In *Terry* and *Sibron* the Court refused to address the issue of whether the initial confrontations involved restraint. In *Terry*, the Court stated: "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation."[159] Similarly, in *Sibron* the Court stated: "We are not called upon to decide in this case whether there was a 'seizure' of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search."[160] The Court acknowledged it

146. *Terry*, 392 U.S. at 30.
147. Sibron v. New York, 392 U.S. 40 (1968).
148. *Id.* at 45.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 47.
154. *Id.*
155. *Id.*
156. Justices Brennan, White, Stewart and Marshall concurred with Chief Justice Warren's majority opinion. *Sibron*, 392 U.S. at 40. Justice Douglas, in a separate opinion, seemed to agree with the approach of the majority. *Id.* at 68. Justice Harlan reiterated the analysis he advocated in *Terry*. *Id.* at 70. Justice Fortas would have given more weight to the confession of error. *Id.* at 70. Finally, Justice Black dissented on the ground that the police action was taken in reasonable self-defense. *Id.* at 70, 79.
157. *Id.* at 60 n.20.
158. *Id.* at 66-67.
159. *Terry*, 392 U.S. at 19 n.16.
160. *Sibron*, 392 U.S. at 63.

is not necessary for a suspect to be taken to the station house before a seizure has occurred, however, it gave no guidelines for determining when a seizure has taken place, outside the undefined "show of authority."[161]

In the decade following *Terry*, courts focused on clarifying the definition of "investigatory detentions." Not until the early 1980s did the "nonseizure" category—supposed "voluntary encounters"—the focus of this analysis, receive further scrutiny.[162]

The two cases which gave rise to the test currently employed by courts to determine whether a police-citizen encounter constituted a "nonseizure" are *United States v. Mendenhall*[163] and *Florida v. Royer*.[164] In *Mendenhall*, Drug Enforcement agents believed Mendenhall's behavior in the Detroit Metropolitan Airport was characteristic of a drug trafficker. The agents approached her, identified themselves and asked to see her driver's license and airline ticket.[165] After discovering a discrepancy between the names listed on the two items and observing Mendenhall's increased nervousness, the agents asked Mendenhall to accompany them to the DEA office for further questions.[166] There, Mendenhall agreed to a search of her person and handbag despite being told she could refuse such a search. The search resulted in the discovery of heroin and the agents arrested Mendenhall.[167]

Justice Stewart, writing for the plurality, focused on whether Mendenhall had been seized when approached by the agents and asked questions.[168] In answering this question, Justice Stewart followed the view expressed in *Terry* that a person is "seized" only when his freedom of movement is restrained by means of physical force or a show of authority.[169] Thus, Justice Stewart held "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[170] Justice Stewart concluded that "nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure."[171]

Justice Powell concurred with the result, but found that a seizure based on reasonable suspicion occurred.[172] While he did not disagree with the "walk away" standard put forth by Justice Stewart, he felt it was

161. *Terry*, 392 U.S. at 19 n.16.
162. Butterfoss, *supra* note 135, at 437-38.
163. 446 U.S. 544 (1980).
164. 460 U.S. 491 (1983).
165. *Mendenhall*, 446 U.S. at 547-48.
166. *Id.* at 548.
167. *Id.* at 549.
168. *Id.* at 551-52.
169. *Id.* at 553.
170. *Id.* at 554.
171. *Id.*
172. *Id.* at 560 (Powell, J., concurring).

a close call as to whether Mendenhall was free to walk away.[173] Justice White, dissenting, assumed as well a seizure occurred, and disagreed with the standard suggested by Stewart.[174] The three differing views in the *Mendenhall* opinion created uncertainty among lower courts as to the standard for determining whether a seizure took place.[175] Three years later, the Supreme Court addressed this uncertainty in *Florida v. Royer*.[176]

