THE WAR ON DRUGS: EVENING THE ODDS THROUGH USE OF THE AIRPORT DRUG COURIER PROFILE

I. INTRODUCTION

> Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image — others who create others still, across our land and down our generations, sparing not even the unborn.[1]
>
> — United States Court of Appeals for the Fifth Circuit

The scourge of illegal drug abuse plagues the United States despite increased efforts by various law enforcement agencies to eradicate the narcotics trade.[2] "The toll [drug abuse inflicts] on our society in lives made wretched, in costs to citizens, and in profits of gross size funneled to the most odious criminals, is

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[1] Terrebonne v. Butler, 820 F.2d 156, 157-58 (5th Cir. 1987). Courts have often recognized the widespread destruction drug dealers perpetrate. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 296 n.12 (1980) (Powell, J., dissenting) ("A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault."); Carmona v. Ward, 576 F.2d 405, 411 (2d Cir. 1978) ("The drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse . . . . Measured thus by the harm it inflicts upon the addict, and, through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank.").

Statistics demonstrate that the "epidemic proportions" of the drug trade in 1978 still exist. The arrest rate of persons 18 years and older for drug abuse violations has risen steadily from 36.4 per 100,000 citizens in 1965 to 554.7 in 1992. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 413 (1995) [hereinafter D.O.J. SOURCEBOOK].

[2] Shortly after his election, President Bush declared, "We need, fully and completely, to marshal the nation's energy and intelligence in a true all-out war against drugs. We can and must win that war." *Excerpts from News Session by Bush, Watkins and Bennett*, N.Y. TIMES, Jan. 13, 1989, at D16. The federal government has consistently increased the fiscal amount budgeted to combat the drug trade and spent nearly $13.3 billion in 1995. *See* D.O.J. SOURCEBOOK, *supra* note 1, at 19. This figure represents an increase of $1.2 billion from the amount budgeted for 1994 and exceeds the amount spent in 1985 by more than $10 billion. *See id.*

These efforts have been successful in intercepting large quantities of illicit drugs. In 1988, the United States Customs Service alone seized more than $9.7 billion worth of cocaine, $1.7 billion in marijuana, and $905 million worth of heroin. *See id.* at 467. In 1993, the Drug Enforcement Administration seized more than one million pounds of illegal narcotics. *See id.* at 463. These accomplishments, though impressive, have nonetheless failed to decimate the widespread drug trade.

staggering."[3] Drugs lead the abuser fortunate enough to evade his demise to physical, financial and moral devastation,[4] although their pernicious effects are not confined to the individual who uses them. The enormous profits generated by the drug trade invite corruption of unscrupulous law enforcement officials through lucrative bribes.[5] Most importantly, narcotics induce the abuser to commit crime,[6] producing a wave of drug-related violence perpetrated against others involved in illegal drug activity as well as law enforcement officials and innocent victims.[7]

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[3] United States v. Berry, 670 F.2d 583, 594 (5th Cir. Unit B 1982). The Supreme Court of the United States has also acknowledged the adverse effects of illegal drugs. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring) (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989)) ("Possession, use, and distribution of illegal drugs represents 'one of the greatest problems affecting the health and welfare of our population.'"); Florida v. Royer, 460 U.S. 491, 508 (1983) (Powell, J., concurring) ("[T]he public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit."); *Id.* at 512 (Brennan, J., concurring) ("[T]he traffic in illicit drugs is a matter of pressing national concern."); United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring) ("Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances.").

[4] *See Carmona*, 576 F.2d at 411-12.

[5] *See id.* at 412; Bothwell v. State, 300 S.E.2d 126, 129 (Ga.) (such corruption "in itself poses a grave threat to society"), *cert. denied*, 463 U.S. 1210 (1983).

[6] Justice Kennedy has emphasized that drug abuse correlates with crime in three ways: "(1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) [a] drug user may commit crime in order to obtain money to buy drugs; and (3) violent crime may occur as part of the drug business or culture." *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring); *see also Carmona*, 576 F.2d at 412 ("The crime [drug abuse] spawns is well recognized. Addicts turn to prostitution, larceny, robbery, burglary and assault to support their habits.").

[7] *See Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring) (citing U.S. DEP'T OF HEALTH & HUM. SERVICES, EPIDEMIOLOGIC TRENDS IN DRUG ABUSE 107 (1990)) (60% of the homicides in Detroit in 1990 were drug-related); Michael Marriott, *After 3 Years, Crack Plague in New York City Only Gets Worse*, N.Y. TIMES, Feb. 20, 1989, at A1 ("Crack has contributed to the city's soaring homicide rate. Drugs . . . played a role in at least 38 percent of the 1,867 murders [in 1988]."); Irvin Molotsky, *Capital's Homicide Rate Is at a Record*, N.Y. TIMES, Oct. 30, 1988, at A20 (police in Washington, D.C. attribute the city's record homicide rate to the increased use of crack cocaine). One nationwide study revealed that 57% of males arrested for murder tested positive for illicit drugs. *See Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring) (citing NATIONAL INST. OF JUSTICE, 1989 DRUG USE FORECASTING ANNUAL REPORT 9 (1990)). The same study also demonstrated that 55% of males arrested for assault, 63% arrested on weapons charges, and 73% arrested for robbery were drug abusers. *See id.* (citing same). Similar research conducted by the United States Department of Justice revealed that in 1993, the percentage of male arrestees who tested positive for illegal drugs exceeded 60% in several major U.S. cities, including a high of 77% in Manhattan and San Diego. *See* D.O.J. SOURCEBOOK, *supra* note 1, at 459.

At the root of this epidemic lie those who provide the public with illicit drugs: the dealers and traffickers. By transporting narcotics and executing the transactions these dealers contrive, traffickers perpetuate the destruction of society caused by illicit drugs. The sophistication of the modern drug trade presents extraordinary problems for law enforcement officials,[8] requiring them to devise new methods to prevent the transfer of narcotics from traffickers to users. The development of the drug courier profile[9] has provided the means to effectuate protection of the public, although its ultimate success will require absolute endorsement by the judiciary.

A drug courier profile is "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs,"[10] often used by law enforcement officials to identify drug traffickers among airline passengers.[11] Exhibition of several profile traits by a particular individual may arouse the suspicion of expert narcotics officers stationed in an airport. The agents usually approach the person, identify themselves as law enforcement officers and ask whether the person is willing to answer a few questions.[12] If the individual consents, the officers will ask to see the suspect's identification and airline ticket and pose questions regarding the person's travel plans. If the interview leads the officers to conclude that the passenger is likely transporting drugs, they will request his consent to search his luggage. Should the suspect refuse, the circumstances may allow the officers to detain the luggage for a search by a drug-detecting canine.[13]

Constitutional principles dictate that the criminal justice system must not sac-

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[8] *See* United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) (Powell, J., concurring) ("Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal [drug trafficking] may be unmatched in any other area of law enforcement."). Other Supreme Court Justices have also acknowledged the difficulty law enforcement officials encounter in fighting the war against drugs. Justice Blackmun has asserted that detection of drug trafficking is hindered by significant obstacles, which include the "extraordinary and well-documented difficulty of identifying drug couriers." Florida v. Royer, 460 U.S. 491, 519 (1983) (Blackmun, J., dissenting). Chief Justice Rehnquist has noted the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics." United States v. Hernandez, 473 U.S. 531, 538 (1985) (opinion by Rehnquist, J.).

[9] This Note will repeatedly refer to the profile in the singular, although many different profiles exist. Unless otherwise noted, "the profile" refers to the drug courier profile in general, rather than referring to one in particular.

[10] *Mendenhall*, 446 U.S. at 547 n.1.

[11] Since drug smugglers import narcotics along the United States coastline, drug couriers must rely on commercial transportation to distribute the contraband throughout the country. *See* Alexandra Coulter, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers*, 43 VAND. L. REV. 1311, 1313 (1990).

[12] See *infra* Section III(A)(1) for a discussion of the typical airport stop pursuant to the use of the drug courier profile.

[13] *See infra* Sections III(A)(2)-(3).

rifice the rights of the innocent in order to apprehend the guilty.[14] Innocent citizens have a fundamental interest in remaining free from harassment by the police, especially when encounters occur in public when the officers lack direct evidence of criminal activity.[15] For these reasons, legal scholars have often criticized use of the drug courier profile as an arbitrary intrusion in violation of the Fourth Amendment. The Supreme Court of the United States, however, as well as the federal courts of appeals and district courts, have generally approved of use of the profile to identify drug traffickers. Since "the twofold aim of [the law] is that guilt shall not escape [nor] innocence suffer,"[16] law enforcement officials must remain free to reach the bounds established by the Fourth Amendment so long as they do not exceed them.[17] The difficulty involved in identifying drug traffickers necessitates reliance on the drug courier profile to effectuate justice.

This Note examines the drug courier profile as applied in the airport context.[18] Following a description of the origin of the profile and subsequent developments, this Note will discuss Fourth Amendment principles regarding the requisite suspicion to detain an individual or his luggage. It will then examine how the Supreme Court and lower federal courts[19] have interpreted these principles as they apply to the identification of drug trafficking suspects through use of the drug courier profile. This Note will also discuss flaws critics often attribute to the profile and its use, show why such criticism is unwarranted and based on erroneous reasoning, and demonstrate that the profile is necessary to protect society from further destruction associated with narcotics trafficking.

II. ELEMENTS OF THE DRUG COURIER PROFILE

The original drug courier profile emerged in 1974 as the invention of Drug

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[14] *See* Florida v. Royer, 460 U.S. 491, 512 (1983) (Brennan, J., concurring).

[15] The Supreme Court has recognized that the evidence gathered by law enforcement agencies by use of the drug courier profile is purely circumstantial. *See* United States v. Sokolow, 490 U.S. 1, 10 n.6 (1989). The Court has not disapproved of the use of such evidence, however.

[16] Berger v. United States, 295 U.S. 78, 88 (1935).

[17] *See Royer*, 460 U.S. at 519 (Blackmun, J., dissenting) ("The special need for flexibility in uncovering illicit drug couriers is hardly debatable."). By holding stops unconstitutional when the profiles have been too narrow in scope or the circumstances did not provide a proper basis for a detention, courts have fixed limits on the application of profiles and provided a check on overzealous law enforcement. *See infra* Section IV.

[18] The original drug courier profile has spawned similar compilations of characteristics for use on the nation's highways and in bus terminals and train stations. This Note, however, will focus exclusively on stops within the airport setting involving suspects boarding or departing from flights traveling within the United States only.

[19] This Note will not discuss in detail profile cases arising in state courts, since the majority of those cases involve defendants arrested in bus or train terminals or on the highway, rather than within the airport context.

