

CASE COMMENTS

Criminal Procedure—Tenth Circuit Authorizes Investigatory Stops Based on Past Misdemeanor Offenses—*United States v. Moran*, 503 F.3d 1135 (10th Cir. 2007)

The Fourth Amendment to the United States Constitution affords individuals the right to be free from unreasonable searches and seizures.¹ The United States Supreme Court recognizes that certain seizures, such as investigatory stops conducted by police officers, comport with the protections guaranteed by the Fourth Amendment.² In *United States v. Moran*,³ the United States Court of Appeals for the Tenth Circuit considered whether investigatory stops based on reasonable suspicion of a completed misdemeanor are constitutionally permissible.⁴ The Tenth Circuit held that the investigatory stop based on the commission of a past misdemeanor was reasonable in light of the strong governmental interest of “solving crimes and bringing offenders to justice” and the continuing threat to public safety posed by the unique factual circumstances presented in the case.⁵ The court, however, declined to make a blanket endorsement of all investigatory stops based on past misdemeanors.⁶

On the afternoon of January 8, 2005, a resident of Mayhill, New Mexico, called the police to report that the defendant, David Moran, had been trespassing on her private property for the second time that day.⁷ When

1. U.S. CONST. amend. IV (protecting freedom of individuals as part of Bill of Rights). The Fourth Amendment provides in relevant part, “[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, and no Warrants shall issue, but upon probable cause.” *Id.*

2. *Terry v. Ohio*, 392 U.S. 1, 31 (1968) (declaring investigatory stops do not violate Fourth Amendment). The Court in *Terry* held that brief investigatory stops by police are permissible if the stop is based on reasonable suspicion of criminal activity. *Id.* at 30-31.

3. 503 F.3d 1135 (10th Cir. 2007).

4. *Id.* at 1141 (addressing legality of stop based on past misdemeanor crime). Under New Mexico law, criminal trespass is a misdemeanor. N.M. STAT. § 30-14-1(A) (2006). Criminal trespass “consists of knowingly entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land.” *Id.*

5. 503 F.3d at 1141-42 (holding stop reasonable under facts of case).

6. *Id.* (declining to declare all stops based on misdemeanors reasonable). See also *Current Circuit Splits*, 4 SETON HALL CIR. REV. 129, 144 (2007) (stressing *Moran* holding limited to specific facts of case); *Investigatory Stop*, 24 No. 21 W. CRIM. L. NEWS 31 (2007) (concluding decision in *Moran* based on specific circumstances of case).

7. 503 F.3d at 1138 (outlining circumstances leading to Moran’s arrest). The property owner called the police on two separate occasions that day, once at 11:49 A.M. and once at 4:45 P.M., to complain of Moran trespassing on her property. *Id.* The owner’s property bordered public land commonly used for hunting, and crossing private property was the most convenient way to access the national forest. *Id.*

officers arrived on the scene to investigate the trespass, they noticed a black SUV parked nearby.⁸ One of the officers knew from past personal experience that Moran usually drove two vehicles, one of which was a black SUV.⁹ When the officers saw the SUV drive away a few minutes later, they followed the SUV for a short distance before signaling for the driver to stop.¹⁰ When the officer approached the vehicle on foot, he noticed a rifle on the backseat.¹¹ After requesting permission from Moran to search the vehicle, the officer determined that the rifle was loaded and eventually arrested Moran pursuant to an unrelated warrant.¹²

A jury convicted Moran of being a felon in possession of a firearm.¹³ On appeal, Moran argued that the district court should have suppressed all physical evidence obtained from the search of his vehicle on the grounds that the stop was unlawful.¹⁴ Moran argued that police may only stop an individual for suspected past criminal activity when that crime is a felony, not a misdemeanor.¹⁵ The Tenth Circuit rejected Moran's appeal, reasoning that the limited intrusion imposed by the investigatory stop was warranted based on the ongoing threat to public safety and the government's strong interest in solving the crime.¹⁶

The Fourth Amendment to the United States Constitution protects individuals' fundamental rights by prohibiting the government from conducting

8. *Id.* at 1138 (noting officer who responded to each complaint of trespass). One local police officer responded to the first complaint and spoke with the property owner, but did not see Moran and left. *Id.* The same officer responded to the second call, along with the chief of police and an officer from the New Mexico Department of Game and Fish. *Id.* at 1138 n.2-3. Trespass complaints related to hunting are within the purview of Game and Fish Department's authority. *Id.* at 1138.

