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**Criminal Procedure—"Drug Courier Profile" Characteristics Are Sufficient to Establish Reasonable Suspicion of Criminal Conduct.
United States v. Sokolow**

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CRIMINAL PROCEDURE—“DRUG COURIER PROFILE” CHARACTERISTICS ARE SUFFICIENT TO ESTABLISH REASONABLE SUSPICION OF CRIMINAL CONDUCT. *United States v. Sokolow*, 109 S. Ct. 1581 (1989).

Between July 22 and July 25, 1984,¹ Andrew Sokolow and a companion traveled from Honolulu, Hawaii to Miami, Florida and back to Honolulu, a trip of 20 hours in route to and from Miami with only a 48-hour stay in Miami.² Upon their return to Honolulu International Airport, Drug Enforcement Administration (DEA) officers forcibly stopped and questioned Sokolow and his companion.³

When the DEA agents stopped Sokolow they already knew several facts about his trip that matched their “drug courier profile.” They knew that: (1) Sokolow paid \$2,100 in cash for the two airplane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.⁴

After questioning Sokolow and his companion,⁵ the DEA agents took them to a DEA office in the airport where a narcotics detector dog examined their luggage. When the dog reached Sokolow’s shoulder bag, it alerted the agents. While obtaining a search warrant, the agents placed Sokolow under arrest and advised him of his constitutional rights.⁶

The agents found no drugs in the bag, but they did find that it

1. *United States v. Sokolow*, 831 F.2d 1413, 1415 (9th Cir. 1987).

2. *United States v. Sokolow*, 109 S. Ct. 1581, 1582 (1989).

3. 831 F.2d at 1415. The agents grabbed Sokolow by the arm, pulled him onto the walkway, and sat him down. The agents then asked him for his airline ticket and identification. The district court originally held the stop to be an impermissible seizure. 808 F.2d 1366 (9th Cir. 1987). However, when the government offered additional evidence, the court vacated this decision and ruled against the government on broader grounds. 831 F.2d at 1424.

4. 109 S. Ct. at 1582. The Court also stated twice in the facts that Sokolow was dressed in a black jumpsuit and wore gold jewelry. It did not specify if the suspect’s apparel should be considered in establishing a reasonable suspicion or used simply for identifying the suspect. *Id.* at 1583-84.

5. The facts of the case do not reveal the amount of time that Sokolow was detained for questioning. He was stopped at 6:41 p.m. 831 F.2d at 1415. He was allowed to leave at 9:30 p.m., but probable cause for his arrest arose at an unspecified time during his detention. 109 S. Ct. at 1584.

6. 109 S. Ct. at 1584.

contained various documents implicating Sokolow's involvement in drug trafficking.⁷ The dog reexamined the remaining luggage and alerted the agents to another bag, but the agents could not obtain a second warrant until the following morning.⁸ The agents released Sokolow but retained his luggage. The next morning, after a second dog confirmed the first dog's alert, the agents obtained a search warrant and found 1,063 grams of cocaine inside Sokolow's bag.⁹ He was then indicted for possession of cocaine with intent to distribute.¹⁰

At trial, Sokolow entered a guilty plea conditioned upon preserving his right to appeal the district judge's decision on his fourth amendment claims. Sokolow's claims were based on his detention at the airport and the search of his luggage without reasonable suspicion.¹¹ The United States District Court for Hawaii found that the DEA agents had a reasonable suspicion that Sokolow was involved in drug trafficking when they stopped him at the airport.¹² A divided panel of the Court of Appeals for the Ninth Circuit reversed,¹³ holding that there was no sufficient evidence of "ongoing criminal activity" to satisfy its understanding of the requirements for "reasonable suspicion". Therefore, the agents' stop was impermissible.¹⁴

The United States Supreme Court granted certiorari¹⁵ and, in a seven-to-two decision, reversed the Ninth Circuit. The Court said a reasonable suspicion that Sokolow was carrying illegal drugs existed when the DEA agents stopped him. The Court also noted that although an agent must show specific and articulable facts to establish reasonable suspicion, the significance of these factors is not lessened by being listed in a "profile." *United States v. Sokolow*, 109 S. Ct. 1581 (1989).

The Supreme Court has decided numerous cases defining the coverage of the fourth amendment's search and seizure protections.

7. *Id.*

8. *Id.* Since it was 9:30 p.m. when the dog alerted the agents to the second bag, it was apparently too late in the evening for the agents to obtain a warrant.

9. *Id.*

10. *Id.*

11. 808 F.2d at 1368.

12. 109 S. Ct. at 1584.

13. *United States v. Sokolow*, 831 F.2d 1413.