Enforcement Administration (DEA) Special Agent Paul Markonni,[20] a renowned expert in the field of narcotics law enforcement.[21] Prior to its creation, the lack of a comprehensive profile required narcotics officers to rely on tips provided by other law enforcement agencies and airline personnel to identify traffickers. Unless a ticket agent or local police officer notified the DEA that a particular passenger appeared suspicious, the agency would not know whom to suspect, thus precluding the identification of a large number of couriers. The DEA eventually discovered a pattern among the characteristics exhibited by drug couriers, which enabled agents to distinguish them from ordinary passengers even when they lacked prior information about the particular individual.[22]

In *United States v. Elmore*,[23] the Court of Appeals for the Fifth Circuit identified the seven primary characteristics of the Markonni drug courier profile as the following:

> (1) Arrival from or departure to an identified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers.[24]

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[20] *See* United States v. Ehlebracht, 693 F.2d 333, 335 n.3 (Former 5th Cir. 1982) (identifying Markonni as the creator of the first profile). Special Agent Markonni initially developed the profile to aid in the identification of drug traffickers in the Detroit airport. *Id.*

[21] Federal courts have often acknowledged Markonni's expertise and proficiency in identifying drug couriers. *See, e.g., id.* (citing 34 cases, including 15 from the Fifth Circuit, in which Markonni has played a role and concluding that "the exploits of Special Agent Markonni are nearly legendary in this circuit"); United States v. Sentovich, 677 F.2d 834, 835 (11th Cir. 1982) ("The ubiquitous DEA Agent Paul Markonni once again sticks his nose into the drug trade. . . . We now learn that among Markonni's many talents is an olfactory sense we in the past only attributed to canines."); United States v. Williams, 647 F.2d 588, 589 (5th Cir. 1981) (discussing evidence discovered pursuant to "one of the unerring hunches of the ubiquitous Agent Paul Markonni").

[22] *See* United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977) (citing the testimony of DEA Agent Markonni).

[23] 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

[24] *Id.* at 1039 n.3 (referring to the suppression hearing testimony of Special Agent Markonni). One year earlier, the Fifth Circuit had identified the following factors which the DEA considers indicative of drug trafficking:

> (a) unusual nervousness; (b) no luggage or very limited luggage; (c) possession of an unusually large amount of cash, especially when in bills of small denominations; (d) unusual itinerary, taking circuitous routes from cities known to be source cities for narcotics, such as flying [from a source city by way of a non-source city]; (e) arriving from a known narcotics source city; (f) paying for an airline ticket in currency of small denominations; (g) purchasing a one-way ticket; (h) use of an alias; (i) use of a false telephone number on an airline reservation; (j) placing a telephone call immediately upon arrival at airport; and (k) travel by a known narcotics trafficker.

The court identified the secondary characteristics of the profile as the following:

> (1) [T]he almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or distribution cities.[25]

The DEA assigns different weight to these eleven factors when used to identify drug courier suspects, and courts do the same when determining the presence or absence of reasonable suspicion.[26] Other law enforcement agencies have developed profiles of their own, and although many share similar characteristics, the profiles vary from airport to airport.[27]

The contemporary DEA drug courier profile embodies many characteristics absent from the list cited in *Elmore*. Additional physical traits often considered to be typical of drug traffickers include unusual dress,[28] age between twenty-five and thirty-five years old,[29] and paleness commonly associated with extreme anxiety.[30]

The DEA has also discovered a pattern of behavioral characteristics that drug couriers frequently display. When transporting narcotics in their luggage, drug couriers often carry their bags onto the plane rather than checking them in order to keep the contraband close to their person.[31] In order to disassociate themselves from suitcases containing narcotics, traffickers either do not use luggage identification tags[32] or fill them out with false information. Drug couriers typically purchase their ticket on the same day as their flight, and often do so less than an hour before departure.[33]

United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978).

[25] *Elmore*, 595 F.2d at 1039 n.3.

[26] *See id.*

[27] *See* United States v. Berry, 670 F.2d 583, 599 n.17 (5th Cir. Unit B 1982).

[28] *See* United States v. Rico, 594 F.2d 320, 325 (2d Cir. 1979).

[29] *See* Florida v. Royer, 460 U.S. 491, 493 n.2 (1983) (plurality opinion).

[30] *See id.*

[31] *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 4 (1989) (defendant and companion carried a total of four pieces of luggage onto plane).

[32] *See* United States v. Ramirez-Cifuentes, 682 F.2d 337, 342 (2d Cir. 1982) ("Granted, the lack of an identification tag on a shoulder bag may not appear to be worthy of note to the untrained eye because such bags are frequently carried onto the airplane and are often untagged. It is a common factor in our prior airport cases, however, that drug couriers do not place their names upon the bags in which they carry contraband."); United States v. Forero-Rincon, 626 F.2d 218, 222 (2d Cir. 1980); United States v. Vasquez, 612 F.2d 1338, 1343 (2d Cir. 1979) (noting that the fact that the suspect's luggage did not contain appropriate identification tags "gains significance from" one officer's testimony that 90% of luggage is properly tagged).

[33] *See* United States v. Bueno, 21 F.3d 120, 125 (6th Cir. 1994) (referring to the testimony of Sgt. David Bunning, Cincinnati/Northern Kentucky Int'l Airport Police Dep't); United States v. Fry, 622 F.2d 1218, 1220 (5th Cir. 1980); United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978).

Upon arrival at their destination, drug traffickers often attempt to disembark first in order to expedite their exit from the airport.[34] DEA agents also focus on the last few passengers to deplane, however,[35] in order to detect those taking advantage of the distraction the other passengers pose. Upon disembarking the flight, drug traffickers typically engage in "countersurveillance" by visually scanning the airport terminal to detect the presence of law enforcement personnel.[36] In order to avoid the possibility of both being arrested, two couriers traveling together will attempt to conceal their acquaintance by pretending not to know each other.[37] One will usually proceed behind the other, separated by other passengers, while keeping his accomplice under constant observation.[38] When attempting to catch a connecting flight, drug couriers often do not stop to ask airline personnel stationed at the gate for directions; they leave the area as quickly as possible and determine where to board their next flight through other means.[39] Traffickers tend to walk quickly through the terminal, frequently checking behind them to see if they are being followed.[40] Upon arriving at their destination, drug couriers usually attempt to leave the airport immediately.[41] Some, however, purposely delay their departure to avoid suspicion[42] and may take circuitous routes through the airport.[43] Drug couriers who transport narcotics hidden on their person often enter a restroom upon deplaning.[44]

In order to disassociate himself from his flight, a drug trafficker may discard his airline ticket immediately upon arrival[45] or claim that he does not have it

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[34] *See, e.g.*, United States v. Moore, 675 F.2d 802, 803 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983).

[35] *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 548 n.1 (1980) (plurality opinion).

[36] *See, e.g.*, United States v. Pantazis, 816 F.2d 361, 363 (8th Cir. 1987); *Fry*, 622 F.2d at 1219; United States v. Rico, 594 F.2d 320, 325 (2d Cir. 1979).

[37] *See* United States v. Poitier, 818 F.2d 679, 680 (8th Cir. 1987) (referring to the testimony of DEA Special Agent Paul Markonni); United States v. Bowles, 625 F.2d 526, 534-35, 535 n.11 (5th Cir. 1980) (referring to the testimony of Markonni and two other DEA agents).

[38] *See Poitier*, 818 F.2d at 680; *Bowles*, 625 F.2d at 534-35.

[39] *See* United States v. Bueno, 21 F.3d 120, 125 (6th Cir. 1994) (referring to the testimony of Sgt. David Bunning, Cincinnati/Northern Kentucky Int'l Airport Police Dep't).

[40] *See, e.g.*, United States v. Millan, 912 F.2d 1014, 1015 (8th Cir. 1990).

[41] *See, e.g.*, United States v. Lambert, 46 F.3d 1064, 1066 (10th Cir. 1995).

[42] *See* United States v. Pantazis, 816 F.2d 361, 363 (8th Cir. 1987); United States v. Regan, 687 F.2d 531, 533 n.2 (1st Cir. 1982) (referring the the testimony of a law enforcement official who stated that drug couriers often delay their departure from the airport "to be sure the coast is clear").

[43] *See, e.g.*, United States v. Erwin, 803 F.2d 1505, 1506 (9th Cir. 1986).

[44] *See, e.g.*, United States v. Knox, 839 F.2d 285, 287 (6th Cir. 1988).

[45] *See* United States v. Respress, 9 F.3d 483, 486-87 (6th Cir. 1993) (finding suspicious the defendant's claim that his ticket must have fallen out of his pocket while sitting in the back seat of a taxicab, when the arresting officer found the stub wedged behind the rear seat cushion and could not retrieve it without removing the entire seat); *Pantazis*, 816

with him.[46] Traffickers also tend to use forged identification[47] or claim that they do not have identification on their person.[48]

III. THE CONSENSUAL ENCOUNTER VERSUS INVOLUNTARY DETENTION: FOURTH AMENDMENT PRINCIPLES OF SEIZURE AS APPLIED IN THE AIRPORT CONTEXT

A. *The Law Regarding Investigative Stops*

The Fourth Amendment to the Constitution of the United States declares "[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."[49] Three types of permissible encounters between police and citizens exist under the Fourth Amendment: "consensual encounters in which contact is initiated by a police officer without any articulable reason whatsoever and the citizen is briefly asked some questions; a temporary involuntary detention or *Terry* stop which must be predicated upon 'reasonable suspicion;' and arrests which must be based on probable cause."[50]

1. The Consensual Encounter

No constitutional violation occurs when a police officer approaches a citizen, even if selected at random, and merely asks a few questions.[51] The officer needs no suspicion whatsoever for stopping the particular individual, who remains free to decline to answer[52] and leave the area or terminate the encounter.[53] The justification for this common law "right to inquire" rule[54] lies in the "acknowledged

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F.2d at 363.

[46] *See Regan*, 687 F.2d at 533 n.3 (noting that the defendant's explanation that he left his ticket on the plane was "more than coincidental," given that he retained his baggage claim checks, which are usually stapled to the ticket); *see also* United States v. Vasquez, 612 F.2d 1338, 1340 (2d Cir. 1979) (suspect claimed he did not have his ticket, although the officer had seen him place the ticket in his pocket); United States v. Rico, 594 F.2d 320, 326 (2d Cir. 1979).

[47] *See, e.g.*, United States v. Bueno, 21 F.3d 120, 124-25 (6th Cir. 1994).

[48] *See* United States v. Odum, 72 F.3d 1279, 1285 (7th Cir. 1995) (noting that the typical innocent passenger does not travel without identification); United States v. Weaver, 966 F.2d 391, 393 (8th Cir. 1992) (referring to the testimony of DEA Agent Carl Hicks that it is "extremely uncommon for adults not to have identification, but common for drug couriers").

[49] U.S. CONST. amend. IV.

[50] *Bueno*, 21 F.3d at 123.

[51] *See* Terry v. Ohio, 392 U.S. 1, 34 (1968) (Powell, J., concurring) ("[There] is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.").

[52] The officer cannot lawfully compel the citizen to answer. *See* Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969).

[53] *See* Florida v. Bostick, 501 U.S. 429, 431 (1991).

[54] *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1264 (1990).

need for police questioning as a tool in the effective enforcement of the criminal laws,"[55] for "[w]ithout such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished."[56] Second, since the amount of time needed to ask if a person is willing to talk and to obtain a reply "may be so brief as to be insignificant,"[57] the right to inquire rule places only a minimal burden on the public.[58] The Supreme Court has extended this doctrine, noting that "the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate."[59]

Once a DEA officer suspects a particular airline passenger of trafficking narcotics, he will attempt to obtain as much knowledge about that person as possible without confronting him. If the person has not yet left the source city and is waiting in line to purchase a ticket, the agent will stand behind or near the passenger in order to determine his itinerary, method of payment, and whether the passenger checks any luggage.[60] Once the suspect has arrived at the destination city, officers will follow him through the airport terminal in order to conduct further surveillance,[61] although they usually have little opportunity to do so since the typical trafficker seeks to leave the airport as quickly as possible. By exam-

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[55] United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion).