9. *Id.* (indicating officer had personal knowledge of vehicles Moran usually drove).

10. *Id.* at 1139 (describing events leading to traffic stop). A neighboring landowner told the officers that he gave Moran permission to cross his land that day, only after Moran had threatened to kill all of the deer behind his property if he refused. *Id.* One of the officers stopped the black SUV approximately one-quarter mile down the road. *Id.* The SUV belonged to Moran's girlfriend, but the officer had personal knowledge that Moran often drove it. *Id.*

11. 503 F.3d at 1139 (noting officer observed rifle when checking backseat for passengers). As the officer approached the vehicle he shone his flashlight through the windows and noticed "the butt of a rifle stock sticking out of an unzipped rifle case in the backseat." *Id.*

12. *Id.* (detailing circumstances of investigatory stop). Upon receiving permission from Moran to look inside the SUV, the officer removed the rifle. *Id.*

13. *See id.* at 1139 (detailing grand jury indictment prior to jury conviction). The jury convicted Moran of violating 18 U.S.C. § 922(g)(1), prohibiting convicted felons from shipping, transporting, or possessing firearms. 18 U.S.C. § 922(g)(1) (2006). Moran was sentenced to thirty-seven months in prison followed by two years of supervised release. Brief of Defendant-Appellant at 1, *United States v. Moran*, 503 F.3d 1135 (10th Cir. 2007) (No. 06-2175), 2006 WL 3293805 (providing background facts for appeal).

14. 503 F.3d at 1140 (addressing Moran's claims on appeal). Additionally, Moran argued that the officers did not have reasonable suspicion that he was in fact driving the SUV, thus making the stop unlawful. *Id.* The court, however, quickly dismissed this claim, indicating that the reliability of the complaint, coupled with the officer's personal knowledge of what vehicles Moran usually drove, was more than sufficient for the officer reasonably to believe Moran was driving the SUV. *Id.* at 1140-41.

15. *Id.* at 1141 (articulating Moran's specific basis for claiming stop unlawful).

16. *Id.* at 1143 (determining reasonableness of stop based on suspicion of trespass).

unreasonable searches and seizures.¹⁷ In *Terry v. Ohio*,¹⁸ the Supreme Court ruled that, in limited situations, police officers may briefly stop individuals to prevent future crimes without violating the Fourth Amendment.¹⁹ Later dubbed “*Terry* stops,” these brief investigatory stops permit officers to detain individuals and conduct a limited search based on a reasonable belief that criminal activity is afoot.²⁰ Officers making investigatory stops must have reasonable suspicion of criminal activity—a less demanding standard than probable cause, which is required for full searches and arrests.²¹ At a suppression hearing, courts consider the “totality of the circumstances” in determining the reasonableness of the officer’s belief.²² Furthermore, to justify a search, officers may rely on rational inferences based on specific and

17. U.S. CONST. amend. IV (providing right of individuals to be secure in their persons). The Fourth Amendment requires probable cause for warrants to be issued. *Id.*; see also *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (declaring Fourth Amendment’s protection against unreasonable searches and seizures); *Katz v. United States*, 389 U.S. 347, 351 (1967) (proclaiming Fourth Amendment protects people not places); *Elkins v. United States*, 364 U.S. 206, 222 (1960) (reasserting Constitution prohibits only unreasonable searches and seizures).

18. 392 U.S. 1 (1968).

19. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (allowing police to conduct brief, investigatory stops based on reasonable suspicion of criminal activity); see also *Ornelas v. United States*, 517 U.S. 690, 693 (1996) (confirming investigatory stops supported by reasonable suspicion comport with Fourth Amendment); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (restating *Terry* stop standard based on reasonable suspicion of criminal activity satisfies Fourth Amendment).

20. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (describing circumstances when limited search permissible under Fourth Amendment). *Terry* provides police with the authority to stop and frisk only for crime prevention. See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2 (4th ed. 2004 & Supp. 2007) (analyzing parameters of police stops). *Terry* provides officers with the ability to conduct a stop and frisk when they reasonably suspect that “criminal activity is afoot.” See *id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Investigatory stops also apply to traffic stops. See *United States v. Vercher*, 358 F.3d 1257, 1261 (10th Cir. 2004) (applying *Terry* standard to motor vehicle stops). Traffic stops are considered seizures, and Fourth Amendment standards therefore apply. See *United States v. Quintana-Garcia*, 343 F.3d 1266, 1271 (10th Cir. 2003) (stressing Fourth Amendment protections extend to investigatory stops of vehicles); LEWIS R. KATZ, BALDWIN’S OHIO HANDBOOK SERIES, OHIO ARREST, SEARCH & SEIZURE § 17:2 (2007) (asserting vehicle stops become seizures to which Fourth Amendment principles apply).

21. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (permitting officers to make investigatory stops based on less than probable cause). Reasonable and articulable suspicion that someone is in the commission of, or about to commit, a crime is sufficient justification for an investigatory stop. See *id.*; see also *United States v. Hishaw*, 235 F.3d 565, 569 (10th Cir. 2000) (requiring reasonable suspicion of criminal activity to support investigatory stop). Police may arrest individuals, with or without a warrant, so long as they have probable cause. See *Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979). “Probable cause exists where the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (internal quotation marks omitted) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

22. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (describing reasonable suspicion as suspecting one of criminal activity based on particularized and objective circumstances). Reasonable suspicion is a low threshold burden of proof. See *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000) (indicating reasonable suspicion requires less than preponderance of evidence); *Alabama v. White*, 496 U.S. 325, 330 (1990) (noting less required to show reasonable suspicion than probable cause); *United States v. Treto-Haro*, 287 F.3d 1000, 1004 (10th Cir. 2002) (recognizing reasonable suspicion less demanding standard than probable cause).

articulable facts.²³

Almost two decades after *Terry*, the Supreme Court expanded the circumstances in which police officers may conduct investigatory stops in *United States v. Hensley*.²⁴ In *Hensley*, the Court held that it was constitutionally permissible for police officers to stop a person based on reasonable suspicion that he or she “was involved in or is wanted in connection with a completed felony.”²⁵ The Supreme Court set forth a balancing test to determine the constitutionality of a stop by weighing “the nature and quality of the intrusion on personal security against the importance of the governmental interest alleged to justify the intrusion.”²⁶ The Court in *Hensley* intentionally refrained from applying its holding to all past crimes, leaving unresolved the issue of whether completed misdemeanors are sufficient to authorize investigatory stops.²⁷

Following *Hensley*, state and federal courts have utilized varying approaches to determine whether officers are permitted to conduct investigatory stops based on past crimes.²⁸ In *Gaddis ex rel. Gaddis v. Redford Township*,²⁹ the

23. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (justifying basis for intrusion on Fourth Amendment privileges). Reasonable suspicion may be based either on officer’s personal knowledge and observations or on information he has received from another person. *Adams v. Williams*, 407 U.S. 143, 147 (1972). Reasonableness is an objective standard requiring a balancing of the individual’s constitutional rights with the officer’s interest in promoting legitimate governmental interests. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979). An officer need not rule out the chance that the conduct is innocent, provided that the circumstances indicate an objective basis for the stop. *See United States v. Arizu*, 534 U.S. 266, 277-78 (2002).

24. *See United States v. Hensley*, 469 U.S. 221, 229 (1985) (permitting police to stop persons suspected of past criminal activity without probable cause). The Supreme Court held that reasonable suspicion based on specific and articulable facts is sufficient for an investigative stop of a past felony. *Id.* at 233.

25. *United States v. Hensley*, 469 U.S. 221, 229 (1985) (broadening officers’ authority to conduct investigative stops). The Supreme Court noted that restraining police action could allow the suspect to flee or create a threat to public safety. *Id.*; *see also* LAFAVE, *supra* note 20 (asserting Supreme Court’s decision in *Hensley* specifically upheld *Terry* regarding completed crimes); 7 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE SERIES, CRIMINAL LAW & PROCEDURE § 3.3 (3d. ed. 2001 & Supp. 2007) (suggesting *Hensley* merely rejected assertion *Terry* limited stops to ongoing crimes).

26. *United States v. Hensley*, 469 U.S. 221, 228 (1985) (utilizing balancing test to determine whether probable cause existed for particular stop).

