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Struggling to Give Meaning to the Concept of Meaningful Interference: The Eighth Circuit Announces a New Rule

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NOTES

Struggling to Give Meaning to the Concept of "Meaningful Interference": The Eighth Circuit Announces a New Rule

U.S. v. Va Lerie[1]

I. INTRODUCTION

In *United States v. Jacobsen*, the United States Supreme Court held that a Fourth Amendment seizure of property occurs "when there is some meaningful interference with an individual's possessory interests in that property."[2] Since the Supreme Court's holding in *Jacobsen*, state and federal courts have struggled to apply *Jacobsen*'s "meaningful interference" standard to cases involving property entrusted to third-party common carriers.[3] Currently, at least four separate judicial views exist on how to apply *Jacobsen*'s "meaningful interference" standard. The problem of how to apply the standard has proved particularly troublesome in the Eighth Circuit, where several of these views have consistently competed for dominance.

This Note examines *United States v. Va Lerie*, a recent Eighth Circuit case involving law enforcement interference with property entrusted to Greyhound, a third-party common carrier.[4] In *Va Lerie*, the Eighth Circuit established a new test for determining when property entrusted to third-party common carriers is seized within the meaning of the Fourth Amendment.[5] This Note argues that the Eighth Circuit's new test fails to comport with the holding of *Jacobsen*. As such, the Eighth Circuit should have adhered to a line of precedent that distinguishes between the touching of property by law

1. 424 F.3d 694 (8th Cir. 2005) (en banc).

2. 466 U.S. 109, 113 (1984).

3. This situation most commonly arises in cases where an individual entrusts a package to third party such as Federal Express or where an individual checks luggage with an airline or bussing company for transport to a specified destination. In these situations, an individual relinquishes control of the property to a third party, and in doing so, necessarily gives up a greater degree of possessory and privacy interests in the property than in the case of carry-on luggage or property directly within the control of a person.

4. *Va Lerie*, 424 F.3d at 696.

5. *Id.* at 707.

enforcement officials and a more detailed inquiry "into characteristics [of the property] that could not be observed by merely holding [it]."[6]

II. FACTS AND HOLDING

On December 23, 2002, Keith Va Lerie was traveling from Los Angeles, California to Washington, D.C. aboard a Greyhound Bus.[7] Around noon, the bus stopped at a Greyhound Bus Station in Omaha, Nebraska, where Nebraska State Patrol ("NSP") Investigator Alan Eberle began an investigation of the bus's lower luggage bins.[8] A black garment bag belonging to Va Lerie aroused Eberle's suspicions,[9] and so, Eberle ordered a fellow law enforcement officer to remove Va Lerie's bag from the bus and take it to the rear baggage terminal of the Greyhound Bus Station.[10]

After summoning Va Lerie to the bus station ticket counter, Eberle told Va Lerie that he was a law enforcement officer and explained to Va Lerie that he was not under arrest or in trouble.[11] Va Lerie agreed to speak with Eberle, who then requested that Va Lerie follow him back to the rear baggage terminal.[12] Upon reaching the rear baggage terminal, Investigator Eberle explained that he was a narcotics officer, and that his duties at the Greyhound Bus Station included watching for people who might be transporting illegal drugs.[13] Investigator Eberle then asked Va Lerie for consent to search the detained garment bag that Va Lerie had identified as belonging to him.[14] After Va Lerie gave his consent to a search of the bag, officers conducted a minute

6. *See generally* U.S. v. Gomez, 312 F.3d 920, 924 n.2 (8th Cir. 2002).

7. *Va Lerie*, 424 F.3d at 696.

8. *Id.* This investigation was conducted in conformity with Investigator Eberle's drug interdiction duties.

9. *Id.* He claimed this bag aroused his suspicions because the bag was new and had Va Lerie's name, but no phone number on it. *Id.* The bag was also missing a passenger's name tag. *Id.* These facts caused Investigator Eberle to conduct a computer check of the claim number affixed to the bag, and as a result of this check, Investigator Eberle discovered that the passenger who owned the bag paid cash on the same day of travel for a one-way ticket to Washington, D.C. *Id.*

10. *Id.* This action was taken as a preliminary step in asking for Va Lerie's permission to search the bag. Law enforcement officials removed the luggage from the bus rather than asking Va Lerie to come over the bus "due to an understanding [between] NSP and Greyhound that Greyhound does not want an excess of people in the refueling area." U.S. v. Va Lerie, No. 8:03-CR-23, 2003 WL 21953948, at *1 (D. Neb. June 10, 2003). Despite the fact that law enforcement officials removed Va Lerie's bag from the bus and took it to the rear baggage terminal, Investigator Eberle "testified the luggage 'was not in our custody[, but] was still in Greyhound's custody.'" *Va Lerie*, 424 F.3d at 697 (alteration in original).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

long search of the garment bag, which produced five vacuum sealed bags containing cocaine.[15]

Va Lerie was subsequently indicted for possession with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. § 841(a)(1)-(b)(1).[16] Prior to adjudication on the merits, however, Va Lerie moved to suppress both the physical evidence obtained from the search of his garment bag and certain statements made to NSP investigators following his arrest.[17] Additionally, at a hearing on his motion to suppress, Va Lerie argued that the movement of his bag from the lower luggage compartment of the bus to the rear baggage terminal constituted an unconstitutional seizure under the Fourth Amendment.[18]

A. Procedural Posture

At a pretrial evidentiary hearing, a magistrate judge made several recommendations to the district court regarding Va Lerie's motion to suppress.[19] As to the Fourth Amendment seizure issue, the magistrate judge concluded that the NSP's removal of Va Lerie's bag from the bus did not constitute an unreasonable seizure within the meaning of the Fourth Amendment.[20] Accordingly, the magistrate judge recommended that Va Lerie's motion to suppress be denied.[21]

Following the evidentiary hearing, Va Lerie objected to the recommendations of the magistrate judge.[22] As to the seizure issue, the district court judge concluded that "'the removal of [Va Lerie's checked luggage] and its sequestration in a room of the bus terminal constituted an unconstitutional seizure . . . because they occurred without consent, reasonable suspicion, probable cause, or a warrant.'"[23] In reaching this conclusion, the district court judge stated that the conduct of the NSP officers "substantially interfered" with Va Lerie's possessory interests in his luggage.[24]

The United States appealed the evidentiary findings of the district court judge, and a divided three-judge panel of the Eighth Circuit, with one judge

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15. *Id.*

16. *Id.*

17. *Id.* Neither the search of the bag nor the statements made by Va Lerie are the subject of this case note. As such, the findings of the magistrate judge, the district court, the Eighth Circuit panel, and the Eighth Circuit *en banc* panel with respect to those issues will not be discussed in this note.

