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# Criminal Procedure: Something Smells in the Fifth Circuit: The Further Erosion of the Fourth Amendment

Todd Martin Gascon
*University of Dayton*

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# CRIMINAL PROCEDURE: SOMETHING SMELLS IN THE FIFTH CIRCUIT: THE FURTHER EROSION OF THE FOURTH AMENDMENT—*United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988).

## I. INTRODUCTION

As the drug problem continues to grow, police officers continue to fight this losing battle.[1] In order to stop the importation and distribution of drugs, police officers use a "drug courier profile" to detect and apprehend individuals who traffick drugs through American airports.[2] The "drug courier profile" is a compilation of characteristics that give officers information to determine whether an airline traveler is trafficking drugs.[3] The presence of profile characteristics, combined with an

1. Since 1980, according to congressional sources, the influx of smuggled cocaine has risen from approximately 25 tons a year to 125 tons a year. T. Morganthau & N. Finke Greensberg, *Crack and Crime*, NEWSWEEK, June 16, 1986, at 19.

2. The decision in United States v. Mendenhall, 446 U.S. 544 (1980), was the first time that the drug courier profile was before the Supreme Court as an element of reasonable suspicion. The plurality opinion, authored by Justice Stewart, ignored consideration of the profile traits, finding instead, that no seizure had taken place.

One month later, the drug courier profile was again before the Court in Reid v. Georgia, 448 U.S. 438 (1980) (per curiam), but here the Court found the displayed profile traits insufficient for reasonable suspicion. The Court, in a per curiam opinion, held that Reid's behavior was an insufficient basis for reasonable suspicion as a matter of law. The Court reasoned that a large number of innocent travelers would be subject to random investigative stops if these traits were found sufficient to justify a stop. Something more was required; simply matching a person to a set of drug courier profile traits did not justify a seizure. Finally, a more precise formulation for reasonable suspicion using the characteristics in a drug courier profile was developed in United States v. Cortez, 449 U.S. 411 (1981).

The *Cortez* Court established a totality of the circumstances approach for determining whether reasonable suspicion exists. The approach entails a two step process. First, consideration must be given to the objective observations gleaned from various law enforcement data seen in the light of trained police experience. Falling under this part of the analysis would be the drug courier profile. Second, consideration of the objective data in the first step must raise a suspicion of criminal activity "particularized" to the individual being stopped.

3. The drug courier profile is sometimes referred to as the "Markonni drug courier profile" after DEA agent Paul J. Markonni, who is credited with creating the profile. *See, e.g.*, United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977); Comment, *Mendenhall and Reid: The Drug Courier Profile and Investigative Stops*, 42 U. PITT. L. REV. 835, 837 n.15 (1981).

Profile characteristics are sometimes listed as primary and secondary characteristics. *See, e.g.*, United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979) (implying that characteristics listed as primary are more dispositive of drug activity than secondary characteristics), *cert. denied*, 447 U.S. 910 (1980). For a more detailed look at drug courier profile characteristics, see Comment, *The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?*, 12 NOVA L.J. 273 (1987).

The drug courier profile has had an indirect impact even in Dayton, Ohio. *See* United States v. Setzer, 654 F.2d 354 (5th Cir. Unit B Aug. 1981). Setzer was apprehended by DEA agent Markonni at Atlanta's Hartsfield International Airport. Setzer was on his way to Dayton, Ohio, when agent Markonni noticed that he was extremely nervous and that his initial return flight



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officer's experience, gives an officer the reasonable suspicion necessary to make an investigative stop permitted by *Terry v. Ohio.*[4]

Recently, the Fifth Circuit Court of Appeals in *United States v. Lovell*[5] gave the police *carte blanche* in airports. The *Lovell* court held that police officers who do not have reasonable suspicion may constitutionally remove an airline traveler's luggage from the airline's possession, squeeze the luggage, and then smell the luggage.[6] According to the *Lovell* court, removing, squeezing, and smelling a passenger's luggage are not searches or seizures within the meaning of the fourth amendment.[7]

This casenote argues that a police officer's squeezing and smelling of luggage, as in *Lovell,* constitute a search under the fourth amendment. This note, moreover, argues that the removal of luggage from an airline's conveyor belt constitutes a seizure. In sum, this note argues that the *Lovell* court provided yet another exception to the fourth amendment, one that is at once inconsistent with the plain language of the fourth amendment.