[56] *Id.* (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)); *see also* United States v. Berryman, 717 F.2d 651, 661 (1st Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (Breyer, J., dissenting) ("[T]o force the police to give up the practice of polite, voluntary questioning would threaten serious harm to the public interest in safety and effective law enforcement. . . .").

[57] United States v. Berry, 670 F.2d 583, 595 (5th Cir. Unit B 1982).

[58] *See Berryman*, 717 F.2d at 661 (Breyer, J., dissenting) ("[T]o impose the duty upon an unwilling citizen to answer 'no' [to voluntary questioning] would burden privacy interests only slightly.").

[59] Florida v. Bostick, 501 U.S. 429, 431 (1991). A similar test, developed by the Court in *Mendenhall*, established that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554. In *Bostick*, officers approached the defendant as he sat in a bus that was scheduled to depart shortly. Recognizing that the defendant essentially lacked the option of leaving, the Court modified the *Mendenhall* test and deemed the proper inquiry to be whether the suspect could have terminated the encounter with the police. *See Bostick*, 501 U.S. at 431.

[60] *See* Brief for the United States at 4, United States v. Mendenhall, 446 U.S. 544 (1980) (No. 78-1821); Charles L. 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, 428 (1987).

[61] *See* Brief for the United States at 4, *Mendenhall* (No. 78-1821); Becton, *supra* note 60, at 428.

ining the suspect's public behavior, which the Fourth Amendment affords no protection,[62] officers may lawfully gain information without imposing any burden upon the individual.

Once satisfied that the circumstances warrant further investigation, the officer will approach the suspect, display his credentials and immediately identify himself as a law enforcement official.[63] Although the suspect remains free to leave at this point, many drug traffickers choose not to exercise this option, even when told by the officer that they are not under arrest and may leave if they so choose.[64] After requesting to see the suspect's airline ticket — which reveals the origin and destination cities of the flight, turnaround time and whether the suspect had purchased it with cash — the officer will ask for identification in order to determine if the passenger has used an alias.[65] The officer will ask questions regarding the passenger's travel plans in order to reveal discrepancies or suspicious information.[66] The officer will ask the suspect if he would consent to a search of his luggage and advise the person of his right to refuse.[67] Such a consensual encounter enables the agent to gather further information about the suspect, which may corroborate or dispel his suspicion, without restricting the individual's liberty.

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[62] *See* United States v. Katz, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

[63] *See* United States v. Elmore, 595 F.2d 1036, 1042 (5th Cir. 1979) (citing the testimony of DEA Agent Paul Markonni that such practice is consistent with DEA policy); Brief for the United States at 4, *Mendenhall* (No. 78-1821).

[64] *See, e.g.*, United States v. Sadosky, 732 F.2d 1308, 1340 (8th Cir.), *cert. denied*, 469 U.S. 884 (1984).

[65] *See* Brief for the United States at 4, *Mendenhall* (No. 78-1821).

[66] *See id.*; Becton, *supra* note 60, at 428 & n.63.

[67] Although the Constitution does not require the officer to inform the suspect that he may refuse to consent to a search, *see* United States v. Nunley, 873 F.2d 182, 185 n.2 (8th Cir. 1989) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227, 234 (1973)), DEA agents often read aloud the following *Miranda*-type warnings:

> You have the right to allow or refuse to allow a search to be made of your person and the personal property that you have with you. You have the right to consult an attorney before deciding whether you wish to allow or refuse to allow the search. If you consent to the search any illegal objects found can be used against you in court proceedings. Do you understand?

United States v. Williams, 647 F.2d 588, 590 (Former 5th Cir. 1981) (referring to the testimony of DEA Special Agent Paul Markonni).

2. Determining the Point of Seizure: When the Right to Inquire Rule No Longer Applies

An investigative stop may, however, turn from a consensual encounter to an involuntary detention by which the officers seize, as a matter of law, the defendant or his luggage.[68] The Supreme Court has repeatedly declined to establish a bright-line rule for determining when an investigatory stop becomes a seizure.[69] Instead, the Court has required that "[e]ach case raising a Fourth Amendment issue be judged on its own facts"[70] by examining the "totality of the circumstances."[71] The reviewing court thus determines whether, considering all of the relevant facts surrounding the detention, the suspect's behavior could have led the officer to reasonably believe the suspect was involved in criminal activity. The court must consider these facts "based upon the fair inferences in light of the agent's experience."[72]

The Supreme Court has established guidelines for determining when the point of seizure occurs. A consensual encounter does not convert to an involuntary detention unless the officer infringes upon the liberty of the individual through the use of coercive behavior. Such behavior includes the "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[73] An encounter may also become involuntary when officers communicate to the individual their

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[68] *See* Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 215 (1984).

[69] In Florida v. Royer, 460 U.S. 491 (1983), the Court stated:

> We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

Id. at 506-07; *see also* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion) (rejecting any such litmus-paper test).

[70] United States v. McCaleb, 552 F.2d 717, 721 (6th Cir. 1977).

[71] United States v. Cortez, 449 U.S. 411, 417-18 (1981); *see also* United States v. Caicedo, 85 F.3d 1184, 1189 (6th Cir. 1996) (noting that "[t]here is no single factor that is common to all drug interdiction encounters at locations such as airports" and that "very small differences in scenarios can lead to opposite conclusions" regarding whether reasonable suspicion existed under the circumstances).

[72] Terry v. Ohio, 392 U.S. 1, 30 (1968); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975).

[73] United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion). *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 7 (1989) (defendant was seized as a matter of law when the officer grabbed his arm and moved him from the street back onto the sidewalk); United States v. White, 890 F.2d 1413, 1416 (8th Cir. 1989) (holding that the presence of three officers, two of whom blocked the defendant's only means of walking away by standing in front of him, constituted a seziure).

suspicion that he is carrying narcotics, since a reasonable person would not feel free to leave after that point.[74] Holding the individual's identification and airline ticket throughout the encounter may constitute a seizure, since the individual must choose between forfeiting those items or remaining at the scene.[75] Although officers often inform the suspect that he may choose to leave, such statements will not cure the use of coercive behavior.[76]

3. The Reasonable Suspicion Standard: Justifying the Involuntary Detention of Suspects and Their Luggage

In 1968, the landmark Supreme Court case of *Terry v. Ohio*[77] formulated an exception to the well-delineated rule that an officer could not lawfully detain a suspect without probable cause to believe that person had committed or was committing a crime. The *Terry* decision authorized a law enforcement official to stop and briefly detain a person for investigative purposes if the officer possesses "reasonable suspicion" supported by "articulable facts" that "criminal activity may be afoot,"[78] even in the absence of probable cause to arrest. The Court has described the rationale of the *Terry* exception as follows:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual,

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[74] Particularized suspicion, whether explicit or implicit, will often effect a seizure. *Compare* United States v. Millan, 912 F.2d 1014, 1015 (8th Cir. 1990) (encounter became an involuntary detention when the agent displayed his badge a second time, told the suspect he worked for the DEA, and asked him if he possessed any drugs) *and* United States v. Sadosky, 732 F.2d 1388, 1392-93 (8th Cir.) (encounter became a detention when the officer revealed he was investigating possible drug violations and wanted to question the defendant due to his unusual behavior), *cert. denied*, 469 U.S. 884 (1984) *with* United States v. Nunley, 873 F.2d 182, 184-85 (8th Cir. 1989) (encounter became a seizure when the agent merely mentioned he was stationed in the airport to curb the flow of narcotics). *But see* Florida v. Rodriguez, 469 U.S. 1, 4-6 (1984) (per curiam) (merely displaying a law enforcement badge will not convert a consensual encounter into a seizure).

[75] *See* Florida v. Royer, 460 U.S. 491, 503-04 n.9 (1983); United States v. Cordell, 723 F.2d 1283, 1285 (7th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984); *cf.* United States v. Campbell, 843 F.2d 1089, 1093 (8th Cir. 1988) (questioning the significance of the officers' retention of the defendant's one-way ticket and identification card due the facts that the ticket was useless for further travel and that the identification was a state-issued card, not a driver's license).

[76] *See Nunley*, 873 F.2d at 184-85 (holding that the agent's statements, by indicating the suspect was the target of a particularized investigation, effected a seizure despite his assurances that she was free to leave); *Sadosky*, 732 F.2d at 1392-93 (similar circumstances and conclusion).

[77] 392 U.S. 1 (1968).

[78] *Id.* at 27. The Court explicitly prohibited detentions based on nothing more than an "inchoate and unparticularized suspicion or 'hunch.'" *Id.*

> in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.[79]

A temporary, involuntary detention occurring in the typical airport drug courier profile case resembles a *Terry* stop for Fourth Amendment purposes. Therefore, should the court conclude that the defendant had been seized as a matter of law, it must determine if the seizure was warranted by reasonable suspicion that the individual was involved in criminal activity.[80]

The Supreme Court held in *United States v. Place*[81] that the reasonable suspicion standard also governs the seizure of luggage, stating:

> [W]hen an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.[82]

Once satisfied that reasonable suspicion exists, the agent will detain the luggage, inform the suspect that he remains free to leave, and furnish a receipt for the baggage while recording the suspect's address and telephone number.[83] Since probable cause to search the luggage does not yet exist, the officer will then arrange for a drug-detecting dog to perform a "canine sniff" on the luggage.

4. Attempts to Thwart the Canine Sniff

The exceptional olfactory sense of certain canine breeds makes the dog an excellent law enforcement tool for the detection of narcotics.[84] Specially-trained dogs can detect the presence of narcotics concealed in a piece of luggage without requiring the officer to open it. The officer will walk the canine along the luggage and allow the dog to sniff around it.[85] If the dog "alerts" to the bag-

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[79] Adams v. Williams, 407 U.S. 143, 145-46 (1972); *see also* United States v. Sokolow, 490 U.S. 1, 12-13 (1989) (Marshall, J., dissenting) (quoting *Terry*, 392 U.S. at 20) ("The rationale for permitting brief, warrantless seizures [based upon reasonable suspicion] is, after all, that it is impractical to demand strict compliance with the Fourth Amendment's ordinary probable cause requirement in the face of ongoing or imminent criminal activity demanding 'swift action predicated upon on-the-spot observations of the officer on the beat.'"); *Terry*, 392 U.S. at 20-22.

[80] Should the court find that the officers lacked reasonable suspicion to detain the individual, evidence gained from the search and seizure in the absence of valid consent will often be suppressed and thus inadmissible at trial.

[81] 462 U.S. 696 (1983).

[82] *Id.* at 706.

[83] *See, e.g.*, United States v. Odum, 72 F.3d 1279, 1281 (7th Cir. 1995).

[84] *See* Sandra Guerra, *Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. CRIM. L. & CRIMINOLOGY 1109 (1992). German Shephards and Doberman Pinschers are the most widely used breeds. *See id.* at 1154.

[85] Patrolman Paul MacDonald, Barnstable, Mass. Police Dep't, Lecture at Boston Univ. School of Law (Oct. 25, 1994) [hereinafter MacDonald Lecture]. In order to bolster the

gage[86] — thereby indicating the presence of narcotics — the circumstances may establish probable cause to obtain a search warrant.[87]

Drug couriers attempt to thwart the canine sniff by employing techniques thought to obscure the scent of narcotics. The drug courier usually conceals the narcotics in hard-sided luggage,[88] and often packs them among substances that have particularly strong scents, such as coffee grounds, perfume or moth balls.[89] The drug-detecting capabilities of these canines are so exceptional, however, that these ploys almost always fail.[90]

The Supreme Court has held that a canine sniff of luggage does not constitute a search within the meaning of the Fourth Amendment.[91] In *Place*, the Court

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reliability of the canine sniff, the officer will often place the suspect's bag among several other pieces of luggage and walk the dog along the entire line of baggage. *Id.*

Since there is no right of privacy to a scent, *see infra* notes 91-95 and accompanying text, an officer could lawfully walk the dog around the suspect in order to smell his person if the suspect had refused to consent to a personal search. Due to the chance that the canine may bite the individual, however, law enforcement agencies are generally reluctant to use dogs in such a manner. MacDonald Lecture, *supra*.

