REASONABLE SUSPICION AND THE FOURTH AMENDMENT: UNITED STATES V. SOKOLOW

INTRODUCTION

In July of 1984, agents of the United States Drug Enforcement Agency stopped and detained Andrew Sokolow as he was about to leave Honolulu International Airport. The agents stopped Sokolow because his actions and characteristics led them to reasonably suspect that Sokolow was a drug courier. In addition, Sokolow's behavior mirrored various aspects in the profile of a drug courier. The agents later obtained a warrant to search Sokolow's luggage and found cocaine.

In February of 1989, United States Customs Agents stopped and detained Andrea Hankins and a friend in the Bahamas. Hankins and her friend were subjected to a strip search and told to "spread their cheeks." Unlike Sokolow, Hankins and her friend were not drug couriers; they were innocent vacationers. The only suspicious factors about Hankins appear to have been that she was black and was travelling with only carry-on luggage.

The severity of the drug problem and the violence that accompanies it has given rise to a public outcry to halt the flow of drugs into the United States. The nation's airports are but one battlefield where the "war against drugs" is being fought.

This Note examines United States v. Sokolow, the United States Supreme Court's most recent encounter with a stop and search of a suspected drug courier in an airport. The reasonable suspicion ex-

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2. Id. at 1584. The suspicious factors were that Sokolow 1) paid for the airline tickets in cash; 2) travelled under an alias; 3) arrived from Miami, a source city for drugs; 4) stayed in Miami for only a brief time; 5) appeared nervous; and 6) claimed no luggage. Id. at 1583.
6. Id.
7. Id.
8. Id.
11. See infra notes 17-41 and accompanying text.
cept to the probable cause requirement allows law enforcement officials to stop suspected drug couriers if the officers have a reasonable and articulable suspicion that the suspect is carrying drugs.\textsuperscript{12} The Supreme Court has been consistent in determining what constitutes a reasonable suspicion.\textsuperscript{13} In \textit{Sokolow}, the test is solidified for determining the permissible scope of a stop based on reasonable suspicion.\textsuperscript{14} This Note also examines the use of drug courier profiles and the Court's failure to address the serious problems inherent in the use of this investigative tool.\textsuperscript{15}

\section*{FACTS AND HOLDING}

In \textit{United States v. Sokolow},\textsuperscript{16} agents of the Drug Enforcement Agency (DEA) stopped Andrew Sokolow at the Honolulu International Airport on July 25, 1984.\textsuperscript{17} The agents grabbed Sokolow and his companion and took them to the DEA office at the airport where a narcotics detector dog alerted the agents to Sokolow's shoulder bag.\textsuperscript{18} The DEA agents then arrested Sokolow and obtained a warrant to search the shoulder bag.\textsuperscript{19} The search revealed no drugs, but there was cocaine residue in the bag as well as "some suspicious documents."\textsuperscript{20} The agents had a dog examine the remaining luggage, and the dog alerted the agents to a carry-on bag.\textsuperscript{21} The agents then had to release Sokolow because a search warrant could not be obtained until the following morning.\textsuperscript{22} A search of the carry-on bag the next morning uncovered 1063 grams of cocaine.\textsuperscript{23}

Sokolow moved to suppress the evidence discovered in the search of his luggage on the grounds that the agents did not have a reasonable suspicion to stop him.\textsuperscript{24} After the United States District Court for the District of Hawaii denied his motion, Sokolow pled guilty to the drug charge, reserving the right to appeal the denial of his

\begin{itemize}
  \item \textsuperscript{12} See infra notes 42-73 and accompanying text.
  \item \textsuperscript{13} See infra notes 178-209 and accompanying text.
  \item \textsuperscript{14} See infra notes 210-38 and accompanying text.
  \item \textsuperscript{15} See infra notes 239-72 and accompanying text.
  \item \textsuperscript{17} Id. at 1583.
  \item \textsuperscript{18} Id. at 1584. Sokolow's companion was a woman named Janet Norian. Id. at 1583.
  \item \textsuperscript{19} Brief for United States at 8, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295) (LEXIS, Genfed library, Briefs file) (pagination in accordance with LEXIS screens).
  \item \textsuperscript{20} Id. at 8.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Sokolow, 109 S. Ct. at 1584.
  \item \textsuperscript{24} Id.
\end{itemize}
The United States Court of Appeals for the Ninth Circuit reversed the district court’s denial of Sokolow’s motion to suppress the evidence. The government argued that the agents had a reasonable and articulable suspicion that Sokolow was a drug courier. The agents had thought it was significant that: (1) Sokolow had been returning from a three day trip to Miami, a source city for drugs; (2) Sokolow had paid for his ticket in cash out of a large stack of $20 bills; (3) Sokolow had not checked any luggage; (4) Sokolow had appeared nervous; (5) Sokolow had been wearing a black jumpsuit and a large amount of jewelry; and (6) Sokolow had appeared to be travelling under an alias. These facts matched a DEA drug courier profile.

According to the Ninth Circuit, the facts articulated by the agents did not give rise to the reasonable suspicion required to stop a suspect. The Ninth Circuit fashioned a test which would require that reasonable suspicion be based on “evidence of ongoing criminal behavior.” In the view of the Ninth Circuit, “probabilistic” evidence may be relevant, but in order to use such evidence the prosecution had to first “demonstrate that the combination of behavior exhibited by the suspect, although not directly probative of ongoing

25. United States v. Sokolow, 831 F.2d 1413, 1416 (9th Cir. 1987). Sokolow was convicted of violating section 841(a)(1) which provides: (a) 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) (1982).

26. Sokolow, 831 F.2d 1413, 1424 (9th Cir. 1987) (second amended opinion). The Ninth Circuit had earlier reversed the district court in United States v. Sokolow, 808 F.2d 1366 (9th Cir. 1987). However, the government petitioned for a rehearing and presented additional evidence. The second amended opinion denied the petition for rehearing and vacated the first opinion. Sokolow, 831 F.2d at 1415.

27. Sokolow, 831 F.2d at 1417.

28. Brief for the United States at 15, 31. The agents had been alerted to Sokolow by an airline ticket agent. Sokolow purchased the ticket under the name Andrew Kray and gave the airline his telephone number. The agents checked the number and found that it was listed under the name of “Karl Herman.” The agents determined that Sokolow lived at the address because the airline ticket agent identified the voice on the answering machine at that number. What the agents did not know was that Sokolow was Herman’s roommate, but that the number was listed under Herman’s name. Id. at 4, 5.

29. Sokolow, 831 F.2d at 1417. The drug courier profile is a “rather loosely formulated, informal . . . checklist used by DEA agents to identify suspected drug couriers. 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. 418 (1987). Although there are certain characteristics common to the profiles, the characteristics differ from airport to airport. Becton stated that “the profile is not rigid, but is constantly modified in light of experience.” Id. at 433. See infra notes 141-64 and accompanying text.