18. *Id.*

19. *Id.* at 698.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 698-99 (alternation in original).

24. U.S. v. Va Lerie, No. 8:03-CR-23, 2003 WL 21956437, at *4 (D. Neb. June 10, 2003).

writing for the majority, one judge concurring in the result of the majority, and one judge dissenting, affirmed the findings of the district court.[25] The panel majority concluded that "Va Lerie's luggage 'was seized within the meaning of the Fourth Amendment when [Investigator] Eberle had the bag removed from the bus, taken to a room inside the rear baggage terminal, and detained while the officer endeavored to locate the bag's owner and obtain consent to search the bag.'"[26] The United States sought a rehearing by the *en banc* court.

B. Eighth Circuit Court of Appeals En Banc Decision

After granting the United States' request, the Eighth Circuit reversed the decision of the district court and adopted a three-factor test to be applied in cases involving law enforcement interference with property entrusted to third-party common carriers.[27] Under the Eighth Circuit's new test, a Fourth Amendment seizure has occurred only when an individual can show that law enforcement detention of the entrusted property does any one of the following: 1) delays a passenger's travel or significantly impacts a passenger's freedom of movement, or 2) delays timely delivery of the property, or 3) deprives the carrier of its custody of the property.[28] Ultimately, the Eighth Circuit concluded that none of these factors applied in Va Lerie's case and, as a result, held that no Fourth Amendment seizure occurred when NSP officials removed Va Lerie's bag from the Greyhound Bus.[29]

III. LEGAL BACKGROUND

A. "Search" versus "Seizure" and the Distinction between Possession and Entrustment

The Fourth Amendment of the United States Constitution provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[30] The United States Supreme Court has consistently recognized that the Search Clause of the Fourth Amendment must be distin-

25. *Va Lerie*, 424 F.3d at 699-700.

26. *Va Lerie*, 424 F.3d at 700 (alteration in original). In reaching its holding, two members of the Eight Circuit panel urged an "*en banc* court to 're-visit the issue of what constitutes a seizure in the context of a temporary removal and inspection of packages and luggage that have been sent or checked with common carriers.'" *Id.*

27. *Id.* at 707, 711.

28. *Id.* at 707.

29. *Id.* at 708-09.

30. U.S. CONST. amend. IV.

guished from the Seizure Clause.[31] As such, Fourth Amendment jurisprudence has developed upon the assumption that the Search and Seizure Clauses of the Fourth Amendment afford different safeguards against government conduct.[32] A Fourth Amendment search "'occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.'"[33] A Fourth Amendment seizure of property, by contrast, "occurs when there is some meaningful interference with an individual's possessory interests in that property."[34]

Further, various courts have distinguished Fourth Amendment seizure cases involving government conduct whereby property is directly taken out of the defendant's possession from cases involving property "received by police from some third party or . . . [property that was] delayed by a third party at police request."[35] In the former case, government conduct implicates "dual concerns": the government not only interferes with a person's possession of the property itself, but the government also impinges on a person's freedom of movement, and therefore, that person's "'liberty interest in proceeding with his itinerary.'"[36] Because of these concerns, the Supreme Court has required a showing of reasonable suspicion in cases where government officials take property directly out of the possession of its owner.[37]

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31. U.S. v. Jacobsen, 466 U.S. 109, 113 (1984).

32. *Va Lerie*, 424 F.3d at 701 (citing Segura v. U.S., 468 U.S. 796, 806 (1984)).

33. *Id.* (quoting Jacobsen, 466 U.S. at 113 (1984)).

34. *Id.* (quoting *Jacobsen*, 466 U.S. at 113 (1984)). Although the Supreme Court has routinely dealt with Fourth Amendment Search Clause cases, the Supreme Court cases dealing with the Fourth Amendment's Seizure Clause are sparse by comparison. *See generally Jacobsen*, 466 U.S. at 114 n.5 (noting that the "concept of a 'seizure' of property is not much discussed in [the Supreme Court's] cases"). Nevertheless, in *Arizona v. Hicks*, the Supreme Court specifically rejected the notion that the Fourth Amendment's protection against unreasonable seizures is "of inferior worth." Arizona v. Hicks, 480 U.S. 321, 328 (1987).

35. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.8(e), 746-59 (4th ed. 2004).

36. *Id.* at 757 (quoting U.S. v. La France, 879 F.2d 1 (1st Cir. 1989)).

37. *See, e.g.*, U.S. v. Place, 462 U.S. 696 (1983). In *Place*, the defendant, Raymond Place, was stopped by federal drug agents upon his arrival at a New York airport. *Id.* at 698. After Place refused to consent to a search of his luggage, the agents informed him that they were going to take possession of his luggage while simultaneously attempting to obtain a search warrant from a federal judge. *Id.* at 699. The agents then took Place's luggage to another New York airport where the luggage was subjected to a canine sniff test. *Id.* Although the dog reacted positively to Place's luggage, ninety minutes had passed since the time of the initial seizure. *Id.* In finding that the government conduct in question violated the Seizure Clause of the Fourth Amendment, the Supreme Court first noted that the principles of *Terry v. Ohio* allow a law enforcement officer to conduct a brief investigation in to circumstances that "lead him reasonably to believe that a traveler is carrying luggage that contains narcotics." *Id.* at 706. However, the Court noted that a "Terry-type investigative stop"

In the latter case of property entrusted to third-party common carriers, by contrast, a person necessarily gives up a great deal of control over the property, thus reducing that person's possessory interests in the property.[38] As a result, some courts have given government officials greater discretion in seizing property entrusted to third parties.[39] On occasion, these courts have even suggested that the government conduct has resulted in no seizure at all, "meaning not even a reasonable suspicion test need be met."[40]

B. Seizure of Property Entrusted to Third Parties - United States v. Jacobsen

In *United States v. Jacobsen*, the Supreme Court was confronted with the issue of what government conduct constitutes a Fourth Amendment seizure of property when that property is entrusted to third-party common carriers.[41] The case arose after employees of Federal Express, a private freight carrier, damaged a package belonging to the Jacobsens, with a fork lift while the package was being processed at the Federal Express office within the Minneapolis-St. Paul airport.[42] As a result of the damage, Federal Express employees, pursuant to a company policy regarding insurance claims, opened the package in order to examine its contents.[43] Upon doing so, the Federal Express employees found three zip-lock plastic bags containing six and a half ounces of a white powdery substance.[44] This finding caused Federal Express to notify the Drug Enforcement Agency ("DEA").[45] Before DEA agents could arrive, however, the Federal Express employees placed the plastic bags back into their original box.[46] When the DEA agents arrived, they took possession of the package, placed it on a desk, and subsequently removed the plastic bags containing the white powder.[47] A field test on the powder identified the substance in the bags as cocaine.[48]

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based on reasonable suspicion presupposes an investigation properly limited in scope. *Id.* Because the government conduct in question in *Place* involved a detention of property lasting 90 minutes, the Supreme Court concluded that "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable . . . ." *Id.* at 709-10.

