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Barbara J. Lorence

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE—BRIEF INVESTIGATIONAL STOPS—DRUG COURIER PROFILES—The United States Supreme Court has held that drug courier profiles may be utilized by law enforcement agents to demonstrate that a reasonable suspicion of criminal activity exists in order to justify their brief investigative stop of an individual for questioning within Constitutional parameters.

United States v. Sokolow, ___ U.S. ___, 109 S. Ct. 1581 (1989).

Early in the evening of July 25, 1984, Andrew Sokolow was stopped by Drug Enforcement Administration (DEA) agents shortly after his arrival at the Honolulu International Airport from Miami.[1] One piece of Sokolow's luggage, a Louis Vuitton tote, was found to contain 1.063 grams of cocaine.[2] Prior to stopping the respondent, DEA agents had determined that:

> 1. Sokolow had paid $2,100 in cash for two round-trip tickets from a stack of $20 bills estimated by the ticket agent to contain approximately $4,000.[3]
> 2. He and a female companion had stayed in Miami about 48 hours, with the flight time to and from Honolulu and Miami totaling 20 hours.[4]
> 3. Miami is a known source city for illegal drugs.[5]
> 4. The name under which Sokolow purchased his ticket did not match the name under which his telephone was listed.[6]

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1. United States v. Sokolow, ___U.S. ___, 109 S. Ct. 1581 (1989). Also stopped was Janet Norian, Sokolow's female roommate, who had accompanied respondent on his trip to and from Miami. *Id.* at 4402.

2. 109 S. Ct. at 1584. All four pieces of Sokolow's luggage were sniffed by two narcotics detection dogs. The dogs "alerted", or indicated by their behavior that they detected the smell of an illegal substance, to two pieces of this luggage. Search warrants were obtained for both bags. When searched, only the Louis Vuitton tote appeared to contain cocaine although cocaine residue was discovered later in the other bag as well. *Id.*

3. 109 S. Ct. at 1583. Respondent purchased his tickets at a United Airlines counter in the Honolulu Airport. He handed the ticket agent a large stack of $20 bills, from which the agent took $2,100. The agent observed that the stack was depleted by about half and that respondent seemed nervous. The ticket agent informed Officer John McCarthy of the Honolulu Police Department's airport task force of Sokolow's large cash purchase. Brief for the United States at 3, United States v. Sokolow, 109 S. Ct. 1581 (1989)(No. 87-1295).

4. 109 S. Ct. at 1583.

5. Petition for Writ of Certiorari at 11-12, United States v. Sokolow, 109 S. Ct. 1581 (1989)(No.87-1295). The DEA agents who questioned respondent testified at an evidentiary hearing that "Miami is the granddaddy source city for cocaine." *Id.* at 13.

6. Brief for the United States at 3-4. Respondent bought his tickets in the names Andrew Kray and Janet Norian. After being tipped off by the United Airlines agent, Officer McCarthy checked the home phone number Sokolow had provided and learned that it was listed to a Karl Herman. There was no Hawaiian telephone listing for Andrew Kray. When

5. Neither respondent nor his companion checked any of their four pieces of luggage on either flight.[7]
6. Sokolow appeared to be nervous throughout his trip.[8]
7. Respondent was about 25 years old and wore a black jumpsuit with a lot of gold jewelry during both flights.[9]

Four DEA agents intercepted Sokolow and his companion, Janet Norian, as they were hailing a cab outside the airport.[10] Agent Richard Kempshall showed the respondent his credentials, then guided him back onto the sidewalk.[11] When asked to produce his ticket and identification, Sokolow replied that he had neither.[12] He told the agents his name was "Sokolow" but that his ticket had been purchased in his mother's maiden name of "Kray."[13] Both respondent and Norian were taken to the airport DEA office where their luggage was "searched" by Donker, a dog trained to sniff out narcotics.[14] Donker alerted to respondent's brown shoulder bag.[15] At this point, Sokolow was placed under arrest and informed of his Miranda rights.[16] He made no statement.[17] Agents obtained a search warrant for the brown shoulder bag but discovered no illicit drugs.[18] However, the bag did contain an assortment of papers

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McCarthy called Herman's number, the ticket agent identified the recorded message as being in Andrew Kray's voice. *Id.*

7. 109 S. Ct. at 1583.

8. Brief for the United States at 3-4. The ticket agent had told Officer McCarthy of Sokolow's nervous conduct. Narcotics agents during his layover in the Los Angeles airport on his return flight also reported his nervous mannerisms, such as "looking all around the waiting area." *Id.*

9. 109 S. Ct. at 1583.

10. *Id.* at 1584. After deplaning, Sokolow and Norian carried their bags directly to the ground transportation area and moved out into the street to flag down a taxi. *Id.*

11. *Id.* The agents denied having physical contact with Sokolow. The District Court found respondent's claim that an agent had grabbed him "reasonably believable," observing that the government had the burden of proof on this issue. Petition for Writ of Certiorari at 4-5, United States v. Sokolow, 109 S. Ct. 1581 (1989)(No. 87-1295).

12. 109 S. Ct. at 1584.

13. *Id.* While in the airport DEA office, Sokolow also claimed that a man named Marty, whom he had met on the beach, bought his tickets. Brief for the United States at 5.

14. 109 S. Ct. at 1584. Narcotics dogs are not permitted to perform their duties within the public areas of the airport. Regarding the constitutionality of using trained dogs to detect narcotics in airline passengers' luggage, the Supreme Court held in 1983 that such sniffing was not a search and so not entitled to Fourth Amendment protection. United States v. Place, 462 696 (1983).

15. 109 S. Ct. at 1584. In the affidavit for a warrant to search this bag, task force officer McCarthy indicated that Donker had accurately alerted to the presence of narcotics in luggage on hundreds of previous occasions and was a reliable narcotics detection dog. Petition for Writ of Certiorari at 5.

16. 109 S. Ct. at 1584.

17. *Id.*

18. *Id.* A more complete examination later revealed cocaine residue. Petition for Writ

linking respondent with the drug trade.[19] Donker then sniffed the remaining three pieces of luggage and this time alerted to a medium-sized Louis Vitton bag.[20] As it was too late in the evening to secure a second search warrant, respondent was allowed to leave, but without his luggage.[21] The following morning, a second narcotics detection dog confirmed Donker's alert to the Louis Vuitton bag and a warrant to search this piece was sought and granted.[22] Agents thereafter found 1.063 grams of cocaine inside the Louis Vuitton bag.[23]

Based on the above evidence, Sokolow was indicted for violation of Title 21, United States Code, Section 841(a)(1), and charged with possession with intent to distribute cocaine.[24] The District Court denied respondent's motion to suppress the evidence produced by the airport searches, finding that Sokolow's detention by DEA agents was supported by a reasonable suspicion that respondent was presently engaged in drug trafficking.[25] Sokolow was convicted after entering a conditional plea of guilty.[26]

The United States Court of Appeals for the Ninth Circuit reversed the District Court's conviction, holding that the reasonable suspicion necessary to justify respondent's detention by DEA agents was not present.[27] The majority opinion divided evidence

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of Certiorari at 5.

19. 109 S. Ct. at 1584. Inside the bag were two round trip tickets for previous Honolulu-Miami flights issued in the names Andrew Kray and James Wodehouse, along with Miami hotel receipts matching these trips. Hand-written notes that appeared to be memos of drug transactions also were found. The bag also held four safety deposit box keys and respondent's personal address book listing the names of suspected drug traffickers. Petition for Writ of Certiorari at 5-6.

20. 109 S. Ct. at 1584.

21. *Id.* Donker alerted to the second bag around 9:30 p.m., approximately three hours after respondent had initially been approached by DEA agents. Petition for Writ of Certiorari at 6.