In *Royer*, Justice White, writing for the four justice plurality, adhered to the "free to leave" test of *Mendenhall*.[177] Yet, the Court reached the opposite result with facts virtually identical to *Mendenhall*. Royer, like Mendenhall, fit a drug courier profile.[178] Royer produced a driver's license and airline ticket bearing different names, and became noticeably more nervous as the conversation with the government agents progressed.[179] The agents did not return Royer's license or ticket, but asked him to accompany them to a flight attendant's lounge.[180] Royer's luggage was brought to the room without Royer's consent. When requested, Royer produced a key to one suitcase and allowed the officers to pry open the other suitcase. The agents found marijuana and arrested Royer.[181]

The court ruled the search of the luggage was unlawful because at that time, Royer "as a practical matter" was under arrest[182] and probable cause did not exist to justify such an arrest.[183] Paramount to this determination was the fact the agents retained Royer's ticket and driver's license without indicating in any way he was free to depart.[184] While tenuous to hinge the different outcomes of *Mendenhall* and *Royer* on whether identification was returned, this one fact further supported the Court's "free to leave" analysis.[185]

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173. *Id.* at n.1.
174. *Id.* at 569-71 (White, J., dissenting).
175. Butterfoss, *supra* note 135, at 447.
176. 460 U.S. 491 (1983).
177. *Id.* at 503-04 n.9.
178. *Id.* at 493.
179. *Id.* at 494.
180. *Id.*
181. *Id.* at 494-95.
182. *Id.* at 501.
183. *Id.* at 507.
184. *Id.* at 503-04 n.9.
185. The next Supreme Court decision that addressed the issue of when a seizure occurs was I.N.S. v. Delgado, 466 U.S. 210 (1984). In that case, the practice of immigration officers in conducting surveys of factories in search of illegal aliens was challenged. Agents approached employees, asked questions and, in some cases, requested immigration papers. The Ninth Circuit applied the *Mendenhall* test to conclude that the entire work force had been seized because a reasonable worker "would have believed he was not free to leave." The Supreme Court reversed, citing the language of *Royer* that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." The Court felt the employees could not have possessed a reasonable fear that they were not free to continue working or move about the factory. *Delgado*, with its unusual setting of a factory, added little in the way of clarification to the murky doctrine of "nonseizures." *Id.*

In 1991, the Supreme Court in *Florida v. Bostick*[186] interpreted the *Mendenhall-Royer* "free to leave" test to include the concept of "free to terminate the encounter."[187] At issue in that case was the constitutionality of random bus searches. In an effort to curtail drug traffic, Broward County Sheriff's Department officers routinely boarded buses and, without articulable suspicion, asked passengers for permission to search their luggage.[188] Bostick, after being advised of his right to refuse, consented to such a search. After finding cocaine, the officers arrested Bostick.[189] The trial court denied his motion to suppress the cocaine. The Florida Court of Appeals affirmed, but certified a question to the Florida Supreme Court concerning the constitutionality of such random bus searches.[190]

The Florida Supreme Court, citing the *Mendenhall-Royer* test, held that a reasonable passenger would not feel free to leave the bus to avoid questioning by the police, and adopted a *per se* rule that such "working the buses" was unconstitutional.[191] The Supreme Court granted certiorari to determine whether this *per se* rule is consistent with the Fourth Amendment.

The Supreme Court held the "free to leave" analysis inapplicable to the setting of a bus because Bostick's freedom of movement was restricted not because of police conduct, but because he chose to be a passenger on a bus.[192] Consequently, the appropriate inquiry "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[193] At issue then, was whether such a police-citizen encounter on a bus constituted an investigatory detention first identified in *Terry*.

The Court recognized that a seizure does not occur merely because a police officer approaches an individual and asks a few questions. Such an encounter does not trigger Fourth Amendment protection unless it loses its consensual nature.[194] In addition, police officers may request consent to search luggage as long as they do not convey the message that compliance with their request is mandatory.[195]

The Court pointed out that the trial court did not evaluate all the circumstances surrounding the encounter to determine whether a seizure occurred, but rather based its finding solely on the fact the encounter took place on a bus.[196] The location of the encounter is one factor for consideration, but the trial court erred in making it the only