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reservation was on an early weekday morning flight. *Id.* at 356.

4. Terry v. Ohio, 392 U.S. 1 (1968). In a subsequent opinion, the Supreme Court applied the *Terry* rationale to seizures of property:

> [W]hen an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

United States v. Place, 462 U.S. 696, 705 (1983).

5. 849 F.2d 910 (5th Cir. 1988). On July 8, 1988, seven other cases were handed down all citing *Lovell* as controlling: United States v. Cagle, 849 F.2d 924, 926 (5th Cir. 1988) ("[i]t is clear that the agents' removal of Cagle's bag from the conveyor belt, their compression of the bag to procure a scent, and their subsequent sniff of the bag did not constitute a seizure. It is equally apparent . . . that the agents' prolonged detention of the suitcase . . . did so.") (citations omitted); United States v. Garcia, 849 F.2d 917 (5th Cir. 1988) (border patrol agents' squeeze and sniff of suitcase after removing it from an airport baggage area did not constitute a search or seizure as established in *Lovell*); United States v. Gutierrez, 849 F.2d 940 (5th Cir. 1988) (border patrol agent's removal of suspect's bag from airport baggage area conveyor belt and squeeze of the bag to procure a scent, constituted neither a search nor seizure as defined in *Lovell*); United States v. Hahn, 849 F.2d 932 (5th Cir. 1988) (border patrol agent's removal of suitcase from airport baggage conveyor belt, squeeze of the bag to procure a scent, and subsequent sniff of the bag did not constitute a search or seizure as established in *Lovell*); United States v. Karman, 849, F.2d 928 (5th Cir. 1988) (border patrol agents' compression and sniff of suitcases constitute neither a search nor seizure within the meaning of *Lovell*); United States v. Roman, 849 F.2d 920 (5th Cir. 1988) (defendant Roman abandoned suitcases which he checked at airport, and thus, did not have standing to challenge the search of the suitcases); United States v. Sawyer, 849 F.2d 938 (5th Cir. 1988) (border patrol agents' action removing suspect's baggage from airport baggage conveyor belt and compressing the suitcase was not a search or seizure within the meaning of *Lovell*).

6. *Lovell*, 849 F.2d at 912–16.

7. *Id.*

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## II. FACTS AND HOLDING

On May 28, 1987, two United States Border Patrol Agents observed Benny Carl Lovell arrive at a Texas airport in a taxi cab.[8] Both agents watched Lovell remove one suitcase from the cab while the taxi driver removed another.[9] The suitcases were made of soft-sided nylon.[10] The agents noticed that Lovell appeared to be very nervous.[11] Lovell checked his bags with the airport skycap and walked into the terminal.[12] One of the agents went to the baggage area and removed Lovell's suitcases from the conveyor belt.[13] The agents noticed that the suitcases were heavy and, when the agents touched the sides of the suitcases, they felt a solid mass.[14] The agents then compressed the sides of the suitcases.[15] Upon compression, the agents " 'got a real faint smell

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8. *Id.* at 911.

9. *Id.*

10. *Id.*

11. *Id.* The agents observed Lovell anxiously searching his pockets for money to pay the cab driver and as he approached the skycap he glanced around nervously. *Id.* One of the agents who was standing next to the skycap, watched as Lovell filled out the baggage claim checks. *Id.* The agent noted that Lovell's writing was erratic and that Lovell kept glancing around nervously as he wrote. *Id.* Another agent observed that Lovell "had a toothpick in his mouth and it was going 90 miles an hour." *Id.* Nervousness is one of the seven primary characteristics identified in Elmore v. United States, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

Applying the two-step analysis for reasonable suspicion established in United States v. Cortez, 449 U.S. 411 (1981), Lovell had but one characteristic under the drug courier profile—nervousness. Using step two of the *Cortez* test, one could hardly conclude that because Lovell was nervous, he must be engaged in some type of criminal activity. Clearly, this one fact could not have been used to satisfy a stop of Lovell. And it certainly could not justify a search of his luggage.

The Fifth Circuit's decision in United States v. Lovell, 849 F.2d 910 (5th Cir. 1988), has effectively allowed law enforcement officials to sidestep the Constitution. It is clear from the above analysis, and Fifth Circuit precedent, that the border agents in *Lovell* did not have reasonable suspicion. The agents needed additional evidence that Lovell might be trafficking drugs in order to stop him and conduct a limited investigative detention of him.