[86] A drug-sniffing canine will alert to baggage by scratching or biting at it or by merely sitting down, depending on the type of training the dog has received. MacDonald Lecture, *supra* note 85.

[87] Unless exigent circumstances exist, law enforcement officials must obtain a search warrant to open a suspect's luggage unless the person consents to a search. *See* United States v. Place, 462 U.S. 696, 701 (1983); Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion).

[88] *See* United States v. Lui, 941 F.2d 844, 846 (9th Cir. 1991) (referring to the testimony of a Special Agent of the United States Customs Service, who stated that drug couriers use hard-sided luggage 80% of the time).

[89] *See, e.g.*, United States v. Kennedy, 61 F.3d 494, 496 (6th Cir. 1995) (defendant placed narcotics among clothes sprayed with perfume); United States v. Bueno, 21 F.3d 120, 123 (6th Cir. 1994) (defendant had wrapped cocaine in cellophane and placed it among coffee grounds); United States v. Ferguson, 935 F.2d 1518, 1521 (8th Cir. 1991) (defendant attempted to use moth balls to conceal scent of cocaine); United States v. Bronstein, 521 F.2d 459, 461, 463 (2d Cir. 1975) (officers found marijuana packed among moth balls); *see also* United States v. Delaney, 52 F.3d 182, 185 (8th Cir. 1995) (defendant placed crack cocaine in box of detergent); United States v. Buchanan, 985 F.2d 1372, 1375 (8th Cir. 1993) (defendant attempted to conceal cocaine in a box of laundry detergent); United States v. Foster, 939 F.2d 445, 449 (7th Cir. 1991) (PCP and cocaine found in a can containing talcum powder and packed among diapers); United States v. Loyd, 837 F. Supp. 922, 924 (N.D. Ill. 1993) (dog alerted to cocaine located in two suitcases containing fabric softener sheets); United States v. Abadia, 134 F.R.D. 263, 266 (E.D. Mo. 1990) (defendant placed cocaine in containers immersed in liquid hand soap and sprayed with perfume); MacDonald Lecture, *supra* note 85 (describing ploys used to conceal the scent of narcotics from canines, including one instance in which the courier packed cocaine in a large container of popcorn kernels).

[90] MacDonald Lecture, *supra* note 85.

[91] *See* United States v. Place, 462 U.S. 696, 707 (1983). Prior to *Place*, lower federal courts had often reached the same conclusion. *See, e.g.*, United States v. Goldstein, 635

considered the canine sniff to be "*sui generis*,"[92] reasoning that since such a technique discloses only the presence or absence of illegal narcotics and does not expose other items to public view, a dog sniff does not subject the owner to the same embarrassment and inconvenience that often accompany other searches.[93] Concluding that a canine sniff is therefore much less intrusive than a typical search,[94] the Court endorsed its use by stating, "We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[95] The canine sniff is consistent with the Supreme Court's suggestion that officers use the least intrusive means possible to verify or dispel suspicion that a particular person is carrying narcotics.[96]

IV. JUDICIAL SCRUTINY OF THE DRUG COURIER PROFILE

A. *The Supreme Court of the United States*

The Supreme Court has consistently held that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[97] The Court has often acknowledged the need to thwart drug

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F.2d 356, 361 (5th Cir.) (since "the passenger's reasonable expectation of privacy does not extend to the airspace surrounding the luggage," use of drug-detecting canines to sniff luggage constitutes "neither a search nor a seizure under the Fourth Amendment"), *cert. denied*, 452 U.S. 962 (1981); *See* United States v. Klein, 626 F.2d 22, 26-27 (7th Cir. 1980); United States v. Sullivan, 625 F.2d 4, 13 (4th Cir. 1980); United States v. Bronstein, 521 F.2d 459, 461 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

Since a dog sniff does not constitute a search for Fourth Amendment purposes, an officer does not need reasonable suspicion to subject luggage to inspection by a drug-detecting canine once the owner has checked it with the airline. United States v. Goldstein, 635 F.2d 356, 361-62 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981). Once an agent determines that a particular subject matches the drug courier profile and is likely trafficking narcotics, he may temporarily seize any baggage the individual has checked. *See* United States v. Riley, 927 F.2d 1045, 1047 (8th Cir. 1991) (upholding such a seizure and subsequent dog sniff based on the exhibition of profile characteristics before the defendant's flight left Los Angeles). In the majority of drug courier cases, however, the defendant does not check his luggage or the officers do not suspect the defendant until he has arrived from the source city and claimed his luggage. Thus law enforcement officials rarely have an opportunity to submit baggage to a canine sniff before they encounter the defendant.

[92] *Place*, 462 U.S. at 707.

[93] *See id.*

[94] *See id.*

[95] *Id.*

[96] *See infra* note 123.

[97] Delaware v. Prouse, 440 U.S. 648, 654 (1979); *see also* Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981); Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring) ("[The] key principle of the Fourth Amendment is reasonableness — the balancing of competing interests.").

trafficking as such a warranted objective,[98] stating that "[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels."[99]

The Court has generally approved of using the drug courier profile to identify suspects, provided that innocent travelers are not routinely exposed to the chance that they will be stopped. As Justice Rehnquist stated, "sheer logic dictates that where certain characteristics repeatedly are found among drug smugglers, the existence of those characteristics in a particular case is to be considered accordingly in determining whether there are grounds to believe that further investigation is appropriate."[100] Much of the debate among the Justices, however, has concerned the issue of which circumstances may satisfy reasonable suspicion when law enforcement officials detain suspects using the drug courier profile.

1. The Original Supreme Court Drug Courier Profile Case: *United States v. Mendenhall*

The Supreme Court first examined the use of the drug courier profile in 1980 in *United States v. Mendenhall*.[101] DEA agents stationed at the Detroit Metropolitan Airport spotted defendant Mendenhall as the last passenger to disembark a flight from Los Angeles, which the DEA considers a source city for much of the heroin brought into Detroit.[102] Their suspicions were further aroused when Mendenhall appeared very nervous and "completely scanned the whole area where [the agents] were standing."[103] She also did not claim any luggage and had changed airlines for her departure from Detroit.

The agents approached the defendant and requested to see her identification and plane ticket. When the agents noticed that different names appeared on her driver's license and ticket, Mendenhall became extremely nervous and replied that she "just felt like using that name."[104] She also became extremely nervous at that point. The agents then asked Mendenhall to accompany them to the DEA office, and a subsequent search revealed cocaine.

By a five to four vote, the Supreme Court held that the initial stop did not constitute an unlawful seizure under Fourth Amendment analysis.[105] Justice Stewart and Justice Rehnquist did not reach the issue of whether the officers had reasonable suspicion to detain Mendenhall, finding that the defendant had not

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[98] *See* Florida v. Royer, 460 U.S. 491, 498-99 (1983) (plurality opinion) (the fact that the public interest involved is the suppression of illegal transactions in drugs warrants application of the reasonable suspicion standard to temporary detention).

[99] United States v. Place, 462 U.S. 696, 704 (1983).

[100] *Royer*, 460 U.S. at 525 (Rehnquist, J., dissenting).

[101] 446 U.S. 544 (1980) (plurality opinion).

[102] *See id.* at 547 n.1.

[103] *Id.*

[104] *Id.* at 548.

[105] *See id.* at 555. Justice Stewart wrote the plurality opinion.

been seized prior to her arrest.[106] Justice Powell, Justice Blackmun and Chief Justice Burger believed a *Terry* stop occurred, and that the profile characteristics exhibited by the defendant established reasonable suspicion to justify the detention.[107] The four dissenters — Justices White, Marshall, Brennan and Stevens — believed that the officers' actions prior to the arrest constituted a seizure that failed to satisfy the reasonable suspicion standard.[108]

With only seven Justices addressing the issue of reasonable suspicion, the *Mendenhall* Court failed to articulate the role of the drug courier profile and whether its use could justify an investigative stop. The failure of five Justices to agree upon the key issue of the case — whether reasonable suspicion existed under the circumstances — meant not only that the Court failed to establish precedent,[109] but that the decision offered little guidance to lower federal courts.[110]

2. Limited Progress: *Reid v. Georgia*

One month after deciding *Mendenhall*, the Supreme Court again addressed the issue of drug courier profiles in *Reid v. Georgia*.[111] A DEA agent stationed at the Atlanta main airport observed defendant Reid disembark a flight from Fort Lauderdale, which the agency considers to be a source city for cocaine.[112] The arrival occurred early in the morning, when few law enforcement personnel were known to be on duty.[113] Carrying only a shoulder bag, the defendant proceeded through the concourse and past the baggage claim area. The agent noticed Reid occasionally glance at another man walking behind him, separated by several other passengers. The other man carried a bag similar to the one belonging to the defendant. The agent suspected that Reid was attempting to hide the fact that they were traveling together. Upon reaching the main lobby of the terminal, the two suspects spoke briefly and left the terminal together.

The agent approached the two men outside, identified himself as a federal narcotics officer, and asked to see their airline tickets and identification. The tickets indicated that Reid had purchased both of them, and that the two men had remained in Fort Lauderdale for only one day. Both suspects became nervous during this encounter. After the agent asked if they would consent to a search of their persons and luggage, Reid attempted to flee and abandoned his bag. A subsequent search of the bag revealed cocaine.

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[106] *See id.* at 555-57.

[107] *See id.* at 560-65.

[108] *See id.* at 566-73.

[109] *See* United States v. Forero-Rincon, 626 F.2d 218, 219 n.3 (2d Cir. 1980) ("*Mendenhall* does not control the case before us, for *Mendenhall* has no majority opinion on the question of the reasonableness of the suspicion prompting the stop."); *see also* United States v. Saperstein, 723 F.2d 1221, 1224, 1225 (6th Cir. 1983) (characterizing *Mendenhall* as a "fractured opinion" which provided "little binding precedent").

[110] United States v. Ramirez-Cifuentes, 682 F.2d 337, 344 (2d Cir. 1982).

[111] 448 U.S. 438 (1980) (per curiam).

[112] *See id.* at 441.

