Loyola University Chicago Law Journal

Volume 21
Issue 1 *Fall 1989*

Article 8

1989

Gold Chains, Jumpsuits and Hunches: The Use of Drug Courier Profiles After *United States v. Sokolow*

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I. INTRODUCTION

The fourth amendment to the United States Constitution[1] requires a law enforcement officer to have probable cause in order to make a valid investigative stop.[2] Recent case law has relaxed this probable cause standard to a reasonable suspicion standard in some situations.[3] The adjudication of this reasonable suspicion standard, however, has become uncertain when drug courier profiles are used as the basis of the reasonable suspicion.[4] Because the use of drug courier profiles is an effective method of thwarting illegal drug trafficking, one method of adjudication must be accepted for determining whether the reasonable suspicion standard has been met when a suspected drug courier is stopped pursuant to a drug courier profile.[5]

On April 3, 1989, the United States Supreme Court decided *United States v. Sokolow*.[6] The Court held that a federal Drug Enforcement Agency ("DEA") agent must have a reasonable suspicion in order to stop an individual pursuant to a drug courier profile.[7] The Court refused to follow or construct a special test by which reasonable suspicion should be analyzed when drug courier profiles are involved.[8] Instead, the Court applied a traditional analysis by looking to all of the facts and circumstances present before the stop to determine whether there were sufficient facts on which to base reasonable suspicion.[9]

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1. For the complete text of the fourth amendment and a general discussion thereof, see *infra* note 10 and accompanying text.
2. *See infra* notes 14-29 and accompanying text for a discussion of the traditional probable cause standard and a discussion of the different types of stops and their constitutional requirements.
3. *See infra* notes 30-45 for a discussion of these recent cases and their impact on the probable cause standard.
4. *See infra* notes 46-62 and accompanying text for a discussion of the way in which courts have dealt with the drug courier profile as a basis for reasonable suspicion.
5. *See* note 46 for a discussion of the drug courier profile program's success.
6. 109 S. Ct. 1581 (1989).
7. *Id.* at 1587.
8. *Id.* at 1585-86.
9. *Id.* at 1586.

This Note will provide an analysis of drug courier profile law and the status of that law in light of the *Sokolow* decision. First, background information will be discussed, including the history of drug courier profiles and drug courier profile adjudication in recent Supreme Court cases. Next, a detailed description of the lower court and Supreme Court decisions in *United States v. Sokolow* will be provided. Finally, this Note will conclude that *Sokolow* was decided correctly and that cases involving drug courier profiles should be treated no differently than those involving any other type of facts, that is, they should be analyzed utilizing a traditional test of reasonable suspicion.

II. BACKGROUND

A. The Fourth Amendment to the United States Constitution

The fourth amendment[10] to the United States Constitution prohibits the government from carrying out "unreasonable searches and seizures."[11] The fourth amendment does not prohibit all searches and seizures, only those searches and seizures that are deemed unreasonable.[12] The reasonableness of a search or seizure is determined by weighing its intrusiveness against its benefit to the public.[13] In determining reasonableness and in outlining fourth amendment protections, the Supreme Court has recognized three distinct types of encounters between police and citizens:[14] (1) a

10. The fourth amendment provides in full:

> 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.

U.S. CONST. amend. IV.

11. For a general discussion of fourth amendment jurisprudence, see W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT (1978).

12. Elkins v. United States, 364 U.S. 206, 222 (1960).

13. *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (stating that the permissibility of a particular law enforcement practice is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests").

14. *See* Florida v. Royer, 460 U.S. 491, 497-501 (1983). *See infra* notes 17, 19, 26-27, 63, 76-79 and accompanying text (for additional discussion of *Royer*). The *Royer* court distinguished between police approach/voluntary questioning stops and investigative stops. *Id.* at 497-501 (citing Terry v. Ohio, 392 U.S. 1, 31-33 (1968) (Harlan, J., concurring) (White, J., concurring); Michigan v. Summers, 452 U.S. 692 (1981); Dunaway v. New York, 442 U.S. 200, 210 n.12 (1979)). The delineation between investigative stops and arrests is apparent from an analysis of the holding in Terry v. Ohio, 392 U.S. 1 (1968). For a discussion of *Terry*, see *infra* notes 24-26, 30-41, 139-40 and accompanying text.

police approach with voluntary questioning, which involves a police officer approaching a citizen who freely provides information to the officer,[15] (2) investigative stops, which involve temporarily detaining a suspect for further investigation,[16] and (3) arrests, which involve taking a suspect into police custody.[17]

Stops involving police approach and voluntary questioning are considered the least intrusive police encounters.[18] When a police officer approaches a citizen and identifies himself as such, the contact is so minimal that no "seizure" occurs.[19] These stops are designed to gather information and only occur with the consent of the person being questioned.[20] The citizen is free to leave at any time and is not forced to answer any questions.[21] Because no seizure occurs, fourth amendment concepts of reasonable suspicion and probable cause do not apply.[22]

Investigative stops usually involve a brief detention and are performed pursuant to suspicious conduct.[23] They are designed to gather additional information or to stop the threat of imminent

15. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 216 (1984). (the Court stated that unless the circumstances of an encounter "are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave," such questioning is not a detention under the fourth amendment).

16. United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (holding that detention of a traveler for investigation was proper when customs officials had reasonable suspicion that the traveler is an alimentary canal smuggler). *See also Terry*, 392 U.S. at 27 (allowing an officer to make a reasonable search regardless of whether he has probable cause to arrest that individual). For further discussion of *Terry*, see *infra* notes 24-25, 30-41, 139-40 and accompanying text.

17. *See, e.g., Royer*, 460 U.S at 503 (court stated that an investigation is an improper arrest when it is more intrusive than necessary and law enforcement officers have only reasonable suspicion, not probable cause). *See supra* note 14 and accompanying text (for additional discussion of *Royer*).

18. *See, e.g., Delgado*, 466 U.S. at 219, (asking factory workers questions about citizenship held not a seizure); United States v. Mendenhall, 446 U.S. 544, 553 (1980) (seizure present only when there is restraint of freedom or movement "by means of physical force or a show of authority"). For further discussion of *Mendenhall*, see *infra* notes 46, 63, 65-70 and accompanying text. For additional discussion of *Delgado*, see *supra* note 15 and accompanying text.

