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State v. Neal: Why Less Is Less in an Analysis of Reasonable Suspicion

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STATE V. NEAL: WHY LESS IS LESS IN AN ANALYSIS OF REASONABLE SUSPICION

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I. INTRODUCTION

"Reasonable suspicion" is an important legal concept that state and federal courts have addressed numerous times since its debut in *Terry v. Ohio*.[1] The reasonable suspicion analysis requires a court to perform a fact-specific evaluation of the particular circumstances of an individual case.[2] The New Mexico Supreme Court has recognized the "duty of appellate courts to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context,"[3] and the U.S. Supreme Court has recognized that determining whether reasonable suspicion exists involves the analysis of a "factual mosaic," so that courts can better "provide law enforcement officers with the tools to reach correct determinations beforehand."[4] Clear, thorough, and instructive opinions are necessary to reach these goals.

In 2007, the New Mexico Supreme Court decided a case that contained all of the factual components for a reasonable suspicion analysis that would add to this "factual mosaic." Unfortunately, a careful look at the opinion reveals that the court either failed to fully and properly apply this test, or at a minimum failed to fully explain its reasoning in coming to its decision, thereby missing its opportunity to do so. In *State v. Neal*, the New Mexico Supreme Court considered whether an officer's ten-minute detention of a defendant's vehicle following a valid traffic stop was "reasonable" under the Fourth Amendment.[5] On July 30, 2007, the court issued a 3–2 split decision in this case, in which it found that the information known to the officer at the time of the detention did not amount to the individualized, specific, articulable facts required to sup-

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1. 392 U.S. 1 (1968).
2. *Id.* at 37.
3. State v. Neal, 2007-NMSC-43, ¶ 19, 164 P.3d 57, 63.
4. United States v. Arvizu, 534 U.S. 266, 275 (2002).
5. *See generally Neal*, 2007-NMSC-43, 164 P.3d 57.

port a finding of reasonable suspicion.[6] In coming to this decision, the court considered several factors, including the officer's observations of the defendant, the defendant's demeanor, and the defendant's denial of consent to search his truck.[7] After first considering each of these factors individually, the court determined that the officer lacked reasonable suspicion[8] under the totality of the circumstances.[9] Thus, the court found that the detention was unreasonable under the Fourth Amendment and that all evidence obtained as a result of the detention should be suppressed.[10]

This case note provides a brief overview of the purposes of the Fourth Amendment and then proceeds to discuss federal and state decisions analyzing reasonable suspicion in various contexts. Parts III and IV will then explain the factual and procedural history of this case, including both the New Mexico Court of Appeals' and the New Mexico Supreme Court's rationales for their decisions. Part V will evaluate the way in which the New Mexico Supreme Court applied the totality of the circumstances test for reasonable suspicion to the facts in *State v. Neal*, analyze the New Mexico Supreme Court's opinion, and explain how it fails to fully and properly analyze the facts of this case according to the established tests for reasonable suspicion. Finally, Part VI will discuss the particular need for New Mexico courts to conduct a complete and thorough reasonable suspicion analysis.

II. BACKGROUND LAW

The Fourth Amendment to the U.S. Constitution assures the right of individuals "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[11] The Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment.[12] Under the Fourth Amendment, an individual is entitled to be free from unreasonable governmental intrusion wherever he has a reasonable expectation of privacy.[13] The U.S. Supreme Court has pointed out that "what the Constitution forbids is not all searches and

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6. *Id.* ¶ 31, 164 P.3d at 66.
7. *Id.* ¶ 28, 164 P.3d at 65.
8. Reasonable suspicion requires "some minimal level of objective justification" that is "more than an inchoate and particularized suspicion or 'hunch,'" but less than the level of suspicion required for probable cause. U.S. v. Sokolow, 490 U.S. 1, 7 (1989).
9. *Neal*, 2007-NMSC-43, ¶¶ 29–31, 164 P.3d 57 at 65–66.
10. *Id.* ¶ 36, 164 P.3d at 67.
11. U.S. CONST. amend. IV.
12. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
13. Terry v. Ohio, 392 U.S. 1, 9 (1968).

seizures," but only those that are unreasonable.[14] Accordingly, determining whether a governmental intrusion is reasonable is crucial.

Until 1968, the U.S. Supreme Court interpreted the Fourth Amendment's reasonableness requirement to mean that, subject to an established exception, all searches and seizures were to be based on probable cause and executed pursuant to a warrant.[15] In 1968, however, the Court issued its opinion in the landmark case of *Terry v. Ohio* and adopted the reasonable suspicion standard for brief investigatory detentions and limited weapons searches in certain circumstances.[16] In order to justify such a detention or weapons search, an officer need now only satisfy the lesser reasonable suspicion standard, rather than probable cause.[17] Since 1968, *Terry* has become the go-to case for reasonable suspicion analysis—state and federal courts have cited *Terry* for that purpose more than 40,000 times.[18] As can be seen in the following discussion of *Terry* and its progeny, however, determining what is reasonable is harder than it may seem.

A. Terry v. Ohio*: The Fourth Amendment, Reasonable Suspicion, and the Totality of the Circumstances*

In 1968, the U.S. Supreme Court examined whether a "stop and frisk" fell within the Fourth Amendment's proscriptions against unreasonable searches and seizures in *Terry v. Ohio*.[19] In *Terry*, the Court concluded that the Fourth Amendment was implicated even when police officers' actions stop short of an actual arrest or full-blown search, but it also established a standard lower than probable cause in situations in which officers detain an individual and pat-down his clothing for evidence of weapons.[20] Although the Court found the officer's actions to be reasonable, and thus ultimately upheld the district court's denial of defendant's motion to suppress, the *Terry* opinion instituted the standard that has become known as "reasonable suspicion."[21]

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14. *Id.*

15. Johnson v. U.S., 333 U.S. 10, 14–15 (1948) (stating that, unless an exception applies, the Fourth Amendment requires searches and seizures be conducted pursuant to a warrant); *see also* Katz v. U.S., 389 U.S. 347, 357 (1967) (noting that the Fourth Amendment imposes a presumptive warrant requirement for searches and seizures).

16. *Terry*, 392 U.S. 1.

17. *Id.* at 27.

18. LexisNexis Shepard's Report: *Terry v. Ohio* (February 10, 2013) *available at* http://www.lexisnexis.com/ (log in, then follow "Get a Document" hyperlink, then type in "392 U.S. 1", then follow "Shepardize" hyperlink).

19. *Terry*, 392 U.S. at 13 (explaining that when an officer performs a stop on the street, interrogates, and pats down for weapons, it is known as a "stop and frisk").

20. *Id.* at 16, 27.

21. *Terry*, 392 U.S. 1.

Terry involved an officer's observations of two men, Terry and his co-defendant, Chilton. Initially, the two men were standing on a street corner in Cleveland, Ohio, acting in a manner the officer stated "didn't look right."[22] The officer continued to observe the men and watched as they took turns walking down the street, each time pausing to look in the same store window.[23] Each time, the man who walked down the street would return to the street corner and confer with the other man.[24] The officer observed them repeat this ritual approximately six times each.[25] At one point, while Terry and Chilton were conversing on the corner, a third man joined them and spoke to them.[26] He then walked away, and Terry and Chilton resumed their "pacing, peering, and conferring."[27] After approximately ten to twelve minutes they both left, heading in the same direction the third man had gone.[28]

The officer decided to investigate further, because he had become suspicious after observing the defendants' actions.[29] His experience[30] and observations led him to suspect that Terry and Chilton were casing the store for a robbery[31] and to fear that the men were armed.[32] The officer then followed the two men and saw them stop to talk to the same man with whom he had seen them conversing earlier.[33] The officer approached the three men and asked for their names.[34] After the men "mumbled something" in response to his question, the officer spun Terry around, patted down the outside of his clothing, and felt a pistol in the pocket of his overcoat.[35] He then told all three of the men to enter a nearby store, removed the .38 caliber revolver from Terry's coat pocket, and patted down the outer clothing of the other two men.[36] Chilton also had a re-

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22. *Id.* at 5.
23. *Id.* at 6.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 5 (noting that this particular officer had been assigned to patrol that area of downtown Cleveland for shoplifters and pickpockets for thirty years).
31. *Id.* at 6.
32. *Id.* The Court found this suspicion to be credible because the actions of defendants were consistent with the officer's belief that the men were contemplating a robbery and that it was reasonable to assume that robbery would involve the use of weapons. *Id.* at 32.
33. *Id.*
34. *Id.* at 7.
35. *Id.*
36. *Id.*

volver in his coat pocket, but the third man was unarmed.[37] As a result, Terry and Chilton were charged with carrying concealed weapons.[38]