30. Sokolow, 831 F.2d at 1419.

31. Id. at 1421.
criminal behavior, [was] unlikely to exist in innocent persons or, perhaps, in some 'significant' percentage of innocent persons." 32

The United States Supreme Court reversed the Ninth Circuit. 33 The majority of the Supreme Court rejected the test enunciated by the Ninth Circuit because it had introduced "unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment." 34 The Court stated that reasonable suspicion was based not on certainties but on probabilities and that the circumstances as a whole were relevant. 35

The Court conceded that the facts in Sokolow, taken individually, did not suggest criminal activity, but when considered as a whole the facts did give rise to a reasonable suspicion. 36 Sokolow had argued that the agents stopped him merely because his actions matched a drug courier profile and not because the agents had a reasonable and articulable suspicion that he was a drug courier. 37 The Court, however, found that although the factors articulated by the agents matched a drug courier profile, that did not "detract from their evidentiary significance." 38 Nor did the Court accept Sokolow's contention that the fourth amendment required the agents to use the least intrusive means available to investigate their suspicions. 39

The dissent, however, determined that the agents' reliance on a drug courier profile was significant because a mechanistic reliance on such a profile "runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention." 40 In addition, the dissent found Sokolow to be "strikingly similar" to earlier cases in which the Court had found a lack of reasonable suspicion. 41

32. Id. at 1420.
33. Sokolow, 109 S. Ct. at 1585.
34. Id.
35. Id. (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). See infra notes 70-73 and accompanying text.
37. Brief for Respondent at 17-18, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295) (LEXIS, Genfed Library, Briefs file) (pagination in accordance with LEXIS screens). Sokolow further argued that "[w]ithout prior knowledge of facts suggestive of criminal behavior by a particular person, the agents seek out those air travelers whose conduct conforms with characteristics of the profile." Id. at 17.
39. Id.
40. Id. at 1588 (Marshall, J., dissenting).
41. Id. at 1589. Justice Marshall compared Sokolow to Reid v. Georgia, 448 U.S. 438 (1980), in which the Court held that agents did not have a reasonable suspicion to stop the suspects. Id. at 441. See infra notes 147-52 and accompanying text.
BACKGROUND

THE FOURTH AMENDMENT AND REASONABLE SUSPICION

The fourth amendment requires that there be probable cause before the authorities may search a particular person or place.\textsuperscript{42} The probable cause requirement demands that a "fair probability" exists that the search will uncover evidence of a crime.\textsuperscript{43} However, the United States Supreme Court has determined that even if probable cause exists for a particular search, the search may still be invalid because of its unreasonableness.\textsuperscript{44}

Conversely, in the absence of probable cause a search or seizure may be constitutionally valid if it is not unreasonable.\textsuperscript{45} The Supreme Court in \textit{Terry v. Ohio}\textsuperscript{46} carved out an exception to the fourth amendment probable cause requirement.\textsuperscript{47} The facts in \textit{Terry} involved a search by a police officer who had observed Terry, Richard Chilton, and a man named Katz "casing" a store.\textsuperscript{48} The officer grabbed and frisked one of the suspects.\textsuperscript{49} The state charged two of the individuals with possession of a concealed weapon and subsequently convicted them.\textsuperscript{50} The suspects appealed the use of the

\textsuperscript{42} U.S. CONST. amend. IV. The amendment provides:
[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

\textit{Id.}

\textsuperscript{43} Illinois v. Gates, 462 U.S. 213, 238 (1983). An anonymous tip, supplemented by a police affidavit, constituted probable cause when the affidavit showed that police surveillance of the suspects corroborated the contents of the anonymous tip. When determining what is enough to justify the issuance of a warrant, the focus should be on the "totality of the circumstances." \textit{Id.} at 230, 246. \textit{See also}, Brinegar v. United States, 338 U.S. 160, 175 (1949) (explaining that the probabilities involved are the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act").

\textsuperscript{44} See \textit{Winston v. Lee}, 470 U.S. 753, 763-66 (1985) (holding that surgery on a robbery suspect to retrieve a bullet implicating the suspect in the crime was unreasonable even though the search was supported by probable cause).

\textsuperscript{45} \textit{Terry v. Ohio}, 392 U.S. 1, 20 (1968). \textit{See infra} notes 46-55 and accompanying text. \textit{See also}, Sibron v. New York, 392 U.S. 40, 63-64 (1968) (finding that search and seizure of a suspect may be justified by a reasonable suspicion, but police officer observing a conversation between suspect and drug dealer is insufficient to constitute probable cause or reasonable suspicion when the officer does not know the context of the conversations).

\textsuperscript{46} 392 U.S. 1 (1968).

\textsuperscript{47} \textit{Id.} at 20. \textit{See also} Florida v. Royer, 460 U.S. 491, 498 (1983) (explaining that the exception is limited to cases in which the suspect "has committed or is about to commit a crime").

\textsuperscript{48} \textit{Terry}, 392 U.S. at 5-6.

\textsuperscript{49} \textit{Id.} at 7.

\textsuperscript{50} \textit{Id.} at 4.
weapons as evidence against them.\textsuperscript{51}

The Supreme Court held that the officer's search of the suspects was reasonable despite the absence of probable cause.\textsuperscript{52} The Court's narrow opinion justified warrantless searches of a suspect in situations in which police officers believed that their own safety or the safety of the public was in direct danger.\textsuperscript{53} In any event, police officers must have a reasonable suspicion drawn from particular facts that the individual represents a threat.\textsuperscript{54} There must be more than just an "inchoate and unparticularized suspicion or 'hunch.'"\textsuperscript{55}

Five years later in \textit{Adams v. Williams},\textsuperscript{56} the Supreme Court expanded the \textit{Terry} exception to justify the stop and search of Robert Williams, an individual suspected of narcotics possession.\textsuperscript{57} In \textit{Adams}, the officer based his reasonable suspicion on a tip from an informant with whom the officer was familiar.\textsuperscript{58} The informant had told the officer that the suspect was carrying drugs as well as a gun.\textsuperscript{59} The Court found that this information was sufficient to justify a stop and search of the suspect.\textsuperscript{60}

The dissent disagreed that the tip from the informant was sufficient to justify the stop and subsequent search.\textsuperscript{61} Justice Marshall argued that the officer knew very little about the suspect and his behavior other than what the informant had told him.\textsuperscript{62} In addition, possession of a concealed weapon in Connecticut was legal provided that one had a permit.\textsuperscript{63} The dissent argued that the officer had not and could not have known if the suspect had the requisite permit.\textsuperscript{64}