38. *Id.*
39. 4 LAFAVE, *supra* note 35 at 759.
40. *Id.*
41. U.S. v. Jacobsen, 466 U.S. 109 (1984).
42. *Id.* at 111.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 112.

The Supreme Court began its analysis in *Jacobsen* by noting that a Fourth Amendment seizure of property occurs "when there is some meaningful interference with an individual's possessory interests in that property."[49] In discussing whether the conduct of DEA officials constituted a Fourth Amendment seizure on the facts in *Jacobsen*, the Supreme Court distinguished between the government conduct occurring prior to the field test and the government conduct in administering the field test.[50] As to the government conduct involved in taking possession of the package prior to conducting a field test, the Supreme Court stated that "the agents' assertion of dominion and control over the package and its contents [for their own purposes] did constitute a 'seizure.'"[51] The Court further commented that this "initial seizure" was not unreasonable because the Jacobsens' "privacy interest in the contents of the package had been largely compromised" as a result of the Federal Express employees' conduct in opening their package.[52]

As to the government conduct in administering the field test, the Supreme Court concluded that DEA agents "converted what had been only a temporary deprivation of possessory interests into a permanent one."[53] Despite finding that a Fourth Amendment seizure occurred *both before and after* the field test, the Supreme Court nevertheless held that no Fourth Amendment violation occurred in *Jacobsen* because the information obtained from the previous opening of the package by Federal Express employees gave DEA agents probable cause to believe the package contained contraband.[54]

C. Various Approaches to the Seizure of Property Entrusted to Third-Party Common Carriers

Despite *Jacobsen*'s relatively straightforward "meaningful interference" standard, various state and federal courts have developed conflicting positions

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49. *Id.* at 113.

50. *Id.* at 120-26.

51. *Id.* at 120. As is discussed in Part IV below, the *Jacobsen* Court's use of "dominion and control" language has resulted in the possibility that the Supreme Court announced two standards – "meaningful interference" and "dominion and control" – in determining whether government conduct constitutes a Fourth Amendment seizure of property. *See generally Va Lerie*, 424 F.3d 694, 702 (8th Cir. 2005) (en banc).

52. *Jacobsen*, 466 U.S. at 120-21. The Court also acknowledged that its opinion on this issue was in conformity with "[b]oth the Magistrate and the District Court [who] found that the agents took custody of the package from Federal Express after they arrived," and that "[a]lthough respondents had entrusted possession of the items to Federal Express, the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a 'seizure,' though not necessarily an unreasonable one." *Id.* at 122 n.18.

53. *Id.* at 124-25.

54. *Id.* at 120-26.

on the issue of what government conduct constitutes "meaningful interference".[55] The issue has proved particularly troublesome in the Eighth Circuit, where several conflicting judicial views on the subject have been adopted.

Only two of these judicial views, however, comport with the literal holding of *Jacobsen*. One of these views holds that, when a government agent takes possession of property entrusted to a third-party common carrier, a seizure takes place.[56] The other judicial view posits that no seizure occurs when an officer merely picks up the property, but a seizure does occur when the officer inquires "into characteristics [of the property] that could not be observed by merely holding [it]."[57] Although these two views differ slightly on

55. *See* State v. Knight, 679 N.E.2d 758, 760 (C.P. Ohio 1997) (noting a split of federal authority on the issue); *see also* State v. Ressler, 701 N.W.2d 915, 920 (N.D. 2005) (noting that there has not been universal acceptance of a test to determine when government agents seize property entrusted to third-party common carriers).

56. *See, e.g.*, U.S. v. Daniel, 982 F.2d 146, 149 n.4 (5th Cir. 1993) (per curiam) (holding that law enforcement officer seized package well before arrival of drug dog when officer "physically handled [a package] – squeezing and shaking it"). While this view literally comports with *Jacobsen*'s holding that law enforcement's assertion of dominion and control over property for their own purposes constitutes "meaningful interference," it is, ironically, a view adhered to in only a minute number of cases. *See, e.g.*, State v. Lopez, No. C5-00-161, 2000 WL 1468049 (Minn. Ct. App. Oct. 3, 2000) (holding that reasonable suspicion was required in order for police officer to pull a package off a sort line because "federal caselaw at least assumes that intercepting mail or packages involves a 'seizure.'"); State v. LaSalla, 536 So. 2d 1037, 1038 (Fla. Dist. Ct. App. 1989) (holding that law enforcement's removal of airline passengers' checked luggage from an airline conveyor belt without showing of reasonable suspicion or probable cause constituted an illegal seizure).

57. U.S. v. Gomez, 312 F.3d 920, 924 n.2 (8th Cir. 2002). This occurs, for example, when a law enforcement agent moves property so as to allow a canine to sniff it. At first blush, this later approach does not literally conform to *Jacobsen's* holding that law enforcement officer's seize a package when they take possession of it. It should be noted, however, that the *Jacobsen* Court itself was arguably unclear as to whether a seizure occurred in that case solely because officer's picked up property entrusted to a third party, or because officer's picked up property with the intention of immediately subjecting that property to a field test. If the later is true, then this later approach probably conforms to the holding of *Jacobsen*, essentially making the former approach a more restrictive variant.

Cases supporting the view articulated in *Gomez* require a showing of reasonable suspicion when an officer inquires into characteristics of the property that could not be observed by holding it. *See, e.g., id.* at 925 (analyzing "further inquiry" issue in terms of reasonable suspicion). For other Eighth Circuit cases supporting the view articulated in *Gomez*, see *infra* note 64.. For cases from other courts supporting this view, see U.S. v. Robinson, 390 F.3d 853, 870 (6th Cir. 2004) (noting "this and many other courts have found that only reasonable suspicion, and not probable cause, is necessary in order to briefly detain a package for further investigation, such as examination by a drug-sniffing dog"); U.S. v. Glover, 104 F.3d 1570, 1576 (10th Cir. 1997) (stating that "[i]n this Circuit, it is clear that '[a] temporary detention of mail for [further] investigative purposes is not an unreasonable seizure when authorities have a

what government conduct constitutes a seizure of property entrusted to third-party common carriers, both seek to recognize and validate "the minimal, yet ever-present, possessory rights an individual maintains" in the entrusted property. Additionally, they provide a "mechanism to check what would otherwise be a nearly unrestrained power of government to temporarily confiscate" the property.[58]

In addition to the two lines of authority that appear to comport with *Jacobsen*, several others that have little relationship to *Jacobsen* have also developed. One of these focuses on the contractual expectations of persons who entrust property to third-party common carriers.[59] Under this so called "contract-based theory," the issue of whether government interference with property entrusted to a third-party common carrier constitutes a seizure is