The Supreme Court found that the officer had, in fact, searched and seized Terry when he subjected him to a stop and frisk.[39] However, the Court decided that the evidence needed to justify a stop and frisk was "not of the same degree of conclusiveness as that required for an arrest."[40] The Court found that swift action necessitated by on on-the-spot observations of an officer could not be subjected to a warrant procedure, but should be evaluated under the Fourth Amendment's general prohibition of unreasonable searches and seizures.[41]

The Court first balanced an officer's need to search against the intrusion upon the constitutionally protected interest of the individual.[42] The *Terry* Court found that the governmental interest was effective crime prevention and detection.[43] It determined that the officer was discharging a legitimate investigative function and that the officer's observations in this case, when taken together, warranted the intrusion of further investigation.[44] Thereafter, the Court determined that the officer was justified in performing a pat-down of defendants, because this investigation involved only a limited and confined search for hidden weapons, and was justified by the interest in reducing risks of physical harm to officers.[45] In each case, it was important to the Court that the investigation was limited in duration and scope to the governmental interest that justified it in the first place.[46]

Furthermore, the Court found that an officer must "point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant an intrusion."[47] The Court emphasized that the facts must be judged against an objective standard, because anything less would result in searches predicated on nothing more than

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37. *Id.*

38. *Id.* at 6.

39. *Id.* at 19.

40. *Id.* at 11, n.5 (citing People v. Rivera, 14 N.Y. 2d 441, 445, 201 N.E. 2d 32, 34 (1965)).

41. *Id.* at 20.

42. *Id.* (citing Camara v. Municipal Court, 387 U.S. 523, 534–537 (1967).

43. *Id.* at 22.

44. *Id.* at 22–23 (noting that although the circumstance of two men standing on a street corner or strolling by a store window is not itself unusual, when all circumstances of the men's conduct were taken together their behavior warranted further investigation).

45. *Id.* at 24, 29.

46. *Id.*

47. *Id.* at 21.

"inarticulate hunches."[48] Thus, in justifying a pat-down for weapons, the question is not whether the officer is certain that a subject is armed, but whether a "reasonably prudent man in the circumstances" would be warranted in believing his safety was in danger.[49] In the "reasonably prudent man" evaluation, due weight must also be given to the reasonable inferences drawn by the officer from his experience.[50]

Under the totality of the circumstances, in *Terry* the Supreme Court found that the officer had reasonable suspicion to perform a stop and frisk.[51] The observations of the officer and the rational inferences taken from those observations in light of the officer's experience, combined with the governmental interest in preventing and detecting crime and its interest in officer and public safety, justified the officer's actions.[52] Accordingly, the Court determined that the revolver found on Terry as a result of the stop and frisk was properly admitted as evidence against him.[53]

B. Federal Court Decisions Following Terry

Since *Terry*, courts have expanded the reasonable suspicion standard to searches and seizures that fall outside of the stop and frisk category. In *United States v. Sokolow*, the U.S. Supreme Court applied the principles of *Terry* to a case in which DEA agents stopped a man for further investigation based on their suspicion that he was involved in drug trafficking.[54] When agents stopped Sokolow, they knew he had paid $2,100 in cash from a roll of twenty-dollar bills for two round-trip airline tickets from Honolulu to Miami, he was traveling under a name that did not match the telephone number he provided, he had stayed in Miami for only forty-eight hours, he appeared nervous during his trip, and he did not check any of his luggage.[55] Based on this information, DEA agents stopped Sokolow after he arrived at the Honolulu airport, escorted him to the DEA office at the airport, and examined his luggage through the use of a narcotics detector dog.[56] The agents subsequently found 1,063 grams of cocaine in Sokolow's carry-on luggage.[57]

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48. *Id.* at 21, 22.
49. *Id.* at 27.
50. *Id.* at 27.
51. *Id.* at 30.
52. *See id.*
53. *Id.* at 30.
54. United States v. Sokolow, 490 U.S. 1 (1989).
55. *Id.* at 3 (also noting that Miami is a city known as a source for illicit drugs).
56. *Id.* at 5.
57. *Id.*

As in *Terry*, here the Court found that while any of these factors, taken alone, may be consistent with innocent conduct, "taken together they amount to reasonable suspicion."[58] The Court emphasized the need to look at the "whole picture" when analyzing reasonable suspicion, stating that "the concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'"[59] The Court found that, under the facts known to them, DEA agents had reasonable suspicion to suspect that Sokolow was transporting illegal drugs.[60]

In 2002, the Supreme Court determined in *United States v. Arvizu* that a border patrol agent had reasonable suspicion for an investigatory stop of a vehicle.[61] The Court stated that, in order to justify an investigatory stop, there must be "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[62] The border patrol agent was alerted that a sensor on a road frequently used by drug smugglers had been activated. When he went to investigate, he saw a minivan driven by a man and containing a woman in the passenger seat and three children in the back.[63] The driver appeared to be very stiff and seemed to be trying to pretend the agent was not there, even though he was driving right next to him.[64] The agent saw that the knees of the children were very high and watched as, at one point, the children all put their hands up and waved at him in a mechanical, odd manner for four to five minutes.[65] The minivan turned off the road at the last place it could have turned to avoid a checkpoint, which was a road suited for four-wheel drive vehicles rather than minivans.[66] When the officer radioed in for a registration check, he learned that the minivan was registered to an address in an area notorious for smuggling.[67] The officer also knew minivans to be a type of vehicle smugglers often used.[68] The Court stated that the agent was entitled to assess the situation according to his specialized training and his familiarity with the area.[69] Accordingly, the Court found that under the totality of the circumstances the agent reasonably

58. *Id.* at 9.
59. *Id.* at 7 (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).
60. *Id.* at 13.
61. United States v. Arvizu, 534 U.S. 266 (2002).
62. *Id.* at 273.
63. *Id.* at 270.
64. *Id.*
65. *Id.* at 270–71.
66. *Id.* at 271.
67. *Id.*
68. *Id.* at 270.
69. *Id.* at 276.

believed the defendant was engaged in illegal activity, thereby justifying the agent's stop of defendant's vehicle under the Fourth Amendment.[70]

In *United States v. Santos*, the Tenth Circuit gave particular deference to a trooper's experience and training in finding that he had independent reasonable suspicion to detain a defendant beyond his initial detention for speeding.[71] The court stated that a reviewing court is required to permit officers to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person."[72] Although it found defendant's argument that the trooper lacked reasonable suspicion to search a suitcase in his vehicle "not without support in the record,"[73] the court nonetheless affirmed the district court's denial of his motion to suppress.[74]

Since *Terry*, the U.S. Supreme Court and the Tenth Circuit have analyzed reasonable suspicion in a multitude of factual contexts. Although the contexts are ever-changing, the basis of the reasonable suspicion analysis originally set forth in *Terry* remains basically the same. Reasonable suspicion exists when all of the facts known to the officer at the time of the detention (and the reasonable inferences taken from those facts), in light of that particular officer's experience and training, would lead that officer to suspect that an individual is engaged in criminal activity.[75] Furthermore, courts must make this determination by evaluating all of the circumstances known to the officer in connection with one another.[76]

C. New Mexico Courts and Reasonable Suspicion Under the Fourth Amendment

New Mexico courts have also followed the totality of the circumstances analysis set forth in *Terry* when interpreting reasonable suspicion under the Fourth Amendment. In *State v. Vandenberg*, the New Mexico Supreme Court found that an officer had reasonable suspicion to conduct a protective frisk for weapons where he relied on a "be on the lookout"

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70. *Id.* at 277–78.

71. 403 F.3d 1120 (10th Cir. 2005).

72. *Id.* at 1124 (internal citations and quotations omitted).

73. *Id.* at 1125. Although the defendant gave initial consent to search his vehicle, he refused consent to allow the trooper to search a suitcase located in his trunk and later contended that the trooper based his finding of reasonable suspicion on this subsequent refusal to allow search of the suitcase. *Id.*

74. *Id.* at 1134.