19. *Royer*, 460 U.S. at 497-98.

20. Police requests for information are consensual even though citizens are not told that they are free to not respond. *Delgado*, 466 U.S. at 216.

21. *Id.*

22. *Id.*

23. *See, e.g.*, Florida v. Rodriguez, 469 U.S. 1 (1985) (investigative stop when defendant was questioned and his luggage examined due to suspicious activity in Miami International Airport); United States v. Galberth, 846 F.2d 983 (5th Cir.), *cert. denied*, 109 S. Ct. 167 (1988) (investigative stop when suspect was searched because of suspicions of drug trafficking); United States v. Ruigomez, 702 F.2d 61 (5th Cir. 1983) (investigative stop when officer received permission to search car even though original stop was illegal).

harm.[24] Investigative stops rise to a greater level of intrusion than stops for voluntary questioning. Due to this heightened level of intrusion, an officer performing an investigative stop must do so based upon a reasonable and articulable suspicion.[25] If the officer is overly intrusive or if the citizen is detained for an unreasonable length of time, then the investigative stop may turn into an arrest.[26]

An arrest, the most intrusive type of encounter, occurs when an officer takes a citizen into custody.[27] The standard used to determine whether an arrest is valid is stricter than that for an investigative stop. An arrest must be based upon probable cause, that is, when "the facts and circumstances within . . . [the officer's knowledge are] sufficient in themselves to warrant a man of reasonable caution in the belief that"[28] an offense has been or is being committed. Probable cause need not be established by proof beyond a reasonable doubt or by a preponderance of the evidence, however, "more than bare suspicion" is required.[29]

B. The Investigative Stop in Supreme Court Decisions

The first case to sustain a search and seizure on less than probable cause was *Terry v. Ohio*.[30] In *Terry*, a police officer observed Terry surveying the scene around a store.[31] The officer approached Terry to ask him his name,[32] and when he offered an insufficient response, the officer became even more suspicious and searched for

24. *See* Terry v. Ohio, 392 U.S. 1 (1968).

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

26. *Id.* at 21-22; *see also* Florida v. Royer, 460 U.S. 491, 500 (1982) ("investigative detention must be temporary and should last no longer than is necessary to effectuate the purpose of the stop").

27. *See, e.g., Royer,* 460 U.S. at 500.

28. Carroll v. United States, 267 U.S. 132, 162 (1925). *See also* Henry v. United States, 361 U.S. 98, 102 (1959).

29. Brinegar v. United States, 338 U.S. 160, 175 (1949). *See also* Illinois v. Gates, 462 U.S. 213, 235 (1983), ("[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place [in the determination of probable cause]") (citing Spinelli v. United States, 393 U.S. 410, 419 (1969)); W. LAFAVE, *supra* note 11, at § 3.2(e). For further discussion of *Gates* see *infra* notes 101, 117 and accompanying text. One commentator stated that the only certain assertion about probable cause is that it "lies somewhere between bare suspicion and proof of guilt beyond a reasonable doubt." Armentano, *The Standards for Probable Cause Under the Fourth Amendment*, 44 CONN. BAR J. 137, 144 (1970).

30. 392 U.S. 1 (1968). The Court decided two companion cases on the same day as *Terry*. The reasoning and holdings were similar in all three cases. *See* Sibron v. New York, 392 U.S. 40 (1968); Peters v. New York, 392 U.S. 40 (1968).

31. *Terry,* 392 U.S. at 5-6.

32. *Id.* at 7.

a weapon by patting down Terry's outer clothing. The officer felt a hard object, reached into Terry's coat, and removed a gun.

Terry was charged with carrying a concealed weapon. At trial, he moved to suppress evidence of the gun by arguing that the search was unreasonable and that it infringed upon his fourth amendment rights. The court denied this motion on the basis that the officer had reasonable cause to make an investigation.[33] The trial court convicted Terry,[34] and the appellate court affirmed.[35] The Supreme Court focused its decision on whether the "stop and frisk" constitued an unreasonable search and seizure.[36] The Court balanced Terry's fourth amendment right to be free from arbitrary police interference against the public's interest in effective law enforcement[37] and upheld the search.[38]

The application of the *Terry* rationale was limited to stop and frisk situations initiated to prevent a specific crime or bodily injury.[39] Further, an officer had authority to search only when the officer could indicate "specific and articulable facts which, taken together with rational inferences from those facts, [warranted an] intrusion."[40] The purpose of this reasonable suspicion test is to protect the police officer and others in his immediate vicinity from assault. Any search pursuant to this test, therefore, must be limited in scope to discover a weapon or other hidden instrument which could be used for such an assault.[41]

In *Adams v. Williams*,[42] the Court expanded *Terry* by upholding a "stop and frisk" when there was no threatened danger to the officer and only minimal need for immediate police action.[43] In *Adams*, the officer received information from a known informant

33. *Id.* at 8.

34. *Id.* at 7-8.

35. State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (Cuyahoga Co. 1966), *aff'd*, 392 U.S. 1 (1968).

36. *Terry*, 392 U.S. at 19-20.

37. *Id.* at 20-27 (citing Camara v. Municipal Court, 387 U.S. 523 (1967)).

38. *Id.* at 31.

39. *Id.* at 30. The Court recognized the limited scope of *Terry* in subsequent cases. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 93 (1979); Dunaway v. New York, 442 U.S. 200, 210 (1979). In United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975), the Court held that reasonable suspicion of criminal activity permits a temporary seizure for the purpose of questioning, limited to the purpose of a stop.

40. *Terry*, 392 U.S. at 21 (citing Beck v. Ohio, 379 U.S. 89, 96-97 (1964); Ker v. California, 374 U.S. 23, 34-37 (1963); Wong Sun v. United States, 371 U.S. 471, 479-84 (1963)).

41. *Id.* at 29. Under *Terry*, an officer cannot perform a "general exploratory search" in hopes of finding some indication of criminal activity. *Id.* at 30.

42. 407 U.S. 143 (1972).

43. *Id.* at 148.

that the defendant, who was sitting in a car, possessed drugs and a gun. The officer approached the car and reached through the window to remove a gun from the defendant's waistband. After arresting Adams for unlawful possession of a weapon, the officer searched the car and seized some heroin and an additional gun.