[113] *See id.*

Considering that Reid had arrived from Fort Lauderdale on an early morning flight, carried only a shoulder bag, and attempted to conceal his association with his accomplice, the Supreme Court held that "the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances."[114] A seven to one majority[115] found that the first three characteristics "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."[116] The Court also ruled that the agent's suspicion that Reid was trying to conceal his acquaintance with the other traveler was more of "an 'inchoate and unparticularized suspicion or hunch' than a fair inference in the light of [the agent's] experience."[117] The Court considered the only behavior indicative of criminal activity to be the fact that Reid occasionally looked back at his accomplice, which the Court ruled could not provide the sole basis to stop and detain the defendants.[118]

Reid v. Georgia thus established that manifestation of profile characteristics alone can never automatically justify a temporary detention.[119] The Court, however, failed to further articulate the significance of the drug courier profile to a determination of reasonable suspicion.[120]

3. Further Development: *Florida v. Royer*

The 1983 case of *Florida v. Royer*[121] afforded the Court a third opportunity to examine an arrest resulting from use of the drug courier profile. Officers of the Dade County Public Safety Department stationed in Miami International Airport observed defendant Royer, appearing pale and nervous while looking around the terminal, purchase a one-way ticket to New York City with a large number of bills. The officers' suspicions were further alerted by the fact that Royer was carrying luggage that appeared to be heavy, had written only his name and destination on the luggage identification tag rather than including his full address,

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[114] *Id.* In so holding, the Court reversed the decision of the Georgia Court of Appeals, which held that reasonable suspicion to detain the individuals existed under the circumstances. *See* State v. Reid, 255 S.E.2d 71, 72 (Ga. App. 1979), *rev'd*, 448 U.S. 438 (1980).

[115] Only Justice Rehnquist dissented.

[116] *Reid*, 448 U.S. at 441.

[117] *Id.* (citation omitted).

[118] *See id.*

[119] *See* Florida v. Royer, 460 U.S. 491, 525 (1983) (Rehnquist, J., dissenting) (stating the *Reid* decision established that "conformity with certain aspects of the 'profile' does not automatically create a particularized suspicion which will justify an investigatory stop").

[120] *See* United States v. Saperstein, 723 F.2d 1221, 1224 (6th Cir. 1983) (the *Reid* decision provided "very little substantive analysis"); United States v. Ramirez-Cifuentes, 682 F.2d 337, 342 (2d Cir. 1982).

[121] 460 U.S. 491 (1983) (plurality opinion).

was casually dressed, and appeared to be between the ages of twenty-five and thirty-five years old. The agents approached Royer, identified themselves as police officers, and asked if he had a moment to speak with them. Royer agreed, and complied with the agents' subsequent request to produce his airline ticket and identification. The name on the ticket and luggage tags did not match that on the driver's license, and when asked about this discrepancy, Royer replied that a friend had made the ticket reservation. This explanation failed to dispel the suspicions of the officers, who noticed that the defendant had become increasingly nervous during this conversation. When asked if he would consent to a search of his luggage, Royer unlocked one suitcase and allowed an officer to open the other, revealing a total of sixty-five pounds of marijuana.

Although the plurality[122] held that the officers had reasonable suspicion to believe the defendant's luggage contained narcotics,[123] it concluded that not until the officers learned the defendant was traveling under an alias did the circumstances justify the temporary detention.[124] In his concurring opinion, Justice Brennan stated that whether "considered individually or collectively, [the facts of this case] are perfectly consistent with innocent behavior and cannot possibly give rise to any inference supporting a reasonable suspicion of criminal activity."[125]

Among the dissenters, Justice Blackmun believed that due to the "suspicious circumstances they had noted . . . the officers' conduct was fully supported by reasonable suspicion."[126] Justice Rehnquist, the lone dissenter in *Reid*, criticized the plurality's endorsement of a bright-line rule establishing that conformity with a drug courier profile cannot provide the basis for reasonable suspicion.[127] Rehn-

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[122] Justice White wrote the plurality opinion, in which Justice Marshall, Justice Powell, and Justice Stevens joined.

[123] *Royer*, 460 U.S. at 502 ("[The officers had] adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention."). The Court also stated that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.* at 500. As the Court later noted, this statement concerned the length of the investigative stop, not whether the police could have used less intrusive means to verify their suspicions before approaching the suspect. *See* United States v. Sokolow, 490 U.S. 1, 11 (1989) ("The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decisions. . . .").

[124] *See Royer*, 460 U.S. at 507.

[125] *Id.* at 512 (Brennan, J., concurring).

[126] *Id.* at 516 (Blackmun, J., dissenting).

[127] *See id.* at 525 n.6 (Rehnquist, J., dissenting) (referring to the rule established in State v. Royer, 389 So. 2d 1007, 1017 n.6 (Fla. 3d Dist. Ct. App. 1979), *aff'd*, 460 U.S. 491 (1983)).

quist argued that *Mendenhall*

> made it clear that a police officer is entitled to assess the totality of the circumstances in the light of his own training and experience and that instruction on a drug courier profile would be a part of his accumulated knowledge. This process is not amenable to bright-line rules such as the Florida court tried to establish. We are not dealing . . . with hard certainties, but with probabilities.[128]

Rehnquist also noted that the profile is "not intended to provide a mathematical formula that automatically establishes grounds for a belief that criminal activity is afoot."[129]

4. The Basis for Modern Drug Courier Profile Analysis: *United States v. Sokolow*

Chief Justice Rehnquist's view eventually prevailed in the 1989 case of *United States v. Sokolow*.[130] Defendant Andrew Sokolow purchased two round-trip tickets from Honolulu to Miami, a source city for drugs.[131] Accompanied by a woman, Sokolow gave his name as Andrew Kray and sought to depart on a flight leaving later that day. The ticket agent became suspicious and informed an officer of the Honolulu Police Department that Sokolow had presented a roll of twenty-dollar bills, which appeared to contain a total of approximately $4000, and paid $2100 cash for the tickets. The officer also learned that Sokolow seemed nervous during the purchase, appeared to be young, was dressed in a black jumpsuit and wore gold jewelry, and did not check the four pieces of luggage he and his companion were carrying. The officer checked the telephone number Sokolow had given the ticket agent, and although he recognized Sokolow's voice on the answering machine, he discovered that number had been subscribed to one Karl Herman.[132]

The officers' suspicions were further aroused once they learned that Sokolow had departed on July 22 and booked his return flight for July 25; he would thus visit Miami for only forty-eight hours, even though a round-trip flight from Honolulu to Miami takes twenty hours. The Honolulu Police Department notified the DEA in Los Angeles, where the flight was scheduled to make a stopover. DEA agents observed Sokolow during the layover appearing very nervous while scanning the waiting area. When the defendant and his companion re-

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[128] *Id.* at 527 n.6 (Rehnquist, J., dissenting).

[129] *Id.* at 526 n.6 (Rehnquist, J., dissenting).

[130] 490 U.S. 1 (1989).

[131] *See* United States v. Sokolow, 831 F.2d 1413, 1417 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989).

[132] Officials later learned that Karl Herman was the defendant's roommate, although at the time of the initial investigation the officer was not aware of this fact. The officer thus thought Sokolow's real name was Karl Herman, and since he was traveling under the name Andrew Kray, believed he was using an alias. The Supreme Court held this belief was reasonable in light of the facts. *See Sokolow*, 490 U.S. at 9.

turned to Honolulu, four DEA agents approached them as part of an investigatory stop. When asked for his identification and airline ticket, Sokolow replied that he had neither. He explained that his last name was Sokolow, and that he chose to travel under his mother's maiden name, Kray. The agents led both individuals to the DEA office located within the airport. After two drug-sniffing dogs alerted to another piece of the defendant's luggage, the agents obtained a warrant and the subsequent search revealed more than a kilogram of cocaine.

After the United States District Court for Hawaii denied the defendant's motion to suppress the cocaine, the Court of Appeals for the Ninth Circuit reversed and held that the agents lacked reasonable suspicion to stop Sokolow.[133] The Ninth Circuit established a two-prong test that divided drug courier profile characteristics into two categories. The first consisted of behavior indicating "ongoing criminal activity," such as use of an alias, scanning the area as if concerned with surveillance, or evasive movement through the airport.[134] The court of appeals stated that one such factor must always be present to satisfy reasonable suspicion.[135] The court placed in the second category "personal characteristics" exhibited by drug traffickers, such as nervousness, refusal to check luggage, type of attire, paying for tickets with cash, and traveling to a source city for a short period of time.[136] Concluding that these traits are "shared by drug couriers and the public at large,"[137] the court ruled they are relevant to a determination of reasonable suspicion only if the government can also show the presence of a factor placed in the first category.[138] Concluding that no evidence of ongoing criminal activity existed in this case, the Ninth Circuit held that the DEA agents lacked reasonable suspicion to detain Sokolow.[139]

Led by Chief Justice Rehnquist,[140] the Supreme Court rejected the Ninth Circuit's rigid two-part test and concluded that the factors in question provided the agents with reasonable suspicion to believe Sokolow was trafficking narcotics.[141] Favoring a totality of the circumstances approach, the majority indicated its disfavor of a bright-line rule and objected to the separation of characteristics into

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[133] *See Sokolow*, 831 F.2d at 1423-24. This marked the second decision issued by the court of appeals on this case; the court had earlier reversed the District Court on other grounds. *See* United States v. Sokolow, 808 F.2d 1366, *vacated*, 831 F.2d 1413 (9th Cir. 1987). The second decision resulted from the government's petition for rehearing, which claimed the court had erred in separately considering each of the facts known to the agents, rather than examining the totality of the circumstances. *See Sokolow*, 490 U.S. at 6 n.2.

[134] *See Sokolow*, 831 F.2d at 1419-20.

[135] *See id.* at 1422-23.

[136] *See id.* at 1420.

[137] *Id.*

[138] *See id.* at 1422-23.

[139] *See id.* at 1422-24.

[140] Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy joined in the majority opinion.

[141] *See* United States v. Sokolow, 490 U.S. 1 (1989).

categories.[142]

Examining some of the factors exhibited by Sokolow separately,[143] Chief Justice Rehnquist considered the payment of $2100 in cash to be "out of the ordinary" and decided it was "even more out of the ordinary" to carry a roll of twenty-dollar bills containing such a large sum of money.[144] The Chief Justice also determined that Sokolow's unusual itinerary could have contributed to reasonable suspicion, as could the belief of the agents that he was traveling under an alias.[145] The majority recognized that although each of these factors did not by itself indicate the presence of criminal activity, the facts satisfied the reasonable suspicion standard when considered under the totality of the circumstances approach.[146]

Addressing the issue of the drug courier profile, Rehnquist stated:

> We do not agree with respondent that our analysis is somehow changed by the agents' belief that his behavior was consistent with one of the DEA's "drug courier profiles." A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent.[147]

The *Sokolow* decision thus indicates the Supreme Court's approval of the drug courier profile by allowing courts to take into account behavior included in the profile when reviewing the totality of the circumstances. The Court, however, merely stated that the inclusion of specific characteristics in the drug courier profile does not establish a disadvantage to the prosecution; the Court declined

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[142] *See id.* at 8. This conclusion resembled Judge Wiggins' dissenting opinion in the second Ninth Circuit decision, which criticized the two-part test as "overly mechanistic" and "contrary to the case-by case determination of reasonable articulable suspicion based on all the facts." *Sokolow*, 831 F.2d at 1426 (Wiggins, J., dissenting).

[143] Chief Justice Rehnquist did so in order to determine if each element could possibly contribute to the determination of reasonable suspicion. Justice Marshall also scrutinized each factor separately in his dissent, although by erroneously focusing on whether possible innocent explanations for each type of behavior may exist, he concluded that the defendant's behavior produced no evidence of illegal activity. *See Sokolow*, 490 U.S. at 13-17 (Marshall, J., dissenting).

[144] *Id.* at 8, 9. The Ninth Circuit had also noted that innocent travelers do not carry thousands of dollars in cash. *See Sokolow*, 831 F.2d at 1427-28.

[145] *See Sokolow*, 490 U.S. at 9.