75. Terry v. Ohio, 392 U.S. 1, 21, 27 (1968).

76. *Id.* at 22; U.S. v. Sokolow, 490 U.S. 1, 9 (1989).

alert and his own observations of the suspect's demeanor.[77] The court emphasized the importance of the officer's articulation of specific reasons and specific observations of the defendant's conduct that justified his need for a weapons frisk.[78]

Conversely, in *State v. Prince*, the court found that an officer lacked reasonable suspicion to detain an individual beyond the time necessary to issue a traffic citation where the officer failed to provide "crucial details and particularized information regarding the alleged criminal activity that was occurring."[79] Despite the validity of the defendant's initial detention for speeding, the court emphasized that the officer could not use the initial detention "to fish for evidence of other crimes" without independent reasonable suspicion to detain him beyond the initial stop.[80]

In *State v. Robbs*, a case heavily relied on by the court of appeals in *Neal*, the New Mexico Court of Appeals found that a tip from an informant provided reasonable suspicion to support an investigatory stop of defendant's vehicle.[81] In the context of tips from informants, the court found that the informant's ability to predict a suspect's behavior demonstrates a familiarity with that suspect that indicates the informant has reliable information.[82] Accordingly, the court found that, because an officer's reasonable suspicion depends on the reliability and the content of the information in his possession, a suspect's movements through time that track with the predictions of the informant can provide reasonable suspicion.[83]

Having found that the officer's investigatory stop of the defendant was justified by reasonable suspicion,[84] the court also found that the scope of the detention was reasonable.[85] In making this determination, the court weighed the government's justification for the detention, the character of the intrusion on the individual detained, police diligence in conducting

77. 2003-NMSC-030, ¶ 29, 81 P.3d 19, 27 (stating that the officer testified that the defendant exhibited an extreme degree of nervousness, which in his experience indicated that the defendant may have been in "fight or flight" mode).

78. *Id.* ¶ 28, 81 P.3d at 27.

79. 2004-NMCA-127, ¶ 17, 101 P.3d 332, 338.

80. *Id.* ¶ 19, 101 P.3d at 338.

81. 2006-NMCA-061, 136 P.3d 570.

82. *Id.* ¶ 14, 136 P.3d at 575.

83. *Id.* ¶¶ 13–14, 136 P.3d at 575.

84. *Id.* ¶ 19, 136 P.3d at 572. The informant told police that her husband would be delivering methamphetamine to a specific address, described the vehicle, and gave the license plate number; the officers later observed a vehicle matching that description proceeding toward the address specified by the informant. *Id.* ¶ 2, 136 P.3d at 572.

85. *Id.* ¶ 31, 136 P.3d at 579.

the investigation, and the length of the detention.[86] Regarding these factors, the court found that the officer's detention was justified by his reasonable suspicion, that the defendant's freedom of movement had not been severely restricted, that the officer's use of a drug dog was a means of investigation that would confirm or dispel his suspicions quickly, and that officers acted with diligence by immediately requesting the drug dog.[87] Accordingly, detaining the defendant for thirty-five to forty minutes to await a drug dog was within the permissible scope of the investigatory stop.[88] Because the officers had reasonable suspicion to initiate an investigatory stop and because the scope of the detention was also reasonable, the court of appeals affirmed the district court's denial of defendant's motion to suppress evidence.[89]

Overall, the New Mexico appellate cases have tracked the federal cases in their treatment and analysis of reasonable suspicion. The important factors in such an analysis in either case continue to be those articulated in *Terry*. Thus, a court must make a thorough analysis of all of the surrounding circumstances and facts in conjunction with one another. This analysis should also account for the particular officer's experience and training. As explained in the following section, however, in *Neal* the New Mexico Supreme Court fell short in both of these areas.

III. FACTUAL BACKGOUND

On July 31, 2004, Alamogordo Department of Public Safety Officer Neil LaSalle observed a truck stopped in front of a house that was the subject of an ongoing drug investigation.[90] The vehicle was driven by David Neal (though Officer LaSalle did not know his identity at that time), and an unknown man was leaning into the driver's side window.[91] Although Officer LaSalle could not see the two men's hands or hear what they were saying, he believed that they were engaged in a drug transaction.[92] Before Officer LaSalle could approach the truck, however, the man who was leaning into the truck went back into the house, and Neal drove away.[93] Officer LaSalle decided to follow Neal and noticed that the

86. *Id.* ¶ 21, 136 P.3d at 577.
87. *Id.* ¶¶ 24, 29, 136 P.3d at 578–79.
88. *Id.* ¶ 31, 136 P.3d at 579.
89. *Id.*
90. State v. Neal, 2007-NMSC-43, ¶ 4, 164 P.3d 57, 60.
91. *Id.*
92. *Id.* ¶ 5, 164 P.3d at 60.
93. *Id.*

truck had a cracked windshield.[94] When he initiated a traffic stop for the cracked windshield violation, he recognized Neal from his prior drug-related and assault convictions.[95] Officer LaSalle asked Neal for his driver's license, registration, and insurance.[96] He then ran a wants and warrants check and was advised to proceed with caution, because Neal might be armed and dangerous.[97] Officer LaSalle was also informed that due to Neal's prior record a back-up officer was on the way.[98]

Officer LaSalle asked Neal to identify the man to whom he had been speaking in front of the house and learned that the man was Jeff Horton, an individual who had been involved in criminal activity and was under investigation for drugs.[99] According to Officer LaSalle, Neal became agitated and nervous during this questioning.[100] Specifically, he stated that Neal's hands were fidgety, he avoided eye contact and questioning, and he looked as if he wanted to leave.[101] Neal was issued a citation for the cracked windshield.[102] Officer LaSalle then requested permission from Neal to search the truck for drugs and weapons, but Neal refused consent.[103] At that time, Officer LaSalle informed Neal that he was free to go, but that the truck would be detained so that he could get a drug dog to perform a perimeter sniff of the vehicle.[104] Based on his observations of Neal in front of the house and during the stop, his belief that Neal had engaged in a drug transaction, and his knowledge of both Neal's and Horton's criminal histories, Officer LaSalle believed he had reasonable suspicion to detain the truck while awaiting the drug dog.[105]

Neal then left the truck to find a pay phone to call his father, James Neal, who was the owner of the truck.[106] Within approximately ten minutes, a Border Patrol Officer arrived at the scene with a drug-sniffing dog.[107] When Neal's father arrived shortly thereafter, he observed the drug-sniffing dog jump in and out of the truck and was advised that the

94. *Id.*
95. *Id.*
96. *Id.* ¶ 6, 164 P.3d at 60.
97. *Id.*
98. *Id.*
99. *Id.* ¶ 7, 164 P.3d at 60.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* ¶ 8, 164 P.3d at 60.
104. *Id.*
105. *Id.* ¶ 9, 164 P.3d at 60.
106. *Id.* ¶¶ 8, 11, 164 P.3d at 60, 61.
107. *Id.* ¶ 10, 164 P.3d at 60.

officers were in the process of obtaining a search warrant.[108] Neal's father then gave oral consent to the search of the vehicle and later signed a written consent form.[109] When officers searched the truck pursuant to his consent, they found a loaded firearm and methamphetamine.[110]

IV. PROCEDURAL BACKGROUND

Neal successfully moved to suppress the handgun and methamphetamine found in the truck, claiming that the evidence was obtained in an illegal search and seizure under both the Fourth Amendment to the U.S. Constitution and article II, section 10 of the New Mexico Constitution.[111] The district court found that although expansion of the initial traffic stop was supported by reasonable suspicion, the subsequent ten-minute detention of the truck required probable cause, which the officers did not have.[112] The State of New Mexico appealed this decision, and in a split opinion the court of appeals reversed the decision of the district court.[113] The New Mexico Supreme Court then granted certiorari and reversed the decision of the court of appeals.[114]

A. New Mexico Court of Appeals

Like the district court, the court of appeals found that Officer LaSalle's expansion of the initial traffic stop was supported by reasonable suspicion, but it further found that his reasonable suspicion was sufficient to support the subsequent ten-minute detention of the truck.[115] In reaching its decision, the court relied largely on its previous decision in *State v. Robbs*, a case in which officers were found to have had reasonable suspicion to detain a vehicle for nearly forty-five minutes to wait for a drug sniffing dog based on a specific tip provided by an informant.[116]

The court of appeals based its determination that Officer LaSalle had reasonable suspicion to suspect Neal of drug activity on the totality of the circumstances.[117] The court stated that when Officer LaSalle initiated the traffic stop, he only had a general suspicion or hunch of such