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reasonable suspicion of criminal activity'" (first alteration in original)); U.S. v. Dennis, 115 F.3d 524, 533 (7th Cir. 1997) (not discussing whether property entrusted a to third party was seized before canine sniff, but noting detention did occur when property was subjected to canine sniff and analyzing that detention in terms of reasonable suspicion); People v. Ortega, 34 P.3d 986, 990-91 (Colo. 2001) (noting "no seizure occurs when an officer merely picks up an individual's property to look at it," but holding that law enforcement's movement of a suitcase from a lower luggage bin of a Greyhound Bus to the garage in which the bus was being serviced did constitute a seizure); Virginia v. Hurley, 548 S.E.2d 266, 269 (Va. Ct. App. 2001) (failing to analyze whether a law enforcement officer's taking possession of packages from sort line at Federal Express Facility constituted seizure, but holding that officers had reasonable suspicion to conduct "on-the-spot inquiry" and subsequent drug dog sniff of package); Illinois v. McPhee, 628 N.E.2d 523, 530-31 (Ill. App. Ct. 1993) (not discussing whether an officer's initial acquisition of an envelope entrusted to a third party constituted a seizure, but holding that a showing of reasonable suspicion was required where a drug interdiction officer briefly placed the envelope in his locked police car awaiting further investigation while carrying out duties at a Federal Express facility).

58. State v. Ressler, 701 N.W.2d 915, 920 (N.D. 2005); *see also Knight*, 679 N.E.2d at 761 (holding that seizure of a package placed in the postal stream based on anything less than reasonable suspicion "would confer on law enforcement officials [the] unbridled authority that was repugnant to the Framers of our Constitution.").

59. *See* U.S. v. Ward, 144 F.3d 1024, 1031 (7th Cir. 1998). For Eighth Circuit cases supporting this view see *infra* note 67, and cases that follow. For cases outside of the Eighth Circuit supporting this view see U.S. v. Wood, 6 F. Supp. 2d 1213, 1224 (D. Kan. 1998) (holding that the only possessory interest at stake when a package is mailed is a contract-based expectancy that the package would be delivered "within some promised or reasonably expected period of time."); U.S. v. La France, 879 F.2d 1, 7 (1st Cir. 1989) (holding no seizure where delivery of package was not delayed and analyzing issue in terms of contractual expectations); State v. Theriault, No. CR. 00-63-B-S, 2001 WL 15531, at *4 (D. Me. Jan. 5, 2001) (holding that seizure of a package occurs when delivery is delayed). It should be further noted that because *Theriault* discusses with approval *United States v. Lovell* and *United States v. Gant*, discussed in note 62 below, *Theriault* could be properly placed in the "freedom of movement" camp as well.

colored "by the common carrier's contractual obligation to deliver the bag at a specified time."[60] As a result, courts following this theory hold that there is no Fourth Amendment seizure until the detention of the interfered property "delays delivery . . . beyond the contractually agreed-upon hour."[61]

A similar line of authority focuses not only on the timely delivery of property, but further examines whether the government's detention of the property would have impinged on the individual's "freedom of movement."[62] As such, when law enforcement officials briefly detain for investigation property entrusted to a third-party common carrier, a seizure will only be found if the investigation results in the frustration of the individual's freedom of movement or timely delivery of property.[63]

As the above discussion suggests, the issue of whether government conduct in interfering with property entrusted to a third-party common carrier constitutes a seizure has engendered a great deal of disagreement in various state and federal courts. The issue has likewise produced similar disagreement within the Eighth Circuit, where three of the various conflicting judicial views have been adopted in the case law.

Although the Eighth Circuit does not appear to have adopted the view that any law enforcement interference with property entrusted to third-party common carriers constitutes a seizure, numerous Eighth Circuit cases draw the distinction between law enforcement conduct involving a superficial inspection of the outside of property entrusted to a third party, and law enforcement conduct inquiring "into characteristics that could not be observed by merely holding" the property.[64] Moreover, in repeatedly adopting this

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60. *Ward*, 144 F.3d at 1031.

61. *Id.*

62. U.S. v. Lovell, 849 F.2d 910, 916 (5th Cir. 1988). For Eighth Circuit cases supporting this view see *infra* note 66, and cases that follow. For cases outside of the Eighth Circuit supporting this view, see U.S. v. Gant, 112 F.3d 239, 242 (6th Cir. 1997) (holding that there was no seizure where carry-on luggage left unattended was subjected to canine sniff, because luggage owner's travel was not interrupted); U.S. v. Johnson, 990 F.2d 1129, 1132 (9th Cir. 1993) (holding no seizure where canine sniff of checked airline luggage was completed "prior to the time the luggage would have been placed on the airplane"); U.S. v. Brown, 884 F.2d 1309, 1311 (9th Cir. 1989) (holding that a brief detention of luggage that did not interfere with airline passenger's travel or frustrated the passenger's expectation of timely delivery with respect to his luggage is no seizure at all); State v. Theriault, No. CR. 00-63-B-S, 2001 WL 15531, at *4 (D. Me. Jan. 5, 2001) (citing with approval *Lovell* and *Gant*, but then holding that seizure of a package occurs when delivery is delayed); State v. Peters, 941 P.2d 228, 232 (Ariz. 1997) (holding that brief, non-intrusive detention of checked luggage is not a seizure where detention does not "unreasonably delay the traveler or result in the traveler or his luggage missing the flight").

63. *Lovell*, 849 F.2d at 916.

64. U.S. v. Gomez, 312 F.3d 920, 924 n.2 (8th Cir. 2002). *See also* U.S. v. Morones, 355 F.3d 1108, 1111 (8th Cir. 2004) (quoting *Gomez* for the proposition that the Eighth Circuit makes such a distinction); U.S. v. Fuller, 374 F.3d 617, 621 (8th

distinction, the Eighth Circuit recognizes that persons who entrust their property to a third-party common carrier reasonably expect that their property will be handled and that the physical attributes of that property will be observed by the third-party common carrier.[65]

Despite repeatedly adopting the line of authority that distinguishes between merely touching property and inquiring into characteristics of property that require going beyond a superficial inspection of the property, the Eighth Circuit has, on other occasions, adopted both the delay in travel/freedom of movement approach,[66] as well as the "contract-based" approach.[67] In so doing, the Eighth Circuit has adopted several approaches that analytically conflict with one another. As a result, Eighth Circuit jurisprudence on the issue