The observation of Lovell by the two agents involved identifying characteristics that are used in a "drug courier profile." Becton, *The Drug Courier Profile: "All Seems Infected that th' Infected Spy, as all Looks Yellow to the Jaundic'd Eye,"* 65 N.C.L. REV. 417 (1987).

> As part of the DEA's airline surveillance program to intercept illegal drugs, the drug courier profile focuses on the conduct and appearance of air travelers. Based solely on the fact certain airline passengers' behavior and appearance comport with the drug courier profile, DEA agents have identified possible narcotics couriers and then stopped, questioned, and arrested these individuals.

*Id.* at 418.

12. *Lovell*, 849 F.2d at 911.

13. *Id.*

14. *Id.*

15. *Id.* "Agent Williams described the mechanics of a baggage squeeze as follows: 'Well I would squeeze enough in order to force enough air out to be able to smell it.' Agent Jordan indicated that Williams 'put his nose up to the zipper part.'" Brief for Appellant at 3, United States v. Lovell, 849 F.2d 910 (5th Cir. 1988) (No. 87-1682) (citations omitted).

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of talcum powder and a real strong odor of marijuana.' "[16] Before compressing the suitcases, the agents could not detect the smell of marijuana.[17]

After detecting the odor of marijuana, one of the agents attempted to apprehend Lovell, but Lovell had already departed for Birmingham, Alabama.[18] The agents contacted the canine unit of the El Paso Police Department, and arranged to have a narcotics-sniffing dog brought to the airport.[19] The agents put Lovell's suitcases in a lineup and the dog alerted four times to Lovell's suitcases.[20] Thereafter, the Drug Enforcement Administration (DEA) was contacted and a search warrant was obtained.[21] Pursuant to the warrant, the agents opened the suitcases and found sixty-eight pounds of marijuana.[22] The agents then called the DEA in Birmingham, Alabama, and gave them a physical description of Lovell and his flight number. The Alabama DEA agents apprehended Lovell, and, after searching him, discovered baggage claim tickets matching those on the suitcases in El Paso.[23]

On June 16, 1987, Lovell was indicted by a federal grand jury on one count charging that he unlawfully possessed marijuana with the intent to distribute,[24] in violation of 21 U.S.C. § 841(a)(1).[25] Lovell moved to suppress all evidence.[26] The district court denied Lovell's motion.[27] Lovell then entered a conditional plea of guilty, reserving the right to appeal the denial of his motion to suppress.[28] Lovell appealed.[29]

The Court of Appeals for the Fifth Circuit addressed three issues: whether the agents' removal of Lovell's bags from the conveyor belt constituted a seizure; whether the agents' compression of Lovell's bags constituted either a search or seizure; and whether the agents' sniff of

16. *Lovell*, 849 F.2d at 911.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 911-12.
24. *Id.* at 912.
25. 21 U.S.C. § 841(a)(1) (1988). Section 841(a)(1) provides that it is "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *Id.*
26. *Lovell*, 849 F.2d at 912.
27. *Id.*
28. *Id.* at 911. Federal Rule of Criminal Procedure 11(a)(2) allows a defendant, with the approval of government, to enter a conditional plea of guilty. FED. R. CRIM. P. 11(a)(2). This, in effect, reserves the right, on appeal from the judgment, to review the adverse determination of any specified pretrial motion. On appeal, the issue in *Lovell* was the lower court's denial of Lovell's motion to suppress. *Lovell*, 849 F.2d at 912.
29. *Lovell*, 849 F.2d at 912.

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Lovell's bags constituted a search.[30] At the outset, the court of appeals assumed, without deciding, that the agents did not have reasonable suspicion that Lovell's bags contained marijuana before they removed the bags from the conveyor belt for a sniff test.[31]

The court of appeals first asked whether the agents' sniff of Lovell's bags was a search.[32] Relying upon its decision in *United States v. Goldstein*,[33] the court of appeals concluded that the agents' sniff of Lovell's bags was not a search.[34] Lovell tried to distinguish *Goldstein* by arguing "that the agents' actions in the instant case were more intrusive than those in *Goldstein* because the agents squeezed his bags."[35] But the court of appeals rejected this reasoning[36] and stated that a similar argument had failed in *United States v. Viera*.[37] Lovell, moreover, argued that the agents' lifting and squeezing of his bags constituted a search.[38] Again, the court of appeals disagreed, concluding that the handling of Lovell's bags was not a search.[39] Similarly, the court of appeals found that the handling of Lovell's bags was not a

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30. *Id.* Lovell did not appeal to the United States Supreme Court because he had served his sentence in full. Telephone interview with Elizabeth Rogers, Esq., First Assistant Federal Public Defender in El Paso, Texas (Nov. 3, 1988).