22. 109 S. Ct. at 1584.

23. *Id.*

24. *Id.* 21 U.S.C. § 841(a) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 841(a)(1)(1970).

25. United States v. Sokolow, ___ U.S. ___, 109 S. Ct. 1581 1584 (1989).

26. Petition for Writ of Certiorari at 2-3. Sokolow was sentenced to five years in prison, followed by three years of parole. *Id.* at 3.

27. 109 S. Ct. at 1584. This was the second time the Court of Appeals heard this case, and in both instances the Court concluded that respondent's stop was not supported by a reasonable suspicion that he was engaged in criminal activity. On the first hearing, the Court examined separately each fact known by the agents to determine if it gave rise to a reasonable suspicion that respondent was transporting drugs. After the Supreme Court's

used to constitute reasonable suspicion into two types: evidence descriptive of "ongoing criminal activity" and evidence descriptive of the "personal characteristics" of drug traffickers.[28] In the first category, the Court of Appeals listed the use of an alias and evasive behavior in an airport.[29] In the second category, the Court placed cash payment for tickets, nervousness, unchecked baggage, unconventional dress, and a brief stay in a city notorious for its drug trade.[30] Foreseeing a danger in that the second category of "personal characteristics" could be shared by drug traffickers and innocent persons alike, the Court required that before any of these last factors could be used to help accumulate reasonable suspicion, there must also be evidence of "ongoing criminal activity" from the first category.[31] The Court further demanded that the government show that this combination of evidence from both categories could not also "describe the behavior of significant numbers of innocent persons."[32] The majority denied that the DEA agents had any evidence of respondent's ongoing criminal activity[33] and so, applying its newly-enunciated, two-part test for reasonable suspicion, held that Sokolow's detention was without justification and therefore unconstitutional.[34]

The United States Supreme Court granted certiorari and reversed the judgment of the Court of Appeals.[35] Chief Justice Rehnquist, writing for the majority, focused on the issue of whether the DEA agents reasonably suspected that respondent was engaged in criminal activity when they initially stopped him as he was leaving the Honolulu airport.[36] The Court first cited *Terry v. Ohio*[37] for its

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decision in United States v. Cortez, 449 U.S. 411 (1981), the government petitioned for a rehearing and argued that this individualized analysis of the factors leading to reasonable suspicion was not in keeping with the "totality of the circumstances" analysis advocated by *Cortez*. Petition for Writ of Certiorari at 7-9.

28. *Sokolow*, 109 S. Ct. at 1584-85.

29. 109 S. Ct. at 1584.

30. 109 S. Ct. at 1585.

31. 109 S. Ct. at 1584-85.

32. *Id.* The Court of Appeals requested that this be proved by resort to "empirical documentation" or "statistical evidence." Petition for Writ of Certiorari at 9.

33. 109 S. Ct. at 1585. Respondent's apparent use of an alias was discounted by the Court of Appeals as evidence of ongoing criminal activity because "it is not unusual for persons with different last names to share a common residence and telephone." Petition for Writ of Certiorari at 9.

34. 109 S. Ct. at 1585.

35. *Id.*

36. *Id.* As Rehnquist stated, "our decision, then, turns on whether the agents had a reasonable suspicion that respondent was engaged in wrongdoing when they encountered him on the sidewalk." *Id.*

holding that law enforcement officers can stop and briefly detain an individual for investigation if they have reasonable suspicion supported by articulable facts that crime may be afoot.[38] The majority then referred to previous decisions that posited that whether or not reasonable suspicion existed could not be determined by reliance upon a mechanical checklist.[39] Rather, the "totality of the circumstances" of each stop by law enforcement officers must be considered in evaluating its validity.[40]

The majority was critical of the two-part test formulated by the Court of Appeals. The majority's first objection was that this test, which required that at least one fact indicative of present criminal activity be joined with those "personal characteristics" of drug couriers, was in opposition to earlier opinions that had consistently held there are no crisply defined criteria for reasonable suspicion.[41] The second, stronger objection of the majority was that the Court of Appeals' classification of evidence into two categories attempted to distinguish between evidence on the basis of its greater or lesser probative value, evidence which the majority viewed to be of potentially equal probative value.[42] The majority's belief was that the use of an alias and evasive movement through an airport, cited by the Court of Appeals as classic omens of ongoing criminal activity, "do not have the sort of ironclad significance attributed to them by the Court of Appeals."[43] In addition, the majority opinion took aim at the Court of Appeals' dismissal of those personal characteristics frequently identified with drug traffickers as "merely probabilistic" by pointing out that these factors can be highly probative as well.[44] The majority stated that the Court of Appeals two-part test drew too fine a line between the kinds of evidence whose probative value

37. 392 U.S. 1 (1968).

38. *Id.* at 30. Reasonable suspicion is broadly defined in *Terry* as less than probable cause but more than an inchoate hunch. *Id.* at 20-22.

39. *Sokolow*, 109 S. Ct. at 1585. United States v. Gates, 462 U.S. 213 (1983) is quoted for its assertion that reasonable suspicion cannot be "readily, or even usefully, reduced to a neat set of legal rules." *Id* at 232.

40. *Sokolow*, 109 S. Ct. at 1585. This was the holding of United States v. Cortez, 449 U.S. 411 (1981).

41. *Sokolow*, 109 S. Ct. at 1585. Again quoting from *Cortez*, "the process does not deal with hard certainties, but with probabilities." *Cortez*, *supra*, note 40, at 418.

42. *Sokolow*, 109 S. Ct. at 1586.

43. *Id.* The majority puts forth an example of "innocent" use of an alias as where a newsworthy individual traveling to a hospital for an operation might wish to conceal his identity. *Id.*

44. *Id.* The majority dryly avers that few Hawaiians would endure a 20-hour flight to enjoy a scant 48 hours on the beaches of Miami during the month of July. *Id.*

differed only slightly, if at all.[45]

Similarly, the majority emphasized that a factor used to support reasonable suspicion could be coincident with innocent behavior.[46] This type of factor, the majority reasoned, could be considered along with other factors to have made up the "totality of circumstances" from which reasonable suspicion may have arisen.[47] The majority opinion recalled that the facts of *Terry* set forth a number of separate, seemingly innocent acts that amounted to reasonable suspicion only when viewed collectively by a seasoned police officer.[48] The majority, by referring in the footnotes to two recent drug courier cases, *Florida v. Royer*[49] and *Reid v. Georgia*,[50] ratified the principle that it is the total body of evidence in each instance that must be reviewed in order to assess reasonable suspicion.[51]

In Sokolow's case, the majority held that reasonable suspicion was nonetheless valid if the personal characteristics and behavior of Sokolow that originally brought him to the attention of DEA agents were listed in a drug courier profile.[52] The Court firmly asserted that "the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary

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45. *Id.*

46. *Id.* The opinion quotes from Reid v. Georgia, 448 U.S. 438 (1980), "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Id.* at 441. The Court stated, however, that this was not such a case.

47. *Sokolow*, 109 S. Ct. at 1586-87. The Court again harks back to *Cortez* for its holding that the whole picture must be taken into account in determining whether police have sufficient cause to detain an individual. *Id.*

48. 109 S. Ct. at 1587. As the Court acknowledges, *Terry* involved "a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." Terry v. Ohio, 392 U.S. 1, 22 (1968).

49. 460 U.S. 491 (1983).

50. 448 U.S. 438 (1980).