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Cir. 2004) (holding that "[i]f a government investigator merely observes the outside of a package or lifts it from a conveyor belt and handles it briefly for inspection, then there is no seizure for fourth amendment purposes . . . ." but further stating that "[w]hen the government removes a package from the mail stream and takes it to another part of a mail processing facility for more thorough inspection, generally by a drug-sniffing dog, then it has conducted a stop subject to constitutional scrutiny."); U.S. v. Logan, 362 F.3d 530, 533 (8th Cir. 2004) (not addressing the handling issue, but holding that "[u]nder our existing precedent[,] it is clear this package was seized for Fourth Amendment purposes when [law enforcement] detained it and subjected it to canine sniff"); U.S. v. Walker, 324 F.3d 1032, 1036 (8th Cir. 2003) (not addressing the handling issue, but holding that "[i]t is clear under our precedent that when [law enforcement] moved the package to a separate room for canine sniff, the package was seized for Fourth Amendment purposes"); U.S. v. Terriques, 319 F.3d 1051, 1054 (8th Cir. 2003) (holding that while standard inspection of a package does not constitute a seizure, removing a package from the stream of mail while pursuing a search warrant does constitute a seizure); U.S. v. Demoss, 279 F.3d 632, 636 (8th Cir. 2002) (holding that a package was not seized when lifted by a law enforcement officer from a conveyor belt at a Federal Express facility, but that seizure did occur when the officer "moved the package away from the conveyor belt and detained the package for a canine sniff.").

65. *Gomez*, 312 F.3d at 923 (noting that it is unreasonable to expect that any package will make its way through the postal system with its characteristics unnoticed).

66. *See, e.g.*, U.S. v. Riley, 927 F.2d 1045, 1048 (8th Cir. 1991) (holding that a dog sniff of property entrusted to a third-party common carrier does not constitute a Fourth Amendment seizure where "the procedure caused no significant delay to the suspect's travel"); *see also* U.S. v. Harvey, 961 F.2d 1361, 1363-64 (8th Cir. 1992) (no seizure where law enforcement officials moved a bag from an overhead bin on bus to the floor to subject it to a canine sniff, because the appellants had "left their bag unattended, and the temporary removal of the baggage caused no delay to appellants' travel.").

67. U.S. v. Vasquez, 213 F.3d 425, 426 (8th Cir. 2000) (alluding to the "contract based" approach by citing *Ward* for the proposition that no seizure occurs until officers "delayed or otherwise interfered with the normal processing of the package."); *see also* U.S. v. Demoss, 279 F.3d 632 (8th Cir. 2002) (Hansen, J., dissenting) (arguing that the Eighth Circuit should adopt the approach taken by *Ward*).

of what government conduct constitutes a seizure of property entrusted to third parties, prior to its holding in *Va Lerie*, was in a state of disarray.

IV. THE INSTANT DECISION

A. Majority Decision

In *U.S. v. Va Lerie*, the Eighth Circuit Court of Appeals announced a three-factor test to be applied in cases presenting a question as to "whether law enforcement's interference with checked luggage [or other property entrusted to third-party common carriers] constitutes a seizure."[68] Under this newly announced test, a Fourth Amendment seizure of property entrusted to third-party common carriers occurs only when an individual can show that law enforcement detention of the entrusted property does any one of the following: 1) delays a passenger's travel or significantly impacts a passenger's freedom of movement, or 2) delays timely delivery of the property, or 3) deprives the carrier of its custody of the property.[69] If even a single one of these factors is satisfied, a Fourth Amendment seizure has occurred.[70]

The majority began its analysis in *Va Lerie* by first addressing several preliminary concerns. Specifically, the majority discussed the difficulty of reconciling Eighth Circuit jurisprudence as to the question of what government conduct "constitutes a seizure in cases involving law enforcement's interference with luggage or mailed packages," and further emphasized the need "to speak with a clear voice when discussing the scope of the Seizure Clause."[71] The majority further commented that a "consistent application of the Seizure Clause . . . is vital to the protection of civil liberties and also to law enforcement's ability to conduct itself in a constitutional manner."[72]

Preliminary issues aside, the majority turned its focus to a discussion of *United States v. Jacobsen*.[73] The majority noted the *Jacobsen* Court's holding that "a seizure of property 'occurs when there is some meaningful interfer-

68. U.S. v. Va Lerie, 424 F.3d 694, 707 (8th Cir. 2005) (en banc).

69. *Id.* As to the third factor, "depriv[ing] the carrier of its custody of the checked luggage," the Eighth Circuit went on to say that in order "[t]o test the breadth of the carrier's custodial rights, we ask whether the government's actions go beyond the scope of the passenger's reasonable expectations for how the passenger's luggage might be handled when in the carrier's custody." *Id.* at 707 n.7 (citing U.S. v. Ward, 144 F.3d 1024, 1032 (7th Cir. 1998)).

70. *Id.* at 707.

71. *Id.* at 700. At this point the majority compared the inconsistent holdings of several Eight Circuit cases, and stated that "[t]o the extent that these decisions are inconsistent with this opinion, they are no longer controlling precedent in this circuit." *Id.* at 701 n.3.

72. *Id.* at 701.

73. *Id.* at 702.

ence with an individual's possessory interests in that property.'"[74] It then detailed the facts of *Jacobsen*, underscoring the Supreme Court's conclusion that "law enforcement's exertion of dominion and control over [the] private property for its own purposes constituted a seizure in that case."[75]

Next, the majority turned its attention to the *Jacobsen* Court's apparent use of two standards – "meaningful interference" and "dominion and control" – in determining whether government conduct constituted a seizure.[76] The majority first stated its belief that *Jacobsen*'s "dominion and control" language referenced only one standard.[77] In the majority's view, the Supreme Court simply "referenced dominion and control when applying the [meaningful interference] seizure standard."[78] The majority then concluded that the single standard articulated by the *Jacobsen* Court was meant to distinguish between the "conversion . . . as opposed to the mere technical trespass to an individual's private property."[79] Thus, when the Supreme Court referenced "dominion and control," the majority argued that the *Jacobsen* Court was referring to the government conduct in converting rather than taking possession of the package involved in *Jacobsen*.[80]

Having discussed *Jacobsen*, the court next discussed a number of circuit court decisions dealing with seizure issues involving property entrusted to third-party common carriers.[81] It started this discussion with *United States v. Lovell*,[82] a Fifth Circuit case.[83] The majority highlighted the fact that the *Lovell* court premised its Fourth Amendment seizure inquiry on "freedom of movement" and "expectation of timely delivery" concerns in discussing whether a government agent's conduct in removing a passenger's checked luggage from a baggage conveyor constituted a "meaningful interference."[84]

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74. *Id.* (quoting U.S. v. Jacobsen, 466 U.S. 109, 113 (1984)).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* In making this assertion, the majority did not account for the *Jacobsen* Court's conclusion that a seizure occurred before government agents acted to convert the Jacobsens' property.