14. *Id.* at 1420-21. The court developed a two-category test to determine the existence of reasonable suspicion. The first category consisted of facts of "ongoing criminal activity." The majority ruled that at least one factor of "ongoing criminal activity" must always be found to establish reasonable suspicion. The second category identified factors describing "personal characteristics" which the suspect had in common with the innocent traveler. These factors were only relevant if evidence of "ongoing criminal activity" was shown. *Id.* at 1419-21.

15. *United States v. Sokolow*, 108 S. Ct. 2033 (1988).

However, its decisions have not indicated any consistent approach for the government to take to ensure these safeguards.¹⁶ This "non-approach" strategy has left unanswered the basic question of what particular methods should (or should not) be used by law enforcement officers when conducting a search or seizure.

The fourth amendment remained largely unexplored until the Supreme Court's decision in *Boyd v. United States*¹⁷ almost 100 years after the ratification of the Bill of Rights.¹⁸ Since that time, "[n]o area of the law has more bedeviled the judiciary, from the Justices of the Supreme Court down to the magistrate"¹⁹

Generally, the fourth amendment guarantees that the people can be secure in their houses, papers, and effects against unreasonable searches and seizures, and that no warrants, either search or arrest, will be issued unless based upon probable cause.²⁰ While the implications of the amendment are great, the ambiguous language has given rise to much debate and criticism.²¹ For example, the amendment does not define the term "unreasonable" as it applies to search and seizure.²² The amendment also fails to define the relationship between the "unreasonableness clause" and the "warrant clause."²³

Before the issue of unreasonableness can be addressed, the Court must first decide if a search or seizure actually occurred.²⁴ In determining what constitutes a search or seizure, the Court must find gov-

16. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 364 (1974).

17. 116 U.S. 616 (1886). The Court held that the forced production of personal papers was a search and that the search was unreasonable. *Id.* at 622-25. The Court also linked the fourth and fifth amendment together to produce a broad privilege against self-incrimination. *Id.* at 630-35.

18. CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 25 n.2 (CONGRESSIONAL RESEARCH SERVICE 1987).

19. Amsterdam, *supra* note 16, at 349 (quoting LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255).

20. U.S. CONST. amend. IV provides:

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.

21. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42 (1966).

22. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1, at 5 (1978).

23. J. LANDYNSKI, *supra* note 21, at 42. Two interpretations of the fourth amendment have emerged. One view follows the theory that a search is unreasonable unless the warrant requirement is met. The other view claims that a warrant is not required if the search is reasonable. Amsterdam, *supra* note 16, at 358.

24. *See infra* notes 25-28 and accompanying text.

ernment action²⁵ and an intrusion into an individual's protected area.²⁶ If the intrusion is not a search or seizure, then the individual cannot claim any protection under the fourth amendment.²⁷ This reasoning results in an "all or nothing" outcome because the fourth amendment protections hinge on the finding of a search or seizure.²⁸

Once a court finds that a search or seizure has occurred, then it considers the issue of reasonableness. Traditionally, probable cause²⁹ served as the measuring stick for determining not only the presence of the prerequisite factors for the issuance of a warrant, but also whether a warrantless search or seizure was reasonable.³⁰ Without probable cause the search or seizure failed to meet the reasonableness requirement and evidence uncovered as a result was inadmissible under the exclusionary rule.³¹

Since 1967³² the Court has created more and more exceptions to the warrant requirement,³³ the probable cause requirement,³⁴ and in

25. See, e.g., *Burdeau v. McDowell*, 256 U.S. 465 (1921) (The Court distinguished between search by private party and search by government official).

26. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring) (legitimate expectation of privacy test established to determine areas protected by the fourth amendment).

27. *Amsterdam*, *supra* note 16, at 388.

28. *Id.*

29. Probable cause is defined as more than mere suspicion. It exists where "the facts and circumstances within . . . [the arresting officers'] knowledge and of which they had reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in belief that an offense has been or is being committed . . ." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

30. *Wong Sun v. United States*, 371 U.S. 471 (1963). "[A] relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.'" *Id.* at 479 (quoting *Brinegar*, 338 U.S. at 176).

31. All evidence obtained by an unreasonable search and seizure is excluded from evidence at trial under the fourth amendment. *Weeks v. United States*, 232 U.S. 383 (1914). "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

While the exclusionary rule is still the law today, it has come under increased fire during the last two decades, mainly because of the incredible burden it places on law enforcement agencies. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984); *Stone v. Powell*, 428 U.S. 465 (1976) (White, J., dissenting); *United States v. Calandra*, 414 U.S. 338 (1974); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (Burger, C.J., dissenting). See generally W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.1, at 81 (1985). In 1974 the Court appeared to be positioning itself to either limit or possibly abandon the rule altogether. See *United States v. Calandra*, 414 U.S. 338 (1974). A majority of the Court stated that the rule was "a judicially created remedy designed to safeguard Fourth Amendment rights . . ." and thus, not a constitutionally protected right. *Id.* at 348. Now, however, the Court may be taking an alternative course of action. See *infra* notes 32-42 and accompanying text.

32. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

33. See *Texas v. Brown*, 460 U.S. 730 (1983) (plain view exception); *United States v. Ross*, 456 U.S. 798 (1982) (containers within auto exception); *United States v. Watson*, 423

some instances both requirements³⁵ of the fourth amendment. While the use of warrant requirement exceptions is well settled,³⁶ the courts have consistently required a showing of probable cause.³⁷

The Court began laying the foundation for acceptance of a warrantless search based on less than traditional probable cause³⁸ in *Camara v. Municipal Court*.³⁹ In that case, the Court developed a sliding-scale approach⁴⁰ which attempted to balance the interest of the state against that of the individual.⁴¹ Although the Court did not abandon the probable cause standard, it appeared to create a per se administrative standard for probable cause in the case of health and safety inspections.⁴²

The following year, in *Terry v. Ohio*,⁴³ the Court for the first time directly addressed the applicability of the probable cause standard in certain law enforcement investigatory stops. The Court reasoned that a stop and frisk was a lesser intrusion than a full search or full arrest⁴⁴ and, therefore, the officer need only establish a "reasonable suspicion" to satisfy the fourth amendment reasonableness requirement.⁴⁵

U.S. 411 (1976) (arrest in public area exception); *Cardwell v. Lewis*, 417 U.S. 583 (1974) (exterior of auto exception); and *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967) (hot pursuit exception).

34. See *Camara*, 387 U.S. 523. Health, building, fire, and other administrative inspectors could not enter private property without a search warrant; however, the inspector did not have to establish probable cause to obtain the warrant. Administrative or legislative action provided the probable cause simply because the building belonged to a particular class of structures.

35. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (student search exception); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (inventory search exception); *Michigan v. Summers*, 452 U.S. 692 (1981) (detainment of owner of house with valid search warrant exception); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest exception); *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk exception).

36. *Carroll v. United States*, 267 U.S. 132 (1925) (warrantless automobile search for evidence was lawful).

37. W. LAFAVE & J. ISRAEL, *supra* note 31, § 3.8, at 177.

38. See *supra* note 29.

39. 387 U.S. 523.

40. R. ALLEN & R. KUHN, *CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS* 595 (1985). "Pursuant to this approach, the Court has considered whether some relatively unintrusive governmental activities can legally be engaged in without the traditional, individualized probable cause showing." *Id.*

41. 387 U.S. at 536-37.

42. *Id.* at 537-38.

43. 392 U.S. 1 (1968).

44. *Id.* at 24-26. The Court found that a fourth amendment seizure occurred but balanced the need to ensure the officer's safety against the brief intrusion.

45. "[A]n objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.* at 21-22 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

The cornerstone of the Court's decision was the officer's ability to show "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."⁴⁶ The reasonable suspicion standard led to the development of the law enforcement profiles.⁴⁷

The Federal Aviation Administration instituted the first "profile" in 1968.⁴⁸ It served as only one phase of a multi-faceted screening system established to deter the hijacking of U.S. airliners.⁴⁹ The characteristics of the profile remain secret, but it is known that approximately twenty-five characteristics make up the profile.⁵⁰ These traits are based on behavioral traits exhibited by passengers.⁵¹ In *United States v. Lopez*,⁵² the district court stated that, absent the elements of discretion or prejudice, the described screening system was consistent with the protections of the fourth amendment.⁵³

In *United States v. Brignoni-Ponce*⁵⁴ a case involving the smuggling of illegal aliens across the Mexican border, the Court discussed seven profile characteristics that could lead to reasonable suspicion of criminal activity.⁵⁵ Six years later in *United States v. Cortez*⁵⁶ another

46. *Id.* at 21.

47. *See, e.g.,* *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971). *Lopez* involved a hijacker profile where the court cited *Terry* in concluding that a court must (1) require an officer to base the stop on objective evidence (specific and articulable facts), (2) balance the risk to the community against the limited intrusion of the individual, and (3) determine if the "frisk" was reasonable. The court also noted the frisk must be based on more than a mere hunch but less than traditional probable cause. *Id.* at 1093. *See also* *United States v. Montoya de Hernandez*, 473 U.S. 531, 541-42 (1985) (alimentary canal drug smuggler profile); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-82 (1975) (illegal alien smuggler profile).