At trial, Adams argued that absent more reliable information than the informant's tip, the officer's search was unreasonable under the standards set forth in *Terry*.[44] The Court, however, upheld the search and seizure under the reasonable suspicion standard because the tip had indicia of reliability and properly provided the basis for a reasonable suspicion.[45] Hence, *Adams* expanded the *Terry* standard by making it applicable to situations in which there is no known threat of imminent harm to an officer or another person in the vicinity.

C. The Drug Courier Profile as the Basis of Reasonable Suspicion to Justify a Search and Seizure

1. History and Background of Drug Courier Profiles

Since 1974, the DEA has used a drug courier profile program in an effort to stop illegal drug trafficking through the nation's airports.[46] A profile is a compilation of characteristics that are purportedly common to drug couriers and smugglers to which DEA agents compare a person's actions and manners.

DEA agents observe air travelers as they deplane,[47] and if an

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44. *Id.*

45. *Id.* at 147.

46. *See generally* 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), *see also* United States v. Mendenhall, 446 U.S. 544, 562 (1980) (Powell, J., concurring); United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (recalling that the DEA first used the profile in Detroit in 1974).

The DEA adapted the drug courier profile program from a similar program used by the Federal Aviation Administration (FAA) to recognize hijackers. *See* Weinstock, *The Airport Search and the Fourth Amendment: Reconciling the Theories and Practices*, 7 U.C.L.A.-ALASKA L. REV. 307 (1978) (stating that before the FAA routinely searched all carry-on baggage and magnetically screened all passengers, it utilized a "hijacker profile" as part of its screening program); McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293, 302-03 (1972) (discusses task force formulation of "hijacker profile").

The use of drug courier profiles has thwarted drug trafficking among cities targeted by the DEA. United States v. Mendenhall, 446 U.S. 596, 706, 708 n.1 (6th Cir. 1979) (Weick, J., dissenting) (noting the large quantity of illegal drugs seized during the infancy of the drug courier profile program), *rev'd*, 446 U.S. 544 (1980).

47. Brief for the United States at 4, United States v. Mendenhall, 446 U.S. 544 (1980). *See, e.g.*, United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980)

individual fits the profile, the agents further scrutinize the traveler's actions.[48] When the suspect is about to leave the airport or about to catch a connecting flight, the agent usually approaches and requests some identification.[49] The agent then questions the suspect and examines the suspect's plane ticket to further determine whether the traveler matches additional characteristics consistent with a profile.[50] If further inquiry is warranted, the suspect is asked to submit voluntarily to a search.[51] If the suspect refuses, the suspect's baggage is detained until a search warrant is obtained. Usually, the suspect is released.[52]

There is no single drug courier profile used throughout the nation.[53] Not only do the elements of the profiles change from airport to airport, they may vary depending on the particular agent.[54] Further, profiles may change due to the status of the flight,[55] sex of the traveler,[56] or the region in which the airport is located.[57] Some

(suspect was noticed while agent was observing passengers deplane). Note that criminal profiles are used in other contexts as well, such as to detect serial killers or smugglers of undocumented workers into the United States. *See* Becton, *supra* note 46, at 423-26. Pervasive use of profiles at airports has resulted in smugglers using alternative transportation methods. *Id.* Drug courier profiles are used with increasing frequency at railroad stations. *See, e.g.*, United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989); United States v. Carrasquillo, 877 F.2d 73 (D.C. Cir. 1989).

48. Brief for the United States at 4, United States v. Mendenhall, 446 U.S. 544 (1980). *See, e.g.*, United States. v. Robinson, 625 F.2d 1211, 1213 (5th Cir. 1980), *later app.*, 690 F.2d 869 (11th Cir. 1982) (suspect's actions in the airport terminal further observed after DEA agents determined he fit a profile).

49. *See, e.g.*, Reid v. Georgia, 448 U.S. 438, 439 (1980) (per curiam). *See infra* notes 71-75 and accompanying text (for further discussion of *Reid*).

50. Brief for the United States at 4, United States v. Mendenhall, 446 U.S. 544 (1980).

51. *See generally* Gardiner, *Consent to Search in Response to Police Threats to Seek or Obtain a Search Warrant: Some Alternatives*, 71 J. CRIM. L. & CRIMINOLOGY 163, 171-72 (1980) (discussing consent searches).

52. *See, e.g.*, United States v. Vasquez, 612 F.2d 1338, 1341 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980) (without consent, the law requires a search warrant before searching suspect's baggage).

53. Brief for the United States at 31 n.23, United States v. Mendenhall, 446 U.S. 544 (1980) (No. 78-1821).

54. *See, e.g.*, United States v. Westerbann-Martinez, 435 F. Supp. 690, 698-99 (E.D.N.Y. 1977) ("[a]gent Rose, in this case, specifically denied that being the last to deplane . . . and taking a circuitous route . . . were part of the profile . . . . He had no knowledge whether the use of small denomination currency . . . was part of the profile. . . ." even though these acts were part of a profile used by other agents).

55. Robinson v. State, 388 So. 2d 286, 288 n.1 (Fla. Dist. Ct. App. 1980) (different profiles for incoming and outgoing flights).

56. United States v. Patino, 649 F.2d 724, 725 (9th Cir. 1981) (referred to a "female" drug courier profile).

57. United States v. Berry, 670 F.2d 583, 598-99 (5th Cir. 1982) (referred to regional profile).

commentators and courts have even suggested that profiles completely change from one occurrence to another, allowing an agent to stop almost any traveler.[58]

Generally, travelers who fit drug courier profiles arrive from source cities,[59] carry little or no luggage or an empty suitcase, use an alias, fail to check baggage, pay for airline tickets in small denominations of cash, make quick return trips, appear nervous, scan the terminal area after deplaning, and travel at off-peak hours or by a circuitous route.[60] Even though each characteristic by itself may be "quite consistent with innocent travel,"[61] a combination of these characteristics may arouse a DEA agent's suspicion, causing that agent to pursue a drug courier profile investigation further.[62] Although DEA agents regularly used drug courier profiles, no Supreme Court decision had addressed whether conformity with drug courier profile characteristics automatically provided an officer with reasonable suspicion.