\textsuperscript{51} Id. at 8.
\textsuperscript{52} Id. at 30-31.
\textsuperscript{53} Id. The Court did not address the question of the validity of a seizure "upon less than probable cause for the purpose of 'detention' and/or interrogation." Id. at 19 n.16.
\textsuperscript{54} \textit{Sibron}, 392 U.S. at 64 (holding that "[t]he suspect's mere act of talking with a number of known narcotic addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime").
\textsuperscript{55} \textit{Terry}, 392 U.S. at 27.
\textsuperscript{56} 407 U.S. 143 (1972).
\textsuperscript{57} Id. at 149.
\textsuperscript{58} Id. at 144-45.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 149. Justice Rehnquist reasoned that because the officer had a reasonable suspicion to investigate for drugs and because he knew the individual was armed, the search for the gun was justified by a need "to pursue his investigation without fear of violence." Id. at 146. The arrest for possession of the handgun was supported by probable cause; the initial stop was supported by a reasonable suspicion. Id. at 149.
\textsuperscript{61} Id. at 151 (Brennan, J., dissenting). \textit{See also} id. at 154-55 (Marshall, J., dissenting).
\textsuperscript{62} Id. at 159 (Marshall, J., dissenting).
\textsuperscript{63} Id. at 159.
\textsuperscript{64} Id. at 158-59.
In 1975, the Court further expanded *Terry* in *United States v. Brignoni-Ponce.* This expansion specifically allowed border patrol agents to stop a vehicle reasonably suspected of transporting illegal aliens. The Court recognized that the government had a strong interest in policing the border. However, the Court found that the particular stop involved in *Brignoni-Ponce* could not be justified by a reasonable suspicion because the agents' sole reason for stopping the car was that the occupants appeared to be of Mexican descent. The Court held that this fact alone was not enough to give rise to a reasonable suspicion.

On the basis of *Terry* and *Brignoni-Ponce,* the Court six years later in *United States v. Cortez* allowed the stop of another vehicle suspected of transporting aliens across the border. The officers in *Cortez* had based their suspicions on physical evidence such as a distinctive set of footprints and other footprints leading toward a stretch of highway. The Court held that the physical evidence combined with the fact that the vehicle in question was the only vehicle to make a return trip from a desolate road in the middle of the night was enough to justify the stop.

The cases following *Terry* recognize a limited exception to the fourth amendment probable cause requirement. Law enforcement officers may stop suspects on less than probable cause if they have a reasonable suspicion that a suspect is engaged in or is about to engage in criminal activity. However, the scope of a *Terry* stop is not without limits.

**The Limits of a Terry Stop**

In *Terry,* the Court authorized a brief stop and search on less than probable cause that was limited in scope for the purpose of discovering a weapon which could be used to harm the police officer or others. In *Terry,* the Court held that the officer had "seized" the

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66. Id. at 881.
67. Id. at 878.
68. Id. at 885-86.
69. Id. at 886.
71. Id. at 421.
72. Id. at 413-14.
73. Id. at 414-15.
75. *Brignoni-Ponce,* 422 U.S. at 881.
suspect in the fourth amendment sense.\textsuperscript{78} The Court in \textit{Terry} noted that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."\textsuperscript{79} The Court struggled in the cases following \textit{Terry} to define the limits of a stop and search based on reasonable suspicion.\textsuperscript{80}

In \textit{Dunaway v. New York},\textsuperscript{81} the police brought a murder suspect to the police station for interrogation without formally arresting him.\textsuperscript{82} The Court noted that \textit{Terry} and its progeny authorized a brief stop on less than probable cause.\textsuperscript{83} The situation in \textit{Dunaway}, however, went beyond a brief stop in that the officers took the suspect to the police station for interrogation and was "in important respects indistinguishable from a traditional arrest."\textsuperscript{84} Accordingly, the Court held that a reasonable suspicion was not enough in this situation and that probable cause was required.\textsuperscript{85}

In \textit{United States v. Mendenhall},\textsuperscript{86} two members of the Court adopted a narrower definition of seizure than had the \textit{Terry} Court.\textsuperscript{87} In \textit{Mendenhall}, DEA agents stopped Sylvia Mendenhall, a young, black woman because she fit the pattern of a drug courier profile.\textsuperscript{88} Specifically, the agents had thought it was suspicious that Mendenhall (1) had arrived at the Detroit airport from Los Angeles, a source city for heroin; (2) had been the last person to deplane; (3) had appeared nervous; (4) had claimed no luggage; and (5) had changed airlines for a flight out of Detroit.\textsuperscript{89} After examining and returning Mendenhall's airline ticket and identification, the agents asked Mendenhall to accompany them to the DEA office in the airport.\textsuperscript{90} Mendenhall did not verbally respond to the agents' request, but she did follow them to the office.\textsuperscript{91}

On these facts, Justices Stewart and Rehnquist, delivering the opinion of the Court, found that there was no seizure,\textsuperscript{92} even though the dissent pointed out that one of the agents had testified that he

\begin{footnotesize}
\begin{enumerate}
\item[78.] Id. at 19.
\item[79.] Id. at 16.
\item[80.] See infra notes 81-141 and accompanying text.
\item[81.] 442 U.S. 200 (1979).
\item[82.] Id. at 202-03.
\item[83.] Id. at 209.
\item[84.] Id. at 212.
\item[85.] Id. at 215-16.
\item[86.] 446 U.S. 544 (1980).
\item[87.] Id. at 553-54. See Becton, \textit{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, 467-68 & nn.362-63.
\item[88.] Mendenhall, 446 U.S. at 547 n.1.
\item[89.] Id.
\item[90.] Id. at 548.
\item[91.] Id.
\item[92.] Id. at 558.
\end{enumerate}
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would have stopped Mendenhall had she tried to walk away.\textsuperscript{93} In the view of Justices Stewart and Rehnquist, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."\textsuperscript{94} The Court found that the fact that Mendenhall was not told that she was free to leave was not determinative of whether there was a seizure.\textsuperscript{95}

The other members of the Mendenhall majority concurred in the judgment but did not reach the seizure issue because it had not been raised in the court below.\textsuperscript{96} These Justices reversed the court of appeals because they found the stop justified by a reasonable suspicion.\textsuperscript{97} Justice Powell, in finding that the facts gave rise to a reasonable suspicion, stressed the important governmental interest in halting drug traffic and the expertise of the DEA agents.\textsuperscript{98}

The four dissenting Justices found nothing unusual or suspicious about Mendenhall's behavior.\textsuperscript{99} The dissent found that the facts articulated by the agents simply were not enough from which to infer criminal conduct.\textsuperscript{100}

Three years later, in Florida v. Royer,\textsuperscript{101} a majority of the Court accepted Justice Stewart's "free to leave" test set out in Mendenhall,\textsuperscript{102} although on the facts in question the Court found that there had been a seizure.\textsuperscript{103} In Royer, police detectives stopped Royer at the Miami International Airport because his behavior matched a drug courier profile.\textsuperscript{104} Specifically, the detectives had considered it suspicious that the suspect (1) had been carrying heavily laden American Tourister luggage; (2) had been young; (3) had appeared nervous; (4) had paid for his ticket in cash from a large stack of bills; and (5) had only written a name and destination on the tag attached to his

\textsuperscript{93} Id. at 575 n.12 (White, J., dissenting).
\textsuperscript{94} Id. at 554.
\textsuperscript{95} Id. at 555. See Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973), (holding that "[v]oluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent"). However, Justices Stewart and Rehnquist decided the seizure issue even though it had not been raised below. The lower courts had assumed that Mendenhall had been seized in the fourth amendment sense. Mendenhall, 446 U.S. at 566 (White, J., dissenting).
\textsuperscript{96} Mendenhall, 446 U.S. at 560 (Powell, J., concurring).
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 561-62.
\textsuperscript{99} Id. at 572-73 (White, J., dissenting).
\textsuperscript{100} Id.
\textsuperscript{101} 460 U.S. 491 (1983).
\textsuperscript{102} 446 U.S. at 554. See supra note 94 and accompanying text.
\textsuperscript{103} 460 U.S. at 501-02.
\textsuperscript{104} Id. at 493.
baggage. The detectives asked for Royer's airline ticket and identification and then requested that he accompany them to an office.