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108. *Id.* ¶ 11, 164 P.3d at 61.
109. *Id.*
110. *Id.*
111. *Id.* ¶ 2, 164 P.3d at 59.
112. *Id.*
113. *Id.*
114. *Id.* ¶ 3, 164 P.3d at 60.
115. *Id.* ¶ 2, 164 P.3d at 59.
116. *Id.*; State v. Robbs, 2006-NMCA-61, ¶ 31, 136 P.3d 570, 579.
117. State v. Neal, No. 25,864, Memorandum Opinion at 6; *see also* U.S. v. Santos, 403 F.3d 1120, 1133 (10th Cir. 2005) (explaining that under a totality of the circum-

drug activity,[118] but that the additional information learned during the stop was sufficient to create reasonable suspicion.[119] The court emphasized that although, considered individually, the facts known to LaSalle may have been insufficient to create reasonable suspicion, when taken together in context this information could establish reasonable suspicion.[120]

Satisfied that LaSalle had reasonable suspicion to investigate drug activity, the court proceeded to follow the analysis conducted in *Robbs* to evaluate the scope of LaSalle's investigatory detention.[121] After analyzing each of the four factors, the court determined that each had been met. Accordingly, the court reversed the district court's grant of Neal's motion to suppress and remanded the case.[122]

Judge Kennedy dissented from the majority opinion, stating that LaSalle lacked the individualized, articulable suspicion required to justify his detention of Neal.[123] He concluded by opining that the case was distinguishable from *Robbs* and that he "saw more hunch and conjecture supporting the detention than [the court] should allow."[124]

B. New Mexico Supreme Court

In a 3-2 split decision, the New Mexico Supreme Court reversed the court of appeals' ruling, finding that Officer LaSalle did not have a specific and particularized suspicion to detain Neal beyond the time necessary to issue the traffic citation for the cracked windshield.[125] Because the parties did not dispute the validity of LaSalle's initial traffic stop, the court acknowledged that LaSalle had authority to ask for Neal's license,

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stances analysis, a court should not look at each fact individually but rather consider all facts together to determine whether reasonable suspicion exists).

118. *Neal*, No. 25,864, Memorandum Opinion at 5 (stating that at the time LaSalle initiated the stop he had a general suspicion that drug activity had taken place based on his observation of Neal in front of a house under investigation for drug activity and a man leaning into Neal's truck).

119. *Neal*, No. 25,864, Memorandum Opinion at 5 (including Neal's criminal record, the fact that the man who was leaning into his truck was the subject of a drug investigation, and Neal's nervousness, avoidance of eye contact, and appearance of wanting to leave).

120. *Id.* at 6.

121. In its analysis, the court considered four factors to assess the reasonableness of this detention: "the government's justification for the detention, the character of the intrusion on the individual, the diligence of the police in conducting the investigation, and the length of the detention." *Id.*

122. *Id.* at 8.

123. *Id.* at 9 (Kennedy, J., dissenting).

124. *Id.* at 9 (Kennedy, J., dissenting).

125. State v. Neal, 2007-NMSC-43, ¶ 36, 164 P.3d 57, 67.

registration, and insurance information as a result of the stop.[126] What the court saw as the core issue was whether LaSalle then had a reasonable suspicion that Neal was in possession of drugs, thereby justifying his detention of the vehicle beyond the time required to issue a traffic citation.[127]

Although the New Mexico Court of Appeals relied heavily on *Robbs*,[128] the supreme court agreed with Judge Kennedy's view that *Robbs* was distinguishable from *Neal* because the officers' reasonable suspicion in *Robbs* evolved from a specific tip that was subsequently corroborated by police observations.[129] The court wrote that the only valid basis for LaSalle's stop of Neal, however, was a cracked windshield.[130] Accordingly, the court rejected the contention that the *Robbs* decision was controlling in Neal's case and relied on other case law in making its determination.[131]

The court then went on to assess whether LaSalle had reasonable suspicion to detain Neal beyond the purposes of the traffic stop according to the totality of the circumstances.[132] Although the court recognized that it should not analyze each individual factor "in a vacuum,"[133] the court wrote that it was nonetheless compelled to address each of the factors relied upon by LaSalle in forming his belief that he had reasonable suspicion that drugs were in the vehicle.[134]

In addressing LaSalle's observation that Neal was nervous and appeared eager to leave, the court cited both New Mexico and Tenth Circuit case law to support its conclusion that simple nervousness cannot be equated with reasonable suspicion.[135] The court also stated that Neal's interaction and association with Horton was insufficient to create reason-

126. *Id.* ¶ 22, 164 P.3d at 63.

127. *Id.*

128. *Id.*

129. *Id.* ¶ 23, 164 P.3d at 64 (noting that in *Robbs*, police had reasonable suspicion based on a specific tip they received regarding a drug transaction that would be taking place, and where, when conducting surveillance of the identified residence, police then saw the vehicle described at approximately the time predicted by the informant).

130. *Neal*, 2007-NMSC-043, ¶ 23, 164 P.3d at 64.

131. *See id.*

132. *Id.* ¶ 28, 164 P.3d at 65.

133. *Id.* (stating that such an approach, referred to as "divide and conquer," is precluded under a totality of the circumstances assessment).

134. *Id.*

135. *Neal*, 2007-NMSC-043 ¶ 29, 164 P.3d at 65 (citing State v. Vandenberg, 2003-NMSC-030, ¶ 31, 81 P.3d 19, 27–28; United States v. Millan-Diaz, 975 F.2d 720, 722 (10th Cir. 1992)).

able suspicion.[136] The court considered Neal's denial of consent to search the truck "a neutral act," and thus refused to factor his denial into its reasonable suspicion analysis.[137]

The court determined that, even taking into account LaSalle's training and experience, it was unreasonable for LaSalle to infer that Neal had been involved in a drug transaction.[138] Indulging the factual inferences drawn by LaSalle, the court found that Neal's conduct and the surrounding circumstances did not amount to the kind of individualized, specific, articulable facts required to amount to reasonable suspicion.[139] Agreeing with Judge Kennedy's dissent from the court of appeals, the supreme court stated that the circumstances "smack[ed] more of . . . conjecture and hunch" and were thus insufficient.[140] Without reasonable suspicion that Neal was involved in criminal activity, LaSalle could not lawfully detain Neal's truck to wait for a drug dog.[141] The court stated that to find otherwise "would eviscerate the very protection of individual rights and liberties the Fourth Amendment was designed to create and which this Court has taken an oath to uphold."[142]

In a dissent joined by Justice Maes, Justice Bosson criticized the majority for its failure to evaluate the specific length of the detention, give adequate deference to LaSalle's experience and training, balance the governmental interest in preventing the use and distribution of methamphetamine against Neal's right to be free from governmental intrusion, and properly evaluate each of the factors known to LaSalle under the totality of the circumstances.[143] Justice Bosson also expressed concern that the majority did not discuss more recent Tenth Circuit precedent in its evaluation of reasonable suspicion under the Fourth Amendment.[144] Under a proper Fourth Amendment analysis, giving due deference to the officer's experience and training, Justice Bosson concluded that LaSalle could reasonably suspect Neal of drug activity.[145]

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136. *Neal*, 2007-NMSC-043, ¶ 30, 164 P.3d at 66 (making this determination notwithstanding the fact that Horton was a felon under investigation for drug activity).
137. *Id.* (citing *Vandenberg*, 2003-NMSC-030, ¶ 46, 81 P.3d at 33).
138. *Neal*, 2007-NMSC-043, ¶ 31, 164 P.3d at 66.
139. *Id.*
140. *Id.*
141. *Id.* ¶ 32, 164 P.3d at 66.
142. *Id.* ¶ 31, 164 P.3d at 66.
143. *Neal*, 2007-NMSC-043, ¶¶ 39–47, 164 P.3d at 67–70, (Bosson, J., dissenting).
144. *Id.* ¶ 48, 164 P.3d at 70 (Bosson, J., dissenting).
145. *Id.* ¶ 49, 164 P.3d at 70 (Bosson, J., dissenting).