27. *See United States v. Hensley*, 469 U.S. 221, 229 (1985) (leaving open potential for investigatory stops based on crimes other than completed felonies). The Court was careful to say that its silence on misdemeanors was not to imply that a misdemeanor was insufficient to justify an investigatory stop, but rather that it need not decide in the present case whether it was. *See id.*

28. *See infra* notes 30, 32, & 34 (discussing split amongst circuit courts addressing issue). *Compare United States v. Johnson*, 364 F.3d 1185, 1188 (10th Cir. 2004) (holding investigatory stops permissible when officers reasonably believe crime just completed or in progress), *United States v. Griffin*, 7 F.3d 1512, 1516 (10th Cir. 1993) (providing officer need only obtain reasonable suspicion crime was or will be committed to conduct investigative stop), *and* STEVEN OBERMAN, TENNESSEE HANDBOOK SERIES, DUI: THE CRIME AND CONSEQUENCES IN TENNESSEE § 3:2 (2008) (asserting investigatory stops permissible for misdemeanors as well as felonies), *with United States v. Jegede*, 294 F. Supp. 2d 704, 708-09 (D. Md. 2003) (holding reasonable suspicion of completed misdemeanor insufficient to warrant investigatory stop), *Washington v. Duncan*, 43 P.3d 513, 517 (Wash. 2002) (declining to permit investigatory stops based on civil infractions), *Minnesota v. Holmes*, 569 N.W.2d 181, 185 (Minn. 1997) (dismissing parking violations as insufficient to warrant investigatory search), *and Blaisdell v. Comm’r of Pub. Safety*, 375 N.W.2d 880, 883-84 (Minn. Ct. App. 1986)

Sixth Circuit concluded that law enforcement officers are permitted to make stops based only on reasonable suspicion of completed felonies and not “mere completed misdemeanor[s].”³⁰ Alternatively, in *United States v. Grigg*,³¹ the Ninth Circuit adopted a balancing test requiring courts to determine the legality of the stop in question based on the nature of the misdemeanor along with the possibility for continued risk of danger or escalation.³² Similarly, in *United States v. Hughes*,³³ the Eighth Circuit refused to adopt a bright-line rule prohibiting police from making investigatory stops based on completed misdemeanors, instead favoring a case-by-case balancing of the government’s interests with the defendant’s personal interests.³⁴

In *United States v. Moran*, the Tenth Circuit refused to hold as a matter of law that investigatory stops are permissible on the basis of past misdemeanors.³⁵ When applying the balancing test set forth in *Hensley*, the Tenth Circuit was forced to address the specific question left open by the Supreme Court regarding the legality of investigatory stops predicated solely

(concluding investigatory stops of vehicles based on completed misdemeanors violate Fourth Amendment), *aff’d*, 381 N.W.2d 849 (Minn. 1986).

29. 364 F.3d 763 (6th Cir. 2004).

30. *Gaddis ex rel. Gaddis v. Reford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004) (prohibiting police from conducting investigatory stop based merely on completed misdemeanor). The Sixth Circuit relied on the Supreme Court’s decision in *United States v. Hensley* for support that investigative stops are only permissible based on reasonable suspicion of a completed felony. *See id.* The court added that investigative stops based on reasonable suspicion of ongoing crimes would be permissible for both felonies and misdemeanors. *See id.* Eleven years earlier, the Sixth Circuit ruled consistently with this notion when it determined that the searching officers lacked reasonable suspicion that the defendant “was committing or was about to commit a crime or . . . had committed a completed felony.” *See United States v. Halliburton*, No. 91-6268, 966 F.2d 1454, 1992 WL 138433, at *4 (6th Cir. 1992) (characterizing seizure as unreasonable under Fourth Amendment in absence of reasonable and articulable suspicion). The court reversed the defendant’s conviction because the state failed to show the defendant had been or was involved in a felony. *See id.*

31. 498 F.3d 1070 (9th Cir. 2007).

32. *United States v. Griggs*, 498 F.3d 1070, 1081 (9th Cir. 2007) (rejecting formal classification standard prohibiting investigatory searches). The Ninth Circuit adopted a rule that requires the reviewing court to view the totality of the circumstances and weigh the individual’s privacy interests against the efficiency of an investigatory stop while considering whether possible alternatives existed that would have served the same purpose. *See id.* Rather than instituting a blanket prohibition on misdemeanors authorizing investigatory searches, this standard allows law enforcement to consider the nature of the misdemeanor offense. *See id.* This balancing standard focuses on the “potential for ongoing or repeated danger . . . and any risk of escalation.” *Id.* The court, however, noted that courts must not overlook privacy interests of individuals and alternative methods by police when determining the legality of investigatory stops. *See id.*

33. 517 F.3d 1013 (8th Cir. 2008).