2. United States Supreme Court Decisions Dealing With Drug Courier Profiles

The United States Supreme Court had rendered three significant decisions that analyzed the use of drug courier profiles in light of fourth amendment protections.[63] In each case, the Court relied on facts not within the profile "that were in themselves, at least to some degree, incriminating."[64] All three decisions thus failed to articulate any definite standards to guide DEA agents and lower courts in deciding the propriety of arrests involving drug courier profiles.

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58. *See* Becton, *supra* note 46, at 417, app. 474-90 (contains chart and data indicating often opposite characteristics used in profiles); *see also*, United States v. Sokolow, 109 S. Ct. 1581, 1588-89 (1989) (Marshall, J., dissenting) (citing cases using opposite characteristics).

59. A "source city" is a city from which drug dealers ship illegal drugs to other locations for sale or further distribution. *See* Reid v. Georgia, 448 U.S. 438 (1980) (per curiam) (Fort Lauderdale, Florida is a source city for cocaine); United States v. Buenaventura-Ariza, 615 F.2d 29, 31 n.5 (2d Cir. 1980) (Miami, Florida is a source city for cocaine).

60. *See* Becton, *supra* note 46, at 417, app. 474 (1987) (appendix has listing of numerous profile characteristics).

61. United States v. Sokolow, 109 S. Ct. 1581, 1586 (1989).

62. *Id. See also* Brief for the United States at 4, United States v. Mendenhall, 446 U.S. 544 (1980).

63. *See* Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980) (per curiam); United States v. Mendenhall, 446 U.S. 544 (1980). For a discussion of these cases, see *infra* notes 65-79 and accompanying text.

64. United States v. Colyer, 878 F.2d 469, 480 (D.C. Cir. 1989). *See supra* note 47 and accompanying text (for additional discussion of *Colyer*).

In the first case, *United States v. Mendenhall*,[65] DEA agents observed the suspect Mendenhall deplaning in Detroit and noticed that she possessed several characteristics consistent with a drug courier profile. She had arrived on a flight from Los Angeles, a source city of drugs flowing to Detroit. She appeared nervous, scanned the deplaning area and deplaned last. Mendenhall claimed no luggage in the baggage area. Lastly, she changed planes for her departure out of Detroit. After approaching and questioning Mendenhall, the agents discovered that she was traveling under an assumed name. They then asked for her consent to a search of her person and of her handbag, and she acquiesced. The agents found two packets of heroin concealed in her undergarments, and they arrested her for possession of narcotics.

The district court convicted Mendenhall; the Court of Appeals for the Sixth Circuit reversed, holding that Mendenhall did not consent to the search.[66] The court of appeals further held that conformity with a drug courier profile by itself did not justify the nonconsensual search.[67] A five member majority of the Supreme Court reversed, holding that no seizure occurred because Mendenhall properly had consented to the search.[68] Because the majority based its decision of the stop's propriety on Mendenhall's alleged consent, *Mendenhall* did not conclusively determine whether a drug courier profile alone could form the basis for a reasonable suspicion. Only Justice Powell, joined by Chief Justice Burger and Justice Blackmun, addressed the issue.[69] These three Justices found that a seizure had occurred; they also concluded that Mendenhall's conformity with the drug courier profile was sufficient to establish the reasonable suspicion necessary to warrant an investigative stop.[70]

In the Court's next decision, *Reid v. Georgia*,[71] the suspect also fit within a drug courier profile. He arrived early in the morning (presumably when law enforcement officers would not be present in great numbers) from Fort Lauderdale, a source city. He carried no luggage, and concealed that he was traveling with another per-

65. 446 U.S. 544 (1980) (plurality opinion).

66. *Id.* (plurality opinion).

67. United States v. Mendenhall, 596 F.2d 706, 707 (6th Cir. 1979) (en banc) (citing United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977)), *rev'd*, 446 U.S. 544 (1980).

68. *Mendenhall*, 446 U.S. at 555-60.

69. *Id.* at 564 (Powell, J., concurring).

70. *Id.* at 565 (Powell, J., concurring).

71. 448 U.S. 438 (1980) (per curiam). *Reid* was decided one month after *Mendenhall*.

son. When confronted, Reid's companion fled, abandoning a shoulder bag. An agent searched the bag, found cocaine and arrested Reid.

The Supreme Court held that the trial court had appropriately granted Reid's motion to suppress the evidence of the cocaine because it was the fruit of an illegal search.[72] The Court stated that most of the profile characteristics described presumably innocent travelers and, as such, should not be relied upon in determining reasonable suspicion.[73] The Court recognized that, although the characteristic of concealing the fact of traveling with another person was quite suspicious, that characteristic by itself was "too slender a reed to support the seizure."[74] Conformity with four characteristics of a drug courier profile could not justify a seizure.[75]

In the most recent in the trilogy of drug courier profile cases, *Florida v. Royer*,[76] DEA agents stopped Royer after they determined that he fit a drug courier profile.[77] He was casually dressed and between twenty-five and thirty-five years old. He seemed pale and nervous and carried American Tourister luggage that looked heavy. The tag on his luggage had not been filled out completely. Finally, he had paid for his ticket in cash.

The agents proceeded to question Royer, and with his consent, searched his luggage and found marijuana. Royer was then arrested for narcotics possession. A plurality of the Court stated that Royer exhibited enough characteristics to provide a basis for reasonable suspicion required to justify an investigative stop.[78] The Court, however, overturned the conviction because no seizure had occurred.[79] The Court again failed to indicate when reliance upon drug courier profile characteristics alone is a sufficient basis for reasonable suspicion.

Mendenhall, Reid and *Royer* failed to provide the lower courts with any conclusive test as to the validity of drug courier profiles as an investigative tool. Without proper guidance from the Court, law enforcement agents were free to stop airline passengers based

72. *Id.* at 441.

73. *Id.* (the Court noted that innocent travelers "would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure").

74. *Id.*

75. *Id.* at 441.

76. 460 U.S. 491 (1983) (plurality opinion).

77. *Id.* at 493-94 (plurality opinion).

78. *Id.* at 502 (plurality opinion).

79. *Id.* at 501-08 (plurality opinion). Due to this conclusion, the Court did not address the drug courier profile in more detail.

solely upon their perceived physical and psychological differences from other passengers. With this precedent, and against the background of an exploding drug crisis,[80] the Court faced another drug courier profile case.