186. 111 S. Ct. 2382 (1991).
187. *Id.* at 2387.
188. *Id.* at 2384.
189. *Id.* at 2384-85.
190. *Id.* at 2385.
191. *Id.*
192. *Id.* at 2387.
193. *Id.*
194. *Id.* at 2386.
195. *Id.*
196. *Id.* at 2388.

relevant factor.[197] Accordingly, the Supreme Court remanded so the Florida court could properly evaluate the seizure question.[198]

The *Bostick* dissent took issue with the majority's authorization of police questioning of citizens without particularized suspicion, which it viewed as a violation of the core values of the Fourth Amendment.[199] Judge Marshall, speaking for the dissent, characterized such "random indiscriminate stopping and questioning of individuals"[200] as "inconvenient, intrusive, and intimidating."[201] The dissent argued if the Court allowed these types of confrontations, so too will it allow "random knocks on the doors of our citizens' homes seeking 'consent' to search for drugs."[202] The dissent agreed with the majority's test, but failed to understand how Bostick could have felt free to decline the officers' requests.[203]

The dissent argued Bostick had no reasonable alternative to cooperating with the officers.[204] Had Bostick refused to answer questions, he would have aroused the officers' suspicions. In addition, leaving the bus at an intermediate point in a long bus journey[205] and abandoning his belongings in the process was not a feasible option.[206] The dissent concluded by emphasizing police may approach passengers whom they have reason to suspect of criminal wrongdoing.[207] In addition, police may confront passengers without suspicion "so long as they took simple steps, like advising the passengers confronted of their right to decline to be questioned, to dispel the aura of coercion and intimidation that pervades such encounters."[208] As the encounter with Bostick did not fall within one of these two acceptable categories, the dissent found the encounter illegal.

B. *Tenth Circuit Opinion*

1. *United States v. Ward*[209]

a. *Background*

In *Ward,* the Albuquerque Police Department received information concerning an Amtrack train passenger, Ward. The information re-

197. *Id.* at 2389.

198. On remand, the Florida Supreme Court found that defendant's consent to search his luggage was voluntary, and affirmed the conviction. Bostick v. State, 593 So. 2d 494 (Fla. 1992).

199. *Bostick,* 111 S. Ct. at 2389 (Marshall, J., dissenting). Justices Blackmun and Stevens joined Justice Marshall in dissent. *Id.*

200. *Id.* at 2391 (quoting United States v. Lewis, 728 F. Supp. 784, 788-89 (D.D.C.), *rev'd,* 921 F.2d 1294 (D.C. Cir. 1990)).

201. *Id.* at 2390 (quoting United States v. Chandler, 744 F. Supp. 333, 335 (D.D.C. 1990)).

202. *Id.* at 2391 (quoting *Lewis,* 728 F. Supp. at 788-89).

203. *Id.*

204. *Id.* at 2392-94.

205. *Id.* at 2393.

206. *Id.* at 2393-94.

207. *Id.* at 2394.

208. *Id.* at 2394-95.

209. 961 F.2d 1526 (10th Cir. 1992).

vealed that the passenger had paid $600 in cash for a one-way ticket from Flagstaff, Arizona to Kansas City, Missouri; the call-back number given by the passenger originated in Tucson, a known drug origination point; and that the passenger reserved the largest private room on the train.[210] Detective Erekson and Agent Small met the train when it arrived in Albuquerque. The officers boarded the train and knocked on the door to the train sleeper car occupied by Ward. Ward opened the door and the detective leaned inside the compartment and asked Ward for permission to talk to him and to enter the compartment.[211] Ward granted both requests.

The detective sat down between Ward and the door. The detective questioned Ward about his luggage and identification.[212] Ward stated that his only luggage was a shoulder bag, which he allowed the detective to examine.[213] Discovering a discrepancy between the names listed on Ward's ticket and his driver's license further aroused the detective's suspicion.