51. *Sokolow*, 109 S. Ct. at 1586-87. In *Florida v. Royer*, the police knew before stopping defendant that (1) he was using an alias; (2) he paid cash for his ticket; (3) he was traveling from Miami, a recognized distribution point of illicit narcotics; (4) he appeared to be nervous; (5) his luggage tags bore only his name - no address or phone number. The Court held that these factors led the police to reasonably suspect Royer to be engaged in criminal activity. In *Reid v. Georgia*, the Court held that petitioner's stop by the DEA was absent reasonable suspicion. At the time of the stop, the agent knew that (1) Reid's flight originated in Ft. Lauderdale, a source city for cocaine; (2) Reid did not check any of his luggage; (3) he arrived on an early morning flight, when police surveillance is presumed to be thin; (4) it appeared Reid was trying to conceal the fact that he was traveling with another. *Id.*

52. 109 S. Ct. at 1587. Rehnquist writes, "we do not agree with respondent that our analysis is somehow changed by the agent's belief that his behavior was consistent with one of the DEA's drug courier profiles." *Id.*

significance."[53]

The opinion concluded by refusing to review the reasonableness of the agents' detention of respondent based on whether the least intrusive means available was used to confirm the drug agents' suspicions.[54] Dicta in *Florida v. Royer*[55] was interpreted as directing that the period of detention during which an investigation is conducted be as brief as possible, not as requiring that the least intrusive means of investigation be used.[56] The majority quite forcefully stated that "the reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigative techniques."[57] To find otherwise, the court feared, would interfere with law enforcement's ability to take quick action and lead the courts to second-guess police decisions.[58]

In summation, the Supreme Court held that the DEA Agents had a reasonable basis for suspecting that Sokolow was trafficking in drugs on the facts presented, and therefore, their detention of Sokolow passed Fourth Amendment scrutiny.[59]

In his dissent, Justice Marshall began by warning that Fourth Amendment rights can be subtly eroded if their application—even to criminals—is ignored.[60] He claimed that by holding that the DEA agents reasonably suspected Sokolow to be a drug trafficker, and therefore subject to lawful detention, the Court "diminishes the rights of all citizens to be secure in their persons."[61] Marshall pointed out that the Fourth Amendment safeguards individual privacy and security by requiring that all seizures and searches be supported by a showing of probable cause.[62] Referring to the reasonable suspicion standard as deriving from probable cause, Marshall limited the scope of reasonable suspicion to those situations

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53. *Id.*

54. *Id.*

55. 460 U.S. 491 (1983).

56. *Sokolow*, 109 S. Ct. at 1587. *Florida v. Royer* reads, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." 460 U.S. at 500.

57. *Sokolow*, 109 S. Ct. at 1587.

58. *Id.* The majority cited the opinions in United States v. Montoya de Hernandez, 473 U.S. 531 (1985) and United States v. Sharpe, 470 U.S. 675 (1985) as deriding this second-guessing as unrealistic and harmful to effective law enforcement. *Id.*

59. *Id.*

60. *Id.* Justice Brennan joined this dissent, agreeing with Marshall that the circumstances of Sokolow's detention do not demonstrate a reasonable suspicion that he was engaged in criminal activity. *Id.* at 1591.

61. 109 S. Ct. at 1587-88.

62. 109 S. Ct. at 1588.

necessitating immediate police action and where the resulting detentions would be brief and would "fall short of being full-scale searches and seizures."[63] Marshall argued that the mandate that reasonable suspicion be grounded on "specific and articulable facts" indicating that the individual is committing or about to commit a crime deters police searches and seizures based on vague stereotypes or other irrelevant factors.[64]

Marshall believed that the facts adduced by the agents relevant to Andrew Sokolow did not amount to reasonable suspicion.[65] Marshall contended that Sokolow was stopped solely because he fit the drug courier profile, however variable the characteristics included therein may have been.[66] Castigating the "mechanistice application of a formula of personal and behavioral traits in deciding whom to detain," Marshall predicted that the majority decision would now allow innocent citizens to be subjected to arbitrary police detentions.[67] The dissent cited *Reid v. Georgia*,[68] where eight members of the Supreme Court agreed that the defendant's personification of four characteristics contained in a drug courier profile was insufficient to support a finding of reasonable suspicion.[69] The dissent protested that the facts in *Reid*, where defendant tried to conceal that he was traveling with another and even attempted to flee when approached by DEA agents, implied criminal intent and activity more so than the facts here.[70] Justice Marshall maintained that Sokolow's only manifestation of criminal involvement was his nervousness, which in light of recent aircraft mishaps was not un-

63. *Id.* As examples of those exigent situations requiring on-the-spot police action, Marshall lists "the need to stop ongoing crimes, to prevent imminent crimes, and to protect law-enforcement officers in highly charged situations." *Id.*

64. *Id.* Marshall postulates that the reasonable suspicion standard guards against police harassment of those innocent citizens who just happen to look like criminals. *Id.*

65. *Sokolow*, 109 S. Ct. at 1589-90.

66. *Id.* Marshall details a number of cases where the suspects were said to have evinced characteristics of the drug courier profile - but these characteristics differ from case to case. Contrast United States v. Mendenhall, 446 U.S. 544, 564 (1980), where suspect was among the last passengers to deplane, with United States v. Moore, 675 F.2d 802, 803 (CA6 1982), cert. denied, 460 U.S. 1068 (1983), where suspect was the first to deplane. Or Brooks v. United States, 444 U.S. 878 (1979), where suspect acted nervously, with United States v. Himmelwright, 551 F.2d 991, 992 (CA5), *cert. denied*, 434 U.S. 902 (1977), where suspect acted too calmly. *Id.*

67. *Id.* Marshall expresses his fear that "reflexive reliance on a profile of drug courier characteristics" risks "unwarranted police harassment and detention." *Id.*

68. 448 U.S. 438 (1980).

69. *Sokolow*, 109 S. Ct. at 1589, *citing Reid*, 448 U.S. at 441.

70. 109 S. Ct. at 1590.

expected.[71] Additionally, the dissent discounted the need for immediate police action - where reasonable suspicion is a practical exception to the probable cause standard - because Sokolow's phone number was known.[72] (Presumbly his home address could thus have been ascertained and continued investigation made possible.)

The dissent closed by praising the probity of the Court of Appeals' decision affirming the "Fourth Amendment principle that law enforcement officers must reasonably suspect a person of criminal activity before they can detain him."[73] As a final note of disagreement, Justice Marshall alleged in a footnote that the reasonableness embodied in the Fourth Amendment demanded that searches be conducted in the least intrusive manner possible, which he implied was not done in *Sokolow*.[74]

The Fourth Amendment promises protection of an individual's privacy and security by proclaiming that,

> the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[75]

Throughout the 1800's and for much of the 1900's, this amendment was interpreted by judicial decision and dicta as stringently requiring that any government intrusion amounting to a search or seizure where the individual had a reasonable expectation of privacy had to be supported by probable cause, with or without a warrant.[76] Only the existence of probable cause by law enforcement officers to believe a crime had been committed, was being committed, or was about to be committed in the case of a seizure, or to believe contraband would be found in the case of a search, sufficed

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71. *Id.* Alluding to "plane crashes, near-collisions, and air terrorism," the dissent concludes, "there are manifold and good reasons for being agitated while awaiting a flight . . . that have nothing to do with one's involvement in a criminal endeavor." *Id.*

72. *Id.* Marshall suggests that it is unreasonable to believe Sokolow would have been beyond further investigation once he had departed the Honolulu airport. *Id.*

73. 109 S. Ct. at 1591.