80. *Id.* at 702-03. Because the Eighth Circuit majority did "not believe *Jacobsen* enunciated separate standards for seizure cases," the majority commented that it will not concern itself "with trying to apply both standards." *Id.* at 703. As such, the majority stated that its analysis of the seizure issue in *Va Lerie* would "focus on whether the NSP's conduct constituted some meaningful interference with Va Lerie's possessory interests in his checked luggage." *Id.*

81. *Id.* at 703.

82. 849 F.2d 910 (5th Cir. 1988).

83. *Va Lerie*, 424 F.3d at 703. In *Lovell*, several border patrol agents removed an airline passenger's checked luggage from a baggage conveyor belt after noticing that the airline passenger was nervous. *Id.* The agents then compressed the sides of the passenger's bag several times, and upon doing so, smelled marijuana. *Id.*

84. *Id.*

In noting the Fifth Circuit's conclusion that no seizure occurred under the facts in *Lovell*, the majority emphasized the Fifth Circuit's assertion that "the defendant [in *Lovell*] 'had surrendered his bags to a third-party common carrier with the expectation that the carrier would transport the bags to [the defendant]'s destination for him to reclaim when he arrived.'"[85] Further, the majority emphasized the Fifth Circuit's conclusion that, because the defendant's "travel would not 'have been interfered with or his expectations with respect to his luggage frustrated,' had the agents not smelled marijuana . . . '[t]he momentary delay occasioned by the bags' removal from the conveyor belt was insufficient to constitute a meaningful interference with [the defendant]'s possessory interests in his bags.'"[86]

The court then turned its discussion to two similar cases, *United States v. Brown*[87] and *United States v. Johnson*,[88] in which the Ninth Circuit adopted the Fifth Circuit's approach in *Lovell*.[89] The majority noted that the Ninth Circuit, like the Fifth Circuit, had conceptualized the phrase "meaningful interference" in terms of "freedom of movement" and "expectation of timely delivery" concerns.[90] As a result, the majority stated that the Ninth Circuit had adopted the rule that no meaningful interference can exist where the brief detention of property has in no way interfered with a person's travel or a person's expectations with respect to the timely delivery of his luggage.[91]

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85. *Id.* (quoting *Lovell*, 849 F.2d at 916) (second alteration in original).

86. *Id.* at 703-04 (quoting *Lovell*, 849 F.2d at 916) (alterations in original).

87. 884 F.2d 1309 (9th Cir. 1989). In *Brown*, law enforcement officials detained an airline passenger's checked luggage after observing the passenger's nervous behavior while he was checking the luggage. *Va Lerie*, 424 F.3d at 704 (citing *Brown*, 884 F.2d at 1310). The defendant subsequently consented to a search of his bag, and the search produced two kilograms of cocaine. *Id.* (citing *Brown*, 884 F.2d at 1310-11).

88. 990 F.2d 1129 (9th Cir. 1993). In *Johnson*, law enforcement officials received permission from an airline to go onto the tarmac and investigate a passenger's checked luggage after becoming suspicious of that passenger. *Va Lerie*, 424 F.3d at 704 (citing *Johnson*, 990 F.2d at 1132-33). Although the airline representative "'refused to relinquish custody of the luggage'" to the law enforcement officials, the "airline representative later 'allowed the officers, with the airline representative present, to take the luggage'" to a law enforcement office inside the airport. *Id.* at 704-05 (quoting *Johnson*, 990 F.2d at 1130-31). There, a canine sniff was conducted. *Id.* at 705 (citing *Johnson*, 990 F.2d at 1132-33). When the drug dog alerted to the bag, law enforcement officials obtained a warrant, searched the bag, and found 2.9 kilograms of cocaine. *Id.* (citing *Johnson*, 990 F.2d at 1132-33).

89. *Id.* at 704.

90. *Id.*at 704-05.

91. *Id.* at 706-07.

Finally, the majority turned to a discussion of *United States v. Ward*,[92] a Seventh Circuit case.[93] In discussing *Ward*, the court noted the Seventh Circuit's analysis of the "meaningful interference" standard in terms of "contractual expectations."[94] Specifically, the Seventh Circuit stated that law enforcement interference with property entrusted to a third party would only constitute a seizure when such interference would interrupt transport of the property or interfere with the defendant's "'contractually-based expectation that he would regain possession of the bag at a particular time.'"[95]

Based on its reading of *Jacobsen*, and the decisions of the Fifth, Seventh, and Ninth circuits, the majority announced a new, three-factor test to be applied in cases involving the question of whether law enforcement's interference with property entrusted to a third party constitutes a seizure.[96] Under this new test, a Fourth Amendment seizure occurs when law enforcement's detention of the property does any one of the following: 1) delays a passenger's travel or significantly impacts a passenger's freedom of movement, or 2) delays timely delivery of the property, or 3) deprives the carrier of its custody of the property.[97]

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92. 144 F.3d 1024 (7th Cir. 1998). In *Ward*, the defendant purchased a Greyhound bus ticket for travel from Los Angeles to Indianapolis. *Id.* at 1027. Although the defendant checked a suitcase with Greyhound, he never boarded the bus. *Id.* Instead, the defendant flew to Indianapolis the next day where he intended to pick up the suitcase upon its arrival at the Greyhound bus station in Indianapolis. *Id.* Prior to the arrival of the suitcase in Indianapolis, however, DEA agents removed the defendant's suitcase from the bus during a routine stop in Springfield, Missouri,, and subjected it to a canine sniff. *Id.* at 1027-28. As a result of the canine sniff, DEA officials obtained a warrant, and upon execution of that warrant found cocaine and a gun in the defendant's checked suitcase. *Id.* at 1028. The defendant was subsequently arrested when he attempted to pick up the suitcase in Indianapolis. *Id.* at 1028.

93. *Va Lerie*, 424 F.3d at 705.

94. *Id.* at 706.

95. *Id.* (quoting *Ward*, 144 F.3d at 1033).