48. 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, 423 n.45 (1987).

49. 3 W. LAFAVE, *supra* note 22, § 10.6, at 328-29. The screening program includes (1) notice to the public, (2) use of a hijacker profile, (3) use of a magnetometer, (4) interviews with selected passengers, and (5) frisks or searches of suspected passengers. *Id.*

50. Becton, *supra* note 48, at 423 n.45.

51. *Id.*

52. 328 F. Supp. 1077.

53. *Id.* at 1101. While the court upheld the profile, the profile alone is not sufficient for a stop. The entire screening process must be applied to justify the detainment of a passenger and avoid a fourth amendment violation.

54. 422 U.S. 873 (1975) (a random roving border patrol stop case).

55. The Court noted (1) traveling near the border; (2) on a lightly traveled road; (3) in a notorious smuggling area; (4) in a car that appears to be heavily loaded or has an extraordinary number of passengers or has large compartments suitable for storing aliens; (5) driven by someone of Mexican ancestry; (6) who takes evasive action or drives erratically; and (7) who is carrying passengers exhibiting characteristics of Mexican residents who appear to be trying to hide. *Id.* at 884-85. The Court held that Mexican ancestry alone did not establish reasonable suspicion that the occupants of the car were aliens. *Id.* at 885-86.

56. 449 U.S. 411 (1981).

alien smuggling case, the Court held that a border patrol officer had a "particularized suspicion" based upon the totality of the circumstances that satisfied the fourth amendment reasonableness standard.⁵⁷

The Court alluded to an alimentary canal smuggler profile in *United States v. Montoya de Hernandez*.⁵⁸ In this case, DEA agents detained the defendant for more than twenty-seven hours because she fit the profile.⁵⁹ The Court held that the detention was justified if the agents, "considering all the facts surrounding the traveler and her trip, reasonably suspect[ed] that the traveler [was] smuggling contraband" ⁶⁰ The Court went on to say that "[u]nder this standard officials at the border must have a particularized and objective basis for suspecting the particular person of alimentary canal smuggling."⁶¹

The *Terry* analysis of reasonable suspicion based upon specific and articulable facts underlines the courts' reasoning in all profile cases.⁶² While the decisions in the aforementioned cases by no means stated the acceptance of profiles to establish reasonable suspicion, these cases show the Court's willingness to cumulate the specific facts which alone are sufficient to establish the required reasonable suspicion.

Beginning in the mid 1970s, Drug Enforcement Administration officials began compiling certain traits of drug couriers in an attempt to develop a profile.⁶³ From 1977 to 1982, the number of drug courier profile characteristics flourished as many airports and local drug enforcement units developed their own profiles.⁶⁴

57. *Id.* at 417-18. The Court stated that "[b]ased upon [the totality of the circumstances] the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. . . ." This assessment contains two elements, each of which must be present to justify a stop. The first element requires that "the assessment must be based upon all the circumstances." Second, this process "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id.* at 418.

58. 473 U.S. 531 (1985).

59. The defendant (1) did not recall how her ticket was purchased, (2) came from a source city, (3) carried five thousand dollars in U.S. currency, (4) had made many trips of short duration into the United States, (5) had no family or friends in the country, (6) did not speak English, and (7) planned to use a taxicab for transportation. *Id.* at 533.

60. *Id.* at 541-42.

61. *Id.* at 541.

62. See *supra* notes 48-61 and accompanying text.

63. *United States v. Mendenhall*, 446 U.S. 544, 562 (1980).

64. "[T]here is no national profile; each airport unit developed its own set of drug courier characteristics on the basis of that unit's experience" Becton, *supra* note 48, at 433 (quoting Petition for Certiorari at 17-18 n.17, *Mendenhall* (No. 78-1821)). Compare *United States v. Moore*, 675 F.2d 802, 803 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) (suspect deplaned first) with *United States v. Mendenhall*, 446 U.S. 544, 564 (1980) (suspect deplaned

The *Elmore* profile,⁶⁵ used widely throughout the country, includes eleven basic factors.⁶⁶ The primary characteristics are: (1) arriving from or departing to an identified drug source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) traveling by an unusual itinerary; (4) using an alias; (5) carrying unusually large amounts of cash; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) displaying unusual nervousness.⁶⁷ The secondary characteristics are: (1) using public transportation, particularly taxicabs, almost exclusively in departing from the airport; (2) using the phone immediately after deplaning; (3) leaving a fictitious callback telephone number with the airline; and (4) traveling to source or distribution cities with excessive frequency.⁶⁸