[146] *See id.*

[147] *Id.* at 10. Chief Justice Rehnquist applied the same principle he endorsed in *Florida v. Royer*, in which he stated that "simply because these characteristics are accumulated in a 'profile,' they are not to be given less weight in assessing whether a suspicion is well founded." 460 U.S. 491, 526 n.6 (1983) (Rehnquist, J., dissenting). Lower federal courts have often shared this view. *See, e.g.*, United States v. Gonzalez, 842 F.2d 748, 753 n.2 (5th Cir. 1988) ("[A] court should not downgrade the significance of a particular factor merely because it appears in the profile."); United States v. Berry, 670 F.2d 583, 601 (5th Cir. Unit B 1982).

to articulate that this should enhance the significance of the characteristics even though the DEA has based their inclusion on the expertise of hundreds of law enforcement officers. Since the DEA includes certain behavioral traits in the profile due to their consistent emergence among the behavior of known drug traffickers,[148] this fact supports the contention that the exhibition of profile characteristics may often provide reasonable suspicion of illegal activity.

United States v. Sokolow indicates the Court's disdain for the use of bright-line rules in determining whether reasonable suspicion exists, a position which has drawn criticism from those who believe the decision provides little guidance for other courts.[149] The Court, however, properly recognized the necessity of employing the totality of the circumstances approach, which is warranted due to the differences in degree of many of the characteristics that make up the profile. For example, it would be more relevant that a suspect appeared pale, sweated profusely, and tapped his foot continuously than if he merely seemed nervous or trembled slightly. Paying for a plane ticket twenty minutes before departure warrants greater suspicion than a purchase twenty-four hours prior to the flight. Therefore, bright-line rules establishing specific combinations of characteristics necessary to justify a detention not only contradict the well-accepted method of examining each case on its facts, but would infringe upon the rights of innocent individuals who manifest subtle exhibition of characteristics.[150] The totality of the circumstances standard thus protects the innocent while providing the means to convict the guilty.

B. *Supreme Court Approval and Criticism of the Drug Courier Profile*

The drug courier profile has received far from unanimous endorsement by the Supreme Court. Chief Justice Rehnquist has favored use of the profile and lauds its success,[151] and Justice Powell has described the DEA's use of the profile as "a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution."[152] On the other hand, the profile has endured its share of judicial criticism. Justice Marshall, perhaps the profile's most ardent opponent, stated in his dissenting opinion in *Sokolow*:

> [A] law enforcement officer's 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," particularly in ambiguous or borderline

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[148] *See supra* note 22 and accompanying text.

[149] *See, e.g.*, Steven K. Bernstein, *Supreme Court Review: Fourth Amendment — Using the Drug Courier Profile to Fight the War on Drugs*, 80 J. CRIM. L. & CRIMINOLOGY 996, 1010 (1990) (stating that "lower courts will be left guessing as to what level of conduct would meet the 'reasonable suspicion' standard").

[150] *See Berry*, 670 F.2d at 599 ("[T]he mechanistic use of the profile by the courts without examining the totality of the circumstances could result in blanket approval of police seizures of innocent citizens.").

[151] *See* Florida v. Royer, 460 U.S. 491, 526 n.6 (1983) (Rehnquist, J., dissenting).

[152] United States v. Mendenhall, 446 U.S. 544, 562 (1980) (Powell, J., concurring).

> cases. Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention.[153]

In an oft-cited passage from the same dissenting opinion, Justice Marshall claimed the profile possesses a "chameleon-like way of adapting to any particular set of observations."[154] Though not as explicit as Justice Marshall, Justice Brennan has generally expressed the same views as his colleague.[155]

C. *Drug Courier Profile Analysis by Lower Federal Courts Since* United States v. Sokolow

Federal circuit and district courts have rarely criticized the drug courier profile. The Court of Appeals for the Fifth Circuit has praised the profile as a "valuable administrative tool in guiding law enforcement officers toward individuals on whom the officers should focus their attention in order to determine whether there is a basis for a specific and articulable suspicion that the particular individual is smuggling drugs."[156] The Sixth Circuit considers the profile to be "a lawful starting point for police investigations."[157]

Lower federal courts have, however, occasionally misapplied the standards governing airport stops as established by the Supreme Court. Common errors include the formulation of hypothetical innocent explanations for certain types of profile behavior and emphasizing that the defendant displayed behavior inconsistent with that of the typical drug courier.

The 1995 case of *United States v. Lambert*[158] demonstrates the commission of both of these errors. In *Lambert*, the Tenth Circuit concluded that the officers lacked reasonable suspicion to believe the defendant was carrying narcotics, notwithstanding his exhibition of seven profile characteristics.[159] The agents knew Lambert had used cash to purchase a one-way ticket from Los Angeles — a source city for drugs — to Wichita, Kansas shortly before departure. The defendant carried only one piece of luggage, appeared nervous, and attempted to leave the airport quickly.

The court of appeals erroneously ruled that "[a]ll of this is perfectly consistent with innocent behavior and thus, raises very little suspicion."[160] By offering explanations why an innocent traveler might be nervous and seek to leave the

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[153] United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (citation omitted). Justice Brennan joined in this dissent.

[154] *Id.* (Marshall, J., dissenting) (quoting United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989)). Other courts and commentators have often alluded to this argument in asserting similar opinions. *See infra* note 191 and accompanying text.

[155] *See Royer*, 460 U.S. at 512 (Brennan, J., concurring).

[156] United States v. Berry, 670 F.2d 583, 600 n.21 (5th Cir. Unit B 1982).

[157] United States v. Respress, 9 F.3d 483, 484 n.1 (6th Cir. 1993).

[158] 46 F.3d 1064 (10th Cir. 1995).

[159] *See id.* at 1070.

[160] *Id.*

airport quickly,[161] the court failed to determine whether each characteristic in light of the circumstances could possibly lead the officer to conclude the defendant was carrying narcotics; instead, the court erroneously focused on whether innocent reasons could hypothetically justify the defendant's behavior.[162] The Tenth Circuit also inexplicably considered relevant the fact that Lambert had not used an alias,[163] a trait which the Supreme Court has never deemed necessary to establish reasonable suspicion.[164] Rather than examining the possible criminal aspects of the suspect's behavior and the totality of the circumstances, the court improperly justified its decision on circumstances that were *not* present.[165]

Proper application of the totality of the circumstances approach may be found in the 1992 case of *United States v. Withers*,[166] in which the Seventh Circuit found that reasonable suspicion existed on the basis of only four types of behavior.[167] After her arrival from Miami, defendant Withers displayed several behavioral traits indicating nervousness while waiting for her luggage: she conspicuously paced back and forth, tapped her foot and constantly studied the actions of an airport security guard. She also exhibited trembling, paleness in the face, and a visible rapid pulse in her neck. After officers stopped her and engaged in a

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[161] *See id.* at 1071 (noting that various "risks and time pressures" are associated with airline travel, and stating, "It is also a common experience to see people who, for whatever reason, desire to leave airport terminals as quickly as they can.").

[162] The Supreme Court has recognized that innocent travelers often display some drug courier profile characteristics, yet the Court has noted that the proper inquiry is whether, considering the circumstances as a whole, those characteristics would lead an officer to reasonably believe the suspect was transporting narcotics. *See supra* Section III(A)(2).

[163] The court stated, "[I]t is important to note that Mr. Lambert was not traveling under an alias but, in fact, had made his plane reservations in his name and identified his luggage with his correct name and address." *Lambert*, 46 F.3d at 1071.

[164] In fact, the Supreme Court explicitly rejected such a rigid requirement in *United States v. Sokolow* by ruling that any determination of whether reasonable suspicion existed must turn on the facts of the particular case; thus no particular combination of profile characteristics will automatically create reasonable suspicion. *See supra* notes 141-42, 148 and accompanying text.

[165] Several courts have committed similar errors by noting that the defendant displayed behavior inconsistent with the profile. For example, one Sixth Circuit judge stated that drug couriers typically purchase their tickets using an alias and emphasized that the defendant had bought the ticket in his own name. *See* United States v. Taylor, 956 F.2d 572, 586 n.10 (6th Cir.) (Keith, J., dissenting), *cert. denied*, 506 U.S. 952 (1992). The judge then stated, "Certainly, purchasing a ticket under one's legal name is uncharacteristic behavior for a drug courier. This casts further doubt not only on the officers' basis for stopping [the defendant], but also on the reliability of the drug courier profile." *Id.* Employing similar reasoning, two majority opinions — one from the Eighth Circuit and the other from the First Circuit — found relevant that the defendants had not used aliases and answered the officers' questions truthfully. *See* United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990); United States v. Berryman, 717 F.2d 651, 656 (1st Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

[166] 972 F.2d 837 (7th Cir. 1992).

[167] *See id.* at 843.

consensual interview, Withers gave suspicious answers regarding the nature of her stay in Miami. She first stated that she had stayed with friends in a condominium, then later said she had stayed in a hotel. The defendant consented to a search of her purse, but refused to grant permission to examine the garment bag. The agents detained the bag for a dog sniff, and a lawful search later revealed 500 grams of 95% pure cocaine.

Withers demonstrates the proper use of the totality of the circumstances approach. Although only four characteristics contributed to reasonable suspicion, the court correctly considered the degree of each. The behavioral traits exhibited by the defendant distinguished her from the population of innocent travelers, and reasonably led the officers to suspect she was transporting narcotics.

V. THE CREDIBILITY OF THE DRUG COURIER PROFILE: REFUTING CRITICISM BASED ON ERRONEOUS REASONING

A. *Erroneous Criticism of the Significance Attributed to Drug Courier Profile Characteristics*

Although case law demonstrates that the drug courier profile contains traits typical of narcotics trafficking,[168] critics of the profile assert otherwise. Several contend that "many of the profile characteristics . . . are equally applicable to innocent persons, [and therefore] use of the profile by reviewing courts could lead to approval of wholesale seizures of innocent citizens by police."[169] Critics advocating this view tend to examine each profile characteristic separately and formulate possible innocent explanations for each, leading to the erroneous con-

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[168] *Compare* Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 884 (1985) ("[M]ost of the drug courier profile characteristics appearing in the caselaw do not accurately describe the behaviors of drug couriers. . . .") *with* United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977) (citing the testimony of Special Agent Markonni that over a period of time, "certain characteristics were noted among the defendants" in airport drug trafficking cases which now constitute the drug courier profile) *and* Becton, *supra* note 60, at 426 (stating that the DEA assembled those characteristics most prevalent among narcotics traffickers into the drug courier profile).

[169] Bothwell v. State, 300 S.E.2d 126, 137 (Ga.) (Smith, J., dissenting), *cert. denied*, 463 U.S. 1210 (1983); Cloud, *supra* note 168, at 884 (quoting Justice Smith in *Bothwell*); *see also* United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983) (profiles are "prejudicial because of the potential they have for including innocent citizens as profiled drug couriers"); Guerra, *supra* note 84, at 1110 ("Since the vast majority of individuals investigated are law-abiding citizens, a large number of innocent people must be investigated in order to find a few drug traffickers."); Stephen E. Hall, *A Balancing Approach to the Constitutionality of Drug Courier Profiles*, 1993 U. ILL. L. REV. 1007, 1022 (1993); Jodi Sax, *Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard After* United States v. Sokolow, 25 LOY. L.A. L. REV. 321, 342 n.196, 344-45 (1991) (erroneously stating that certain profile characteristics, including paying for tickets with cash, "are *equally* displayed by the public at large") (emphasis added).

clusion that each trait does not distinguish those involved in criminal endeavors from the ordinary passenger population.[170]

Courts have often recognized that many of the characteristics that make up the drug courier profile, when considered individually, are facially innocent.[171] When determining whether reasonable suspicion existed, however, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."[172] Formulating hypothetical innocent explanations for the exhibition of profile characteristics ignores the possibility that each may indicate involvement in criminal activity. Such an approach thus disregards the totality of the facts of the case, which are essential to the determination of reasonable suspicion.[173] Courts must instead determine, taking into account the reasons offered by the DEA for its inclusion in the drug courier profile, whether each trait could possibly contribute to reasonable suspicion under the circumstances of the particular case. Examining the possible criminal aspects of certain types of behavior justifies the inclusion of characteristics that critics typically accord little or no weight, particularly arrival from a source city, unusual nervousness, and order of deplaning.