The Court found from these facts that the detectives had seized the suspect. The Court found that the crucial difference between Royer and Mendenhall was that the officers in Royer asked for and kept the suspect's airline ticket. With the airline ticket in his hand, the officer then asked Royer to accompany him. In Mendenhall, the DEA agents returned Mendenhall's ticket and identification and then asked her to accompany them to the DEA office. In finding a seizure, the Court held that the stop went beyond the limits of a Terry stop.

Even though the detectives in Royer subsequently exceeded the limits of Terry, the initial stop was justified by a reasonable suspicion. Had the officers used less intrusive means to investigate their suspicions, the Court would have upheld the stop. The Court suggested that the detectives could have used a narcotics detector dog to investigate. If the dog had alerted the officers to the presence of drugs, the officers would have had probable cause to arrest Royer.

The Court has refused to adopt a bright line rule governing the permitted length of a Terry stop. In United States v. Sharpe, DEA agents were engaged in surveillance of a stretch of North Carolina highway. An agent began to follow two vehicles, a car and a pick-up truck, which were travelling in tandem. The agent was suspicious because the pick-up truck was riding low and appeared to be heavily loaded. The agent asked the South Carolina Highway Patrol for assistance to stop the vehicles. The agent pulled over one vehicle, while a patrol officer pulled over the truck about a half

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105. Id. at 493 n.2.
106. Id. at 494.
107. Id. at 501-02.
108. Id. at 503-04 n.9.
109. Id. at 494.
110. Id. at 503-04 n.9.
111. Id. at 504.
112. Id. at 505-06 n.10.
113. Id. at 504-05, 505-06 n.10.
114. Id. at 505.
115. Id. at 505-06.
118. Id. at 677.
119. Id.
120. Id. The officer also observed that the side and rear windows were covered with a quilt. Id.
121. Id. The two vehicles proceeded across the border into South Carolina. At this point the agent decided to stop the vehicle and radioed the state highway patrol. Id.
mile down the highway. The patrol officer then waited fifteen to twenty minutes for the DEA agent to arrive. The Court held that the twenty minute stop did not exceed the limits of *Terry*.

In *United States v. Montoya de Hernandez*, the Court held that, under the facts presented, a sixteen-hour detention was reasonable. In this case, customs agents stopped Montoya de Hernandez at Los Angeles International Airport after she arrived on a flight from Columbia. Customs agents suspected that she was a "balloon swallower." Montoya de Hernandez consented to an x-ray but withdrew her consent when she discovered that she would be taken to the hospital in handcuffs. Customs agents then agreed to place the suspect on the next flight back to Columbia, but complications arose and this was not possible. The agents placed the suspect in a room and told her that "if she went to the toilet she would have to use a wastebasket in the women's restroom, in order that female custom's inspectors could inspect her stool for balloons or capsules carrying narcotics." Approximately twenty-four hours after the agents first stopped her, the agents obtained a court order for a physical exam. The agents finally arrested her twenty-seven hours after she was first stopped. The Court held that because of the strong governmental interests in preventing the flow of drugs over the border the stop had not exceeded the limits of *Terry*.

However, in *United States v. Place*, the Court found that a ninety-minute detention of a suspect's luggage exceeded the limits of *Terry*. DEA agents stopped Raymond Place at La Guardia airport in New York and asked him to consent to a search of his luggage. Place refused and the agents detained his luggage until they could

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122. *Id.* at 678.
123. *Id.* at 679.
124. *Id.* at 688.
126. *Id.* at 535, 544.
127. *Id.* at 532.
128. *Id.* at 534. A balloon swallower is one who smuggles drugs in the alimentary canal. The Court noted that the customs inspector who stopped Montoya de Hernandez had arrested "dozens of alimentary canal smugglers" arriving on the same flight over the years. *Id.*
129. *Id.*
130. *Id.* at 534-35. The next flight to Columbia was via Mexico City. Montoya de Hernandez lacked a Mexican visa and the airline refused to let her on the plane for this reason. *Id.*
131. *Id.* at 535.
132. *Id.* at 547 (Brennan, J., dissenting).
133. *Id.* at 548.
134. *Id.* at 544.
136. *Id.* at 709-10.
137. *Id.* at 698-99.
obtain a search warrant. Ninety minutes later a narcotics detector dog alerted the agents to one of the bags. However, the agents had to wait two days to get a search warrant. The Court found that the "[ninety]-minute detention of [Place's] luggage [was] sufficient to render the seizure unreasonable."

The Airport Drug Courier Profile

A single DEA agent is generally credited with introducing the use of drug courier profiles. While agents in different airports may use different variations on a profile, there are certain core profile characteristics. Some of these core characteristics include: (1) departing from or going to a source or distribution center for drugs; (2) carrying no, or only a small amount of, luggage; (3) carrying large amounts of cash; (4) purchasing airline tickets with cash; (5) displaying nervous behavior; (6) having an unusual itinerary or a short stay in a source or distribution city; (7) travelling under an assumed name; (8) using public transportation upon leaving the airport; (9) using a telephone immediately after deplaning; (10) giving fictitious personal information to the airline; (11) traveling frequently to a source or distribution city; and (12) personal characteristics such as youth, race, or style of dress.

Although there have been numerous lower court cases dealing with the drug courier profile, prior to Sokolow the Court had only