V. ANALYSIS

In *State v. Neal*, the New Mexico Supreme Court held that Officer LaSalle lacked the reasonable suspicion required to detain Neal beyond the time necessary to issue a traffic citation.[146] The court purported to apply the reasonable suspicion balancing test launched by the U.S. Supreme Court in *Terry* and applied by state and federal courts ever since.[147] However, a closer look at the opinion reveals that the court either failed to fully and properly apply this test, or at a minimum failed to fully explain its reasoning in coming to its decision. The *Neal* court itself noted the "duty of appellate courts to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context,"[148] yet its incomplete application of the reasonable suspicion test offers little guidance to officers and in all actuality may only confuse them. Moreover, although the court in this case may have come to the correct decision, the danger remains that subsequent courts looking to the *Neal* opinion for guidance will apply the test similarly and, in doing so, reach improper results.[149]

A. Reasonable Suspicion under the Totality of the Circumstances

The totality of the circumstances test for reasonable suspicion is, by its nature and design, not a bright-line rule for courts and officers to follow.[150] This test involves a fact-specific evaluation of the particular circumstances of an individual case.[151] The U.S. Supreme Court has recognized that this involves the analysis of a "factual mosaic," but also wrote that, under this *de novo* approach, courts can better "provide law enforcement officers with the tools to reach correct determinations beforehand."[152] Thus, under a totality of the circumstances analysis, the importance of evaluating all facts in combination with one another requires a proper consideration of each relevant factor.[153]

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146. *Neal*, 2007-NMSC-043, 164 P.3d 57.

147. *Id.* ¶ 18, 164 P.3d at 62–63 (citing Terry v. Ohio, 392 U.S. 1 (1968)).

148. *Id.* ¶ 19, 164 P.3d at 63 (quoting State v. Vandenberg, 2003-NMSC-030, ¶ 19, 81 P.3d 19, 24-25).

149. This analysis does not question the court's decision, but instead questions its method in coming to that decision. Whether this decision was ultimately correct is difficult to determine given the court's failure to address all relevant factors.

150. United States v. Arvizu, 534 U.S. 266, 274 (2002) (noting that reasonable suspicion is an "elusive concept" that the court has "deliberately avoided reducing to a 'neat set of legal rules'" (internal citations and quotation marks omitted)).

151. *See Terry*, 392 U.S. at 21.

152. *Arvizu*, 534 U.S. at 275.

153. *See Terry*, 392 U.S. at 22–23.

The opinions in *Terry* and *Santos* provide good examples of evaluations of all facts in a totality of the circumstance analysis.[154] In *Terry*, the U.S. Supreme Court took care to address inferences drawn from the officer's observations *in connection with one another* in finding that, although each of Terry's actions may have been innocuous in isolation, together they amounted to reasonable suspicion.[155] Similarly, in *Santos*, the Tenth Circuit Court of Appeals first addressed each of the observations separately and then evaluated all facts together.[156] The Tenth Circuit Court of Appeals held that a set of facts that "might not mean much to ordinary observers," when taken together, amounted to an objective basis for suspecting legal wrongdoing.[157] In both cases, both the U.S. Supreme Court and the Tenth Circuit fully addressed the facts known to the officers in each case at the time those officers initiated the detentions of the respective defendants.[158] Moreover, the courts evaluated these factors not in isolation, but "taken as a whole" in combination with one another.[159]

In *Neal*, however, the New Mexico Supreme Court addressed only the following factors upon which LaSalle based his determination of reasonable suspicion: "[d]efendant's stopping in front of a house under investigation; talking to Horton, a convicted felon; becoming nervous when stopped by police; wishing to leave; and denying consent to search the truck."[160] Oddly absent from this list of factors is Neal's own criminal history, which included drug-related convictions.[161] LaSalle was aware of that information when he stopped Neal for the cracked windshield and recognized him.[162] He then confirmed that information when he checked Neal for warrants.[163] Because LaSalle learned of Neal's history prior in connection with a valid traffic stop, he could validly consider the information as part of his reasonable suspicion analysis.[164] Furthermore, Neal's drug convictions would seem particularly relevant to the court's analysis

154. *See Terry*, 392 U.S. 1; U.S. v. Santos, 403 F.3d 1120 (10th Cir. 2005).

155. *Terry*, 392 U.S. at 22–23.

156. *Santos*, 403 F.3d at 1127–33.

157. *Id.* at 1133–34.

158. *See Terry*, 392 U.S. at 22–23; *Santos*, 403 F.3d at 1127–33.

159. *Terry*, 392 U.S. at 22–23; *Santos*, 403 F.3d at 1127 ("In the final analysis . . . the question is whether, taken as a whole, [the facts] support a finding of reasonable suspicion.").

160. State v. Neal, 2007-NMSC-043, ¶ 28, 164 P.3d 57, 65.

161. *See id.*

162. *Id.* ¶ 5, 164 P.3d at 60.

163. *Id.* ¶ 6, 164 P.3d at 60.

164. *See* State v. Prince, 2004-NMCA-127, ¶ 9, 101 P.3d 332, 336 (stating that officers can request license, insurance, and registration, and run a warrants check in connection with a valid traffic stop).

because LaSalle based his finding of reasonable suspicion, at least in part, on his knowledge of Neal's prior criminal history.[165]

The court's failure to consider or address Neal's criminal history is troubling because it generally undermines the court's totality of the circumstances analysis by omitting one of the circumstances from its analysis. This is particularly problematic where that circumstance is an individual's criminal history, as courts have recognized that this is a potentially significant factor.[166] Although an individual's criminal history on its own is insufficient to create reasonable suspicion, "in conjunction with other factors, criminal history contributes powerfully to the reasonable suspicion calculus."[167] The court was clearly aware of LaSalle's knowledge of Neal's criminal history,[168] and the court initially included that information in its list of factors on which LaSalle based his reasonable suspicion.[169] Nonetheless, when the court later listed the factors it was "compelled to address," Neal's criminal history had vanished.[170] This factor should have been addressed because, particularly when combined with the other factors, it may have tipped the reasonable balance analysis in favor of Officer LaSalle. Additionally, by omitting LaSalle's knowledge of Neal's criminal history from its determination the court sets inadequate precedent for future courts and law enforcement alike.

B. Officer LaSalle's Training and Experience

In its evaluation of an officer's determination of reasonable suspicion, a court should take into consideration that officer's training and experience.[171] In the *Terry* opinion, the U.S. Supreme Court specifically described the extent of the detective's experience and training.[172] The Court explained how long he had been an officer and detective, the amount of time he had spent patrolling the particular area of town, and the type of investigations he had conducted during that time.[173] It also described the routine habits of observation he had developed over the years he spent as a detective in the area.[174] Similarly, in *Sokolow*, the U.S. Supreme Court made note of the specific narcotics training the agent

165. *Neal*, 2007-NMSC-043, ¶ 9, 164 P.3d at 60.
166. United States v. Santos, 403 F.3d 1120, 1132 (10th Cir. 2005).
167. *Id.*
168. *Neal*, 2007-NMSC-043, ¶ 5, 164 P.3d at 60.
169. *Id.* ¶ 9, 164 P.3d at 60.
170. *See id.* ¶ 28, 164 P.3d at 65.
171. *See* U.S. v. Arvizu, 534 U.S. 266, 273 (2002); *see also* Terry v. Ohio, 392 U.S. 1, 27 (1968).
172. *See Terry*, 392 U.S. at 5.
173. *See id.*
174. *See id.*

there had received as a DEA officer when considering "the evidentiary significance as seen by a trained agent."[175]

The *Neal* opinion would have been a better guide if the New Mexico Supreme Court had followed the U. S. Supreme Court's examples in *Terry* and *Sokolow* in evaluating LaSalle's experience and training. The court did acknowledge that LaSalle was entitled to "make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants."[176] The court concluded that, taking LaSalle's training and experience into account, it was not reasonable for him to believe that Neal had been involved in a drug transaction.[177] What the court did not do, however, is clearly explain what it considered LaSalle's training and experience to include, and what, if any, weight should be given to that experience and training.[178]

In the "Facts" section of the opinion, the court did note that: (1) when LaSalle first viewed Neal, Neal was parked in front of a house under investigation for drugs; (2) after LaSalle stopped Neil, he recognized him and knew that he had prior drug and assault convictions; and (3) LaSalle later learned that Horton, the man leaning into Neal's window, was under investigation for drugs and had a criminal background.[179] All of these circumstances became known to LaSalle prior to his expansion of the traffic stop,[180] and they likely factor in to the court's assessment of LaSalle's experience and/or familiarity with the customs of the area's inhabitants. What the court failed to mention, however, is whether LaSalle had any specialized training that would render the inferences he made from this knowledge any more reasonable.

The court's opinion did not explain, or alternatively question, how LaSalle came to the conclusion that he had observed a drug transaction based on his observation of Horton leaning into Neal's driver side window in front of the house.[181] Unlike the U.S. Supreme Court in *Terry* and *Sokolow*,[182] the *Neal* court did not discuss whether LaSalle had any specialized training or particular experience that might have better enabled him to come to such a conclusion. That factor may have been particularly

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175. United States v. Sokolow, 490 U.S. 1, 10 (1989).