96. *Id.* at 706-07. Prior to announcing this test, however, the majority further discussed "a number of principles that relate to checked luggage cases." *Id.* First, the majority stated that "the Fourth Amendment's Seizure Clause prohibits the government from restraining an individual's freedom of movement." *Id.* at 706. Second, the majority noted that "a commercial bus passenger has less possessory interest in checked luggage than he has in carry-on luggage in his immediate possession." *Id.* "At a minimum," the majority commented, "the passenger's possessory interests in his checked luggage entail the right (or at least the expectation) to regain custody, i.e., reclaim immediate possession of the checked luggage at the passenger's or the luggage's destination." *Id.* Third, the majority argued that "a commercial bus passenger who checks his luggage should reasonably expect his luggage to endure a fair amount of handling – if his luggage were not handled, it would not reach its destination." *Id.*

97. *Id.* at 707. At this point, the majority commented that its test "is consistent with the holdings of other courts that have confronted seizure issues involving checked luggage." *Id. See, e.g.*, State v. Goodley, 381 So. 2d 1180, 1182 (Fla. Dist. Ct. App. 1980); U.S. v. Gant, 112 F.3d 239, 240, 242 (6th Cir. 1997)). Moreover, the

Having announced its new test, the majority then turned its analysis to the facts presented in *Va Lerie*. Starting with the first factor, the majority discussed whether the NSP's conduct in removing Va Lerie's checked luggage from the Greyhound bus delayed his travel or otherwise impacted his freedom of movement.[98] As to this first factor in its three-factor test, the majority stated that Va Lerie's travel was delayed and his freedom of movement impacted "only after the NSP searched [his] luggage and discovered a large amount of illegal drugs."[99] Because the NSP's conduct did not affect Va Lerie's freedom of movement or otherwise delay his travel prior to the search, the majority held that no seizure occurred under this first factor.[100]

Turning to the second factor, the court asked whether the NSP's brief detention of Va Lerie's luggage had any affect on its timely delivery.[101] As to this factor, the Eighth Circuit held that the NSP's detention of Va Lerie's bag "did not affect timely delivery of the luggage [because] [n]o evidence suggests [that] the luggage would not have been placed back on the bus for transport to its destination had it not been for the discovery of illegal drugs."[102] Consequently, the Eighth Circuit refused to find that a seizure of Va Lerie's bag occurred on this ground.

Finally, the majority turned to the third factor, deprivation of the carrier's custody of the checked luggage.[103] In beginning this analysis, the majority emphasized that "the breadth of the carrier's custodial rights . . . [is a function of] whether the government's actions go beyond the scope of the passenger's reasonable expectations for how the passenger's luggage might be handled when in the carrier's custody."[104] The majority, therefore, focused its third factor inquiry on Va Lerie's expectations regarding how Greyhound might handle his luggage.[105] The court then stated with respect to this third factor that "Va Lerie's possessory interests in his checked luggage certainly included an expectation that Greyhound – or others at Greyhound's request – would remove the luggage from the lower luggage compartment."[106] Because it argued that Va Lerie should have expected his bag to be moved by Greyhound or others at Greyhound's request, the majority concluded that the NSP's movement of Va Lerie's bag was consistent with Va Lerie's expecta-

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majority further stated that its holding "comports with the views expressed by many judges in this circuit." *Va Lerie*, 424 F.3d at 707-08.

98. *Id.* at 708.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 708.

tions of how his bag would be handled.[107] As such, the court held that "NSP never deprived Greyhound of its custody of Va Lerie's checked luggage."[108]

Because the Eighth Circuit majority concluded that none of the three factors articulated by the court in announcing its new test applied under the facts in *Va Lerie*, the majority held that "NSP's removal of Va Lerie's checked luggage from the bus to a room inside the terminal to seek consent to search did not constitute a . . . Fourth Amendment seizure."[109]

B. The Dissent

Writing for five members of the *en banc* court, Judge Colloton first asserted that the majority's three-factor test conflicted with the Supreme Court's decision in *United States v. Jacobsen*.[110] The dissent noted that the Supreme Court viewed *Jacobsen* as involving two Fourth Amendment seizures.[111] The first seizure occurred prior to the government agents conducting a field test on the white powdery substance found in the package, while the second occurred when government agents conducted the field test.[112] As to the initial seizure, the dissent argued that the Supreme Court was clear that "DEA agents made an initial 'seizure' of the package before conducting the field test" when those agents exerted "dominion and control over the package and its contents" for their own purposes.[113] The dissent buttressed its position by emphasizing the fact that the *Jacobsen* Court "separately analyzed the significance of the field test, concluding that . . . [the field test] 'converted what had been only a temporary deprivation of possessory interests into a permanent one.'"[114]

In addition to arguing that the *Jacobsen* Court found there to be a Fourth Amendment seizure prior to the field test, the dissent argued that its view of *Jacobsen* is "consistent with the [Supreme] Court's later observation that 'from the time of the founding to the present, the word "seizure" has meant a "taking possession,"' and that 'for most purposes at common law, the word [seizure] connoted . . . bringing [an object] within physical control.'"[115] Similarly, the dissent commented that Black's Law Dictionary defined "'custody'

107. *Id.*
108. *Id.*
109. *Id.* at 708-09.
110. *Id.* at 711 (Colloton, J., dissenting).
111. *Id.* at 712.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* (quoting California v. Hodari D., 499 U.S. 621, 624 (1991)) (omission and second alteration in original).

as 'the care and control of a thing . . . for inspection, preservation, or security,'" and that it further equated "'custody' with 'immediate possession.'"[116]

The dissent next turned to the proposition that "[u]nder the test applied by the [majority] . . . the initial seizure in *Jacobsen* would not be a seizure."[117] First, the dissent noted that the first prong of the majority's test would not be satisfied under the facts in *Jacobsen*, because "the initial seizure of the Federal Express package . . . did not delay any travel by the Jacobsens or impact their freedom of movement."[118] Second, the dissent asserted that "there is no reason to believe [that] the 'temporary deprivation' occasioned by the 'decision . . . to exert dominion and control over the package' delayed the delivery of the Jacobsens' package."[119] The dissent concluded that the *Jacobsen* "Court in no way relied on potential delay in announcing its conclusion."[120] Finally, the dissent posited that if "law enforcement's physical possession and control of Va Lerie's luggage . . . did not temporarily deprive Greyhound of its custody of the luggage, then neither did the DEA's possession of the Federal Express package in *Jacobsen* deprive the courier of its custody of the package."[121]

The dissent concluded by pointing out that "[t]he Supreme Court did not regard the initial seizure in Jacobsen as a close question [because] [t]he DEA's possession and control of the package '*clearly* constituted a seizure.'"[122] Thus, "[a]bsent a revision of doctrine by the Supreme Court," the dissent argued that NSP investigators seized Va Lerie's bag.[123]

V. COMMENT

In *United States v. Va Lerie*, the Eighth Circuit held that a Fourth Amendment seizure of property entrusted to third-party common carriers occurs where law enforcement detention of the property does any one of the following: 1) delays a passenger's travel or impacts a passenger's freedom of movement, or 2) delays timely delivery of the property, or 3) deprives the carrier of its custody of the property.[124] In so doing, the Eighth Circuit erroneously distinguished *Jacobsen*, adopting a test that conflicts with that case. The Eighth Circuit would have been better served by adopting *Jacobsen*'s view of the Fourth Amendment, which protects "what would otherwise be a

116. *Id.* at 713 n.12 (quoting BLACK'S LAW DICTIONARY 390 (7th ed. 1999)) (omission in original).
117. *Id.* at 713.
118. *Id.*
119. *Id.* (omission in original).
120. *Id.*
121. *Id.*
122. *Id.* at 715.
123. *Id.*
124. *Id.* at 707 (majority opinion).

nearly unrestrained power of government to temporarily confiscate" property entrusted to third parties.[125]

A. The Eighth Circuit's Approach Conflicts with Jacobsen

In *Jacobsen*, the Supreme Court distinguished between situations in which the government takes possession of a package and situations where the government performs a field test on the package's contents.[126] Nevertheless, the Supreme Court clearly stated that when the government takes possession of a package, the government "seizes" the package.[127] Under *Va Lerie*'s three-factor test, however, the government conduct in *Jacobsen*, found to be a seizure by the Supreme Court, would be no seizure at all.