74. *Id. Citing* Winston v. Lee, 470 U.S. 753, 760-61 (1985), Marshall asserted that, "the manner in which a search is carried out . . . is a highly important index of reasonableness under Fourth Amendment doctrine." *Id.*

75. U.S. CONST. amend. IV.

76. The Court held in Katz v. United States, 389 U.S. 347 (1967) that the Fourth Amendment affords protection only when the individual has a legitimate expectation of privacy; that is, an expectation recognized by society. *Id.* at 350-354. Also *see* Florida v. Royer, 460 U.S. 491, 498 (1983).

to ensure reasonableness.[77]

At the start of the 20th century, the exclusionary rule was fashioned as a deterrent of unreasonable searches and seizures. In 1914, *Weeks v. United States*[78] established the rule that evidence obtained through an unlawful search or seizure by federal officials was to be excluded from consideration in criminal prosecutions at the federal level.[79] Finding that the purpose of the Fourth Amendment was to restrict the power and authority of federal officials, the United States Supreme Court in *Weeks* reasoned that searches and seizures conducted on a federal level in violation of an individual's constitutionally-guaranteed rights should not be tolerated.[80] To that end, evidence obtained pursuant to illegal searches and seizures by federal officers was excluded from admission in federal proceedings.[81] Six years later, in *Silverthorne Lumber Co. v. United States*,[82] the Supreme Court resoundingly affirmed the *Weeks* decision by holding that any knowledge federal officers acquired during their perusal of evidence unlawfully seized, as well as the evidence itself, "shall not be used at all."[83] The Supreme Court, in *Elkins v. United States*,[84] broadened the *Weeks* rule to

77. *See* Justice Douglas' historical analysis of probable cause in his dissent in Terry v. Ohio, 392 U.S. 1, 21-24 (1968). *Quoting* Douglas, "the infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him. *Id.* at 38.

78. 232 U.S. 383 (1914).

79. *Id.* at 392.

80. *Id.*

81. 232 U.S. at 398.

82. 251 U.S. 385 (1920). The Silverthornes were arrested and while detained, their business offices were searched without warrant by federal officials who removed books and papers. Although these materials were returned under court order upon defendants' petition, federal officials made copies of these records. Based on information contained in the copies, a new indictment was issued and the Silverthornes were subpoenaed to produce the originals. When they refused, the district court found them in contempt, jailed the son, and fined the company. The Supreme Court reversed the contempt citation and held that the only way the government could use the information it had purloined from the illegally-seized records was if the same facts could be documented through other means. *Id.*

83. *Id.* at 392.

84. 364 U.S. 206 (1960). State officers searched Elkins' home for obscene materials pursuant to a search warrant restricted to these items. Finding no obscene films or photos, the officers confiscated wiretapping equipment instead. The state court suppressed the admission of this illegally-obtained evidence and dismissed the state indictment. Federal officers obtained the wiretapping paraphernalia and brought a federal indictment against Elkins. Upon motion to suppress, the federal district court refused to exclude the wiretapping evidence because federal officers had not been involved in the unlawful search and seizure. The Supreme Court reasoned that in order to effectuate the guarantees of the Fourth Amendment, illegally-obtained evidence must be inadmissible in federal court regardless of who seized it. *Id.*

exclude from admission in federal criminal trials evidence obtained by state officers in violation of Fourth Amendment protections.[85] The majority reasoned that to allow the admission in federal court of unlawfully seized evidence solely because it was obtained as a result of state, rather than federal, action would constitute judicial subterfuge.[86]

One year later, the United States Supreme Court expanded the application of the exclusionary rule to evidence acquired pursuant to illegal searches and seizures by state and local officers introduced in state criminal trials.[87] The majority opinion in *Mapp v. Ohio*[88] noted that the Due Process Clause of the Fourteenth Amendment allowed for this utilization of the Fourth Amendment proscription against unlawful searches and seizures against the states.[89] Through application of the exclusionary rule today, any evidence obtained as a result of searches or seizures carried out without probable cause, or outside one of the exceptions that has since been excised from Fourth Amendment protection,[90] is excluded from introduction at criminal trial. This suppression of tainted evidence is recognized as an effective means of inhibiting searches and seizures that violate the Fourth Amendment.[91] Up until the late 1960's, any seizure performed without a basis in probable cause was deemed by the courts to be unreasonable - an arbitrary, unjustified government invasion of an individual's constitutional rights.[92] More to the point, any evidence gathered as a

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85. *Id.* at 223.

86. *Id.*

87. Mapp v. Ohio, 376 U.S. 643 (1961).

88. 376 U.S. 643 (1961). State authorities tried to enter Mapp's home in order to question a man they believed to be inside. Mapp refused to allow them to enter without a warrant. The officers returned later that day to forcibly enter Mapp's residence. When she demanded to be shown a warrant, the officers rapidly waved a piece of paper in the air and then proceeded to seize obscene materials. At state court, no warrant was ever produced, the "lewd and lascivious" materials seized were admitted as evidence and Mapp was convicted. The Supreme Court held that illegally-seized evidence would not be admissable in federal or state courts. *Id.*

89. *Id.* at 660.

90. Although probable cause is the common denominator of all reasonable searches and seizures, the following kinds of searches and seizures have been deemed to be outside the warrant requirement of the Fourth Amendment: (1) where consent of the parties has been obtained; (2) where exigent circumstances demand immediate action; (3) where weapons or contraband are in plain view; (4) where a search is conducted incident to a lawful arrest. 68 Am. Jur. 2d Searches and Seizures §§ 37-59 (1964).

91. Chief Justice Warren, writing for the majority in *Terry*, put it this way, "the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." Terry v. Ohio, 392 U.S. 1, 12 (1968).

92. *See* Justice Douglas' sharp dissent in *Terry* where he decries the newly-announced

result of the unlawful seizure could be suppressed at trial.[93]

With its decision in *Terry v. Ohio*[94] in 1968, however, the Supreme Court created a narrow exception to the long-ingrained principle that only probable cause could legitimate the seizure of a citizen. A police officer with thirty-nine years' experience observed Terry and a companion alternately walk up and down a city block six times each, pausing to look in the same store window on each pass.[95] The two then walked a few blocks away where they conferred with a third man who had previously spoken with them in the midst of their reconnaisance.[96] Believing a stickup of the surveilled store was imminent, the officer approached the group, made some inquiries, and then quickly grabbed Terry and patted down his outer garments for weapons.[97] He discovered a gun.[98] Moving all three into a nearby store, the patrolman patted down the other two men and discovered another weapon.[99] At trial, Terry's motion to suppress the admission of the gun as evidence was denied and he was convicted of carrying a concealed weapon.[100] The state appeals court affirmed and the state Supreme Court refused to hear an appeal, claiming no constitutional question was presented.[101]

Granting certiorari, the United States Supreme Court held that when a police officer personally observes behavior that leads him to the reasonable suspicion, in light of his experience, that the person observed may be involved in criminal activity and may pose a present danger to the officer or to the public, a brief detention for questioning may be made as well as a carefully limited search of

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standard of reasonable suspicion because of its lack of certainty and deep roots of probable cause. He laments the enunciation of this "lesser" standard and predicts dire consequences for individual liberty and security. In detailing the history of probable cause in this country, Douglas states, "police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause." Terry v. Ohio, 392 U.S. 1, 21-24 (1968).

93. *Id.* at 12-13.

94. 392 U.S. 1 (1968).

95. 392 U.S. at 6.

96. *Id.*

97. 392 U.S. at 5-6. During this frisk, Officer McFadden felt a gun in Terry's left breast pocket but was unable to remove it while Terry wore the overcoat. McFadden took Terry's coat off him as he herded the three men into the store. *Id.* at 7.

98. *Id.*

99. *Id.* McFadden placed his hands under the outer garments of just the two men on whom he had felt a weapon during the frisk. *Id.*

100. 392 U.S. at 7-8.

101. 392 U.S. at 8. The appeals court decision can be found at State v. Terry, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966).

outer clothing for weapons.[102] Any weapons discovered were admissable as evidence.[103] The Court's decision in *Terry* explicitly authorized the "stop and frisk" based on a reasonable suspicion by a law enforcement officer that criminal activity was afoot.[104] Probable cause was no longer necessary to ensure the constitutionality of any seizure by police.[105] Provided the detainment was brief, based on a reasonable suspicion that crime was afoot, and confined to the purpose of the stop,[106] the Fourth Amendment would not be violated.