III. UNITED STATES V. SOKOLOW

A. The Facts of the Case

In July of 1984, Andrew Sokolow purchased two round trip tickets to Miami, Florida at a ticket counter in the Honolulu airport.[81] Sokolow paid for the tickets with $2,100 in cash. The tickets were purchased in the names of "Andrew Kray" and "Janet Norian."[82] Sokolow gave the ticket agent his home telephone number, which was listed under the name of Karl Herman, Sokolow's roommate. The ticket agent notified the DEA of Sokolow's unusual behavior. Three days after leaving Honolulu, Sokolow and Norian returned to Hawaii. DEA agents stopped Sokolow knowing that he had paid $2,100 for two airplane tickets from a roll of $20 bills containing approximately twice that amount, that he was traveling under a name that differed from the name under which his telephone was listed, that his original destination was Miami, Florida, a source city for illegal drugs, and that he stayed in Miami only forty-eight hours, even though a round-trip flight from Honolulu to Miami takes twenty hours. Sokolow did not check any luggage. In addition, he was dressed in a black jumpsuit, wore gold jewelry and appeared nervous.[83]

After searching his carry-on baggage, the DEA agents found 1,063 grams of cocaine.[84] Sokolow was indicted for possession of cocaine with intent to distribute.[85]

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80. Currently, it is estimated that drug trafficing is a $110 billion a year business. The magnitude of the problem is enormous:

> Some 100,000 babies are born to drug-abusing mothers each year. And in one city alone—Washington, D.C.—drug fights claim nearly 500 lives annually. The FBI says that there are 450 major drug organizations in the United States, but it has enough agents to fight only 35 percent of the operations. So, the drug-war battlefield is ugly.

Watson, *Can Bush Win the Drug War?*, Chicago Sun-Times, February 15, 1990, at 39, col.5.

81. United States v. Sokolow, 109 S. Ct. 1581, 1583 (1989).

82. *Id.* After being stopped, Sokolow explained that his name was Andrew Sokolow but that he was traveling under his mother's maiden name. *Id.* at 1584.

83. *Id.*

84. *Id.* Before the DEA agent searched the baggage, a narcotics detector dog, named Donker, examined it and alerted the agents to the presence of narcotics. *Id.*

85. *Id.* Specifically, Sokolow was indicted under 21 U.S.C. § 841(a)(1) (1988). 109 S. Ct. at 1584.

B. The Lower Courts' Decisions

The United States District Court for Hawaii denied Sokolow's motion to suppress evidence of the cocaine seizure from his carry-on baggage.[86] The court determined that the DEA agents had a reasonable suspicion Sokolow was involved with illegal drug trafficking when the agents stopped him in the airport.[87] Sokolow entered a conditional plea of guilty.[88]

The United States Court of Appeals for the Ninth Circuit reversed Sokolow's conviction,[89] holding that the stop was not justified because the DEA agents did not have a reasonable suspicion.[90] The court created a two-part test to determine the existence of reasonable suspicion in the drug courier profile context. For the first part of the test to be met, there must be some facts consistent with "ongoing criminal activity," such as evasively maneuvering through the airport or using an alias.[91] If at least one characteristic of "ongoing criminal activity" is not present, then there can be no reasonable suspicion and the second part of the test does not come into play.[92]

If there is at least one characteristic of "ongoing criminal activity," however, then the second part of the test becomes operative. For this part of the test to be met, there must be some facts consistent with "personal characteristics" of drug couriers, such as cash payments for tickets, nervousness, type of attire, unchecked luggage, or a brief trip to a source city for drugs.[93] Finding that there was no evidence of "ongoing criminal activity," the court held that the stop was an impermissible invasion of Sokolow's fourth amendment rights.[94] Subsequently, the United States Supreme Court granted the government's petition for certiorari.[95]

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86. *Id.*

87. *Id.*

88. *Id.* In order to preserve his right to challenge the district court's ruling on his fourth amendment claims, Sokolow entered a conditional plea of guilty under FED. R. CRIM. P. 11(a)(2). United States v. Sokolow, 831 F.2d 1413, 1416 (9th Cir. 1987).

89. United States v. Sokolow, 831 F.2d 1413 (1987).

90. *Id.* at 1423. The court of appeals reversed the district court in an earlier decision. United States v. Sokolow, 808 F.2d 1366 (9th Cir.), *vacated,* 831 F.2d 1413 (9th Cir. 1987). The earlier reversal was based on different grounds. The second decision was issued because the government petitioned for rehearing, arguing that the court had erred in considering each of the facts known to the agent distinctly and not collectively. 109 S. Ct. at 1584 n.2.

91. *Sokolow,* 831 F.2d at 1419.

92. *Id.*

93. *Id.* at 1420.

94. *Id.* at 1426.

95. United States v. Sokolow, 108 S. Ct. 2033 (1988). Chief Justice Rehnquist noted

C. *The Opinion of the Court*[96]

1. Reasonable Suspicion in Previous Supreme Court Decisions

The Supreme Court, in reversing the decision of the Ninth Circuit, held that Sokolow's stop and detention were not unconstitutional simply because agents may have believed that he fit a drug courier profile. The Court ruled that the DEA agents otherwise had a reasonable basis for suspecting that Sokolow was transporting illegal drugs.[97]

Because the Court's decision turned on the presence of a reasonable suspicion, Justice Rehnquist addressed the concept as analyzed in previous Supreme Court decisions.[98] First, the Court noted that probable cause is not a necessary requirement for an officer to stop and briefly to detain a person for investigative purposes, if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot."[99] The officer, however, must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'."[100] The Court also stated that probable cause means "a fair probability that contraband or evidence of a crime will be found,"[101] but that "the level of suspicion required for a *Terry* stop is less demanding than that for probable cause."[102] The Court noted that the concept of reasonable suspicion is not "readily, or even usefully, reduced to a neat set of legal rules,"[103] and in evaluating the validity of a stop such as Sokolow's, "the totality of the circumstances—the whole picture" must be considered.[104]

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that the Court granted certiorari "because of [the case's] serious implications for the enforcement of the federal narcotics laws." United States v. Sokolow, 109 S. Ct. at 1585.