Because *Jacobsen* involved a package entrusted to Federal Express, there were no freedom of movement or passenger delay concerns involved in the case. As such, the facts in *Jacobsen* do not satisfy the first factor of the *Va Lerie* test.[128]

Additionally, given the fact that law enforcement interference with the Jacobsens' package did not delay timely delivery of the package, no seizure would have occurred in *Jacobsen* under the second factor of *Va Lerie*'s test.[129] As the *Va Lerie* dissent correctly points out, the facts in *Jacobsen* indicate that law enforcement investigation of the Jacobsens' package, "including further investigation beyond the initial seizure," lasted for only a short period of time before the "the package was 'rewrapped and Federal Express was directed to deliver the package to the addressee shown on the label.'"[130]

Finally, in *Jacobsen*, the initial conduct of law enforcement officers, which consisted of nothing more than taking possession of the Jacobsens' package and placing that package on a desk in the Federal Express office, would not satisfy *Va Lerie*'s third factor.[131] Because of the majority's holding that law enforcement never deprived Greyhound of custody of Va Lerie's bag, even though law enforcement personnel took possession of that bag and removed it to a rear baggage terminal, it is difficult to believe that the conduct in *Jacobsen* would receive dissimilar treatment under the majority's approach. If law enforcement did not deprive Greyhound of custody under the more extreme facts in *Va Lerie*, then law enforcement definitely did not deprive Federal Express of its custody of the package involved in *Jacobsen*. As such, applying the majority's third factor, no seizure occurred in *Jacobsen*.

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125. State v. Ressler, 701 N.W.2d 915, 920 (N.D. 2005).
126. *See generally* U.S. v. Jacobsen, 466 U.S. 109, 120-26 (1984).
127. *Id.* at 120.
128. *Va Lerie*, 424 F.3d at 706.
129. *Id.*
130. *Id.* at 713 (Colloton, J., dissenting) (citing *Jacobsen*, 466 U.S. at 111-12).
131. *Jacobsen*, 466 U.S. at 111.

Despite the majority's attempt to distinguish *Jacobsen* on the ground that the law enforcement conduct in that case involved the conversion of the Jacobsens' property, the court's test does not account for the *Jacobsen* Court's finding that a Fourth Amendment seizure occurred when law enforcement took possession of the Jacobsens' package and placed that package on a desk in a Federal Express office.[132] Given that the test articulated by the Eighth Circuit majority in *Va Lerie* conflicts with precedent of the United States Supreme Court, that test should never have been adopted.

B. The Approach the Eighth Circuit Should have Adopted

The *Va Lerie* majority would have been better served adhering to the long line of precedent in the Eighth Circuit that distinguishes between the mere touching of property by law enforcement officials and a more detailed "inquiry into characteristics [of the property] that could not be observed by merely holding [it]."[133] This line of precedent comports with the Supreme Court's holding in *Jacobsen* and also strikes the proper balance between law enforcement and privacy interests. As it stands, *Va Lerie*'s test fails to comport with the Supreme Court's decision in *Jacobsen*, and further gives law enforcement officers a free pass to do as they please.

Although a literal reading of *Jacobsen* suggests that a Fourth Amendment seizure of property entrusted to third-party common carriers occurs when a law enforcement officer takes possession of such property, the Supreme Court did leave open the possibility for distinguishing *Jacobsen*.[134] As previously noted, the *Jacobsen* Court was unclear as to whether a seizure occurred in that case solely because law enforcement officers picked up property entrusted to third-party common carriers, or because the officers picked up property with the intention of immediately subjecting that property to a field test.[135] As the Eighth Circuit stated in *United States. v. Gomez*, *Jacobsen* can be read as holding that "there was no seizure until the respective officers exerted dominion and control over the packages *by deciding* to go beyond a superficial inspection of the exterior of the packages and to detain the packages for further inquiry into characteristics that could not be observed by merely holding the package."[136] Thus, under the *Gomez* reading of *Jacobsen*, the Supreme Court did not find an initial seizure of the Jacobsens' package solely because an officer picked up the package, but instead, because the conduct of picking the package up was accompanied by the intent to detain the

132. *See id.* at 120.
133. U.S. v. Gomez, 312 F.3d 920, 924 n.2 (8th Cir. 2002).
134. *See generally Jacobsen*, 466 U.S. at 120.
135. *See supra* note 57.
136. *Gomez*, 312 F.3d at 924 n.2 (emphasis added).

package for "inquiry into characteristics that could not be observed by merely holding the package."[137]

The *Gomez* reading of *Jacobsen* essentially attempts to strike a balance between law enforcement officers and citizens. By allowing officers to pick up property entrusted to third-party common carriers, *Gomez* allows police to inquire into characteristics of the package that might lead to a finding of reasonable suspicion, which in turn would allow an officer to conduct a canine sniff of the property to confirm or dispel those suspicions. At the same time, *Gomez* provides an important check against "what would otherwise be a nearly unrestrained power of government to temporarily confiscate" property entrusted to third-party common carriers.[138] As the Eighth Circuit's approach currently stands, however, law enforcement officers have been given a free pass to do as they please.

VI. CONCLUSION

In *United States v. Va Lerie*, the Eighth Circuit adopted a new test for determining when law enforcement interference with property entrusted to third-party common carriers constitutes a Fourth Amendment seizure.[139] Under this test, the law enforcement conduct that the United States Supreme Court clearly concluded to be an "initial seizure" in *Jacobsen*, would be no seizure at all. Because the Eighth Circuit's test fails to comport with Supreme Court precedent, it should not have been adopted. In dealing with third-party common carriers, the Eighth Circuit's decision thus fails to provide the kind of check against over-invasive government conduct the Fourth Amendment is designed to protect.

JOSHUA C. DEVINE

137. *Id.*
138. State v. Ressler, 701 N.W.2d 915, 920 (N.D. 2005).
139. U.S. v. Va Lerie, 424 F.3d 694, 707 (8th Cir. 2005) (en banc).