1. The Source City

Examining the frequency of characteristics appearing in drug courier profile cases identifies arrival from a source city as the most prevalent trait,[174] with

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[170] *See* United States v. White, 890 F.2d 1413, 1419-22 (8th Cir. 1989) (Magill, J., concurring), *cert. denied*, 498 U.S. 825 (1990).

[171] *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 9 (1989) ("Any one of these factors is not *by itself* proof of any illegal conduct and is quite consistent with innocent travel.") (emphasis added).

[172] *Id.* at 10 (quoting Illinois v. Gates, 462 U.S. 213, 243-44 n.13 (1983)). The Court in *Sokolow* examined prior decisions concerning the probable cause standard and found that contributing behavior exhibited by the defendant need not be unlawful. *Id.* The Court then determined that this principle applies equally well to the reasonable suspicion inquiry. *Id. See also* Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam) ("[T]here could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot."); Terry v. Ohio, 392 U.S. 1, 22 (1968) (a case involving "a series of acts, each of them perhaps innocent" when considered separately, "but which taken together warranted further investigation").

Terry, the original reasonable suspicion case, involved two defendants who repeatedly walked back and forth in front of a storefront while peering through its windows. *See id.* at 5-6. Although such behavior was not itself illegal, the Court ruled that it could have reasonably led the officer to conclude the defendant was "casing a job" in order to commit robbery in the near future. *See id.* at 8-10.

[173] *See* United States v. Sokolow, 808 F.2d 1366, 1373 (9th Cir.) (Wiggins, J., dissenting) ("The majority has decided there was not reasonable suspicion for a *Terry* stop by looking at each evidentiary factor discretely. We should view the whole mosaic rather than each tile."), *vacated*, 831 F.2d 1413 (9th Cir. 1987).

[174] *See* Cloud, *supra* note 168, at 897-98 (of 103 defendants involved in cases surveyed by the author, all but one arrived from a source city). This frequency may be attributed to

Miami, Fort Lauderdale, Los Angeles, and New York mentioned regularly. Inclusion of this characteristic in the drug courier profile has often invited criticism that law enforcement officials attach the label of source city to any major urban area in the United States.[175] This occasionally leads authorities to accord little or no weight to the arrival from such a city due to the fact that thousands of passengers depart from such areas each day.[176] The fact that narcotics trafficking originates in numerous major American cities, however, is merely an unfortunate consequence of the widespread prevalence of drugs in this country.[177] Traveling from any city that provides the rest of the nation with illegal narcotics deserves at least some weight, since a drug courier would be far more likely to travel from such an area than from a small, rural town, for example.[178]

2. Unusual Nervousness

Passengers exhibiting signs of extreme anxiety attract the suspicion of law enforcement personnel due to the fact that nervousness tends to expose a drug cou-

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the tendency of law enforcement officials to pay particular attention to individuals arriving from source cities, since flights from those areas are most likely to have a drug courier aboard.

[175] *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 16 (1989) (Marshall, J., dissenting) (determining that the testimony of DEA agents in prior cases demonstrates that virtually every major American city is considered a source or distribution city); United States v. Hooper, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting) ("[T]he government conceded at oral argument that a 'source city' for drug traffic was virtually any city with a major airport. . . .").

[176] *See* United States v. Place, 660 F.2d 44, 48 (2d Cir. 1981), *aff'd*, 462 U.S. 696 (1983); United States v. Andrews, 600 F.2d 563, 566-67 (6th Cir.) (travel from source city deemed not suspicious because "the probability that any given airplane passenger from the city is a drug courier is infinitesimally small," and stating that "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"), *cert. denied*, 444 U.S. 878 (1979); United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978) (giving "little weight" to the fact that the defendant arrived from Los Angeles); United States v. Scott, 545 F.2d 38, 40 n.2 (8th Cir. 1976) (traveling from Los Angeles held to be of "little or no probative value"), *cert. denied*, 429 U.S. 1066 (1977); *see also* Cloud, *supra* note 168, at 899 ("[I]f every area of the nation is suspect, then every air traveler is potentially a suspect merely by virtue of traveling between two locations. Such a result is patently absurd and constitutionally unacceptable."); *cf.* United States v. Bowles, 625 F.2d 526, 533 (Former 5th Cir. 1980) (rejecting the notion that travel from Los Angeles is an insignificant factor).

[177] In United States v. Pulvano, 629 F.2d 1151 (5th Cir. 1980), the testimony of a DEA agent revealed "the tragic fact that every major population center in this country has become a home for drug traffickers." *Id.* at 1155 n.1.

[178] *See* United States v. Sokolow, 831 F.2d 1413, 1423 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989) ("A traveler under an alias arriving from Miami may arouse a greater suspicion than a traveler under an alias arriving from Dubuque.").

rier's fear of apprehension.[179] Critics, however, discount its significance in establishing reasonable suspicion and argue that several legitimate explanations for anxiety may exist. Justice Marshall has stated that recent news accounts of airplane crashes and hijacking attempts may justify a passenger's nervousness.[180] Other judicial opinions have claimed that nervousness may result from the disorientation a passenger may experience upon arriving at an unfamiliar airport.[181] Other scholars have noted that one's fear of scheduling delays[182] may also cause anxiety, as might the possibility that one's luggage will be lost or damaged.[183] Agitation displayed during the police encounter, argue many critics, may merely represent the fear an innocent traveler would reasonably exhibit when approached by strangers identifying themselves as narcotics officers and asked questions indicating the person is a drug trafficking suspect.[184]

These arguments fail to consider that the requisite agitation to satisfy the drug courier profile is unusual nervousness beyond that displayed by the ordinary passenger,[185] rather than mere anxiety. Drug couriers tend to exhibit such extraordinary behavior as profuse sweating, paleness, extreme trembling, and excessive tapping of the foot or wringing of the hands.[186] Subtle or common manifestation

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[179] *See* Cloud, *supra* note 168, at 904 (conceding that nervousness exhibited by traffickers is "caused undoubtedly by a fear of detection"). One scholar has described nervousness as the "quintessential characteristic," noting that it has appeared in 90% of drug courier profile cases. Becton, *supra* note 60, at 431 & n.73.

[180] *See Sokolow*, 490 U.S. at 15 (Marshall, J., dissenting); *see also* United States v. Lambert, 46 F.3d 1064, 1071 (10th Cir. 1995); United States v. White, 890 F.2d 1413, 1418 (8th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990); United States v. Sokolow, 831 F.2d 1413, 1423 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989); United States v. Westerbann-Martinez, 435 F.2d 690, 699-700 (E.D.N.Y. 1977).

[181] *White*, 890 F.2d at 1418; *Westerbann-Martinez*, 435 F.2d at 699-700.

[182] *See Lambert*, 46 F.3d at 1070-71; *White*, 890 F.2d at 1418; *Sokolow*, 831 F.2d at 1423.

[183] *See White*, 890 F.2d at 1418.

[184] *See, e.g.*, Cloud, *supra* note 168, at 904; Peter S. Greenberg, *Drug Courier Profiles,* Mendenhall *and* Reid*: Analyzing Police Intrusions on Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49, 69 (1981); Guerra, *supra* note 84, at 1141.

[185] *See supra* text accompanying note 24.

[186] *See, e.g.*, United States v. Sanford, 658 F.2d 342, 345 (Former 5th Cir. 1981) ("[The defendant] appeared extremely nervous and concerned, and his hands were shaking. He exhibited behavior similar to that seen by [Special Agent] Markonni *in excess of a hundred times* when observing persons in similar situations when narcotics have been involved.") (emphasis added), *cert. denied*, 455 U.S. 991 (1982); *see also* United States v. Withers, 972 F.2d 837, 838-39 (7th Cir. 1992) (while waiting for her luggage, suspect paced back and forth, "anxiously" studied a uniformed security guard, had a rapid pulse visible in her neck, and "generally appear[ed] quite jittery"); United States v. Weaver, 966 F.2d 391, 393 (8th Cir. 1992) (defendant spoke in a rapid, unsteady voice, his hands shook, and he swayed as he conversed with the officer); *White*, 890 F.2d at 1418 (defendant tapped his foot and wrung his hands while waiting at the baggage claim area); United States v. Low, 887 F.2d 232, 234 (9th Cir. 1989) (suspect's hands and one of his legs shook and he was sweating during the voluntary interview).

of anxiety associated with the reasons cited by critics does not invite the same attention from law enforcement personnel, and thus will not contribute significantly, if at all, to a determination of reasonable suspicion.

Furthermore, although legitimate reasons for a person's nervousness may exist, they simply do not apply to the typical drug courier profile case. Once an individual has arrived at his destination, it is unlikely that his concern for delays or airline safety would translate into extreme nervousness.[187] The fact that many profile cases involve defendants whom the officers stopped following their arrival and as they proceeded to leave the airport refutes the characterization of unusual nervousness as a poor indicator of participation in criminal activity.

4. Order of Deplaning

Commentators have often criticized the significance the DEA attaches to the order in which passengers deplane, emphasizing that the DEA considers the acts of being among the first or last few to disembark to be suspicious.[188] These two characteristics are not contradictory, however, since both may reveal the drug courier's attempt to avoid detection.[189] By deplaning first, a narcotics trafficker may be able to expedite his exit from the airport. By disembarking last, he may avoid the suspicion of narcotics agents distracted by dozens of passengers exiting before him and may also gain a better view of their surveillance.

The Eighth Circuit has erroneously emphasized that the order in which a passenger deplanes depends on his seating assignment and amount of carry-on luggage.[190] This view ignores the fact that immediately following the landing, while innocent passengers arise from their seats and begin collecting their baggage, a

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[187] *See White*, 890 F.2d at 1421 n.4 (Magill, J., concurring).

[188] Justice Marshall cited several cases in his dissenting opinion in *Sokolow* which, he concluded, provide conflicting accounts of the characteristics agents deem suspicious. *See* United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (comparing United States v. Moore, 675 F.2d 802, 803 (6th Cir. 1982) (suspect was first passenger to deplane), *cert. denied*, 460 U.S. 1068 (1983) with United States v. Mendenhall, 446 U.S. 544, 548 (1980) (last to deplane) and United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980) (last to deplane)); *see also* United States v. Respress, 9 F.3d 483, 490 (6th Cir. 1993) (Jones, J., dissenting) (similar analysis and conclusion); Becton, *supra* note 60, at 443; Cloud, *supra* note 168, at 891 n.181.