34. *See United States v. Hughes*, 517 F.3d 1013, 1017 (8th Cir. 2008) (determining stop’s constitutionality varies depending on specific circumstances of each case). The court recognized that in certain circumstances, investigatory stops may be justified, on a case-by-case basis, by completed trespasses. *Id.* The court, however, noted that the potential for a confrontation between the property owner and the trespasser alone does not warrant an invasion of an individual’s personal interests. *Id.*

35. 503 F.3d at 1143 (stressing holding as “limited and fact-dependent”); *see also First Impressions*, 4 SETON HALL CIR. REV. 59, 114-15 (2007) [hereinafter *First Impressions*] (explaining Tenth Circuit’s holding based on balancing test articulated in *United States v. Hensley*).

on past misdemeanors.³⁶ While the Tenth Circuit ultimately validated the specific investigatory stop at issue in *Moran*, the court cautioned that the same may not be true for all past misdemeanors.³⁷ In *Moran*, the court relied on several factors in concluding that the officers' belief of an immediate threat to public safety was sufficient to justify governmental intrusion.³⁸ These factors included the risk of confrontation, the likelihood that Moran was armed, and the existence of reliable first-person reports of repeated trespass and threatening behavior.³⁹

In *United States v. Moran*, the Tenth Circuit joined ranks with the Eighth and Ninth Circuits by concluding that *Hensley* does not restrict investigatory stops solely to future crimes or past felonies.⁴⁰ The court explicitly rejected the Sixth Circuit's determination that stops based on completed misdemeanors contravene Supreme Court precedent and reasoned that such a view fails to apply the case-by-case analysis specifically mandated by the Supreme Court in *Hensley*.⁴¹ Accordingly, the Tenth Circuit conducted a fact-specific analysis, ultimately deeming the stop reasonable in light of the government's strong interest in solving the crime and the minor infringement on Moran's individual liberties.⁴²

The Tenth Circuit correctly recognized that in *Hensley*, the Supreme Court intended to emphasize the fact-specific nature of investigatory stops when determining whether a stop comports with the Fourth Amendment.⁴³ In balancing governmental interests against the intrusion on Moran's Fourth Amendment rights, the court did not create a new constitutional principle, but rather expounded upon existing precedent.⁴⁴ Although the Tenth Circuit chose

36. 503 F.3d at 1143 (suggesting uncertainty because of Supreme Court's failure to resolve issue in *Hensley*).

37. *Id.* at 1143 (emphasizing present case includes ongoing risk and strong governmental interest permitting stop). The court carefully limited its holding by refusing to imply that investigatory stops based on any or all completed misdemeanors would be constitutional. *Id.*

38. *Id.* at 1142-43 (detailing justification for limited governmental intrusion).

39. *Id.* (listing specific facts creating basis for strong governmental interest outweighing potential intrusion on individual privacy). When the court balanced these specific circumstances against the nature of the intrusion, it determined that the stop was reasonable. *Id.* at 1143.

40. 503 F.3d at 1141-42 (recognizing issue as matter of first impression and addressing circuit split). The Tenth Circuit cited to the Ninth Circuit's holding as evidence that *Hensley* requires a reasonableness analysis to determine the constitutionality of investigatory stops premised solely on misdemeanors. *Id.* at 1142.

41. *Id.* (concluding Sixth Circuit's approach contrary to balancing methodology in *Hensley*).

42. *Id.* at 1143 (holding investigatory stop of Moran was reasonable under specific facts of case); *see also First Impressions*, *supra* note 35, at 114-15 (pointing to constitutionality of stop based on application of balancing test).

43. *See United States v. Hensley*, 469 U.S. 221, 226 (1985) (demonstrating police may stop persons without probable cause in certain circumstances and remain constitutionally compliant); 503 F.3d at 1141 (pointing to Supreme Court's holding declaring Fourth Amendment compatible with investigatory stops).