96. Chief Justice Rehnquist authored the opinion of the Court and was joined by Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy. Justice Marshall authored a dissenting opinion, in which Justice Brennan joined.

97. *Id.* at 1587. Justice Rehnquist began the opinion by noting that the court of appeals had held that the DEA agents seized Sokolow when they grabbed him by the arm and moved him back to the sidewalk. Because the government did not challenge that conclusion, the Court assumed, without deciding, that a seizure occurred at that time. The Court proceeded to analyze the reasonableness of the seizure in accordance with the language of the fourth amendment.

98. *Id.*

99. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). *See supra* notes 30-45 for a background discussion of investigative stops.

100. 109 S. Ct. at 1587 (citing *Terry*, 392 U.S. at 27).

101. *Id.* (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)).

102. *Id.* (citing United States v. Montoya de Hernandez, 473 U.S. 531, 541, 544 (1985)).

103. *Id.* (citing *Gates*, 462 U.S. at 232).

104. *Id.* (citing United States v. Cortez, 449 U.S. 411, 417 (1981)).

2. The Court's Discussion of the Decision of the Court of Appeals

Justice Rehnquist chastised the Ninth Circuit for attempting to elaborate upon the requirement of reasonable suspicion, stating that by doing so, it created "unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment."[105] The Court stated that the two-part test devised by the court of appeals was not "in keeping with the quoted statements from [the Court's] decisions."[106] In the Court's opinion, to distinguish between evidence of "ongoing criminal behavior" and "probabilistic" evidence would be to draw a sharp line between two types of evidence which differ only in the degree of their probative value.[107]

The Court next discussed the first prong of the Ninth Circuit's test, that is, the "ongoing criminal activity" portion.[108] The court of appeals had determined that taking an evasive or erratic path through the airport or traveling under an alias is evidence of "ongoing criminal activity."[109] The Supreme Court noted, however, that in some circumstances, such actions might be perfectly logical and innocent. For example, one might use an erratic path through an airport to avoid an angry acquaintance or a creditor.[110] Also, one might use an alias to conceal the fact of travel to a hospital or clinic. This type of evidence might be highly probative of criminal activity, but it does not have the "ironclad significance" attributed to it by the lower court.[111]

The Supreme Court then discussed the personal traits that evidence criminal character, noting that they, too, have probative significance.[112] A cash payment of $2,100 for airplane tickets is "out of the ordinary," especially when taken from a roll of twenty dollar bills containing approximately twice that amount. Further, the

105. *Id.* Instead, the Supreme Court took a different approach. As construed by a subsequent court, the *Sokolow* court engaged in "what is inevitably a fact-specific inquiry and determined that the enumerated factors did give the officers sufficiently reasonable suspicion to detain the defendant." United States v. Battista, 876 F.2d 201 (D.C. Cir. 1989).

106. *Sokolow*, 109 S. Ct. at 1586. *See supra* text accompanying footnotes 99-104 for the Court's previous statements to which this quotation refers.

107. 109 S. Ct. at 1586.

108. *Id.*

109. *Id.* The court of appeals reversed the conviction because it found no such evidence of "ongoing criminal activity." *See supra* notes 89-94 and accompanying text.

110. 109 S. Ct. 1586.

111. *Id.*

112. *Id.*

Court indicated that, although a trip from Honolulu to Miami may be innocent, traveling for twenty hours to spend forty-eight hours in Miami during the month of July is cause for suspicion.[113]

The Court concluded its discussion of the appellate court's opinion by stating that any of these factors, by itself, is not proof of illegal conduct and can be consistent with innocent travel.[114] In rejecting the Ninth Circuit's test, the Court reemphasized the use of the "totality of the circumstances" test[115] and determined that all the evidence, taken together, amounted to reasonable suspicion.[116] In support of this conclusion, the Court cited several of its previous decisions in which suspicion was held to be reasonable, even though the basis for that suspicion consisted of a few acts that alone would have been totally innocent.[117]

3. Presence of a Drug Courier Profile

In response to Sokolow's arguments that the presence of a drug courier profile alters the reasonable suspicion analysis, the Court stated that its analysis did not change solely because the DEA agent believed that Sokolow's behavior was consistent with a drug courier profile.[118] Further, it stated that a court sitting to determine whether reasonable suspicion existed must require the DEA agent to articulate the factors which gave rise to that conclusion.[119] In the Court's opinion, the significance of these factors is not lessened merely because they are set forth in a drug courier profile.[120]

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113. *Id.*

114. *Id.* The Court did not discuss the other factors of which the DEA agents may have been apprised that may have supported the reasonableness of their suspicion. For a list of the factors, see *supra* notes 82-83 and accompanying text.

115. *See supra* note 104 and *infra* note 117 and accompanying text.

116. *Id.*

117. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 22 (1968) ("a series of acts, each of them perhaps innocent [if viewed separately] but which taken together warranted further investigation"); Illinois v. Gates, 462 U.S. 213, 243-44 n.13 (1983) ("innocent behavior will frequently provide the basis for a showing of probable cause . . . [i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty' but the degree of suspicion that attaches to particular types of non-criminal acts"). Although the quotation from *Gates* refers to a probable cause inquiry, it also applies to a reasonable suspicion inquiry. *Sokolow,* 109 S. Ct. at 1587. *See supra* note 29 and accompanying text (for further discussion of *Gates*).

118. *Id.*

119. *Id.*

120. *Id.* In this regard, the Court stated that

> [a] court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent.

Id. at 1587. It must be noted that there is no language in the Court's opinion indicating

Finally, the Court concluded by holding that the reasonableness of the agent's decision to stop a suspect is not dependent upon the availability of less intrusive investigating techniques.[121] The Court explained that such a rule would "unduly hamper the police's ability to make swift on-the-spot decisions" and would require courts to "indulge in 'unrealistic second-guessing'."[122]

D. The Dissent

Writing for the dissent, Justice Marshall[123] took the majority to task for granting certiorari to address the validity of a "questionable" law enforcement practice which it then failed to discuss.[124] The dissent argued that by affirming Sokolow's conviction on the ground that the agents had reasonable suspicion of ongoing criminal activity, the majority affirmed the infringement upon Sokolow's fourth amendment rights.[125] Justice Marshall noted that, although criminals usually are the strongest advocates of fourth amendment rights, the Court's interpretation of such rights protects both the innocent and the guilty.[126] By sustaining Sokolow's conviction, therefore, the Court diminished "the rights of *all* citizens to [sic] 'to be secure in their persons' . . . as they traverse the Nation's airports."[127]

The dissent stated that a showing of probable cause is needed for a valid search or seizure unless exigent circumstances exist such as the need to stop a crime in progress, to prevent imminent crimes, or to protect law enforcement officers.[128] In these situations, reasonable suspicion is a prerequisite to a seizure.[129] The reasonable suspicion requirement protects innocent persons from "being subjected to 'overbearing or harassing' police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as

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that its approval of profiles, to help establish reasonable suspicion warranting further investigation, extends to the admissibility at trial of drug courier profile testimony.