During the early 1980s, the Court heard three drug courier pro-

last); *United States v. Sokolow*, 808 F.2d 1366, 1370 (9th Cir.), *vacated*, 831 F.2d 1413 (9th Cir. 1987) (suspect took flight requiring a plane change) *with United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977) (suspect took non-stop flight); *United States v. Himmelwright*, 551 F.2d 991, 992 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977) (suspect acted too calm) *with United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979) (suspect acted nervous); *United States v. Sanford*, 658 F.2d 342, 343 (5th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982) (suspect possessed gym bag) *with United States v. Sullivan*, 625 F.2d 9, 12 (4th Cir. 1980) (suspect purchased one-way ticket to source city and possessed new luggage) *and United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977) (suspect purchased round-trip ticket to source city and possessed no luggage).

65. *United States v. Elmore*, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980). DEA agent Paul Markonni, who is often credited with developing the first "drug courier profile," identified seven "primary characteristics" and four "secondary characteristics" that make up the profile at the suppression hearing. *See infra* notes 67-68 and accompanying text. When Elmore was detained by the DEA agents, they had determined that Elmore had traveled from a "source city," had no baggage, used an alias, exhibited an unusual degree of nervousness, purchased his ticket with cash, and returned from Detroit less than sixteen hours after his arrival. 595 F.2d at 1038-40. *See also United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978).

66. In *Elmore* the court divided the eleven profile characteristics developed by *Ballard* into seven primary characteristics and four secondary characteristics. 595 F.2d at 1039 n.3.

67. *Id.* Even the facts of the Supreme Court's decisions involving drug courier profiles contain traits very similar to those found in the *Elmore* profile. In *Mendenhall*, 446 U.S. 544, the Court cited four profile traits: (1) traveling from a source city; (2) nervousness; (3) using an unusual traveling itinerary; and (4) no luggage. *Id.* at 547 n.1. The Court found five characteristics in *Reid*: (1) traveling from a source city; (2) using unusual itinerary; (3) carrying very little luggage; (4) nervousness; and (5) the defendants hiding the fact that they were traveling together. 448 U.S. at 441. In *Royer* the Court found six factors: (1) nervousness; (2) paid for tickets in cash with large number of bills; (3) using an alias; (4) between 25-35; (5) carrying heavy luggage; and (6) dressed casually. 460 U.S. at 493 n.2.

68. 595 F.2d at 1039 n.3. The primary characteristics derive from logical deductions about the practicalities of the drug business. The secondary characteristics are more likely to misidentify innocent travelers as drug couriers. *See Becton, supra* note 48, at 432.

file cases,⁶⁹ but these decisions only added to the confusion surrounding drug courier stops and the validity of the profile.⁷⁰ While the Court never cited the *Elmore* characteristics, at least four of these traits were found in each case.

The Court first addressed the issue in *United States v. Mendenhall*⁷¹ in May 1980. In *Mendenhall* four profile characteristics first established in *Elmore* were present.⁷² A plurality of the Court decided that the profile characteristics were sufficient for an agent to establish a reasonable suspicion of criminal behavior to make a *Terry* stop.⁷³

One month later on June 30, 1980, the Court in *Reid v. Georgia*⁷⁴ held that the profile itself did not automatically give rise to the reasonable and articulable suspicion of criminal activity required under *Terry*.⁷⁵ The same four characteristics that were present in *Mendenhall* existed in this case.⁷⁶ However, the Court, in a per curiam opinion, failed to even mention *Mendenhall* while finding that the agent lacked a reasonable suspicion of criminal activity to make a permissible stop.⁷⁷

The Court addressed the profile issue for the third time in as many years in *Florida v. Royer*.⁷⁸ The defendant in this case matched six profile traits,⁷⁹ but the Court overturned the defendant's convic-

69. The Supreme Court has questionably heard a fourth case, but the Court failed to mention the drug courier profile by name or recognize any profile traits. *Florida v. Rodriguez*, 469 U.S. 1 (1984).

70. See *infra* notes 71-81 and accompanying text.

71. 446 U.S. 544 (1980) (plurality).

72. *Id.* at 547 n.1. The defendant (1) arrived from a source city, (2) appeared to be "very nervous," (3) claimed no luggage, and (4) changed airlines for her flight from Detroit [unusual itinerary]. *Id.* All four traits meet the *Elmore* profile. See *supra* note 66 and accompanying text.

73. 446 U.S. at 560. Two Justices decided that no seizure occurred at all. *Id.* at 552-54. Three Justices concluded that the agents had reasonable suspicion to justify the stop. *Id.* at 560.

74. 448 U.S. 438 (1980) (per curiam).