While these events took place between Ward and the detective, the agent discovered that Ward had boarded the train with two suitcases. The agent informed the detective of this fact.[214] The detective asked Ward if he possessed keys to the luggage. Ward consented to a search of his pockets which uncovered a key to the luggage. Ward subsequently produced three more keys, further tying Ward to the luggage despite the fact that he subsequently disclaimed ownership of the luggage.[215] These keys opened the luggage, the search of which led to the discovery of 41 pounds of marijuana and the arrest of Ward.[216]

The trial court denied Ward's motion to suppress the marijuana. Ward entered a conditional plea of guilty to possession of narcotics and subsequently appealed the denial of his motion to suppress.[217] The Tenth Circuit reversed the denial of the motion to suppress, holding the seizure and subsequent search of Ward's luggage was unlawful.[218]

b. *Opinion of the Court*

The court began by finding the initial information the officers possessed concerning Ward consistent with the concept of innocent travel. Consequently, that information was insufficient to provide the officers with a reasonable suspicion on which to base an investigatory detention.[219] However, the court did find the officers had reasonable suspicion to detain Ward upon learning of the discrepancies concerning the

210. *Id.* at 1529.
211. *Id.* at 1530.
212. *Id.*
213. *Id.* at 1529-30.
214. *Id.* at 1530.
215. *Id.* at 1535.
216. *Id.*
217. *Id.* at 1528.
218. *Id.* at 1536.
219. *Id.* at 1529.

identification and luggage.[220] Still, the search of Ward's luggage was illegal unless it could be determined Ward voluntarily consented to the questioning and subsequent search of his luggage. The court therefore defined the issue as whether the encounter between Ward and the officers was consensual.[221]

As the *Mendenhall-Royer* "free to leave" test is inapplicable to the setting of a train,[222] the court employed the test handed down by the Supreme Court in *Bostick*: "[W]hether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter."[223] Noting the small size and frail condition of Ward,[224] the presence of two officers, with one officer seated between Ward and the door, and the fact the interrogation of Ward took place in a small roomette outside the view of other passengers, the court concluded that a reasonable person in Ward's position would have felt unable to decline the requests of the officers or terminate the encounter.[225] In addition, the officers did not make simple, general inquiries of Ward, but asked focused, potentially incriminating questions. As this form of questioning implied the investigation has focused specifically on the individual, that individual will feel less able to terminate the encounter.[226]

The court also distinguished *Bostick* from the instant case in that the officers in *Bostick* specifically advised Bostick of his right to terminate the encounter.[227] The officers gave no such advisement to Ward. Although such failure to advise is not determinative of whether a seizure took place, it should be afforded greater weight in light of the fact the encounter with Ward took place in a nonpublic setting.[228] Based on a totality of these circumstances, the court concluded Ward had been unlawfully seized at the point the officer first began asking Ward incriminating questions.[229]

Next, the court addressed the question of whether Ward voluntarily consented to a search of his pockets, which produced the first luggage key. The court pointed out that in order for the consent to be deemed voluntary, it must be sufficiently attenuated in time from the illegal detention.[230] Noting that Ward's consent to a search of his pockets occurred only minutes after the illegal seizure began, the court found no intervening circumstances which attenuated the two.[231] Accordingly, the court held Ward's consent to the search of his pockets was tainted by

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220. *Id.* at 1530.
221. *Id.*
222. *See* Florida v. Bostick, 111 S. Ct. 2382, 2387-88 (1991).
223. *Id.* at 2387.
224. At the time, Ward was 5'7, weighed 145 pounds and had recently undergone a kidney transplant. *Ward*, 961 F.2d at 1533.
225. *Id.* at 1531-33.
226. *Id.* at 1532.
227. *Id.* at 1533.
228. *Id.*
229. *Id.* at 1534.
230. *Id.*
231. *Id.*

the prior illegal seizure, rendering the marijuana the fruit of such illegal seizure.[232]

The court applied the same analysis to determine whether Ward voluntarily disclaimed ownership of the bag. Like consent to search, when abandonment is preceded by an illegal seizure, the abandonment is only valid if sufficiently attenuated from the illegal seizure.[233] As the Government failed to prove such attenuation, the court found Ward's disclaimers of ownership tainted by the illegal seizure.[234] Accordingly, the Tenth Circuit reversed the denial of Ward's motion to suppress, and remanded for consistent further proceedings.