121. *Id.* (citing Brief for Respondent 12-13, 21-23).

122. *Id.* (citing Montoya de Hernandez, 473 U.S. 531, 542 (1985), quoting United States v. Sharpe, 470 U.S. 675, 686-87 (1985)).

123. Justice Brennan joined Justice Marshall in his dissent.

124. *Sokolow*, 109 S. Ct. at 1589 (Marshall, J., dissenting).

125. United States v. Sokolow, 109 S. Ct. at 1587 (Marshall, J., dissenting).

126. *Id.* (Marshall, J., dissenting) (citing Illinois v. Gates, 462 U.S. 213, 290 (1983)).

127. *Id.* at 1587-88 (Marshall, J., dissenting) (citing U.S. CONST. amend. IV) (emphasis in original).

128. *Id.* at 1588 (Marshall, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).

129. *Id.* (Marshall, J., dissenting).

race."[130]

Justice Marshall focused on the fact that Sokolow was stopped pursuant to a drug courier profile,[131] and he emphasized that a mere match, between certain traits on a drug courier profile and Sokolow's characteristics, did not reasonably indicate that he was engaged in criminal activity when he was stopped.[132] According to the dissent, law enforcement officers should not utilize mechanical formulae of personal and behavioral traits to determine when to stop a suspect.[133] A reflexive reliance on drug courier profiles, rather than ordinary, case-by-case police investigation, poses a greater risk of subjecting innocent individuals to unwarranted police detention and harassment.[134] Additionally, this risk is enhanced because drug courier profiles have a "chameleon-like way of adapting to any particular set of observations."[135]

The dissent concluded by analyzing the specific facts of which the DEA agents were apprised,[136] and it determined that because those facts were circumstantial, they did not constitute the basis for a reasonable suspicion of ongoing criminal activity.[137] Accord-

130. *Id.* (Marshall, J., dissenting) (citing *Terry*, 392 U.S. at 14-15, & n.11).

131. *Id.* (Marshall, J., dissenting).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (Marshall, J., dissenting) (citing United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987)). The dissent cited numerous cases that demonstrate the protean nature of drug courier profiles: *compare* United States v. Moore, 675 F.2d 802, 803 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) (suspect was first to deplane) *with* United States v. Mendenhall, 446 U.S. 544, 564 (1980) (last to deplane) *with* United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2nd Cir. 1980) (deplaned from middle). *Compare* United States v. Sullivan, 625 F.2d 9, 12 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (one-way tickets) *with* United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977) (round-trip tickets). *Compare* United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (non-stop flight) *with* United States v. Sokolow, 808 F.2d 1366, 1370 (9th Cir. 1987), *vacated*, 831 F.2d 1413 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1581 (1989) (changed planes). *Compare Craemer*, 555 F.2d at 595 (no luggage) *with* United States v. Sanford, 658 F.2d 342, 343 (5th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982) (gym bag) *with Sullivan*, 625 F.2d at 12 (new suitcases). *Compare* United States v. Smith, 574 F.2d 882, 883 (6th Cir. 1978) (traveling alone) *with* United States v. Fry, 622 F.2d 1218, 1219 (5th Cir. 1980) (traveling with companion). *Compare* United States v. Andrews, 600 F.2d 563, 566 (6th Cir. 1979), *cert. denied, sub nom.* Brooks v. United States, 444 U.S. 878 (1979) (acted nervously) *with* United States v. Himmelwright, 551 F.2d 991, 992 (5th Cir. 1977), *cert. denied*, 434 U.S. 902 (1977) (acted too calmly). For further discussion of the inconsistencies among drug courier profiles, see Becton, *supra* note 46, at 417, app. 474-90.

136. *Id.* at 1589-90.

137. *Id.* The dissent compared the facts in Reid v. Georgia, 448 U.S. 438 (1980) with those in *Sokolow*. The facts in *Sokolow* were "scarcely more suggestive of ongoing criminal activity than those in *Reid*." 109 S. Ct. at 1590 (Marshall, J., dissenting). Reasonable

ing to the dissenting Justices, the majority's finding that the officers were justified in their reasonable suspicion only serves "to indicate [the Court's] willingness, when drug crimes or anti-drug policies are at issue, to give short shrift to constitutional rights."[138]

IV. ANALYSIS

The Court in *United States v. Sokolow*[139] properly upheld Sokolow's conviction on the basis that the DEA agent had a reasonable suspicion that Sokolow was transporting illegal drugs. This statement is not based upon the conclusion that use of a drug courier profile is *per se* constitutional. To the contrary, it is based upon the conclusion that the use of a drug courier profile is not *per se* unconstitutional.

Under the *Terry v. Ohio*[140] expansion of the fourth amendment's requirement of probable cause as the basis of a search of seizure, "reasonable suspicion" will justify a search and seizure in certain situations.[141] Pursuant to this standard, the Court analyzed the facts and circumstances surrounding the seizure of Sokolow's belongings and determined that the agent, in light of the facts known to him at the time, had a reasonable basis to suspect that Sokolow was carrying illegal drugs. The Court did not alter its conclusion solely because the DEA agent believed that his suspicion was consistent with a drug courier profile.

It was proper for the Court to examine the facts of the case instead of altering the reasonable suspicion standard when a drug courier profile has been used to establish the basis for a search and seizure. It would have been wholly improper for the Court to construct some type of "drug courier profile/reasonable suspicion" test to examine the requirement of reasonable suspicion. Some courts *have* chosen to create and to implement a particular reason-

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suspicion was not found in *Reid* as it was in *Sokolow*. *See supra* note 73 and accompanying text.