31. *Lovell*, 849 F.2d at 912 n.2.

32. Although the word "privacy" does not appear in the Constitution, the Supreme Court has recognized a constitutional right to privacy based upon the provisions of the first, third, fourth, fifth, and ninth amendments and their respective "penumbras." Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965). This right to privacy is a "fundamental personal right." *Id.* at 494 (Goldberg, J., concurring); *see, e.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886) (the fourth amendment protects "the privacies of life"), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967); *Ex parte* Jackson, 96 U.S. 727, 733 (1877) (the fourth amendment protects "secrecy of letters and . . . packages").

33. 635 F.2d 356 (5th Cir. Unit B Jan. 1981), *cert. denied*, 452 U.S. 962 (1981).

34. *Lovell*, 849 F.2d at 913. In *Goldstein*, the Fifth Circuit Court of Appeals stated "[i]t is undisputed that, had one of the DEA agents through the use of his olfactory sense detected the odor of the controlled substances in the suitcases, a search would not have occurred." *Goldstein*, 635 F.2d at 361.

35. *Lovell*, 849 F.2d at 913.

36. *Id.*

37. 644 F.2d 509 (5th Cir. Unit B May), *cert. denied*, 454 U.S. 867 (1981). In *Viera*, the defendants were traveling by bus from Los Angeles to Miami. *Id.* at 510. Upon changing from one bus to another in Jacksonville, the bus driver transferred six suitcases belonging to the defendants from one bus to another. *Id.* While the bus driver was loading the last of the six bags, it came open somewhat, and he observed several bags of pills and white powder in the suitcase. *Id.* The bus driver telephoned the DEA in Miami, and upon their arrival, the Miami DEA agents escorted the defendants into the bus terminal where they were arrested. *Id.* The defendants argued that the government "prepped" the bags before they were subjected to a canine sniff, a process not authorized by the court's earlier decision in *Goldstein*. *Id.* at 510. The *Viera* court agreed that *Goldstein* did not deal with prepping specifically, but it reasoned that "a light press of the hands along the outside of a suitcase [was] not sufficiently intrusive to require a different result." *Id.*

38. *Lovell*, 849 F.2d at 912–15.

39. *Id.* at 915–16.

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seizure.[40] As a result, the court of appeals affirmed the district court's dismissal of Lovell's suppression motion.[41]

## III. BACKGROUND

Throughout the years, the Supreme Court has changed the way it applies the fourth amendment.[42] Early decisions interpreting the fourth amendment held that individuals received no fourth amendment protection unless they had propriety or possessory interests in the property searched.[43] For example, in *Olmstead v. United States*,[44] the Supreme Court held that eavesdropping on telephone conversations by "tapping" the wires was not a search because "wires are not part of [one's] house or office any more than are the highways along which they are stretched."[45] The Court applied a trespass doctrine and reasoned that a search required an actual physical invasion into a protected area.[46] Years later, the Court disposed of the trespass doctrine in *Katz v. United States*.[47] In *Katz*, the Court held that it was a search to attach an electronic eavesdropping device to the outside of a telephone booth in order to hear and record conversations inside the booth.[48] The *Katz* standard, set out in Justice Harlan's concurring opinion, focused on the issue of privacy as opposed to an individual's property interest.[49] Justice Harlan stated that the Constitution will protect individuals who "have exhibited an actual (subjective) expectation of privacy and . . . that the expectation be one that society is prepared to recognize as

40. The *Lovell* court distinguished the fourth amendment violation in United States v. Place, 462 U.S. 696 (1983). The *Lovell* court reasoned that Lovell had surrendered his bag to a third-party common carrier with the expectation that the carrier would transport the luggage to his destination. *Id.* at 916. The *Lovell* court noted that there "[was] *no* suggestion that if the agents had not smelled marijuana, Lovell's travel would have been interfered with or his expectations with respect to his luggage frustrated." *Id.* (emphasis added). According to the court, "[t]he momentary delay occasioned by the bags' removal from the conveyer belt was insufficient to constitute a meaningful interference with Lovell's possessory interest in his bags." *Id.*