176. State v. Neal, 2007-NMSC-043, ¶ 31, 164 P.3d 57, 66 (quoting *Arvizu*, 534 U.S. at 276).

177. *Neal*, 2007-NMSC-043, ¶ 31, 164 P.3d at 63.

178. *See Neal*, 2007-NMSC-043, 164 P.3d 57.

179. *Id.* ¶¶ 4–7, 164 P.3d at 60.

180. *Id.*

181. *Id.* ¶ 5, 164 P.3d at 60.

182. Terry v. Ohio, 392 U.S. 1, 5 (1968); United States v. Sokolow, 490 U.S. 1, 10 (1989).

important here, because Officer LaSalle did not hear anything Neal and Horton were saying and could not see their hands.[183] Even though LaSalle gained additional information during the traffic stop, the court did not mention his level of training or how his experience would or would not lead him to reasonably suspect that Neal was involved in drug activity.[184]

In its opinion in *Neal*, the New Mexico Supreme Court should have followed the example set by U.S. Supreme Court precedent regarding the importance of an officer's experience and training in evaluating reasonable suspicion. Whether a particular officer has experience spanning several years or only days influences his or her decision-making processes.[185] Likewise, any specific training an officer has received in a particular area of law enforcement will necessarily inform the officer's evaluation of reasonable suspicion and support his credibility in making that decision.[186] Accordingly, including even a short analysis of LaSalle's experience and training, if only to state that he did not have any special training that would warrant particular deference to his evaluation, would have added clarity and strength to the court's opinion.

C. Balancing Governmental Interests Against Neal's Interests

In *Terry*, the U.S. Supreme Court made clear that the test for reasonableness requires courts to balance the need to search against the invasion that the search entails.[187] The Court found that the governmental interest in crime prevention justified the officer's reasonable investigation of suspects based on their behavior.[188] The officer's investigation was related to this interest.[189] As for the officer's further invasion of Terry's personal security, the Court determined that this investigation involved only a limited and confined search for hidden weapons, and was justified by

183. *Neal*, 2007-NMSC-043, ¶ 5, 164 P.3d at 60.

184. In *State v. Vandenberg*, the New Mexico Supreme Court itself pointed out that the detaining officer made approximately fifty traffic stops a night and was an experienced officer. 2003-NMSC-030, ¶ 9, 83 P.3d 19, 23.

185. *See* United States v. Macias, 658 F.3d 509, 520–21 (5th Cir. 2011) (absent extrinsic evidence regarding an officer's experience, the court was unable to evaluate the validity, basis or intent of his statements that defendant appeared unusually nervous during a traffic stop).

186. *See id.*

187. *Terry*, 392 U.S. at 21.

188. *Id.* at 22 (stating that this interest "underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of possibly criminal behavior even though there is no probable cause to make an arrest").

189. *Id.*

the interest in reducing risks of physical harm to officers.[190] In *Vandenberg*, the New Mexico Supreme Court also cited to this balancing requirement in the context of a protective search.[191] Later, in *Robbs*, the New Mexico Court of Appeals applied the balancing of governmental interests against defendant's privacy rights in the context of an investigatory stop.[192]

The *Neal* majority, however, neglected to address the need to balance the governmental interest in detecting and preventing drug use and distribution against Neal's interest in being free from unwarranted intrusion. The only mention of this balancing analysis appears in Justice Bosson' dissent, which points out the majority's failure to perform this balancing portion of the reasonable suspicion test.[193] Justice Bosson states that "the majority appears to conclude that no amount of investigatory detention for drugs . . . could be justified based on what Officer LaSalle knew."[194] He then uses language such as "I suppose" and "I am compelled to this conclusion" when discussing the majority's likely position that no amount of detention could be justified based on what LaSalle knew.[195] Justice Bosson's criticism of the majority is correct. The majority had previously determined that LaSalle lacked reasonable suspicion to investigate,[196] and thus any expansion of the initial traffic stop would seemingly be unjustified. However, the court should have addressed this portion of the reasonable suspicion analysis rather than ignoring it altogether and leaving this conclusion to conjecture. Even though it relates to the scope of detention rather than justification for that detention in the first place, the court has a responsibility to make its decisions clear.

If even New Mexico Supreme Court justices are left to make suppositions about the exact position of court opinions, how are future courts or officers to determine the importance of how and when to use this part of the reasonable suspicion analysis? The majority opinion should have stated, as did the court in *Vandenberg*, that absent reasonable suspicion there can be no justification for a detention of any length. This is particularly true where the court of appeals relied on *Robbs* for determining the reasonable scope of detention in the same case.[197] Given the opportunity

190. *Id.* at 31.

191. State v. Vandenberg, 2003-NMSC-030, ¶ 23, 81 P.3d 19, 25.

192. State v. Robbs, 2006-NMCA-061, ¶ 9, 136 P.3d 570, 574.

193. State v. Neal, 2007-NMSC-043, ¶¶ 39, 52, 164 P.3d 57, 68, 71 (Bosson, J., dissenting).

194. *Id.* ¶ 39, 164 P.3d at 68 (Bosson, J., dissenting).

195. *Id.*

196. *Id.* ¶ 32, 164 P.3d at 66.

197. State v. Neal, No. 25,864, Memorandum Opinion at 6.

for confusion, the court should have made clear that no detention is acceptable absent reasonable suspicion. Otherwise, the court leaves open the chance that law enforcement officers and future courts may mistakenly believe that a shorter or less intrusive detention is justified even absent reasonable suspicion. A clearer statement of the importance of this type of balancing in a reasonable suspicion analysis would have elucidated search and seizure law and made for more useful precedent.

VI. NEW MEXICO'S NEED FOR CLEAR REASONABLE SUSPICION JURSIPRUDENCE

Since its publication, *State v. Neal* has been cited repeatedly by both the New Mexico Court of Appeals and the New Mexico Supreme Court in opinions regarding reasonable suspicion.[198] Perhaps a sign of its lack of strength is that *Neal* is rarely cited for its overall reasonable suspicion analysis. Most often, *Neal* is cited for its analysis of one of the many factors that may come into play in a reasonable suspicion analysis, such as the defendant's nervousness, location, or associations with other criminals. As explained above, the real difficulty lies in the fact that the fact-specific nature of the totality of the circumstances analysis can lead to uncertain results. The analysis will necessarily be different in every case, because it is next to impossible for two cases to involve the exact same set of facts. Moreover, the results from the analysis, even in the same case and looking at the same facts, often differ from judge to judge and justice to justice.

Because New Mexico interprets article II, section 10 of its constitution as providing broader protection to individual privacy than the Fourth Amendment, a clear and well-reasoned reasonable suspicion analysis becomes increasingly important as the courts expand its use into new contexts.[199] Clear and instructive opinions are necessary to help law enforcement officers shape their conduct, to make individuals aware of their rights, and to guide the courts in making future decisions. New Mexico opinions since *Neal* reveal that the courts have been doing a more thorough job of analyzing and explaining their analyses in the reasonable suspicion context. Uncertainty remains, however, as these decisions still involve several judges and justices coming out on different sides of the analysis.[200] Although the method for applying the totality of circum-

198. Lexis Nexis Shepard's Report: *State v. Neal* (February 10, 2013) available at http://www.lexisnexis.com/ (log in, then follow "Get a Document" hyperlink, then type in "164 P.3d 57", then follow "Shepardize" hyperlink) (cited 45 times).

199. *See* State v. Granville, 2006-NMCA-098, ¶¶ 14, 18, 142 P.3d 933, 937–38, 940.

200. *See* Part VI(B), *infra*.

stances test has been established, the fact remains that it is far from an easily applied, objective, bright-line rule. Because there is no way to make the test truly objective, the best the court can do is to fully analyze and explain its decision-making process to help guide future courts, officers, and individuals.

A. New Mexico Appellate Opinions Analyzing Reasonable Suspicion Post-Neal

In the five years since the New Mexico Supreme Court's opinion in *Neal*, the New Mexico appellate courts have had occasion to analyze reasonable suspicion over 120 times. Of these 120 opinions, the courts have often looked to *Neal* for guidance, citing the opinion forty-four times. A survey of some of these recent opinions reveals that, since *Neal*, the New Mexico appellate courts have worked hard to provide fully reasoned opinions. Because of the nature of the reasonable suspicion analysis and totality of the circumstances test, however, many times the same facts and law lead to very different results when viewed by different judges and justices. The law regarding reasonable suspicion, therefore, remains largely unpredictable.