138. *Sokolow*, 109 S. Ct. at 1591 (Marshall, J., dissenting) (citing Skinner v. Railway Labor Executives Assn., 109 S. Ct. 1402 (1989) (Marshall, J., dissenting) (warrantless drug and alcohol testing of railroad employees held reasonable under the fourth amendment)).

139. 109 S. Ct. 1581 (1989). *See supra* notes 81-85 and accompanying text for a discussion of the facts in *Sokolow*.

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

141. *See Terry*, 392 U.S. at 27; *see also* Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980); Reid v. Georgia, 448 U.S. 438 (1980) (per curiam). For a general discussion of these cases and the reasonable suspicion standard, see *supra* notes 30-41, 63-79 and accompanying text.

able suspicion test to be used only in drug courier profile cases.[142] These tests tend to be complicated and seem to arbitrarily distinguish among different types of characteristics.

For example, in *Elmore v. United States*,[143] the United States Court of Appeals for the Fifth Circuit distinguished between primary and secondary characteristics of drug couriers.[144] The court stated that some characteristics from both groups must be present before reasonable suspicion could be found, but it did not provide a reason for its decision to distinguish between the two types of characteristics. Moreover, the court did not set a minimum number of characteristics that must be present for a reasonable suspicion to arise. In its *Sokolow* decision,[145] the Ninth Circuit concocted a similar test, distinguishing between characteristics of "ongoing criminal activity," and "personal characteristics" of drug couriers.[146] The court's test required the presence of at least one characteristic from both categories before the court would find that the agent's suspicion was reasonable.[147] The court failed, however, to provide a principled distinction between the two types of characteristics.

These types of tests are artificial constructs designed to assist courts in their adjudication of drug courier profile cases.[148]

142. *See, e.g.*, United States v. Sokolow, 831 F.2d 1413 (9th Cir. 1987), *rev'd*, 109 S. Ct. 1581 (1989); Elmore v. United States, 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

143. 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

144. *Id.* at 1039. Specifically, the primary characteristics noted were: (1) arrival from or departure to an identified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as a rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers. The secondary characteristics noted were: (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or distribution cities. *Id.* These characteristics were also discussed in United States v. Ballard, 573 F.2d 913 (5th Cir. 1978). Note that Andrew Sokolow fit all but one of these characteristics. *Sokolow*, 109 S. Ct. at 1583-84.

145. 831 F.2d 1413 (1987), *rev'd*, 109 S. Ct. 1581 (1989).

146. *Id.* at 1419-20. Examples of ongoing criminal activity are (1) use of an alias and (2) evasive movement through the airport. Examples of personal characteristics of drug couriers are (1) cash payment for tickets, (2) nervousness, and (3) type of attire. *Id. See also supra* notes 89-94 and accompanying text for a discussion of these characteristics and the Ninth Circuit's two-part test for reasonable suspicion.

147. *Sokolow*, 831 F.2d at 1419-20.

148. *Id.* at 1425 (Wiggens, J., dissenting) (supporting above contention by stating that the majority's two-part test was "an unjustified parsing of the drug courier profile").

Although there is nothing improper about constructing tests to aid lower courts in their decision-making, to do so at the expense of proper fourth amendment analysis is unwarranted. The Supreme Court recognized this fact and refused to uphold the Ninth Circuit's mechanical approach. *Sokolow*'s rejection of the Ninth Circuit's test suggests that courts similarly should refuse to treat drug courier profile cases in a special manner. The superior method of analysis is an examination of all the facts and circumstances available to the officer. Courts should not alter the conventional test merely because an officer used a drug courier profile to arrive at a reasonable suspicion.

Given the Court's decision, there exists the danger that law enforcement officers may misuse profiles. Race or national origin always should be an impermissible factor.[149] In using a conventional, reasonable suspicion test, courts must be aware of, and protect against, the unreasonable application of profiles. Agents have the inherent ability to make stops on "hunches" and then to support these stops with retrospective drug courier profile analysis.[150] Additionally, they have the ability to detain a person on bare suspicion and then tailor, after the fact, a laundry list of characteristics to match that person's traits. Courts must be extremely cautious to confirm that *before* the stop, the agent possessed knowledge sufficient to establish a reasonable suspicion. If a court finds the agent had the knowledge at that time, then a finding of reasonable suspicion should stand, even though it's based on a drug courier profile.

An agent either has or has not a basis for reasonable suspicion. When confronted with a drug profile case, a court should analyze facts known to the agent before the stop and, without regard to the use of a profile, the court should uphold the stop if there was a basis for reasonable suspicion. Alternatively, if there was no such

149. In another context, during the Senate debates for the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), Senator Simon expressed concern that sanctions would increase against "foreign-looking" or "foreign sounding" individuals legitimately in this country. N. MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986 248 (1987). Because the bulk of drugs imported into the United States comes from Latin America and southeast Asia, there is a concern that innocent individuals who look Latino or Asian could be singled out at airports by agents.

150. *See* Becton, *supra* note 46, at 430. Judge Becton argues that "the legitimacy of the drug courier profile as a predictive device depends on the narcotics agents themselves. The agents can make orderly decisions based on individualized judgments, or they can make arbitrary decisions and rationalize them with after-the-fact compilations of characteristics suited to the individual detained by them. The agents have unchecked power to manipulate the predictive model." *Id.*

basis, the court should strike down the stop. The Court recognized that its decision in *Sokolow* would have "a serious implication for the enforcement of federal narcotics laws."[151] By preserving the profile as an investigative tool and by adhering to traditional reasonable suspicion standards, the Court protected both constitutional rights and an invaluable law enforcement technique.

V. CONCLUSION

In *Sokolow*, the Supreme Court determined that drug courier profile cases deserve no special treatment under fourth amendment analysis. All of the facts known to the DEA agent at the time of the seizure must be analyzed to determine whether the stop was justified by a reasonable basis for suspicion. If there was such a reasonable basis, then the seizure is permissible; if there was not such a basis, then it is not. Such a determination does not change solely because the DEA agent believed his conclusions and resulting actions were consistent with a drug courier profile.

SEAN WILLIAM BEZARK

151. *Sokolow*, 109 S. Ct. at 1585.