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

42. The Supreme Court did not interpret the fourth amendment until 1886. *See* Boyd v. United States, 116 U.S. 616 (1886), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967). The case involved forfeiture proceedings under a revenue act which provided that a refusal to produce requested documents would be considered a confession to the government's allegations. *Id.* at 620. Although there was no actual search and seizure, "[the act] accomplishes the substantial object of [search and seizure] acts in forcing from a party evidence against himself." *Id.* at 622. The importance of *Boyd* lies in the sweeping view of the protection against unreasonable intrusions adopted by the Court.

43. *See, e.g.*, Goldstein v. United States, 316 U.S. 114 (1942).

44. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

45. *Id.* at 465.

46. *Id.* at 463–69.

47. 389 U.S. 347, 353 (1967).

48. *Id.* at 353.

49. *Id.* at 360–62 (Harlan, J., concurring).

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'reasonable.' "[50]

To determine whether society will recognize a privacy interest, one must balance the governmental interests against the individual's expectation of privacy.[51] This balancing test is used not only to determine privacy interests, but also to affect the probable cause standard when the government's intrusion on privacy rises to the level of a search.[52] The Court addressed this issue in *Terry v. Ohio*.[53] In examining the constitutional limits of "stop and frisk" encounters, the Court excepted conduct of this kind from the traditional requirement of probable cause.[54] The Court reasoned:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[55]

The Court extended the scope of *Terry* to seizures of personal property in *United States v. Place*.[56] In *Place*, the Court considered the fourth amendment's prohibition against unlawful searches in connection with a dog's sniff of a traveler's luggage at a public airport.[57] The Court held that a dog's sniff was not a search within the meaning of the fourth amendment.[58] Recognizing that people have a privacy interest in their luggage, the Court emphasized the non-intrusive nature of a dog's sniff.[59] The Court reasoned that a dog's sniff is much less intrusive than a typical search because the officers do not have to rummage through personal effects.[60] Additionally, the Court emphasized the limited disclosure of information obtained via a dog sniff.[61] This limited disclosure ensures that the owner of the luggage is not embarrassed or

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50. *Id.* at 361.
51. *Id.*
52. *Id.*
53. 392 U.S. 1 (1968).
54. *Id.* at 27.
55. *Id.* at 30.
56. 462 U.S. 696 (1983).
57. *Id.* at 707.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

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inconvenienced.[62]

The first time the Court had addressed the reasonableness of a warrantless search based upon an odor was in *Taylor v. United States*.[63] In *Taylor*, a group of liquor prohibition agents investigated a certain location following complaints indicating the presence of illegal liquor.[64] Upon arriving at the location, the agents detected the smell of whiskey emanating from a garage adjacent to Taylor's residence.[65] Peering through a small opening in the garage, the agents observed a number of cardboard cases that they suspected contained jars of whiskey.[66] After removing a lock and entering the garage, the agents conducted a search, uncovering a large cache of liquor.[67] Taylor arrived at the garage and was arrested.[68] The *Taylor* Court did not dispute the value of odor, but found that the search could not be justified.[69] The search was unreasonable because the agents had not obtained, or even attempted to obtain, a search warrant despite their "abundant opportunity" to do so.[70]

The Court next dealt with odor and warrantless searches in *Johnson v. United States*.[71] There an experienced police lieutenant of the Seattle narcotics department received information that unknown persons were smoking opium in a hotel.[72] An attempt to get further information at the hotel revealed a strong odor of burning opium in the hallway.[73] The lieutenant left and returned with several federal narcotic agents.[74] The odor was traced to a room in the hotel.[75] The officers knocked and a voice from within asked who was there.[76] "Lieutenant Beland," an officer replied.[77] Johnson opened the door and admitted the officers. Johnson was arrested.[78] After arresting Johnson,

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62. *Id.*
63. 286 U.S. 1 (1932).
64. *Id.* at 5. Taylor, the resident of the premises, was known to have been previously convicted of violating prohibition laws.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 6. The *Taylor* Court stated that the "[p]rohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search." *Id.*
70. *Id.*
71. 333 U.S. 10 (1948).
72. *Id.* at 12.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