1. *State v. Anaya*: Three court of appeals judges find officer conduct unreasonable; one magistrate court judge, one district court judge and five supreme court justices find officer conduct reasonable

In *Anaya*, the New Mexico Supreme Court reversed a court of appeals decision, which had reversed the district court's order denying the defendant's motion to suppress.[201] In this case, Anaya was driving toward a DWI checkpoint at approximately 2 a.m.[202] When Anaya came within sight of the sign indicating an upcoming checkpoint, she made a legal U-turn and drove in the opposite direction to avoid the stop.[203] Officers observing her actions followed Anaya and ultimately arrested her for DWI.[204] In support of her motion to suppress, Anaya argued that the legal U-turn was insufficient to create a reasonable suspicion that she was committing a crime, and thus the stop was unconstitutional.[205] The district

201. State v. Anaya, 2009-NMSC-043, ¶ 1, 217 P.3d at 587.
202. *Id.* ¶ 4, 217 P.3d at 587.
203. *Id.*
204. *Id.*
205. *Id.* ¶ 5, 217 P.3d at 588. Anaya originally filed her motion to suppress in magistrate court, where her motion was denied. She entered a plea of nolo contendere, reserving her right to challenge the stop in district court. *Id.*

court denied her motion, finding that under the totality of the circumstances officers had reasonable suspicion to stop her vehicle.[206]

The court of appeals found that the available facts were insufficient to create the reasonable suspicion required for officers to stop Anaya's vehicle.[207] The court noted that evading a DWI checkpoint was itself not illegal and that the facts upon which the district court had relied were all legal acts.[208] Thus, the court found that the circumstances amounted to only a generalized suspicion that Anaya was breaking the law, and it reversed the district court's order denying her motion to suppress.[209]

The supreme court then granted certiorari and, in a unanimous opinion, reversed the decision of the court of appeals.[210] Although the court agreed that a legal U-turn alone was insufficient to create reasonable suspicion of criminal activity, it noted that reasonable suspicion does not require officers to observe illegal activity.[211] In coming to its decision, the court relied on the officer's experience in similar situations, the time of day, and the nature of the roadway where the U-turn occurred.[212] The court stated that affirming the court of appeals' decision would essentially tell officers to "ignore reality," and that the case presented reasonable, articulable facts from which the officers could draw sufficient inferences to form reasonable suspicion.[213]

2. *State v. Sewell*: Three court of appeals judges find officer conduct unreasonable; one district court judge and five supreme court justices find officer conduct reasonable

In *Sewell*, the supreme court reversed a court of appeals decision reversing the district court's order denying the defendant's motion to suppress.[214] The court of appeals had held that the continuation of an investigatory stop in order for an officer to speak privately with a passenger of the vehicle was unreasonable under the Fourth Amendment.[215] Looking at the same set of facts, both courts analyzed whether an officer had reasonable suspicion to detain an individual suspected of drug trafficking

206. The district court considered Anaya's U-turn in conjunction with consideration of the time, place, and manner of her action. *Anaya*, 2009-NMSC-043, ¶ 6, 217 P.3d at 588.

207. State v. Anaya, 2008-NMCA-077, ¶ 19, 185 P.3d 1096, 1100.

208. *Id.* ¶ 19, 185 P.3d at 1100.

209. *Id.* ¶¶ 19–20, 185 P.3d at 1100.

210. *Anaya*, 2009-NMSC-043, 217 P.3d 586.

211. *Id.* ¶ 12, 217 P.3d at 589.

212. *Id.* ¶ 17, 217 P.3d at 590.

213. *Id.* ¶ 15, 217 P.3d at 589.

214. State v. Sewell, 2009-NMSC-033, ¶ 1, 211 P.3d 885, 886.

215. *Id.* ¶ 11, 211 P.3d at 887.

after a search of the suspect's vehicle failed to turn up any evidence.[216] Unlike the court of appeals, however, the supreme court found that the evolving circumstances facing the officers made it reasonable for them to expand the scope of their investigation.[217] The court stated that it would have been unreasonable for the officer to ignore the passenger's attempts to communicate something to him.[218] The court of appeals and the supreme court came to opposite conclusions regarding the reasonableness of the officers' actions under the totality of the circumstances, and each of the respective decisions were unanimous.[219]

3. *State v. Alderete*: One district court judge and one court of appeals judge find officer conduct unreasonable; two court of appeals judges find officer conduct reasonable

In *Alderete*, the district court granted the defendant's motion to suppress evidence obtained as a result of a search of her vehicle during a traffic stop.[220] The officers contended that they had reasonable suspicion to stop her vehicle based on surveillance of the house from which her vehicle came and on a reliable tip that drugs were to be delivered to that house and then redistributed.[221] When Alderete left the residence, officers followed her and eventually stopped her vehicle for a traffic violation.[222] The district court found that the traffic stop was pretextual, and that the officers lacked reasonable suspicion for their real motive for the stop,

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216. *Id.* The relevant facts involved an undercover Albuquerque Police Department detective who observed a known prostitute speaking to the driver of a truck who had pulled up to her on the street. The prostitute got into the truck and the driver then made several erratic driving maneuvers in and out of residential neighborhoods. Soon after, the truck stopped so that the prostitute could make a call at a pay phone. The truck then proceeded to a shopping center parking lot, followed by a Cadillac driven by the defendant. The prostitute got out of the truck and into the back seat of the Cadillac and then both vehicles left the parking lot. Suspecting that a drug transaction had just taken place, the detective requested that another officer make an investigatory stop of the Cadillac. The defendant gave the officer permission to search the vehicle, but no drugs were found. During this time, the female passenger (the prostitute) appeared afraid and officer felt that she was trying to indicate that there was something she wanted him to investigate. He pulled her aside to speak to her privately, and she told him that she and the defendant were making a crack deal and that the drugs were in her bra. *Id.* ¶¶ 3–7, 211 P.3d at 572–573.

217. *Id.* ¶ 22, 211 P.3d at 890.

218. *Id.* ¶ 24, 211 P.3d at 890.

219. *See Sewell*, 2009-NMSC-033, ¶ 24, 211 P.3d at 890; State v. Sewell, 2008-NMCA-027, 177 P.3d 536.

220. State v. Alderete, 2011-NMCA-055, ¶ 1, 255 P.3d 377, 378.

221. *Id.* ¶¶ 2–4, 255 P.3d at 379–80.

222. *Id.* ¶ 4, 255 P.3d at 379.

which was to investigate drug activity.[223] According to the district court, because officers did not have any reasonable suspicion that was directed at Alderete herself, their motive for stopping her vehicle was unsupported by reasonable suspicion.[224]

The court of appeals disagreed, finding that the necessary reasonable suspicion was based on detectives' surveillance of the house from which Alderete exited, a reliable tip that drugs would be delivered to and redistributed from that house, corroboration of that tip, and the reasonable inferences that could be drawn from the facts.[225] The court found that although the detectives did not have any information regarding Alderete herself, they did have reasonable suspicion to believe that any vehicle leaving that house under those circumstances was involved in drug activity.[226] In the opinion, the court emphasized its duty to "shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context."[227]

Because he found that the majority opinion improperly characterized some of the relevant facts and that the detectives did not possess any particularized information regarding Alderete, her vehicle and its contents, or the plans for the movement of the drugs, Judge Garcia dissented from the majority opinion.[228] He did not believe that the closeness in time between Alderete's departure from the home and her husband's prior departure allowed the officers to infer that she was transporting some or all of the remaining drugs, particularly when the officers did not know at that time that the first driver was her husband.[229] Thus, according to Judge Garcia's analysis of the facts, the officers' underlying motives for the traffic stop were based only on speculative hunches and unsupported conjecture.[230]

4. *State v. Olson*: Three court of appeals judges find officer conduct unreasonable; one district court judge and five supreme court justices find officer conduct reasonable

Recently, in *State v. Olson*, the New Mexico Supreme Court analyzed the reasonableness of an officer's expansion of a traffic stop into a

223. *Id.* ¶ 10, 255 P.3d at 381.
224. *Id.* ¶ 13, 255 P.3d at 381.
225. *Alderete*, 2011-NMCA-055, ¶ 20, 255 P.3d at 383.
226. *Id.*
227. *Id.* ¶ 21, 255 P.3d at 384.
228. *Id.* ¶ 30, 255 P.3d at 385 (Garcia, J, dissenting).
229. *Id.* ¶ 33, 255 P.3d at 386 (Garcia, J, dissenting).
230. *Alderete*, 2011-NMCA-055, ¶ 39, 255 P.3d at 389 (Garcia, J, dissenting).