Although dispensing with the necessity of probable cause for this particular kind of seizure, the *Terry* Court commented that the reasonableness of the detention must still be ascertained in order to satisfy the Fourth Amendment's prohibition against unreasonable searches and seizures.[107] The Court reiterated that assessing the reasonableness of the government intrusion involved balancing the government's need for the intrusion, be it search or seizure, against the citizen's constitutionally protected interest in maintaining his privacy and security.[108] While acknowledging the government's heavy stake in crime prevention and effective law en-

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102. *Terry*, 392 U.S. at 30-31. The Supreme Court took care to specifically describe the factors occasioning this constitutionally approved detention:

> We merely hold today that where 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 . . .

Id.

103. 392 U.S. at 31.

104. 392 U.S. at 30-31.

105. 392 U.S. at 27. The *Terry* Court rejected "the contention that a policeman needed to have probable cause for an arrest in order for a 'stop and frisk' to be reasonable." *Id.*

106. 392 U.S. at 25-27. Presaging the *Royer* decision, the majority in *Terry* made the point that the search must be "strictly tied to and justified by the circumstances which rendered its initiation permissable," *quoting from* Warren v. Hayden, 387 U.S. 294, 310 (1967). The majority enumerated a number of cases where a search, though constitutionally valid at its inception, became unlawful as a result of "its intolerable intensity and scope." 392 U.S. at 17-19.

107. 392 U.S. at 20-21.

108. *Id.* Chief Justice Warren borrows a phrase from another recent decision when he asserts that there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails." Camara v. Municipal Court, 387 U.S. 523, 534-537 (1967). 392 U.S. at 21.

forcement, the court also recognized the right of the individual to be secure from arbitrary police seizures based on mere whims or hunches.[109] Therefore, Chief Justice Warren, writing for the majority, directed that the police officer, in order to bring this seizure within Fourth Amendment strictures, must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts" would lead a reasonable person to suspect that crime was afoot.[110] Furthermore, the majority pointed out that these "specific facts" and "rational inferences" were to be viewed in light of the officer's on-the-job experience.[111] After all, the Court said, "a series of acts, each of them perhaps innocent in itself, . . . taken together warranted further investigation" when observed by a seasoned police officer.[112] Though establishing but a limited exception to the probable cause standard for lawful seizures, the *Terry* Court took a huge leap in approving a brief investigatory stop for the purpose of questioning where a reasonable suspicion existed based on the officer's observations and experience.[113]

Terry's reach was broadened in 1972 with the Supreme Court's decision in *Adams v. Williams*.[114] In *Adams*, a police officer was told by an informant that an individual in a nearby car was selling narcotics and had a gun tucked into his pants.[115] The officer approached the car, addressed some inquiries to the occupant, then reached through the open window and grabbed the gun, which was not visible.[116] The Supreme Court, in an opinion written by Justice Rehnquist, rejected the argument that reasonable suspicion could

109. *Terry*, 392 U.S. at 22-25. In conceding the large stake the government has in being able to stop and search armed individuals, the majority acknowledged the long history of violence in the U.S. and reported on the number of police officers killed in action during the years 1960-1966. The majority also admitted the sanctity of the individual's rights to privacy and security granted by the Fourth Amendment. *Id.*

110. 392 U.S. at 21. The majority believed that by requiring the stop and search to be based on "narrowly drawn authority," the individual's Fourth Amendment rights would be protected. 392 U.S. at 27.

111. 392 U.S. at 30.

112. 392 U.S. at at 22. In fact, the Court opined that "it would have been poor police work indeed" if the experienced Officer McFadden had failed to become suspicious of the trio as a result of observing their behavior. *Id.* at 23.

113. Florida v. Royer, 460 U.S. 491, 498 (1983).

114. 407 U.S. 143 (1972). The majority in *United States v. Brignoni-Ponce*, a later case, grants *Adams'* expansion of the limited opening permitted by *Terry* by commenting that "we elaborated on *Terry* in Adams v. Williams." United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

115. *Adams*, 407 U.S. at 145-146.

116. *Id.*

be based only on the officer's own observations and held that an unverified informant's tip could possess enough reliability, as here, to justify a stop.[117] Refusing to distinguish among the different source of information used by an officer in arriving at a reasonable suspicion, the Court asserted that "a brief stop of a suspicious individual, . . . to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."[118] Reasonable suspicion was no longer limited to the application of the police officer's experience to his own observations; information received from others linking an individual to criminal activity could now be considered in a reasonable suspicion determination.[119]

United States v. Brignoni-Ponce[120] involved the stop of a vehicle near the Mexican border by the Border Patrol. Echoing *Terry*, the majority opinion, written by Justice Powell, held that border agents on roving patrol could stop vehicles "only if they are aware of specific articulable facts, together with rational inferences from those facts" amounting to a reasonable suspicion that the car's occupants are illegal aliens.[121] The majority opinion cited *Terry* and *Adams* as establishing "that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime."[122] Taking a cue from *Adams*, the majority asserted that a variety of circumstantial evidence was relevant to a determination of reasonable suspicion[123] and faulted the border agents for relying on just one factor: that the car's occupants appeared to be Mexicans.[124] As in *Terry*, the Court in *Brignoni-Ponce* alluded to the sizable government interest involved, in this case that of alleviating the illegal immigrant problem, as it evaluated the reasonableness of the government intru-

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117. *Id.*

118. *Id.*

119. Annotation, *The Law Enforcement Officer's Authority, under Federal Constitution, to "Stop and Frisk" Persons - Supreme Court Cases*, 32 L. Ed. 2d 942 (1988).

120. 422 U.S. 873 (1975).

121. 422 U.S. at 880.

122. 422 U.S. at 881.

123. 422 U.S. at 885.

124. 422 U.S. at 885-86. As Justice Powell put it, "In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens." *Id.*

sion.[125] In his concurring opinion, Justice Douglas observed that this was the first case, since *Terry* established the reasonable suspicion standard, in which such a stop had been declared invalid under the Fourth Amendment.[126]

Beginning in 1980, the Supreme Court heard a series of cases, all dealing with airport stops of individuals suspected by law enforcement agents of transporting illicit drugs.[127] Each of the individuals detained for questioning, and subsequently discovered to be carrying narcotics, attracted attention initially because he or she demonstrated certain behaviors that were part of a drug courier profile used by police to identify possible drug traffickers.[128] In every case, the Supreme Court affirmed the validity of a *Terry*-type stop as well as the introduction at trial of evidence seized as a result of a search in connection with this permissible intrusion.[129]

In *United States v. Mendenhall*,[130] respondent was a young woman who had been stopped and questioned by DEA agents in a Detroit airport.[131] DEA agents initially chose to approach Mendenhall because her conduct matched that described in a drug courier profile.[132] Upon receiving unsatisfactory answers to their inquiries, which heightened their suspicion, the agents asked respondent to accompany them to the airport DEA office, where she consented to a search of her purse and person.[133] A consensual search shortly

125. 422 U.S. at 879. The Court cited numerous statistics, all indicating that Mexican aliens constituted the highest proportion of illegal immigrants. *Quoting* from the INS Annual Reporter, the opinion reported that in 1970, "80%" of the deportable aliens arrested were from Mexico." INS Ann. Rep. 95 (1970). By 1974, that percentage had increased to 94%. INS Ann. Rep. 94 (1974).

126. *Brignoni-Ponce*, 422 U.S. at 890. Justice Douglas observed that, in fact, "since *Terry* we have granted review of a case applying the test only once, in Adams v. Williams, . . . where the Court found the standard satisfied." *Id.*

127. Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 12, United States v. Sokolow, 831 F.2d 1413 (9th Cir.)(No. 87-1295).