75. *Id.* at 441. A five member majority reversed Reid's conviction.

76. *Id.* at 441. The defendants (1) arrived from a source city, (2) arrived in the early morning [unusual itinerary], (3) carried only a shoulder bag [little or no luggage], and (4) appeared to be nervous. Also, the agents observed that the defendants were traveling separately, but met as they were leaving the terminal. *Id.* The first four traits correspond with the *Elmore* profile. See *supra* note 67 and accompanying text.

77. See *supra* note 73.

78. 460 U.S. 491 (1983).

79. *Id.* at 493 n.2. The defendant (1) appeared nervous, (2) paid for his ticket in cash with a large number of bills, (3) did not put his real name on his airline identification tag, (4) was casually dressed, (5) was between 25-35 years of age, and (6) carried sturdy luggage. *Id.* The

tion before it decided the validity of the profile.⁸⁰ Justice White, writing a plurality opinion, contradicted the *Reid* decision by implying that reasonable and articulable suspicion existed to justify a *Terry* stop.⁸¹

The most recent opportunity for the Court to consider the drug courier profile came in the instant case of *United States v. Sokolow*.⁸² Chief Justice Rehnquist, writing for the majority, began the opinion by stating the requirements for a *Terry* stop.⁸³ Under *Terry* a brief stop without probable cause may be constitutional "if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'" ⁸⁴

Reasonable suspicion entails "some minimal level of objective justification" for making a stop.⁸⁵ At the very least, the fourth amendment requires an officer to articulate something more than an "inchoate and unparticularized suspicion or 'hunch'" to make a stop.⁸⁶ However, the level of suspicion needed for a *Terry* stop is considerably less demanding⁸⁷ than the "fair probability" needed for an arrest.⁸⁸

The Court next considered the concept of reasonable suspicion and the circumstances that satisfy its existence.⁸⁹ The Court in *Sokolow* found that the Ninth Circuit's "reasonable suspicion" test created unnecessary difficulties and confusion.⁹⁰ The totality of the circumstances approach was reaffirmed by the Court as the appropriate means for determining the existence of reasonable suspicion.⁹¹ As a result, the Court overturned the rule established by the Ninth

first three traits fall within the *Elmore* primary characteristics. See *supra* note 67 and accompanying text.

80. 460 U.S. at 507-08. The Court concluded that when the officers refused to return his driver's license, his airline ticket, and his luggage, as a practical matter, he was under arrest. *Id.* at 503.

81. *Id.* at 502.

82. 109 S. Ct. 1581 (1989).

83. *Id.* at 1585.

84. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

85. *Id.* (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984)).

86. *Id.* (quoting *Terry*, 392 U.S. at 27).

87. *Id.* (See *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985)).

88. *Id.* The Court stated that probable cause means "a fair probability that contraband or evidence of crime will be found." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

89. *Id.* at 1585-87.

90. 831 F.2d 1413, 1419-21 (1987). The Ninth Circuit established a two-category analysis for determining if reasonable suspicion exists. *Id.* The Court stated that reasonable suspicion, like probable cause, cannot be reduced to a predetermined checklist of rules. 109 S. Ct. at 1585.

91. 109 S. Ct. at 1585. "In evaluating the validity of a stop, we [the Court] must consider

Circuit.⁹²

The Chief Justice noted that the profile characteristics taken alone are not proof of illegal conduct, but to the contrary, are quite common among innocent travelers.⁹³ By applying the totality of the circumstances approach, however, the innocent characteristics taken as a whole may amount to a reasonable suspicion for making a *Terry* stop.⁹⁴ Rehnquist attempted to bolster this reasoning by citing instances where the Court held that a series of innocent acts provided the basis for a showing of probable cause.⁹⁵ In fact, *Terry* itself was based upon "a series of acts, each of them perhaps innocent . . . but which taken together warranted further investigation."⁹⁶

Thus, the majority implicitly approved the use of drug courier profiles to establish a basis for reasonable suspicion.⁹⁷ The Court reasoned that the agents must have specific and articulable facts before a reasonable suspicion is established.⁹⁸ The agents' use of the profile characteristics as the framework for the development of specific and articulable facts did not detract from their evidentiary significance.⁹⁹

Justice Marshall, joined by Justice Brennan, dissented, stating that the case failed to pass the *Terry* requirements for a stop based on reasonable suspicion.¹⁰⁰ The dissenters stated that the majority's decision diminished the rights not only of the guilty, but of all citizens as they travel across the country.¹⁰¹

Justice Marshall noted that under *Terry* the officer must reasonably believe that crime is afoot, crime is imminent, or the officer's safety is in danger to make a stop.¹⁰² The Court in *Terry* also referred to the officer's ability to make fact-specific inferences "in light of his

'the totality of the circumstances—the whole picture.'" *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

92. *Id.* at 1586. "The rule enunciated by the Court of Appeals [Ninth Circuit] . . . is not in keeping with quoted statements from our decisions." *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1587 (citing *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13 (1983)).