Two months after *Ward*, the Tenth Circuit, in an unpublished opinion, decided a similar case, *United States v. Arendondo*.[235] The totality of the circumstances, however, led the Tenth Circuit to affirm Arendondo's conviction for possession of drugs, as contrasted with *Ward*. A comparison of these two cases illustrates the Tenth Circuit's commitment to deciding search and seizure cases based solely on the totality of the circumstances.

C. *Analysis*

The Supreme Court's lack of clarity in the realm of search and seizure allows the lower courts considerable leeway to decide when a seizure occurred. Whether a seizure has occurred should be determined by a realistic examination of the facts in each case. Rather than relying on the fact-specific "totality of the circumstances" test, many courts still apply the unrealistic *Mendenhall-Royer* "free to leave" test.[236] Courts appear comfortable applying a modified *Mendenhall-Royer* test to the search and seizure context.[237] However, a lack of uniformity in the "modified" versions adopted by the courts has resulted in inconsistent treatment of similar cases.

For example, encounters between police and suspected drug smugglers in airports are uniform,[238] yet determining at what point a seizure, if any, has occurred, is analyzed differently by different courts.[239] Some courts find the entire encounter illegal, as the officer lacked sufficient reasonable suspicion. Other courts find the encounter consensual,

232. *Id.* at 1535.

233. *Id.*

234. *Id.* at 1535-36.

235. No. 91-2103, 1992 U.S. App. LEXIS 14654 (10th Cir. June 17, 1992). Tenth Circuit Rule 36.3 states that unpublished opinions and orders and judgments have no precedential value and shall not be cited except for purposes of establishing the doctrines of the law of the case, res judicata or collateral estoppel.

236. Butterfoss, *supra* note 135, at 463.

237. *Id.*

238. Agents develop a suspicion of a passenger usually arriving on a flight from a source city. *Id.* at 457. The agents follow the suspect, approach, identify themselves and ask if the suspect will talk with them. Then the agents ask to see the suspect's ticket and identification. At this point the agents either ask the suspect to accompany them to an office for further questioning or ask for consent to search their luggage. If consent is given and drugs are found, the suspect is arrested. *Id.* at 457-58.

239. *Id.* at 458.

therefore, no seizure occurred. Often courts find a seizure which is justified by the requisite level of suspicion, and hence is legal.[240]

Almost all courts agree that officers merely approaching individuals, requesting to speak with them, and asking for identification does not constitute a seizure.[241] Many courts find a seizure has occurred at some point in the encounter, but hold different views as to when that seizure took place. These points vary from retention of the passenger's ticket and identification,[242] the officer informing the individual of his suspicions,[243] asking the individual a question designed to confirm or dispel suspicion,[244] the officer asking the individual to accompany him to another location,[245] requesting permission to search[246] and threatening to seek a search warrant.[247] The result of these inconsistent applications of the *Mendenhall-Royer* test is the varied treatment of essentially identical situations.

The lack of bright-line rules provided by the Supreme Court as to when a seizure has taken place results in fewer restrictions placed upon police conduct.[248] In 1969, Professor Tiffany suggested one result of *Terry's* ambiguity may be increased judicial intervention to control police practices if the relevant policing agencies do not undertake to do it themselves.[249] However, judicial intervention since *Terry* has done little to clarify this area of law. In the twenty-four years since *Terry*, the Supreme Court has handed down *Mendenhall, Royer* and *Bostick* providing the ambiguous "reasonable person," "free to leave" and "free to terminate the encounter" tests. Courts have difficulty interpreting these tests and policing agencies show increasing tendencies to exploit rather than help clarify the ambiguity. Hard to apply, difficult to define tests do little to clarify search and seizure doctrine.

Professor Butterfoss pointed out the *Mendenhall-Royer* test may not even be true to the principles of *Terry*.[250] Terry held that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[251] The *Terry* court emphasized this

240. *Id.*

241. *Id.*

242. United States v. Thompson, 712 F.2d 1356 (11th Cir. 1983) (seizure occurred when officer held license while making additional requests).