128. *Id.*

129. *Id.*

130. 446 U.S. 544 (1980).

131. *Id.* at 547.

132. 446 U.S. at 547 n.1. Agents attached significance to these facts: Mendenhall arrived from Los Angeles, the source city of most of Detroit's heroin; she was the last passenger to disembark; she "appeared to be very nervous"; she visually scanned the entire waiting room and seemed to "ID" the agents; she then bypassed the baggage claim area even though she had checked some pieces; and she purchased a ticket from another airline for a flight out of Detroit although she already had a ticket. *Id.*

133. 446 U.S. at 547-548. The agents identified themselves as federal law enforcement officers and asked Mendenhall to produce her ticket and some identification. Her driver's license bore the name Sylvia Mendenhall while the plane ticket was in the name of Annette Ford. When asked to explain the discrepancy, Mendenhall replied that she "just felt like

thereafter revealed that respondent had two packages of heroin hidden in her clothing.[134] The district court denied respondent's motion to suppress the introduction of the heroin as evidence, finding that all aspects of the seizure and search were constitutional.[135] Mendenhall was convicted of possession of narcotics with intent to distribute.[136] In reversing Mendenhall's conviction, the Sixth Circuit Court of Appeals'[137] sole explanation was that the case was undistinguishable from *United States v. McCaleb*[138] where the Sixth Circuit had earlier refused to recognize that reasonable suspicion existed where the government relied heavily on a drug courier profile.[139] In *McCaleb*, the Court of Appeals expressly criticized the fact that drug courier characteristics could be exhibited by innocent persons as well as by those trafficking in drugs.[140]

In an opinion by Justice Stewart, the Supreme Court reversed the Court of Appeals' judgment, with five of the justices agreeing that the respondent's detention posed no constitutional problem.[141] *Mendenhall* marks the first case heard by the Supreme Court where a drug courier profile served to substantiate the presence of reasonable suspicion.[142] In his concurring opinion, Justice Powell commented that trained law enforcement personnel are adept at ferreting out criminal activity in what otherwise appears to be innocent behavior.[143]

Just one month after *Mendenhall*, the Supreme Court, in *Reid v. Georgia*,[144] overturned petitioner Reid's conviction for posses-

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using that name." Respondent said she had spent only two days in California. *Id.*

134. 446 U.S. at 548-549. First, a DEA agent requested Mendenhall's permission for a search of her purse and person. He informed her of her rights to refuse but she replied, "Go ahead." The policewoman who was to perform the body search also asked Mendenhall if she had consented to this intrusion. Mendenhall answered in the affirmative. *Id.*

135. 446 U.S. at 549. The District Court ruled that the agents' conduct was a permissible stop under *Terry* and *Brignoni-Ponce*, based on specific and articulable facts that justified a reasonable suspicion of criminal activity. *Id.*

136. 446 U.S. at 547.

137. 596 F.2d 706 (6th Cir. 1979).

138. 552 F.2d 717 (6th Cir. 1977).

139. 446 U.S. at 549-50.

140. 446 U.S. at 550.

141. 446 U.S. at 555, 560. In an opinion marked by concurrences in part, Stewart and Rehnquist found that there had been no seizure of the respondent, thus no particularized justification was required, while Powell, Blackmun, and Burger believed there to be sufficient facts indicating that the agents had a reasonable suspicion that respondent was involved in criminal activity. *Id.*

142. Reid v. Georgia, 448 U.S. 438, 442-43 (1980).

143. 446 U.S. at 563-64.

144. 448 U.S. 438 (1980).

sion of cocaine by the Georgia Court of Appeals.[145] DEA agents on duty in the Atlanta airport observed Reid and a companion, both of whom had just departed a Ft. Lauderdale flight with only carry-on bags, leave the terminal in a manner suggesting they were trying to hide the fact that they were traveling together.[146] One of the agents briefly questioned Reid and his friend, then asked if they would come to the DEA airport office.[147] Petitioner agreed but soon bolted from the group, throwing off his shoulder bag before he was caught.[148] Petitioner sought to exclude the introduction at trial of the cocaine found in this bag, claiming it had been obtained through an unconstitutional seizure.[149] The trial court[150] granted Reid's motion but the Court of Appeals reversed.[151] In a *per curiam* opinion, the United States Supreme Court concluded that on the basis of the few drug courier characteristics exhibited by Reid, no reasonable suspicion existed to justify his detention.[152] The opinion characterized the agents' belief that Reid was trying to distance himself from his traveling companion as a mere hunch,[153] but suggested that in some circumstances lawful behavior could be used to reach a reasonable suspicion that a crime was in progress.[154]

Three years after *Mendenhall* and *Reid*, the Supreme Court issued its opinion in *Florida v. Royer*.[155] County narcotics detectives assigned to the Miami International Airport approached Royer and asked him to produce his plane ticket and some identification,[156] after ascertaining that his "appearance, mannerisms, luggage, and

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145. 448 U.S. at 441-42.

146. 448 U.S. at 439. Both parties carried identical shoulder bags and, though walking apart separated by a few other passengers, kept exchanging glances. *Id.*

147. *Id.* The agent requested both to produce identification and tickets, which they did. The tickets showed that the pair were in Ft. Lauderdale for just a day. Both petitioner and his companion became very nervous during this period. *Id.*

148. *Id.*

149. 448 U.S. at 438.

150. *Id.* at 439.

151. State v. Reid, 149 Ga. App. 685, 255 S.E.2d 71 (1979).

152. 448 U.S. at 441. The four drug courier profile characteristics identified by the Court were: arrival from Ft. Lauderdale, a principal source city for cocaine; arrival in the early morning, when drug surveillance is presumed to be negligible; travel with only carryon luggage; and companions apparently trying to conceal their identical travel plan. *Id.*

153. *Id.* The Court described this belief as "simply too slender a reed to support the seizure in this case." *Id.*

154. *Id.*

155. 460 U.S. 491 (1983).

156. 460 U.S. at 494.

actions fit the so-called drug courier profile."[157] Discovering that respondent's ticket and luggage bore a name different than his driver's license, the detectives identified themselves as narcotics agents and told Royer they suspected him of transporting narcotics.[158] Without returning respondent's ticket or license, the detectives asked him to come to a small room nearby.[159] Royer did so.[160] The detectives had Royer's two pieces of luggage removed from his intended flight and brought to the room, where they asked permission to open them.[161] Royer unlocked one bag and assented to the breaking open of the second.[162] Marijuana was found in both bags.[163] Royer's motion to suppress the marijuana as evidence was denied, and he was convicted of felony possession of marijuana.[164] Reversing the conviction, the District Court of Appeal[165] held that Royer's consent to the search was invalid because it was secured while he was illegally detained.[166] The Court of Appeal determined that the unlawful nature of Royer's detention came not from a lack of reasonable suspicion but from the detectives surpassing the "limited restraint permitted by *Terry v. Ohio*."[167] The Supreme Court affirmed the appellate court's decision.[168] Acknowledging that the drug courier profile was composed of characteristics proven to be typical of drug traffickers,[169] the plurality opinion[170]

157. *Id.* Royer appeared to be exhibiting the following six drug courier profile traits: his luggage appeared to be unusually heavy; Royer appeared to be about 25-35 years old; he was casually dressed; he seemed nervous and extremely watchful; his ticket was a cash purchase from a large wad of bills; Royer wrote only the surname "Holt" and his destination on the airline tag provided for his checked baggage. *Id.*

158. *Id.* Respondent proferred as an explanation for the name discrepancy that a friend of his had made the reservations in his own name. *Id.*

159. *Id.* One of the detectives later described this room as a "large storage closet." *Id.*

160. *Id.*

161. *Id.*

162. 460 U.S. at 494-495.