96. *Id.* (citing *Terry*, 392 U.S. at 22).

97. *Id.* The majority found that the agents had reasonable suspicion to make a stop of Sokolow because he was a suspected drug courier. Thus, the Court established the use of a drug courier profile as an appropriate set of guidelines in determining the existence of specific and articulable facts. *Id.* at 1586-87.

98. See *supra* notes 82-90 and accompanying text.

99. 109 S. Ct. at 1587.

100. *Id.* at 1588 (Marshall, J., dissenting).

101. *Id.*

102. *Id.* (citing *Terry*, 392 U.S. at 30).

experience."¹⁰³ In the present case, there was no apparent crime afoot and the inferences were based on a checklist of characteristics rather than on the officers' experience.¹⁰⁴

Another criticism raised by Justice Marshall was the profile's "chameleon-like way of adapting to any particular set of observations."¹⁰⁵ Marshall then cited fourteen cases as examples where contradictory characteristics were used in various profiles to show the existence of reasonable suspicion.¹⁰⁶ Because no official national profile exists, the Drug Enforcement Administration and local law enforcement agencies can adapt the profile to fit the particular facts of any case.¹⁰⁷

Justice Marshall's final criticism dealt with recent decisions of the Court involving drug crimes and anti-drug policies.¹⁰⁸ Marshall stated that the majority's recent decisions had given "short shrift to constitutional rights" when drug issues were decided.¹⁰⁹

Although the Court has decided several drug courier profile cases,¹¹⁰ the decision in *Sokolow* marked the first time the Court has taken a firm position on the issue. The key to the decision centered upon *United States v. Cortez*,¹¹¹ a case involving the totality of the circumstances approach in conjunction with profile-like factors. In the two cases preceding *Cortez*, the Court considered the dilemma of determining which profile characteristics gave rise to a reasonable suspicion of criminal activity.¹¹² This dilemma possibly explains why the

103. *Id.* (quoting *Terry*, 392 U.S. at 27).

104. *Id.* at 1588. Factors mentioned by the majority included: (1) nervousness; (2) traveling to or from a source city; (3) using different name for airline telephone callback number; (4) paying for tickets in cash; (5) defendant's attire; (6) not checking any luggage; and (7) short stay in source city. *Id.* at 1583. In Justice Marshall's dissent, he gave possible innocent explanations for these profile traits. *Id.* at 1589-90. Justice Marshall also noted that in *Terry* the officer based his suspicion upon thirty years of experience, not on a "mechanistic application of a formula." *Id.* at 1588.

105. *Id.* (quoting *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987)).

106. 109 S. Ct. at 1588. See *supra* note 64 and accompanying text.

107. 109 S. Ct. at 1588.

108. *Id.* at 1591. See, e.g., *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402 (1989).

109. 109 S. Ct. at 1591.

110. See *supra* note 69.

111. 449 U.S. 411 (1981).

112. See *United States v. Mendenhall*, 446 U.S. 544 (1980) and *Reid v. Georgia*, 448 U.S. 438 (1980). The facts in *Mendenhall* and *Reid* were almost identical. The Court in *Mendenhall* said a reasonable suspicion existed, while in *Reid*, the Court ruled the stop impermissible for lack of reasonable suspicion. See *supra* notes 72-76 and accompanying text.

contradicting opinions were issued within a month of each other.¹¹³

The Court in *Florida v. Royer* did not use the *Cortez* reasoning because the Court decided the case on another fourth amendment issue.¹¹⁴ However, *Royer* represented the first time a clear majority approved the use of the profile characteristics for supporting the reasonable suspicion needed for a stop.¹¹⁵

The reasoning in *Cortez* played a very significant part in the Court's analysis in *Sokolow*.¹¹⁶ Chief Justice Rehnquist combined the *Cortez* totality of the circumstances approach with the *Terry* articulable facts requirement to establish the requisite reasonable suspicion standard.¹¹⁷ Under this analysis, the impact of *Sokolow* may reach far beyond the facts of the case. As the majority in *Sokolow* stated, "the factors in question have evidentiary significance regardless of whether they are set forth in a 'profile.'" ¹¹⁸ This reasoning, in effect, gives law enforcement officials the Court's blessing to use profiles as a valid police tool.