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the officers searched the room.[79] The search yielded opium and a warm smoking apparatus.[80] The Supreme Court found the arrest unlawful.[81] The entry to Johnson's room was granted by her involuntary submission to authority.[82] In passing, the Court noted "that odors alone do not authorize a search without warrant."[83]

## IV. ANALYSIS

### A. *There Was a Search of Lovell's Luggage*

Unlike a person, luggage possesses no fourth amendment rights.[84] Accordingly, to determine whether the agents' actions in *United States v. Lovell*[85] constituted a search, one must determine whether the agents' actions violated Lovell's reasonable expectations of privacy in his luggage.[86] The *Lovell* court was quick to conclude that the agents had not violated Lovell's privacy interest in his luggage.[87] This conclu-

79. *Id.*

80. *Id.*

81. *Id.* at 17.

82. *Id.* at 16.

83. *Id.* at 13. The facts in Johnson v. United States, 333 U.S. 10 (1948), are different from those in *Lovell*. In *Johnson*, the officers walked down the hallway and could smell a strong odor of opium, which eventually led them to the defendant's room. The officers in *Lovell* did not walk by the conveyor belt and smell marijuana emanating from Lovell's luggage. Indeed, the officers noticed that Lovell was acting unusually nervous for an air traveler and they decided themselves to remove his luggage from the conveyor belt after Lovell had checked them with the Southwest Airline's clerk. *Lovell*, 849 F.2d at 911. After removing his luggage, the agents compressed and squeezed his luggage and as air was forced from within the locked suitcases in to the "public air," the agents detected, through their olfactory senses, "a real faint smell of talcum powder and a real strong odor of marijuana." *Id.*

The actions of the agents were much more intrusive than what the Fifth Circuit would choose to believe. The agents had to touch and compress Lovell's luggage before they could smell any odor of marijuana. Therefore, this case is significantly different from Johnson, where experienced narcotics agents, acting on an informant's tip, smelled the odor of burning opium (in "public air") and could actually follow the scent right to Johnson's hotel room. *Johnson*, 333 U.S. at 12. The narcotics agents did nothing to enhance their senses. They did not walk down the hall, open up the door to Johnson's room and then determine that there was opium in the room. In effect, this is what the border agents did to Lovell when they squeezed and sniffed his luggage.

84. *See supra* text accompanying note 34. The Supreme Court has stated:

> [T]he Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz v. United States, 389 U.S. 347, 351–52 (1967) (citations omitted).

Despite the clear language, courts regularly find that the expectation of privacy of a person in his luggage is lessened because he has brought the luggage into a public airport.

85. 849 F.2d 910 (5th Cir. 1988).

86. *Id.* at 912.

87. To determine whether Lovell had a reasonable expectation of privacy in his luggage, the court applied the test set out in *Katz*. The expectation of privacy must be an "actual" one, one that is subjectively held by the person affected by the search. *Katz*, 389 U.S. at 361 (Harlan, J.,

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sion, however, is unconvincing. An airline traveler should not lose his fourth amendment protection in his luggage simply because luggage is highly mobile or is found in a public place. In an airport setting, privacy interests in luggage are high. A traveler often has his most valuable and private possessions in his luggage and wants to shield these items from the prying eyes of strangers—especially the government.[88] To the traveler, luggage containing personal belongings represents one of the few hallmarks of privacy.

The actions by the agents clearly violated Lovell's reasonable expectation of privacy in the contents of his luggage. The *Lovell* court recognized the idea that "when airport security concerns are not implicated, 'every passenger who has luggage checked with an airline enjoys a reasonable expectation of privacy that the *contents* of that luggage will not be exposed in the absence of consent or a legally obtained warrant.' "[89] Yet the *Lovell* court failed to adhere to this important principle.

In *Lovell*, there was no evidence that the presence of Lovell's luggage on the conveyor belt implicated any airport concerns. Therefore, Lovell had a reasonable expectation of privacy in the contents of his luggage. There were other constitutional procedures that could have been used without violating Lovell's reasonable expectation of privacy. Since the agents were suspicious that Lovell was trafficking drugs, they should have asked to talk with him before he boarded the airplane. This, however, was not done.