163. *Id.*

164. 460 U.S. at 495. The trial court found that Royer had freely consented to the search of his luggage but, even if he hadn't, the warrantless search would have been reasonable due to exigent circumstances. *Id.*

165. Florida v. Royer, 389 So. 2d 1007 (1980).

166. 389 So. 2d at 1015.

167. *Royer*, 460 U.S. at 495. The plurality opinion boldly asserts that, "we hold here that the officers had reasonable suspicion to believe that Royer's luggage contained drugs." *Id.*

168. 460 U.S. at 507.

169. 460 U.S. at 493 n.2 "The drug courier profile is an abstract of characteristics found to be typical of persons transporting illegal drugs." *Id.*

170. Justice White announced the judgment of the Court, joined by Justices Marshall, Powell and Stevens. Justice Brennan concurred in the result. 460 U.S. at 493, 508.

tallied those drug courier characteristics displayed by Royer.[171] With the addition of the name discrepancy, the opinion concedes that the detectives did have a reasonable basis for suspecting that Royer was trafficking in drugs and so a brief investigatory stop was justified.[172] However, the Court believed that the boundaries of this lawful detention had been overstepped when Royer's license and ticket were not returned to him and his luggage was removed from the plane without his knowledge or consent.[173] Royer was not free to leave; he was under arrest, even before the marijuana was uncovered.[174] The Court refused to find probable cause to arrest.[175] While the *Royer* decision stands as a strong warning to law enforcement officers not to transform a brief stop for investigation into a forced interrogation or arrest, once again the Court validated the use of drug courier characteristics to provide grounds for reasonable suspicion.[176]

The last airport stop case heard by the Supreme Court prior to its decision in *Sokolow* was *Florida v. Rodriguez*.[177] Because of their unusual behavior, respondent and two friends were spotted by county narcotics officers at Miami International Airport.[178] As the officers followed the trio up an escalator, one of the three noticed the plainclothes officers, who overheard him say twice to the other two, "Let's get out of here."[179] Rodriguez made a futile attempt to flee.[180] Identifying themselves, the officers requested the trio to produce plane tickets and identification.[181] Two of the trio

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171. 460 U.S. at 493.

172. 460 U.S. at 502. In the Court's words,

> We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers—paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general—were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention.

Id.

173. 460 U.S. at 501.

174. 460 U.S. at 503. "As a practical matter, Royer was under arrest." *Id.*

175. 460 U.S. at 507.

176. 460 U.S. at 503. As described by the opinion, "What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room . . ." *Id.*

177. 469 U.S. 1 (1984).

178. 469 U.S. at 3.

179. 469 U.S. at 3-4.

180. 469 U.S. at 4. One of the officers described Rodriguez as "pumping" his legs up and down but "not covering much ground." *Id.*

181. *Id.* Initially the officers just showed their badges to the trio. *Id.*

claimed to be the only "Rodriguez" named on the ticket, whereupon the officers requested, and secured, permission to search respondent's luggage.[182] Three bags of cocaine were found.[183] The Florida trial court granted respondent's motion to suppress, holding that not only was there no "articulable suspicion" to stop Rodriguez but that the consent to search was ineffective because the officers failed to inform Rodriguez that he could walk away from the questioning and that he could refuse to permit a search.[184] The Florida Court of Appeals affirmed.[185] Reaching down to reverse the actions of the state courts, the Supreme Court castigated them for failing to heed "the controlling principles of law governing airport stops enunciated" in *Mendenhall* and *Royer*.[186] The *per curiam* opinion held that there was reasonable suspicion to detain Rodriguez for questioning and that the search was consensual.[187] Although the phrase "drug courier profile" was not found in the opinion, the Court took care to detail the various characteristics of respondent and his friends which supported finding of reasonable suspicion.[188] Writing in dissent, Justice Stevens objected primarily because he saw this Court asuming an "error-correction" role for state courts, a responsibility he did not believe it had.[189]

Decided by the Supreme Court in the midst of this last series of drug courier profile cases, *United States v. Cortez*[190] dealt with the investigatory stop of a camper truck by the Border Patrol.[191] Piecing together circumstantial evidence ranging from footprints to travel times, border officers predicted that on the first clear weekend night in late January 1977, a vehicle capable of transporting 8 to 20 people would travel west at approximately 4:00 a.m. on a lit-

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182. *Id.* At this point the officers identified themselves specifically as narcotics officers. *Id.*

183. *Id.*

184. 469 U.S. at 4-5. The trial court asserted that without notice of these rights, the defendant's consent to search was "tainted." 469 U.S. at 5.

185. *Id.*

186. *Id.* Partially excusing the trial court because its ruling came before *Mendenhall* and *Royer* were decided, the opinion denounced the Florida Court of Appeal's handling of this case. *Id.*

187. 469 U.S. at 6.

188. 469 U.S. at 3-6. Such conduct as: paying cash in small bills for a plane ticket; traveling under an alias; carrying all luggage; concealing that one is traveling with others; attempting to evade law enforcement officers; traveling to or from a city notorious for its drug trade; and displaying nervousness. These behavioral characteristics also just happen to be present in drug courier profiles. *Id.*

189. 469 U.S. at 7.

190. 449 U.S. 411 (1981).

191. *Id.* at 415-17.

tle-used highway into the Arizona desert, pick up a group of illegal aliens, and return.[192] On the first such night, officers stopped the only vehicle fitting that description and discovered six Mexican nationals.[193] Convicted in the District Court,[194] respondent won a reversal in the Court of Appeals for the Ninth Circuit,[195] which held that there were no specific and articulable facts to justify this stop, just a number of "innocent inferences."[196]

Overruling the Court of Appeals, the Supreme Court claimed that the essence of reasonable suspicion analysis was that the "totality of the circumstances" must be taken into account.[197] Inferences and deductions as well as facts are to be considered in determining whether, in light of the whole picture, law enforcement officers reasonably suspect that a crime was in progress.[198] Asserting that the process of arriving at a reasonable suspicion "does not deal with hard certainties, but with probabilities,"[199] the Court noted that combining facts with deductions to prevent and solve crime was exactly the sort of police work the criminal justice system encouraged.[200] *Cortez* contributes a key principle to the *Terry*-type stop analysis: reasonable suspicion is to be evaluated by looking at the "totality of the circumstances."[201]

In resolving the issues presented by *Sokolow*, it is imperative to examine these two related lines of cases: the airport stop-drug courier profile cases and the scope of reasonable suspicion cases. *Mendenhall*, *Reid*, *Royer* and *Rodriquez* make up the first group; *Terry*, *Adams*, *Brignoni-Ponce* and *Cortez* constitute the second.

Andrew Sokolow contended throughout his disposition by the courts that drug courier profile characteristics are not the "specific and articulable facts" required to justify a brief investigatory

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192. 449 U.S. at 413-415.

193. 449 U.S. at 415. Only two vehicles traveled that highway between the predicted hours. Both were pickup trucks with camper shells but only one made the return trip—the vehicle stopped by Border Patrol agents. *Id.*

194. 449 U.S. at 416. Respondent was found guilty of six counts of transporting illegal aliens. His motion to suppress the evidence obtained by the search was denied. *Id.*

195. *Id.*

196. 449 U.S. at 416.

197. 449 U.S. at 417.

198. 449 U.S. at 418.

199. *Id.*

200. 449 U.S. at 419. "We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement." *Id.*

201. On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 15, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295).

stop.[202] He argued that although the drug courier profile was a useful tool to aid in the identification of drug traffickers, it was simply a starting point for further investigation.[203] The Court of Appeals for the Ninth Circuit also discredited the use of drug courier profile characteristics as a foundation for reasonable suspicion.[204] Voicing concern that large numbers of innocent citizens would be subject to seizure in the nation's airports if law enforcement officers looked only at personality traits in deciding whom to stop for questioning, the Court announced its unprecedented two-part test for reasonable suspicion.[205] The two lines of cases do not endorse either of these views.