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138. Id. at 699.
139. Id. The Court held that a "canine sniff" does not constitute a search within the fourth amendment sense. Id. at 707.
140. Id. at 699.
141. Id. at 710.
142. Cloud, Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas, 65 B.U.L. Rev. 843, 847 (1985). (The agent credited with developing the profile is Paul Markonni. Id.)
143. Becton, 65 N.C.L. Rev. at 433.
144. Id. at 431. See infra note 144 and accompanying text.
145. Cloud, 65 B.U.L. Rev. at 871 n.120; Becton, 65 N.C.L. Rev. at 443.
146. See, e.g., cf. United States v. Moore, 675 F.2d 802, 803, 808 (6th Cir. 1982), cert. denied 460 U.S. 1068 (1983) (finding that the following facts did not constitute a reasonable suspicion, but subsequent information after the suspect consented to a stop gave rise to probable cause: the suspect arrived from Florida, a source center for drugs; the suspect was among the first to deplane, which suggested that he was traveling first class; the suspect looked "in a furtive manner" at the people in the terminal; and the suspect claimed no luggage); United States v. Sanford, 658 F.2d 342 (5th Cir. 1981), cert. denied 455 U.S. 999 (1982) (finding that the following facts were enough from which to infer a reasonable suspicion: the suspect arrived from Los Angeles, a source city for drugs; the suspect claimed no luggage; the suspect purchased airline tickets with cash; the suspect appeared nervous; the suspect gave a fictitious telephone number to the airline); United States v. Fry, 622 F.2d 1218, 1219 (5th Cir. 1980) (finding that the following facts were enough to constitute reasonable suspicion: the suspects arrived from Miami, a source city for drugs; the suspects carried few pieces of luggage; the suspects stared at the agent and looked back at him on two occasions; the suspects,
dealt with four airport drug courier cases.\textsuperscript{147} The case of \textit{Reid v. Georgia}\textsuperscript{148} was one of the Court's earliest encounters with a drug courier profile.\textsuperscript{149} DEA agents stopped the suspects at the Atlanta airport because they fit a drug courier profile.\textsuperscript{150} The agents had based their suspicions on the following facts: (1) the suspects had arrived from Fort Lauderdale, a source city for drugs; (2) the suspects had arrived early in the morning when police activity at the airport was minimal; (3) the suspects tried to hide the fact that they were travelling as a group; and (4) the suspects carried no luggage.\textsuperscript{151} The Court concluded that the agents did not have a reasonable suspicion to stop the suspects.\textsuperscript{152} The Court stated that the elements of the profile "describe a very large category of presumably innocent travelers, who 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."\textsuperscript{153} However, the Court expressed neither approval nor disapproval regarding the use of a profile.\textsuperscript{154}

The Court in \textit{Mendenhall} dealt with a stop based on the use of a two males, were travelling under the same last name; and the suspects inquired about a flight to Kansas City); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980) (holding that the following facts were enough to lead to a reasonable suspicion: the suspects were carrying new luggage, all the same size; the suspects paid cash for one way tickets; the suspects appeared nervous); United States v. Buenaventura-Ariza, 615 F.2d 29 (2d Cir. 1980) (finding that the following facts were not enough to give rise to a reasonable suspicion: the suspects arrived from Miami, a source city for drugs; the suspects appeared to be nervous; the suspects travelled separately through the terminal, although they were talking to each other when they left the plane and joined each other outside the terminal at a taxi line); United State v. Andrews, 600 F.2d 563 (6th Cir.); \textit{cert. denied} sub \textit{nom.} Brooks v. United States, 444 U.S. 878 (1979) (finding that the following facts did not give rise to a reasonable suspicion, but an anonymous tip plus some evidence of corroboration of the tip was enough: the suspects arrived from Los Angeles, a distribution city for drugs; and two of the suspects appeared nervous); United States v. Himmelwright, 551 F.2d 991 (5th Cir. 1977), \textit{cert. denied}, 434 U.S. 902 (1977) (finding that the following facts were enough to constitute a reasonable suspicion: the suspect was a young woman travelling alone and arriving from Columbia; the woman wore platform shoes, supposedly often used for smuggling and the suspect was "unusually calm"); United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) (finding that two of three suspects appearing nervous; and suspects having only one piece of luggage among them was not enough to constitute a reasonable suspicion. See generally Becton, 65 N.C.L. REV. 417; Cloud, 65 B.U.L. REV. 843.

\textsuperscript{147} Mendenhall, 446 U.S. 544; see supra notes 86-100 and accompanying text. Reid v. Georgia, 448 U.S. 438 (1980); see \textit{infra} notes 148-53 and accompanying text; Royer, 460 U.S. 491; see supra notes 101-14 and accompanying text; Florida v. Rodriguez, 469 U.S. 1 (1984) see \textit{infra} notes 160-65 and accompanying text.

\textsuperscript{148} 448 U.S. 438 (1980).

\textsuperscript{149} Becton, 65 N.C.L. REV. at 421.

\textsuperscript{150} Reid, 448 U.S. at 439-40.

\textsuperscript{151} \textit{Id.} at 441.

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} See \textit{id.} See also Cloud, 65 B.U.L. REV. at 866-67.
drug courier profile\footnote{Mendenhall, 446 U.S. at 547 n.1.} but did not determine the validity of profiles as investigative tools.\footnote{See id. See also Cloud, 65 B.U.L. REV. at 864.} A concurring opinion noted that “highly skilled” DEA agents had developed a profile of drug courier characteristics.\footnote{Mendenhall, 446 U.S. at 562 (Powell, J., concurring).} The concurrence pointed out that stops pursuant to a profile at the Detroit airport had resulted in 122 arrests out of 141 persons stopped.\footnote{Id.} The dissent questioned the relevance of the statistics because the statistics included stops based on “information acquired from airline ticket agents, from . . . independent police work,” and [from] occasional tips as well as [from] observations of behavior at the airport.”\footnote{Id. at 573-74 n.11 (White, J., dissenting).}

The Court in \textit{Florida v. Rodriguez}\footnote{Rodriguez, 469 U.S. at 3. The facts of this case are not entirely clear from the Court’s opinion. The only suspicious factors mentioned in the Court’s opinion are that the suspects were acting in an unusual manner when leaving the ticket counter and tried to evade the detectives. \textit{Id.} at 3-4.} never mentioned a drug courier profile but it was the Court’s last encounter with an airport drug case prior to \textit{Sokolow}.\footnote{Id. at 4, 8 n.1. The dissent labeled this account as “somewhat improbable.” \textit{Id.} at 7 (Stevens, J., dissenting).} Police detectives at the Miami International Airport noticed that Rodriguez, Ramirez, and Blanco were behaving in an unusual manner as they left the ticket counter.\footnote{Id. at 4, 8 n.1. According to the detective who testified at the hearing to suppress the evidence, one of the suspects began to run in place. \textit{Id.} at 4, 8 n.1.} Blanco and Ramirez had looked back at the detectives and Blanco told the others that they should “get out of here.”\footnote{Id.} When they tried to leave the detectives approached them and asked to search their luggage.\footnote{Id. at 6.} Despite the paucity of facts, the Court held that the agents had a reasonable and articulable suspicion that justified the stop.\footnote{See Sharpe, 470 U.S. at 686.}

The state of the law prior to \textit{Sokolow} emphasized that, in the absence of probable cause, law enforcement officers had to have a reasonable and articulable suspicion that a person had committed or was in the process of committing a crime before the officers could stop that person.\footnote{Royer, 460 U.S. at 498.} The Court had focused on reasonableness and had refused to adopt a bright-line rule regarding the permissible length or intrusiveness of a \textit{Terry} stop.\footnote{See \textit{Sharpe}, 470 U.S. at 686.} Similarly, the Court had refused to
pass on the validity or effectiveness of drug courier profiles.168

ANALYSIS

The Supreme Court's decision in United States v. Sokolow169 is essentially consistent with the Court's earlier encounters with airport drug stops analyzed under Terry v. Ohio.170 The Court properly insisted that the test for determining reasonable suspicion was the "totality of the circumstances."