Absent any legitimate airport concerns, the agents' actions could only be justified if Lovell had consented to the search of his luggage or the agents had obtained a search warrant. Lovell had not consented to the search by the agents. In fact, there was no consent from the bailee-airline, which had legal possession of Lovell's luggage. Further, there was no valid search warrant obtained before the search by the agents. The agents obtained a search warrant only after squeezing, touching, and smelling Lovell's luggage.[90] Such action by government officials is

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concurring). This expectation must "be one that society is prepared to recognize as 'reasonable.' " *Id.*

88. For an earlier case stating this same proposition as it applies to a footlocker, see United States v. Chadwick, 433 U.S. 1 (1977). The Supreme Court stated:

> By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment . . . .

*Id.* at 11.

89. *Lovell*, 849 F.2d at 913 (quoting United States v. Goldstein, 635 F.2d 356, 361 (5th Cir. Unit B Jan.), *cert. denied*, 452 U.S. 962 (1981)).

90. *Lovell*, 849 F.2d at 911.

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at odds with the constitutional protections provided in the fourth amendment. Therefore, absent Lovell's consent or a valid search warrant, the agents' actions clearly violated Lovell's reasonable expectation of privacy. This violation of Lovell's privacy interest leads to only one possible conclusion—the touching, squeezing, and smelling of Lovell's luggage was an unreasonable search under the fourth amendment.

The *Lovell* court, relying on *United States v. Goldstein*,[91] concluded that the actions by the agents did not constitute a search within the meaning of the fourth amendment. Specifically, the court concluded that "[t]he agents' sniff of Lovell's bags was not a search."[92] In *Goldstein*, the Fifth Circuit concluded that "[t]he agents' use of a canine's more enhanced . . . olfactory sense cannot convert a sniff of the exterior of those suitcases into a search."[93]Applying *Goldstein*, the *Lovell* court concluded that a human sniff was not a search of Lovell's luggage.[94] This non-intrusive dog sniff, however, was not at all present in *Lovell*. A dog does nothing to enhance his sense of smell: the dog either smells the presence of contraband or it does not. The dog in *Goldstein* detected an aroma of narcotics by smelling the luggage and the air surrounding it.[95] In order to detect an odor of marijuana, the agents in *Lovell* had to do something more than what the dog in *Goldstein* did. They had to search the luggage. The agents had to remove the luggage from the conveyor belt and then squeeze and touch the luggage before they could detect an odor of marijuana.[96] The combination of these acts—removing, touching, squeezing, and then smelling—is very different from walking by Lovell's luggage and detecting an odor of marijuana. Only if the agents had walked past Lovell's luggage as it sat on the conveyor belt and detected an odor of marijuana emanating from his luggage, would they have acted similarly to the dog in *Goldstein*. In that situation, they would have detected an odor of marijuana that was present in the airspace surrounding Lovell's luggage, where Lovell has no reasonable expectation of privacy. In short, the human sniff in *Lovell* is not analogous to the canine sniff in *Goldstein*.

The actions of the agents in *Lovell* are analogous to the actions of the police officer in *Hicks v. Arizona*.[97] In *Hicks*, police officers entered

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91. 635 F.2d 356 (5th Cir. Unit B Jan.), *cert denied*, 452 U.S. 962 (1981).
92. *Lovell*, 849 F.2d at 913.
93. *Goldstein*, 635 F.2d at 361.
94. *Lovell*, 849 F.2d at 913.
95. *Goldstein*, 635 F.2d at 359.
96. *Lovell*, 849 F.2d at 911.
97. 480 U.S. 321 (1987).

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an apartment building after hearing the sound of gunfire.[98] Once inside the apartment, the officers began looking for weapons, the shooter, and possible victims of the shooting.[99] The search of the apartment was constitutional under the doctrine of exigent circumstances.[100] During the search of Hicks' apartment, however, one of the officers noticed an expensive stereo component "which seemed out of place in the squalid and otherwise ill-appointed four-room apartment."[101] The officer moved the stereo component in order to get its serial number, as he suspected that it had been stolen.[102] Holding that the moving of the stereo component, even a few inches, was a violation of Hicks' fourth amendment rights, Justice Scalia wrote: "[T]aking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry."[103]

In *Hicks,* the actions of the police officer went beyond the permissible scope of the lawful entry when he moved the stereo component.[104] If the officer had "[m]erely inspect[ed] those parts of the turntable that came into view during the . . . search [his actions] would have produced no additional invasion of [Hicks'] privacy interest."[105]