243. United States v. Hanson, 801 F.2d 757 (5th Cir. 1986) (seizure occurred when officer retained suspect's drivers license).

244. United States v. Gallego-Zapata, 630 F. Supp. 665 (D. Mass. 1986) (seizure occurred when officers identified themselves and asked defendant from where he came).

245. United States v. Lehmann, 798 F.2d 692 (4th Cir. 1986) (no seizure until agents asked defendant in airport parking lot to accompany them to F.A.A. office).

246. United States v. Gonzales, 842 F.2d 748 (5th Cir. 1988) (encounter became seizure when federal agent told suspect he was a narcotics officer and requested permission to look in suspect's bag), *overruled by*, U.S. v. Hurtado, 905 F.2d 74 (5th Cir. 1990).

247. United States v. Pirelli, 650 F. Supp. 1254 (D. Mass. 1986) (consensual encounter became seizure when officers threatened to obtain search warrant unless suspect consented to search).

248. *See* Tiffany, *supra* note 132, at 453.

249. *Id.*

250. Butterfoss, *supra* note 135, at 480.

251. *Terry*, 392 U.S. at 16.

determination can only be made "in light of the particular circumstances."[252] Justice Stewart in *Mendenhall* converted the *Terry* detention test to a "reasonable person"[253] test, placing more emphasis on that unrealistic subjective standard rather than the necessary objective standard of focusing on the particular circumstances.

Viewed in this light, it appears the Tenth Circuit in *Ward,* while it may have modified *Mendenhall-Royer,* remained true to *Terry.* In *Ward,* the court tested "the limits of *Bostick* in an encounter in a small private compartment of a train."[254] However, examination of *Ward* has shown that the fact the encounter took place on a train was but one element factored into the real questions posed by *Ward.* The first question asked if Ward was detained, and if so, whether that detention was legal. The second question asked, regardless of the legality of the detention, whether Ward voluntarily consented to the search of his pockets and luggage. As these are the principle questions addressed in every search and seizure case, *Ward,* while it may add a twist in that it occurred on a train, is no different.

In deciding whether Ward had been detained, the Tenth Circuit placed great emphasis on the fact Ward was subjected to potentially incriminating questioning, but did not base its decision on that fact alone.[255] Rather, that fact, when combined with the "totality of the circumstances"[256] gave rise to the illegal detention. That *Ward* does not stand for a *per se* rule prohibiting the asking of train passengers potentially incriminating questions is evidenced by the unpublished opinion the Tenth Circuit handed down two months after *Ward,* in *United States v. Arendondo.*[257]

In *Arendondo,* the same DEA agent involved in *Ward,* Agent Small,[258] boarded an Amtrack train in Albuquerque. Unlike the situation in *Ward,* Agent Small did not act pursuant to a tip. Agent Small's attention was drawn to Arendondo when he saw Arendondo, who did not appear handicapped, sitting in the handicapped section of the train.[259] Agent Small approached Arendondo, displayed his badge and asked to speak to him. Arendondo agreed.[260] Agent Small next asked to see

252. *Id.* at 21.

253. Butterfoss, *supra* note 135, at 480.

254. United States v. Ward, 961 F.2d 1526, 1528 (10th Cir. 1992).

255. *Id.* at 1532, 1534. In contrast, the Tenth Circuit has held that asking incriminating questions absent reasonable suspicion renders a detention illegal in the setting of routine traffic stops. In United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988), an officer stopped the defendant for not wearing a seat belt. The court ruled the officer lacked reasonable suspicion to detain and question the defendant further outside the purpose of the stop. The Tenth Circuit followed this opinion three years later in United States v. Walker, 941 F.2d 1086 (10th Cir.), *cert. denied,* 112 S. Ct. 1168 (1991).

256. *Ward,* 961 F.2d at 1534.

257. No. 91-2103, 1992 U.S. App. LEXIS 14654 (10th Cir. June 17, 1992).

258. Agent Small was involved in yet another train case in 1992. *See* United States v. Bloom, 975 F.2d 1447 (10th Cir. 1992). The Tenth Circuit did not materially distinguish *Bloom* from *Ward,* and applied *Ward* to reverse the district court's denial of the motion to suppress. *Id.*

259. *Arendondo,* 1992 U.S. App. LEXIS 14654, at *2.