44. *See United States v. Hensley*, 469 U.S. 221, 228 (1985) (suggesting correct test for determining compatibility with Fourth Amendment is balancing test); 503 F.3d at 1142-43 (applying balancing test); *see also supra* note 26 and accompanying text (quoting balancing test set forth by Supreme Court). The Supreme Court consistently emphasizes fact-specific inquiries under the Fourth Amendment. *See United States v.*

not to establish a bright-line rule, its willingness to address misdemeanors was an attempt to clarify the constitutionality of investigatory stops.⁴⁵

While the Tenth Circuit's decision to apply a balancing test purportedly strives to protect individuals' Fourth Amendment rights, it may not lend itself to practical application.⁴⁶ Even after *Moran*, it remains unclear whether officers will operate with greater certainty when deciding whether to initiate an investigatory stop based only on a completed misdemeanor.⁴⁷ Law enforcement officers may be reluctant to conduct stops at all based on completed misdemeanors because of a perceived risk of compromising evidence obtained in connection with the stop.⁴⁸

The Tenth Circuit's holding requiring a fact-specific determination of the lawfulness of each stop based on a completed misdemeanor virtually ensures a future of expansive litigation on the topic.⁴⁹ The decision, which is in line with the majority of circuit courts that have addressed this issue, will likely have an impact on other circuits as well.⁵⁰ If circuits continue to split on the constitutionality question, perhaps the Supreme Court will pick up where it left off in *Hensley* in the near future.⁵¹

Hughes, 517 F.3d 1013, 1017 (8th Cir. 2008) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

45. See 503 F.3d at 1143 (expanding definition of constitutional investigatory stops by including possibility of past misdemeanors); *supra* note 27 and accompanying text (discussing Supreme Court's intentional decision not to address past misdemeanors as basis of investigatory stop).

46. See 503 F.3d at 1143 (emphasizing fact-based inquiry required to determine legality of investigatory stop based on past misdemeanor). Police efforts in "identifying the perpetrators of crime, whether the offense [is] minor or major" may be hindered. See *United States v. Grigg*, 498 F.3d 1070, 1083 (2007).

47. See *United States v. Hensley*, 469 U.S. 221, 229 (1985) (opting not to provide guidance on legality of investigatory stops based on misdemeanors); 503 F.3d at 1143 (instituting fact-dependant analysis for determining legality of investigatory stops based on misdemeanors). When deciding to make an investigatory stop an officer must predict how a court would weigh the factors in a balancing test. See 503 F.3d at 1143 (limiting analysis to specific circumstances in case, suggesting fact-dependant analysis required in all subsequent cases); see also *supra* note 28 and accompanying text (illustrating *Hensley* balancing test does not provide answer of legality when applied by different courts).

48. See *United States v. Hughes*, 517 F.3d 1013, 1017 (8th Cir. 2008) (declaring court's balancing test decides lawfulness of stop). This requires officers to predict how a court will later rule, and some may opt to avoid this vague inquiry by forgoing the stop altogether. See *id.*

49. See 503 F.3d at 1143 (requiring consideration of individual circumstances to determine legality of investigatory stops based on misdemeanors). The court's decision not to apply its holding to all completed misdemeanors leaves open the question of investigatory stops based on other misdemeanors. *Id.* The court even denies that other stops based on completed criminal trespass will necessarily be reasonable. *Id.* This fact-sensitive inquiry leaves substantial gaps for future litigation. See *id.*

50. See *supra* notes 30, 32, & 34 and accompanying text (outlining decisions of other circuits addressing this issue). With the Tenth, Eighth, and Ninth Circuits all aligned regarding investigatory stops based on completed misdemeanors, the trend among the circuits is straying from the old per se rule forbidding stops based on misdemeanors. See *supra* note 40 and accompanying text (asserting Tenth Circuit holding in line with Eighth and Ninth Circuits). With the strong movement toward individual review based on a balancing test, circuits addressing this issue in the future may fall in line with this majority view. See 503 F.3d at 1143 (creating precedent similar to that of Eighth and Ninth Circuits).

51. See 503 F.3d at 1141 (recognizing Supreme Court explicitly withheld judgment on legality of investigatory stops based on misdemeanors); *supra* note 27 and accompanying text (addressing incompleteness of holding in *Hensley*); *supra* notes 28, 30, 32, & 34 and accompanying text (noting split in courts that have

In *United States v. Moran*, the Tenth Circuit considered the constitutionality of investigatory stops based on reasonable suspicion of a past misdemeanor. The court's decision to apply a fact-specific balancing test comports with the constitutional limits of the Fourth Amendment and remains consistent with the majority of circuit courts that have addressed the issue. Accordingly, if the Supreme Court chooses to address the specific issue left open in *Hensley*, it will likely follow the recent trend of circuit courts that requires a fact-specific inquiry into the circumstances of a particular case when determining the legality of investigatory stops.

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addressed issue). The Sixth and Ninth Circuits highlight the current circuit split on this issue. See 503 F.3d at 1141 (acknowledging matter of first impression in Tenth Circuit and observing current split).