The principles established in *Hicks* are applicable to the agents' actions in *Lovell.* Under the doctrine of "plain odor,"[106] had the agents walked past Lovell's luggage and detected an odor of marijuana, their actions would have produced no invasion of Lovell's privacy interest, since Lovell has no reasonable expectation of privacy in the air surrounding his luggage. However, like the police officer in *Hicks,* the actions of the agents exposed their sense of smell to the hidden items contained inside Lovell's luggage. The agents removed Lovell's luggage from the conveyor belt and began to touch, squeeze, and smell his luggage. These actions exceeded the permissible bounds of "plain odor," just as the officers' turning of the stereo equipment in *Hicks* exceeded the permissible bounds of the "plain view" exception to the fourth amendment. Indeed, the agents in *Lovell* unreasonably searched

98. *Id.* at 323.
99. *Id.*
100. *Id.* at 324.
101. *Id.* at 323.
102. *Id.*
103. *Id.* at 325.
104. *Id.*
105. *Id.*
106. *See* United States v. Salis, 536 F.2d 880, 881 (9th Cir. 1976) ("[G]enerally evidence acquired by unaided human senses from without a protected area is not considered an illegal invasion of privacy . . . .").

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Lovell's luggage.

### B. *There Was a Seizure of Lovell's Luggage*

Relying on *United States v. Place,*[107] the *Lovell* court concluded that the actions by the border agents did not constitute a seizure within the meaning of the fourth amendment.[108] In *Place,* Justice O'Connor stressed that the seizure of luggage from a suspect's immediate possession can invade personal liberty interests as well as possessory interests.[109] Justice O'Connor stated:

> The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. . . . Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return.[110]

Unlike the defendant in *Place,* Lovell's luggage was removed from a conveyor belt and not from his person. The luggage was in the possession of a bailee, Southwest Airlines. Lovell, by the terms of the airline agreement, allowed the airline to take possession, and not ownership, of his luggage and promptly return it to him when he arrived in Birmingham, Alabama. Lovell, as a bailor, agreed only to give possession of his luggage to the airline and no one else. At no time did Lovell expressly or impliedly agree to allow a third party, the border agents, to interfere with the airline's possession of his luggage. It was the physical removal of the bags from the airline's conveyor belt that violated the possessory interest of Lovell in his luggage. Lovell's flight plans were not interrupted. But that is not significant. It is the possibility of interruption that constitutes a seizure. Had the investigation of Lovell's luggage by the border agents proved futile, they may have been unable to return the luggage to the airport personnel. The *Lovell* decision effectively allows government officials to interfere with a bailment situation to which the government is not a party.

## V. CONCLUSION

In *United States v. Lovell,*[111] the agents violated Lovell's reasonable expectations of privacy when they removed and squeezed Lovell's baggage. Although Lovell did not have an expectation of privacy in the air surrounding the luggage, he did have a privacy interest in the con-

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107. 462 U.S. 696 (1983).
108. *Lovell,* 849 F.2d at 916.
109. *Place,* 462 U.S. at 708.
110. *Id.*
111. 849 F.2d 910 (5th Cir. 1988).

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tents of the luggage.[112] The Fifth Circuit Court of Appeals in *Lovell* has frustrated the constitutional safeguards recently provided by the United States Supreme Court in *United States v. Place.*[113] The *Lovell* decision allows the police too much discretion.[114] Other legal alternatives were available to the border patrol agents in *Lovell.* They had the use of narcotics-sniffing dogs and the opportunity to question Lovell.[115] By using these constitutional alternatives, they could have performed their jobs effectively and protected Lovell's fourth amendment rights. Instead, the Fifth Circuit Court of Appeals has created another exception to the fourth amendment.

*Todd Martin Gascon*

112. *Id.* at 914.
113. 462 U.S. 696 (1983).
114. Lovell was neither informed that his luggage had been seized, nor was he given a receipt or a phone number that he might use if the seizure proved to be unwarranted. Brief for Appellant at 11, United States v. Lovell, 849 F.2d 910 (5th Cir. 1988) (No. 87-1682). This same argument was made in United States v. Cagle, 849 F.2d 924 (5th Cir. 1988).
115. *Lovell,* 849 F.2d at 911.

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