prostitution investigation.[231] In *Olson*, the court of appeals had reversed the district court's order denying the defendant's motion to suppress,[232] and once again the supreme court reversed the decision of the court of appeals.[233] This case involved an officer who observed Olson pull into an alley, appear to recognize the police car, and immediately back out of the alley and drive away.[234] Olson's behavior made the officer suspicious; he followed the vehicle, noticed that the temporary tags were expired, and conducted a traffic stop.[235] When the officer approached the vehicle, Olson was rummaging for his paperwork and would not make eye contact with the officer.[236] The officer recognized the passenger of the vehicle as a known prostitute, and based on her dress and makeup, he concluded that she must have been working that evening.[237] After the officer separated Olson and the passenger, Olson told the officer that he was just giving the passenger a ride and that she was not working that night.[238] When the officer asked if Olson had a driver's license on him, Olson reached for his fanny pack.[239] For safety reasons, the officer asked if Olson had any weapons in the pack and requested to take a look to make sure; Olson agreed.[240] In the fanny pack were three crack pipes, and Olson subsequently revealed that he had cocaine in his front pocket.[241]

The district court denied Mr. Olson's motion to suppress, finding that the officer's actions in searching the fanny pack were reasonable under the circumstances.[242] The court of appeals reversed this decision because it found that the officer did not have any articulable, reasonable suspicion to expand the scope of the traffic stop to inquire as to Olson's relationship with his passenger.[243] The court stated that the officer's knowledge that the passenger was a prostitute was insufficient to allow him to infer that Olson had hired his passenger to engage in a sexual act.[244]

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231. State v. Olson, 2012-NMSC-035, 285 P.3d 1066.
232. State v. Olson, 2011-NMCA-056, ¶ 1, 258 P.3d 1140, 1142.
233. *Olson*, 2012-NMSC-035, ¶ 1, 285 P.3d at 1067.
234. *Id.* ¶ 2, 285 P.3d at 1067.
235. *Id.*
236. *Id.* ¶ 3, 285 P.3d at 1067.
237. *Id.*
238. State v. Olson, 2011-NMCA-056, ¶ 4, 258 P.3d 1140, 1143.
239. *Olson*, 2012-NMSC-035, ¶ 5, 285 P.3d at 1068.
240. *Id.*
241. *Id.* ¶ 6, 285 P.3d at 1068.
242. *Olson*, 2011-NMCA-056, ¶ 8, 258 P.3d at 1143.
243. *Id.* ¶ 17, 258 P.3d at 1145.
244. *Id.*

The supreme court disagreed, finding that the officer had articulated several specific reasons he believed Olson was engaged in soliciting prostitution.[245] In doing so, the court analyzed more than just the officer's familiarity with the passenger of the vehicle and her appearance—it also looked at the time and location of the incident, Olson's erratic driving behavior, and the fact that he avoided eye contact with the officer after being pulled over for expired tags.[246] Under these facts, the court determined that the record supported a finding that the officer had a reasonable, articulable suspicion that Olson was involved in the solicitation of a prostitute, so it reversed the decision of the court of appeals.[247]

B. The Court's Interpretation of Article II, Section 10, Has Resulted in a Greater Need for Clear Reasonable Suspicion Analyses

The totality of the circumstances test for reasonable suspicion is not based on an easily applied, bright-line rule, and presents the same difficulties under both the U.S. and New Mexico constitutions. Arguably, the potential consequences of a less-than-perfect analysis, such as that in *Neal,* are greater in cases determined under the New Mexico Constitution.[248] It is well settled that article II, section 10 of the New Mexico Constitution affords criminal defendants broader protections than does the Fourth Amendment.[249] Thus, in several contexts New Mexico courts have chosen to eschew the bright-line rules established by federal courts and instead to consider whether officer conduct is reasonable under the facts of each case.[250]

As a result of New Mexico's consistent avoidance of bright-line rules in search and seizure contexts, the number of cases in which New Mexico courts are required to make reasonableness determinations has increased over the past several years.[251] For example, New Mexico has chosen to analyze reasonableness in determining the reliability of an anonymous tip,[252] the propriety of vehicle searches incident to arrest,[253] whether an individual has been seized for the purposes of article II, sec-

245. *Olson*, 2012-NMSC-035, ¶ 15, 285 P.3d at 1070.
246. *Id.* ¶ 15, 285 P.3d at 1070.
247. *Id.* ¶¶ 15, 22, 285 P.3d at 1070, 1072.
248. Although *Neal* itself was analyzed under the U.S. Constitution, it has and continues to be cited by New Mexico courts in cases analyzed under the New Mexico state constitution.
249. State v. Granville, 2006-NMCA-098, ¶ 14, 142 P.3d 933, 937.
250. State v. Rodarte, 2005-NMCA-141, ¶ 14, 125 P.3d 647, 650-51.
251. *See Granville*, 2006-NMCA-098, ¶ 14, 142 P.3d at 937–38.
252. *See* State v. Urioste, 2002-NMSC-023, 52 P.3d 964.
253. *See* State v. Rowell, 2008-NMSC-041, 188 P.3d 95.

tion 10,[254] and whether an officer had reasonable suspicion to stop a vehicle when the initial reason given for the stop is found to be pretextual.[255] The increase in the number of contexts in which the courts must analyze reasonable suspicion has resulted in the increased frequency with which the courts must apply the totality of the circumstances analysis.[256]

C. How can anyone be sure what constitutes reasonable suspicion?

As explained herein and by the New Mexico and federal courts, reasonable suspicion cannot be narrowed down to a neat set of rules. Because of the variety of factual situations and circumstances present in each case, there simply is no bright-line test to determine whether a law enforcement officer in fact had a reasonable, articulable suspicion that an individual has broken a law. As evinced by the disparity from one judge or justice to another as to what constitutes reasonable suspicion, even under the same set of facts there is no way to be certain. In order to provide guidance in this area, therefore, the courts must fully analyze all available facts and provide a thorough explanation of the reasoning underlying their decisions. Defendants, attorneys, and law enforcement will then have to face the uncertain task of piecing together the facts of each individual case in order to determine their chances of proving or disproving the existence of reasonable suspicion.

VII. CONCLUSION

Appellate courts have a duty to provide guidance to future courts by clearly and carefully explaining their reasoning in their decisions.[257] In cases involving police officer conduct, appellate courts also have a duty to provide those officers with tools that will aid them in their daily activities, prevent them from infringing the constitutional rights of citizens, and avoid suppression of evidence of criminal activity.[258] In *State v. Neal*, the New Mexico Supreme Court missed an opportunity to add to the factual and analytical mosaic that comprises reasonable suspicion precedent.[259] The court's opinion would have better served its purpose as effective pre-

254. *See* State v. Garcia, 2009-NMSC-046, 217 P.3d 1032.

255. *See* State v. Ochoa, 2009-NMCA-002, 206 P.3d 143.

256. State v. Gonzales, 2011-NMSC-012, ¶ 15, 257 P.3d 894, 898 (stating that the court must look at the totality of the circumstances in analyzing whether an officer had reasonable suspicion).

257. *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 147 (2008) ("Outcomes are important, but so is the route by which the Court gets there.").

258. United States v. Arvizu, 534 U.S. 266, 275 (2002).

259. *See id.*

cedent if the court had evaluated Officer LaSalle's reasonable suspicion by considering all of the facts known to him, including some discussion of his specialized training and experience (or lack thereof, if appropriate), and clarifying the circumstances in which a court is required to balance the governmental interests against individual interests in a reasonable suspicion analysis. By failing to do so, the court has diminished the clarity, strength, and utility of the *Neal* opinion.

Since *Neal*, New Mexico appellate courts have had occasion to analyze reasonable suspicion in a variety of factual contexts. As explained herein, New Mexico has declined to adopt the federal bright-line tests in many search and seizure contexts and instead has chosen to determine reasonable suspicion under a totality of the circumstances analysis. Our state has chosen to do so in order to afford its citizens greater privacy protections under article II, section 10 than those offered by the Fourth Amendment. While the totality of the circumstances test may afford individuals broader protections, it often also leads to unpredictable results. Sometimes it is difficult to find the reason in a reasonable suspicion analysis. The courts have a responsibility to analyze all available facts and provide a thorough explanation of the reasoning underlying their decisions. It is only through these steps that our courts can meaningfully contribute to the "factual mosaic" that comprises reasonable suspicion law in New Mexico. This, in turn, will help the courts to provide guidance to law enforcement, citizens, and future courts alike.