171 The Court also, continuing to base the analysis on reasonableness, correctly rejected the contention that the authorities had to use the "least intrusive means" to investigate their suspicions.172

If the decision in Sokolow is significant at all, its significance lies in the Court's assessment of drug courier profiles.173 The Court viewed as unimportant the fact that the conduct and characteristics on which the DEA agents based their reasonable suspicion corresponded with a drug courier profile.174 That the reasonable suspicion of the authorities was based on a drug courier profile would not detract from the "evidentiary significance" of the factors.175 While this view of drug courier profiles may be consistent with the Court's emphasis on reasonableness, it ignores the potential for abuse inherent in drug courier profiles.176

REASONABLE SUSPICION

The Court has long recognized that the fourth amendment does not proscribe all searches and seizures but only those that are unreasonable.177 In the airport drug courier context, the Court has been essentially consistent in determining what constitutes a reasonable stop and search.178

At first glance it may seem that the dissent in Sokolow was correct in stating that the decision in Reid v. Georgia179 was inconsistent with the result in Sokolow.180 Of the four factors on which the

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168. See supra note 147-53 and accompanying text.
171. Sokolow, 109 S. Ct. at 1585.
172. Id. at 1587.
173. See infra notes 238-70 and accompanying text.
175. Id.
176. See infra notes 238-70 and accompanying text.
178. See supra notes 141-66 and accompanying text.
agents based their suspicion in *Reid*,\textsuperscript{181} two were present in *Sokolow*.\textsuperscript{182} However, there were additional factors in *Sokolow* that distinguish it from *Reid*.\textsuperscript{183}

In *Sokolow*, the agents not only knew that Sokolow was arriving from a source city for drugs, they also knew that his stay in Miami was brief.\textsuperscript{184} The agents had reason to be suspicious of a man who travelled twelve thousand miles from Honolulu in the middle of the summer to spend two days in Miami.\textsuperscript{185} The brevity of his trip, combined with the fact that Sokolow was dressed casually and paid for his ticket in cash, also lessened the probability that his trip was legitimate.\textsuperscript{186} It is reasonable to assume that business travelers do not pay for their tickets from a large stack of $20 bills or wear such casual attire as a jumpsuit.\textsuperscript{187} In addition, the fact that Sokolow was not travelling under his own name made it less likely that he was travelling for a legitimate business or personal purpose.\textsuperscript{188}

The agents in *Reid* had significantly less on which to base their reasonable suspicion.\textsuperscript{189} The only factor the Court found significant in *Reid* was that the suspects were trying to hide the fact that they were travelling together.\textsuperscript{190} However, the agents' observation regarding this fact was more of a hunch than a reasonable and articulable suspicion.\textsuperscript{191} Additionally, the agents in *Reid* first noticed the suspects when they deplaned.\textsuperscript{192}

In *Sokolow*, the authorities first became suspicious of Sokolow when he left for Miami.\textsuperscript{193} The agents made an independent investigation regarding Sokolow including a determination of when he purchased his tickets and an attempt to verify the personal information Sokolow had given the airline.\textsuperscript{194} The agents in *Reid* based their

\begin{itemize}
\item \textsuperscript{181} See *Reid*, 448 U.S. at 440-41. The four factors were: (1) the suspects had arrived from Fort Lauderdale; (2) the suspects had arrived at a time of diminished law enforcement activity; (3) the suspects had sought to hide the fact that they were travelling in tandem; and (4) the suspects had checked no luggage. *Id.*
\item \textsuperscript{182} *Sokolow*, 109 S. Ct. at 1583. The two similar factors were that (1) Sokolow had arrived from Miami, and (2) Sokolow had claimed no luggage. *Id.*
\item \textsuperscript{183} See infra notes 184-93 and accompanying text.
\item \textsuperscript{184} *Sokolow*, 109 S. Ct. at 1583.
\item \textsuperscript{185} Brief for United States at 25, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295) (LEXIS, Genfed Library, Briefs File) (pagination in accordance with LEXIS screens).
\item \textsuperscript{186} *Sokolow*, 109 S. Ct. at 1583, 1586.
\item \textsuperscript{187} Brief for United States at 29-31.
\item \textsuperscript{188} *Id.* at 30.
\item \textsuperscript{189} 448 U.S. at 441. See also supra notes 148-53 and accompanying text.
\item \textsuperscript{190} *Reid*, 448 U.S. at 441.
\item \textsuperscript{191} *Id.*
\item \textsuperscript{192} *Id.* at 439.
\item \textsuperscript{193} *Sokolow*, 109 S. Ct. at 1584.
\item \textsuperscript{194} *Id.*
\end{itemize}
suspicions solely on the few facts they observed after the suspects left the plane.\textsuperscript{195}

The facts in \textit{Sokolow} are at least as persuasive, if not more, than the facts of \textit{United States v. Mendenhall}.\textsuperscript{196} Three members of the \textit{Mendenhall} majority found the five factors enunciated by the DEA agents sufficient to justify a reasonable suspicion.\textsuperscript{197} However, the persuasiveness of the factors identified by the agents in \textit{Mendenhall} was lessened by the fact that Mendenhall was changing planes.\textsuperscript{198} This fact explained why Mendenhall claimed no luggage and reduced to four the number of suspicious factors regarding the suspect.\textsuperscript{199}

The facts articulated by the agents in \textit{Sokolow} match three of the four factors in \textit{Mendenhall}.\textsuperscript{200} The additional factors in \textit{Sokolow}, that Sokolow was using an alias and that his stay in Miami was brief, provide a stronger case than the factors in \textit{Mendenhall}.\textsuperscript{201}

The facts of \textit{Sokolow} are more indicative of criminal activity than are the \textit{Florida v. Royer} factors.\textsuperscript{202} Of the six factors in \textit{Royer},\textsuperscript{203} only three are present in \textit{Sokolow}.\textsuperscript{204} But the additional factors in \textit{Sokolow} are more suspicious than the other factors in \textit{Royer}.\textsuperscript{205} Travelling under an alias and enduring a twenty hour flight from Honolulu to spend two days in Miami is more suspicious than being young and carrying a particular brand of luggage.\textsuperscript{206}