260. *Id.*

Arendondo's ticket, which Arendondo produced, and Arendondo's identification, which Arendondo said he did not have. At this point Agent Small informed Arendondo he "was a DEA agent who daily boarded the train looking for people traveling alone and carrying narcotics."[261] Arendondo replied he did not have any drugs. Agent Small then asked for permission to search Arendondo's luggage "to make sure they don't contain any drugs."[262] Arendondo consented, the search uncovered drugs, and Arendondo was arrested.

The Tenth Circuit affirmed the conviction of Arendondo. The Tenth Circuit distinguished this case from *Ward* because the agents questioned Ward in "physically intimidating surroundings" as compared to the fact Arendondo was questioned in "an open public car immediately in front of an exit."[263] In addition, two officers questioned Ward while one questioned Arendondo. Moreover, the court noted physical size greatly favored Arendondo, whereas Ward was diminutive.[264]

Ward, when read in conjunction with *Arendondo*, can be viewed not so much as registering dissent to the holding of *Bostick*, but as registering dissent to the application of unrealistic tests, like *Mendenhall-Royer*. Cases cannot be decided based solely on the location of the encounter, or on what an artificial "reasonable person," who is much more assertive than the average citizen,[265] might feel. Rather, courts must base their decisions solely on the "concrete factual context of the individual case."[266] Courts must examine whether the encounter involved aggression, authoritative commands or blockage of passage.[267] Courts should look to whether the officer visibly displayed his weapons or physically intimidated or threatened the suspect.[268] Also relevant is whether the encounter took place at an unusual time or place.[269] No single factor may be dispositive of whether a seizure has occurred implicating the Fourth Amendment; rather, it depends on the totality of all the circumstances surrounding the incident.[270]

While the Supreme Court received much criticism for its imprecise tests, no alternative exists. If each case is truly to be decided on the basis of assessing the "coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isola-

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261. *Id.* at *3.

262. *Id.*

263. *Id.* at *8 n.8.

264. *Id.*

265. Butterfoss, *supra* note 135, at 439. The reality is citizens virtually never feel free to walk away when approached by a police officer. *Id.*

266. Sibron v. New York, 392 U.S. 40, 59 (1968).

267. *Cf.* Michigan v. Chesternut, 486 U.S. 567, 575 (1988) (police presence alone does not constitute seizure).

268. *Cf.* United States v. Brady, 842 F.2d 1313, 1314 (D.C. Cir. 1988) (defendant faced none of the factors typically found to intimidate persons into thinking compliance is obligatory).

269. *Id.*

270. *Chesternut*, 486 U.S. at 572.

tion,"[271] the test must be imprecise to accommodate varying facts. Search and seizure doctrine became more unclear when the Supreme Court adopted the unrealistic "reasonable person free to leave or terminate the encounter" test. In contrast, the Tenth Circuit has consistently adhered to examining the seizure "in light of the particular circumstances"[272] and in that sense, has remained true to *Terry*.

IV. Conclusion

During the survey period, the Tenth Circuit demonstrated independence in the areas of sentence enhancement and search and seizure. In *Abreu*, the Tenth Circuit rejected the reasoning adhered to by six other circuits as to the applicability of a sentence enhancement provision. However, because of the apparent inconsistency between *Abreu* and *Green*, the Tenth Circuit's sentence enhancement doctrine remains unclear. In *Ward*, the Tenth Circuit registered its dissent to the unrealistic *Mendenhall-Royer* test and reasserted the importance of deciding search and seizure cases based on the totality of the circumstances. In so doing, the Tenth Circuit refused to extend the Supreme Court's holding in *Bostick* to the setting of private train compartments. It will be interesting to see if the Supreme Court finds it necessary to harness the independence demonstrated by the Tenth Circuit in 1992.

Martha A. Paluch

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271. *Id.* at 573.
272. Terry v. Ohio, 392 U.S. 1, 21 (1968).