The Court's acceptance of profiles cause several practical problems. First, by applying this analysis, the Court firmly puts the discretion of the existence of reasonable suspicion in the hands of the field officer. The judges' role in the judicial process might dwindle from one of an independent reviewer of fact to one of a monitor of investigatory formulas.¹¹⁹ This outcome could result in a greater likelihood of pretext searches and discrimination by the law enforcement community and, in turn, to a greater reduction in fourth amendment rights.

Even if a police officer exhibits no prejudice and the defendant meets the profile criteria, a question remains as to the predictive value of profiles. Some profiles are undoubtedly more reliable than others; however, legal scholars claim that predictive schemes in any form are

113. See *Mendenhall*, 446 U.S. 544 (decided May 27, 1980); *Reid*, 448 U.S. 438 (decided June 30, 1980).

114. See *supra* note 80.

115. 460 U.S. 491 (1983). Justice White's plurality opinion, joined by three other justices, approved the profiles as a basis for reasonable suspicion. *Id.* at 502. Justice Powell's concurrence also approved the use of the profile. *Id.* at 508. Justice Blackmun's dissenting opinion stated that the agents had reasonable suspicion based upon the factors of the profile. *Id.* at 518.

116. 109 S. Ct. at 1585-87.

117. "Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think *taken together, they amount to reasonable suspicion.*" *Id.* at 1586 (emphasis added).

118. *Id.* at 1587.

119. McCloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. REV. 843, 857 (1985).

not accurate because they do not treat "individuals as autonomous persons."¹²⁰ Also, by using predictive models (profiles), police agents will only observe couriers that fit the profile's traits. Therefore, agents looking for Hispanic female couriers, for example, would not arrest white male couriers.¹²¹

Likewise, a question remains as to what characteristics in a profile, taken as a whole, justify reasonable suspicion. The majority in *Sokolow* only stated that the traits have "evidentiary significance," and made no mention of the minimum level required to demonstrate reasonable suspicion.¹²² This could result in courts using a case-by-case analysis to determine the existence of reasonable suspicion, and thereby adding to the already confusing past of the profile.¹²³

In Arkansas, the effects of *Sokolow* could be felt much sooner than in other states. Arkansas, like many southern states, has used a type of drug courier profile on its interstate highway system.¹²⁴ However, in 1988, the Arkansas State Police's highway profile suffered a setback by the decision in *McElrath v. Goodwin*.¹²⁵ The case dealt with a "consent decree" that the State Police entered into earlier that year which, among other things, required the troopers to have a "consent to search" form read by all traffic violators before a search could be performed.¹²⁶ Judge Eisele ruled that the decree required that the violator sign the consent form before allowing a search.¹²⁷

Earlier this year, the Arkansas Court of Appeals in *Stafford v. State*¹²⁸ held that since neither the United States nor the Arkansas Supreme Court has rendered an opinion on this matter, local law en-

120. Becton, *supra* note 48, at 429 (citing Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1409 (1979)).

121. Becton, *supra* note 48, at 430 (citing Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 216 (1983)).

122. 109 S. Ct. at 1587.

123. McCloud, *supra* note 119, at 860. "No court has been more guilty of failing to come to grips with the meaning of the drug courier profile than the United States Supreme Court." *Id.*

124. McCloud, *supra* note 119, at 854-55 n.47-50.

125. 713 F. Supp. 299 (E.D. Ark. 1988).

126. *Id.* at 300-01. Subsection (f) of the consent decree stated that:

A vehicle consent search form will be adopted in both English and Spanish in substantially the form appended to this order, providing at least:

- (1) The driver or person in apparent control shall be told of the right to refuse, limit, or revoke consent.
- (2) The driver or person in apparent control shall be told that they will be allowed to go on their way if consent is denied.

127. *Id.* at 304.

128. *Stafford v. State*, No. CACR 88-265 (Ark. Ct. App. May 10, 1989) (LEXIS 239).

forcement officials were not subject to the consent decree entered into by the State Police. Because local and state law enforcement officials often work together, this created a confusing double standard on whether consent is necessary when both local and state officials are present.¹²⁹

The Attorney General's office and attorneys for the Arkansas State Police are currently preparing to petition for a rehearing of *McElrath* based on the Supreme Court's decision in *Sokolow*.¹³⁰ If Judge Eisele grants the petition and rules that *Sokolow* represents "new law," then the highway profile could once again appear on Arkansas highways.

Alec Farmer

129. Telephone interview with Darrel Staten, staff attorney of the Arkansas State Police (July 6, 1989).

130. Telephone interview with Mark Lewis, Assistant Attorney General of the State of Arkansas (July 6, 1989).