The decision in \textit{Sokolow} correctly emphasized that the key issue in a \textit{Terry} stop is reasonableness.\textsuperscript{207} Law enforcement officers do not have to prove to a certainty that the suspect is about to commit a crime but only have to show a reasonable suspicion that criminal ac-

\begin{itemize}
  \item \textsuperscript{195} Reid, 448 U.S. at 439.
  \item \textsuperscript{196} 446 U.S. 544 (1979). The suspicious factors in \textit{Mendenhall} were that the suspect (1) had arrived from a source city for heroin; (2) had appeared nervous; (3) had been the last to deplane; (4) had not claimed any luggage; and (5) had changed airlines for a connecting flight. \textit{Id.} at 547 n.1.
  \item \textsuperscript{197} \textit{Id.} at 560 (Powell, J., concurring).
  \item \textsuperscript{198} \textit{Id.} at 573 (White, J., dissenting).
  \item \textsuperscript{199} \textit{Id.}
  \item \textsuperscript{200} \textit{Sokolow}, 109 S. Ct. at 1583. Sokolow had 1) traveled from a source city; 2) appeared nervous, and 3) checked no luggage. \textit{Id.}
  \item \textsuperscript{201} \textit{Id.}
  \item \textsuperscript{202} 460 U.S. 491 (1983).
  \item \textsuperscript{203} Brief for United States at 30-31.
  \item \textsuperscript{204} \textit{Royer}, 460 U.S. at 493 n.2. The factors in Royer were that the suspect: 1) was carrying heavily laden American Tourister luggage; 2) was young; 3) was casually dressed; 4) paid for his ticket in cash; 5) appeared nervous; and 6) wrote only a name and destination on his baggage.
  \item \textsuperscript{205} Brief for United States at 14, 28. The three similar factors were: 1) paid for airline ticket in cash; 2) dressed casually; and 3) behaved nervously. \textit{Id.}
  \item \textsuperscript{206} \textit{Id.} at 31.
  \item \textsuperscript{207} See Brief for United States at 22, 25.
  \item \textsuperscript{208} \textit{Sokolow}, 109 S. Ct. at 1585.
\end{itemize}
tivity is afoot.\textsuperscript{209}

\textbf{THE LIMITS OF TERRY}

Sokolow had argued that the fourth amendment, as interpreted in \textit{Royer}, required the agents to investigate their suspicions "through employment of the least intrusive means available."\textsuperscript{210} The majority correctly rejected this argument noting that \textit{Royer} was only referring to the length of the stop.\textsuperscript{211} The proper focus is on whether the law enforcement officers investigated their suspicions in a reasonable manner.\textsuperscript{212}

\textit{Terry} and its progeny authorized law enforcement officials to make brief stops for the purpose of reasonable inquiry of suspicious circumstances.\textsuperscript{213} The reasonableness of the length and scope of the stop depend on the governmental interests involved and the severity of the intrusion into the individual's privacy.\textsuperscript{214} The nature of the stop in \textit{Sokolow} was reasonable in light of earlier Court opinions dealing with the limits of \textit{Terry}.\textsuperscript{215}

The Court of Appeals in \textit{Sokolow} had found, and the Court accepted, that the agents seized Sokolow in the fourth amendment sense.\textsuperscript{216} The agents investigated their suspicions in a reasonable and expeditious manner through the use of a trained narcotics detector dog.\textsuperscript{217} Only thirteen minutes elapsed from the time the agents first seized Sokolow and the time the dog alerted the agents to Sokolow's shoulder bag.\textsuperscript{218} The agents' conduct is rendered even more reasonable by the fact that they released Sokolow when it became apparent that they could not obtain a second search warrant for the remaining luggage until the following morning.\textsuperscript{219}

The stop involved in \textit{Sokolow} was far less intrusive than the situation in \textit{Dunaway v. New York}\textsuperscript{220} in which police officers placed the suspect in a police car and took him to the station house for interro-

\begin{itemize}
  \item \textsuperscript{209} \textit{Id.} (citing United States v. Cortez, 449 U.S. 411, 417 (1981)).
  \item \textsuperscript{210} Brief for Respondent at 25, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295). (LEXIS, Genfed Library, Briefs File) (pagination in accordance with LEXIS screens.)
  \item \textsuperscript{211} \textit{Sokolow}, 109 S. Ct. at 1587.
  \item \textsuperscript{212} \textit{Sharpe}, 470 U.S. at 686-87 (1985).
  \item \textsuperscript{213} \textit{See Terry}, 392 U.S. at 30; United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975).
  \item \textsuperscript{214} United States v. Place, 462 U.S. 696, 703 (1983).
  \item \textsuperscript{215} \textit{See supra} notes 77-140 and accompanying text.
  \item \textsuperscript{216} United States v. Sokolow, 831 F.2d 1413, 1416 (9th Cir. 1987). \textit{See also, Sokolow}, 109 S. Ct. at 1585.
  \item \textsuperscript{217} \textit{Sokolow}, 109 S. Ct. at 1584.
  \item \textsuperscript{218} Brief for United States at 7.
  \item \textsuperscript{219} \textit{Id.} at 8.
  \item \textsuperscript{220} 442 U.S. 200 (1979).
\end{itemize}
The agents in *Sokolow* took Sokolow no farther than the airport customs area where the dog examined the shoulder bag.\(^{222}\) The thirteen minutes between the initial stop and arrest in *Sokolow* did not approach the level of the unreasonableness of the hour long detention without an arrest in *Dunaway*.\(^{223}\)

Additionally, the stop in *Sokolow* does not approach the unreasonableness of the ninety-minute detention of the suspect’s luggage in *United States v. Place*.\(^{224}\) The DEA agents in *Place* knew of the suspect’s arrival time and had the opportunity to arrange for an investigation.\(^{225}\) However, the agents had to take the suspect’s luggage to another airport for an examination by a narcotics detector dog.\(^{226}\) The agents in *Sokolow* subjected the suspect to minimal intrusion by having the dog examine the luggage thirteen minutes after the initial stop at a location three hundred yards away.\(^{227}\)

The upholding of the stop in *Sokolow* does not appear to be consistent with the plurality opinion of *Royer*.\(^{228}\) In *Royer*, as in *Sokolow*, about fifteen minutes elapsed from the time of the suspect’s seizure to the time of his arrest.\(^{229}\) The search of Royer’s luggage occurred at a location forty feet away from the site of the stop.\(^{230}\) The only significant difference between these cases is that no narcotics detector dog was involved in *Royer*.\(^{231}\) The Court in *Royer* suggested that the use of a dog would have been a less intrusive investigative technique than waiting for a search warrant.\(^{232}\) However, this difference alone is not enough to distinguish the cases.\(^{233}\)

The *Royer* plurality found that the “investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicions in a short period of time.”\(^{234}\) However, this shifts the focus away from the concept of reasonableness and instead allows the courts to second-guess the officers.\(^{235}\) The least intrusive means approach overlooks the fact that the basis for a *Terry* stop stems from a judicial recognition that it is impracti-

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\(^{222}\) Brief for United States at 7.

\(^{223}\) See *Sharpe*, 470 U.S. at 683.

\(^{224}\) *Place*, 462 U.S. at 710.

\(^{225}\) Id. at 709.

\(^{226}\) Id. at 698-99.

\(^{227}\) Brief for Respondent at 5.

\(^{228}\) See supra notes 101-14 and accompanying text.

\(^{229}\) *Royer*, 460 U.S. at 495.

\(^{230}\) Id. at 494.

\(^{231}\) Id. at 505-06.

\(^{232}\) Id.

\(^{233}\) See supra notes 17-29 and 101-14 and accompanying text.

\(^{234}\) *Royer*, 460 U.S. at 500.