The four cases where the Supreme Court has specifically addressed the issue of whether drug courier profile traits can be used to support a finding of reasonable suspicion are unanimous in holding that they can. In *Mendenhall, Reid, Royer* and *Rodriguez*, the government demonstrated that its officers had reasonably suspected that the individuals stopped were transporting drugs solely by enumerating various characteristics these individuals had in common with the stereotypical drug courier. In every case but *Reid*, the Supreme Court upheld the stop as constitutional. The Court failed to be persuaded in *Reid* only because the government offered so little evidence that Reid's behavior mirrored that of a drug courier, not because the evidence consisted of drug courier profile traits. These four cases from the early 1980's clearly establish that if an airline passenger exhibits a sufficient number of the characteristics closely identified with drug traffickers to evoke a reasonable suspicion of criminal activity, narcotics officers are free to stop and question such a passenger.

Terry and its progeny set the constitutional parameters for a brief investigatory stop and delineated what is to be considered in a reasonable suspicion analysis. While creating a narrow exception to the probable cause standard, the *Terry* Court sought to continue to safeguard individual privacy by demanding that law enforcement officers be able to muster "specific and articulable

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202. On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Brief in opposition, United States v. Sokolow, at 8, 27. 109 S. Ct. 1581 (1989) (No. 87-1295).

203. *Id.* at 21-22.

204. United States v. Sokolow, 831 F.2d 1413 (9th Cir. 1987).

205. Evidence of ongoing criminal activity must be joined with evidence of drug courier characteristics *and* the government must demonstrate that this resultant combination does not describe significant numbers of those imperiled innocent travelers; this is reasonable suspicion to the Court of Appeals.

facts," along with the rational inferences therefrom, that would lead a reasonable person to suspect that the individual detained for questioning was involved in criminal activity.[206] These particularized facts and their natural inferences were to be taken from the officer's personal observations and knowledge and considered in light of his experience.[207] *Adams* expanded the basis for the specific and articulable facts by permitting them to be drawn from any source carrying sufficient indicia of reliability, even the unchecked tip of an informant.[208] The officer was no longer held to what he had personally observed of the detainee; the officer could act on information supplied by others. Pushing the door open even wider, the Court in *Brignoni-Ponce* gave its imprimatur to the use of any and all circumstantial evidence,[209] a category to which drug courier profiles obviously belong. Eliminating any doubt that might persist, the court in *Cortez* postulated that the particularized facts specified for in *Terry* can be found anywhere in the "totality of the circumstances."[210]

At no point in this exploration of the boundaries of a reasonable suspicion analysis was there mention of a two-part test that must be satisfied in order to demonstrate reasonable suspicion. To the contrary, each case from *Terry* to *Cortez* decried dependence on exacting requirements for reasonable suspicion and advocated instead a generalized examination of the total circumstances of every seizure.[211]

The decision of the Supreme Court in *Sokolow* was a predictable and appropriate outcome in light of these prior cases. The Court had consistently posited that reasonable suspicion determinations should be based on common sense, not on legalized formulations,[212]

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

207. *Id.* at 27.

208. Adams v. Williams, 407 U.S. 143 (1972).

209. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

210. United States v. Cortez, 449 U.S. 411, 417 (1981).

211. As Chief Justice Warren expounded in *Terry*, quoting from Camara v. Municipal Court, 387 U.S. 523 (1967), there is "no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails." 392 U.S. 1, 14 (1968). Thirteen years later, Chief Justice Burger writing in *Cortez* expressed similar sentiments when he discussed "the elusive concept of what cause is sufficient to authorize police to stop a person." 449 U.S. 411, 417 (1981).

212. As the majority opinion in *Terry* asserted, "focusing the inquiry squarely on the dangers and demands of the particular situation seems more likely to produce rules which are intelligible to the police and the public alike." 392 U.S. at 12. Elaborating on this theme in *Cortez*, the Court explained, "Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as fact-finders are permitted to do the same - and so are law enforcement officers".

such as the two-part test enunciated by the Court of Appeals below. Since 1968, the decisions of the Supreme Court defining the scope of reasonable suspicion analysis as the totality of the circumstances of each case, and permitting the use of drug courier profile characteristics as specific and articulable facts in that analysis, unequivocally have contradicted the arguments of respondent and the Court of Appeals.

Marshall's dissent and the divided panel of the Court of Appeals which reversed Sokolow's initial conviction both emphasized the peril, and invalidity, of including as part of a reasonable suspicion analysis behavioral characteristics that might indicate innocent as well as criminal conduct. However, as far back as *Terry*, the Supreme Court explicitly approved the use of "a series of acts, each of them perhaps innocent in itself," but when viewed as a whole by the experienced police officer would lead him to the reasonable suspicion that criminal activity was afoot.[213] The Supreme Court recognized in *Illinois v. Gates*[214] that innocent behaviors can often provide a basis for probable cause. The *Gates* opinion went on to explain that, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."[215] Although the *Gates* opinion was concerned with a determination of probable cause, the same assertion as to the use of innocent behavior is true of a determination of reasonable suspicion,[216] the matter at hand in *Sokolow*. In a reasonable suspicion analysis, it is the totality of the circumstances—the whole picture—which is considered in assessing whether the law enforcement agent involved did reasonably suspect that the individual detained was presently engaged in criminal activity. Seemingly innocent acts can be part of this whole picture, as can characteristics taken from a drug courier profile, so long as law enforcement officers are able to demonstrate that all of these factors amount to a reasonable suspicion. The *Sokolow* majority was correct in holding that the reasonable suspicion anaylsis was not altered by the inclusion of drug courier profile characteristics as factors leading to a reasonable suspicion.[217]

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449 U.S. at 418.

213. Terry v. Ohio, 392 U.S. 1, 22-23 (1968).

214. 462 U.S. 213 (1983).

215. 462 U.S. at 243-45.

216. 109 S. Ct. at 1587.

217. Rehnquist tersely states, "We do not agree with respondent that our analysis is somehow changed by the agents' belief that his behavior was consistent with one of the

Terry established the reasonable suspicion standard for brief investigatory stops as requiring that the police be able to demonstrate, through the use of specific and articulable facts, that they did reasonably suspect that the citizen was involved in criminal activity at the time of detention. In applying this standard to the airport stop, drug courier cases heard since 1980,[218] the Supreme Court has held fast to the *Terry* mandate. The Court has carefully assessed whether the facts adduced as constituting reasonable suspicion do in fact add up to this legal requirement.[219]

The author has every expectation that the Court will continue to demand that, whatever the origin of the specific and articulable factors used by police in arriving at a decision to detain an individual for questioning, those factors must demonstrate a reasonable suspicion when viewed as a whole. Further, considering the President's recently announced agenda for fighting drug abuse in the United States, with 70 percent of the monies budgeted going toward efforts to stop the flow of illicit drugs into the country,[220] one could expect that the use of drug courier profiles explicitly condoned by the *Sokolow* Court for airport stops may be broadened for street application as well.

Barbara J. Lorence

DEA's 'drug courier profiles'." 109 S. Ct. 1581, 1587 (1989).

218. These cases are *Royer*, *Reid*, *Mendenhall*, *Rodriquez*, and *Sokolow*.

219. Not all detentions based on drug courier profiles have been upheld. In *Reid*, the Supreme Court concluded that the few drug courier profile characteristics put forward did not amount to reasonable suspicion. 448 U.S. 438 (1980).

220. Morning Edition, National Public Radio, Broadcast of September 14, 1989.