\(^{235}\) See *Sharpe*, 470 U.S. at 686.
cal to require a warrant in every situation. It is impractical to require an officer, as in Terry, to obtain a warrant before stopping an individual who is "casing" a store. Likewise, it is impractical to allow a suspected drug courier such as Sokolow to get into a cab and ride away. The majority in Sokolow correctly decided that a least intrusive means requirement would "unduly hamper the police’s ability to make swift on-the-spot decisions." 

**Drug Courier Profile**

The decision in Sokolow marks the first time the Court has dealt with the value of a drug courier profile itself. Sokolow had argued that the agents stopped him not because his behavior was objectively suspicious but because his characteristics matched a drug courier profile. Sokolow maintained that reliance on an investigative tool of such "doubtful predictive value" could not give rise to a reasonable suspicion.

The government countered by denying the existence of a national drug courier profile. DEA agents do, however, recognize characteristics common to drug couriers. The agents pool their experiences with that of other agents, but "pooling collective experiences is not the same as relying on a mechanical 'profile' as a substitute for judgment."

The Court rejected Sokolow's assertion that reliance on a drug courier profile lessened the reasonableness of the stop. The fact that the elements articulated by the agents are part of a profile does not "detract from their evidentiary significance." The dissent disputed this determination arguing that "mechanistic application of a formula of personal and behavioral traits in deciding whom to detain can only dull the officer's ability and determination to make sensitive and fact-specific inferences 'in light of his experience.'"

The Court's view of the profile is consistent with its emphasis on reasonableness, but it fails to recognize and address the dangers in-

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236. See Terry, 392 U.S. at 20.
237. Id. at 6.
238. Sokolow, 109 S. Ct. at 1584.
239. Id. at 1587.
240. See supra notes 141-67 and accompanying text.
242. Id. at 23.
243. Brief for United States at 43.
244. Id.
245. Id. at 44.
247. Id.
248. Id. at 1588 (Marshall, J., dissenting).
herent in the use of drug courier profiles.\textsuperscript{249} The greatest danger inherent in the use of the profiles is that it subjects citizens to stops, not because their individual behavior is objectively suspicious, but because their conduct and characteristics are similar to others known to be drug couriers.\textsuperscript{250}

Drug courier profiles are premised on the assumption that a certain number of air travelers are drug couriers.\textsuperscript{251} The typical use of a profile entails initial observation of travelers at ticket counters, especially travelers destined to source cities.\textsuperscript{252} Travelers who match certain characteristics, such as checking no luggage or paying for a ticket in cash, are marked for more intense scrutiny.\textsuperscript{253} This scrutiny usually involves heightened surveillance culminating in an encounter in which the agents attempt either to verify or dispel their suspicions.\textsuperscript{254}

Because each airport and possibly each agent has different variations on the core profile characteristics, different classes of people may be singled out for attention at airports.\textsuperscript{255} The actual predictive value of the profiles has not been precisely determined, but one commentator stated that apparently "only a small percentage of travelers stopped in profile investigations are ever arrested."\textsuperscript{256} The guilty and innocent alike will match certain profile characteristics.\textsuperscript{257}

The other inherent danger is that the use of profiles leads to post hoc characterizations of what is suspicious.\textsuperscript{258} One commentator stated that after an arrest has been made, an agent can manufacture "a list of profile characteristics consistent with each traveler's behavior."\textsuperscript{259} Profiles have a "chameleon-like way" of changing themselves to fit the facts of each particular case.\textsuperscript{250} The source or distribution city characteristic best illustrates this danger.\textsuperscript{251} Common source or

\begin{footnotesize}
\begin{enumerate}
\item See 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, 419 (1987).
\item Cloud, B.U.L. REV. at 853.
\item Becton, N.C.L. REV. at 428.
\item Id.
\item Id. The agents attempt to verify their suspicions by first identifying themselves and asking the suspect for identification and the airline ticket. If the agent is still suspicious, the agent then asks the suspect to consent to a search of the suspect's luggage. Id. at 428-29 n.63.
\item Id. at 433. For example, if the profile used includes personal characteristics, only persons who are young, Black, Hispanic, or casually dressed may be stopped. Id.
\item Cloud, B.U.L. REV. at 876. Cloud's study shows that the percentage of arrests at different airports varies. At some airports the percentage is only 3-5%. At others it may be as high as 60%. Id. at 876 and n.135, 136.
\item Cloud, B.U.L. REV. at 920.
\item Cloud, B.U.L. REV. at 853.
\item Id.
\item Sokolow, 109 S. Ct. at 1588 (Marshall, J., dissenting).
\item See infra notes 262-67 and accompanying text.
\end{enumerate}
\end{footnotesize}
distribution cities for narcotics include but are certainly not limited to: Miami, Florida; New York, New York; Los Angeles, California; and San Juan, Puerto Rico. But in a given case, agents will identify almost any city as a source or distribution city. Indeed, the United States Court of Appeals for the Sixth Circuit has observed that:

[O]ur experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center.

Courts also are not above characterizing any city as a distribution center. The United States Court of Appeals for the Fifth Circuit, in recounting the facts of a case, noted that the suspect "inquired about a connecting flight to Kansas City, Missouri, a city with a large population of heroin and cocaine users." The court observed this fact even though the agents had not mentioned it as part of a drug courier profile.

The factors giving rise to an agents' reasonable suspicions should not invalidate an otherwise valid stop merely because the factors are part of a drug courier profile. But neither should a mere congruence between a person's behavior and a drug courier profile give rise to a reasonable suspicion. The focus has to be on the conduct of the individual and whether that conduct is reasonably and objectively considered suspicious. Use of a drug courier profile should not enter into the analysis of whether a stop is reasonable. Law enforcement officers should be required to point to the particular conduct of the particular suspect without reference to a drug courier profile. By not instructing courts to ignore reliance on drug courier profiles, the Court's decision in Sokolow has failed to address the serious problems inherent in the use of such profiles.

264. Id.
265. See United States v. Fry, 622 F.2d 1218, 1219 (5th Cir. 1980).
266. Id. at 1219.
267. Id. at 1219 n.1.
268. Sokolow, 109 S. Ct. at 1587.
269. See Cloud, B.U.L. Rev. at 920.
270. See Sokolow, 109 S. Ct. at 1585.
271. See Cloud, B.U.L. Rev. at 920.
272. Id.
273. Id.
CONCLUSION

While United States v. Sokolow\textsuperscript{274} creates little new substantive law, the case is noteworthy because of the Court's failure to recognize and address the great potential for abuse in drug courier profiles. The dissent stated that the Court "duck[ed] serious issues relating to a questionable law enforcement practice" of doubtful value.\textsuperscript{275} However, the Court correctly emphasized that the validity of a Terry v. Ohio\textsuperscript{276} stop depends on the reasonableness of the law enforcement officer's suspicions. The length and scope of the stop are to be judged by the same reasonableness standard.

\textit{Michael J. Mills—'91}

\textsuperscript{275} \textit{Id.} at 1589 (Marshall, J., dissenting).
\textsuperscript{276} 392 U.S. 1 (1968).