[189] *See* United States v. Tate, 745 F. Supp. 352, 354 n.2 (W.D.N.C. 1990). In *Tate*, the magistrate presiding over the probable cause hearing rejected the use of order of deplaning as a profile trait, stating, "I don't ever want to hear another Agent come in here and tell me that the placement of a suspect at the front or the middle or the back of the plane is a drug courier profile statistic because . . . it's not." *Id.* The District Court for the Western District of North Carolina concluded that the magistrate apparently "believe[d] that the testimony from agents in the past that drug couriers have exited the plane in various locations has eviscerated the order of deplaning as a legitimate drug courier profile [trait]." *Id.* The court then stated that it did "not believe that there is any legal support for such a conclusion." *Id.*

[190] *See White*, 890 F.2d at 1414, 1418.

drug courier could quickly exit his seat and move towards the front, middle or rear of the plane.

B. *Erroneous Criticism of Seemingly Inconsistent Profile Characteristics: Ignoring the Need for Flexibility*

Alluding to Justice Marhsall's dissenting opinion in *Sokolow*, critics often argue that the drug courier profile contains inconsistent characteristics that give the profile a "chameleon-like" quality.[191] Besides emphasizing that the DEA suspects passengers who deplane first or last, critics note that the profile also considers suspicious walking very quickly or very slowly through the airport terminal,[192] and carrying no luggage or carrying numerous baggage onto the plane.[193] This has led one commentator to note:

> Given the plethora of profile characteristics that DEA agents mention in their testimony and that courts explicitly or implicitly find significant, a great risk arises: Rather than use the profile as a reliable guideline, agents may selectively modify the profile during the initial stop and thereafter customize it to fit any hapless traveler who had the misfortune to catch the agent's "trained eye." The multiplicity of inconsistent profile characteristics stands in contrast to the Supreme Court's characterization of the profile's use as well planned and highly specialized. This multiplicity of inconsistent characteristics strongly suggests that agents justify the great majority of airport drug courier stops retrospectively. Agents use what they learn after detaining an individual rather than match an individual to a preconceived, well-thought-out profile that operates as a reliable and accurate detection device.[194]

Such criticism fails to consider that drug couriers consistently change their procedures and modify their behavior to avoid detection; thus, as traffickers seek to adapt to the drug courier profile, the profile must adapt as well.[195] Were the

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[191] *See id.* (citing Justice Marshall and stating that "[t]he characteristics to which officers, and some courts, attach significance in defense of narcotics-related airport stops are disconcertingly interchangeable"), *cert. denied*, 498 U.S. 825 (1990); Bernstein, *supra* note 149, at 1010 (citing Justice Marshall and referring to the profile as an "amorphous set of characteristics . . . [which are] seemingly adapted to meet any particular situation"); Cloud, *supra* note 168, at 879 (also characterizing the profile as "chameleon-like, often chang[ing] from case to case to correspond with the facts of the individual defendant's behavior"); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 482 (1990) (quoting Justice Marshall and concluding that the profiles "are an object of ridicule").

[192] *See* Becton, *supra* note 60, at 441; Cloud, *supra* note 168, at 896.

[193] *See* United States v. Respress, 9 F.3d 483, 490 (6th Cir. 1993) (Jones, J., dissenting); Becton, *supra* note 60, at 442; Cloud, *supra* note 168, at 896.

[194] Becton, *supra* note 60, at 438 (citations omitted); *see also Respress*, 9 F.3d 483 at 490 (Jones, J., dissenting) (also criticizing the drug courier profile as too "malleable").

[195] *See* Karnes v. Srutski, 62 F.3d 485, 490 (6th Cir. 1995).

DEA to suspect only those passengers who sought to leave the terminal quickly, for example, drug traffickers would escape surveillance by simply delaying their departure. The key inquiry is not whether profile characteristics contradict each other, but whether each trait may distinguish the drug courier from the innocent traveler. Therefore, since both claiming no luggage and carrying numerous bags onto the plane are types of behavior uncommon among the ordinary passenger population yet typical of the drug trafficker, the fact that both traits appear in the profile is irrelevant.

C. *Characteristics and Behavior Significantly Indicative of Criminal Activity*

Although one could argue that the exhibition of any profile trait may have a legitimate explanation, some behavioral patterns — particularly the use of an alias and lying or giving suspicious answers to narcotics officers — distinctly manifest criminal activity when displayed in combination with several other profile characteristics. The fact that evidence of these characteristics often appears only during the consensual encounter underscores the importance of allowing law enforcement personnel to approach and question suspects willing to participate in the interview.

1. Use of an Alias

A discrepancy between the name listed on a suspect's airline ticket and that which appears on his identification often leads to the presumption that the passenger is traveling under an alias. The officer will usually allow the person to offer an explanation for the disparity. In response, a drug courier will often claim that another person made the reservation in his name.[196] Other explanations often do not appear plausible,[197] while failure to offer a reason may also contribute to the officer's suspicion. For example, in *United States v. Mendenhall*, the defendant's explanation that she "just felt like using" the name appearing on her ticket failed to dispel the officers' suspicions.[198]

Courts have properly accorded great weight to the use of an alias.[199] Although

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[196] *See, e.g.*, Florida v. Royer, 460 U.S. 491, 494 (1983) (plurality opinion) (suspect claimed a friend had made his airline reservations); United States v. Obasa, 15 F.3d 603, 604 (6th Cir. 1994) (same); United States v. Respress, 9 F.3d 483, 484 (6th Cir. 1993) (suspect claimed someone else had purchased his ticket); United States v. Elmore, 595 F.2d 1036, 1038 (5th Cir. 1979) (defendant claimed his brother-in-law had bought his ticket), *cert. denied*, 447 U.S. 910 (1980).

[197] *See, e.g.*, United States v. Bueno, 21 F.3d 120, 123 (6th Cir. 1994) (defendant claimed he used an alias to check into hotels when he and his wife were quarreling).

[198] *See* 446 U.S. 544, 548 (1980) (plurality opinion); *see also* United States v. Waltzer, 682 F.2d 370, 372 (2d Cir. 1982) (suspect stated he did not know why he was traveling under an alias).

[199] *See, e.g.*, United States v. Lambert, 46 F.3d 1064, 1069 (10th Cir. 1989) (noting that the use of an alias constitutes "objectively suspicious" behavior); United States v. Bloom, 975 F.2d 1447, 1457 (10th Cir. 1992) (same); United States v. Sokolow, 831 F.2d 1413, 1419 (9th Cir. 1987) (noting that use of an alias is "clearly consistent with an

legitimate explanations for traveling under an assumed name may exist, passengers who employ aliases do not constitute "a very large category of presumably innocent travelers." Use of an alias constitutes inherently suspicious behavior that distinguishes, perhaps more effectively than any other profile characteristic, the drug courier from the rest of the passenger population.

2. Lies, Discrepancies and Suspicious Answers

Information offered by the suspect during the consensual encounter that the officer knows to be false may contribute significantly to reasonable suspicion. For example, in one case the court found significant that the defendant claimed he had been visiting a friend in Houston for two days, while the agent knew he had traveled to Miami and stayed there for only fifteen hours.[200] Besides misrepresenting the nature of their trip, drug couriers often lie about where and how they purchased their tickets,[201] facts which the agent may often verify by checking airline records and ticket receipts.

Since an officer who initially suspects a particular passenger upon his arrival lacks substantial information about that person and his travel plans, questioning posed during the consensual encounter becomes crucial to effective investigation. Although the agent may not be able to verify whether the suspect is telling the truth, the interview may reveal suspicious answers and inconsistencies in the person's statements, both of which may contribute to reasonable suspicion. Officers will usually give the suspect the opportunity to explain the discrepancies, although many decline to do so.[202]

Inquiry regarding the nature of the suspect's trip often reveals significant discrepancies,[203] since the drug courier must formulate lies to disguise the actual

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ongoing crime"), *rev'd*, 490 U.S. 1 (1989).

[200] *See* United States v. Pantazis, 816 F.2d 361, 363 (8th Cir. 1987) (concluding that since the defendant "pointedly lied to avoid any connection between his trip and a narcotic-source city," his "deceptive answers coupled with his previous suspicious actions solidified the objective basis required for [the officer's] belief the shoulderbag contained narcotics"); *see also* United States v. Gonzales, 842 F.2d 748, 750, 753 (5th Cir. 1988) (finding "particularly significant" the fact that the defendant claimed to be staying in Dallas for several days, while the officer knew her return flight to Miami was scheduled to leave later that afternoon).

[201] *See, e.g.*, United States v. Sterling, 909 F.2d 1078, 1080 (7th Cir. 1990) (officers knew the suspect had purchased her ticket at the airport that same morning, although she claimed to have bought it from a travel agency).

[202] *See, e.g.*, United States v. Withers, 972 F.2d 837, 839 (7th Cir. 1992); United States v. Erwin, 803 F.2d 1505, 1507 (9th Cir. 1986).

[203] *See, e.g.*, *Sterling*, 909 F.2d at 1080 (defendant could not remember the name of the hotel she claimed to have stayed in for several days, stated she had visited her cousin in Miami, and was uncertain whether her cousin's sister was also her cousin); United States v. Low, 887 F.2d 232, 234 (9th Cir. 1989) (defendant claimed he had traveled to Hawaii to attend the funeral of his former partner's aunt, although he could not tell the officer his former partner's last name or his aunt's name).

purpose of his travels. For example, one suspect who disembarked in Cincinnati from a flight continuing to Anchorage, Alaska could not remember his final destination.[204] Another defendant claimed to be returning from visiting his ill grandmother in San Francisco, then later stated she was waiting for him in Alaska.[205]

When an officer stops two passengers suspected of transporting narcotics together, he will often question them separately. This practice tends to reveal discrepancies in their statements that may contribute to reasonable suspicion. For example, after one woman identified her male companion as her boyfriend and stated they had known each other for six months, the man insisted that he had only recently met her.[206]

Before a search has occurred, drug traffickers frequently deny they have knowledge of the contents of their luggage. The suspect usually states someone else owns the bags[207] or claims that another person packed them.[208] Such asser-

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[204] *See* United States v. Bueno, 21 F.3d 120, 122 (6th Cir. 1994). The Court of Appeals determined that this factor could, as a matter of law, have contributed to reasonable suspicion. *See id.* at 125.

[205] *See Erwin*, 803 F.2d at 1507. The Court of Appeals concluded that in this case, the discrepancy could not contribute to reasonable suspicion because the defendant had already been seized at the point he made the comments. *See id.* at 1510 n.2. In doing so, however, the court suggested that if uttered before the point of seizure, the contradictory statements might have contributed to reasonable suspicion. *See id.* Regardless of the relevance of the discrepancy to this particular case, this example demonstrates the tendency of drug couriers to fabricate information they relay to officers.

[206] *See* United States v. Poitier, 818 F.2d 679, 681 (8th Cir. 1987).

[207] *See, e.g.*, United States v. McKines, 933 F.2d 1412, 1414 (8th Cir.) (defendant claimed a friend had given the suitcase to him and asked him to deliver it to his sister), *cert. denied*, 502 U.S. 985 (1991); United States v. Saperstein, 723 F.2d 1221, 1223 (6th Cir. 1983) (suspect stated someone in New York had asked him to deliver the suitcase to a friend in Detroit, although officers noted a claim ticket attached to the bag indicating it had also been transported from Detroit to New York); United States v. Ramirez-Cifuentes, 682 F.2d 337, 341 (2d Cir. 1982) (defendant claimed someone had paid him $500 to deliver a package to New York moments after claiming the parcel contained a gift for a friend).

Although similar statements made by the suspect after a consensual search are irrelevant to a determination of reasonable suspicion, they demonstrate the tendency of drug couriers to lie to law enforcement personnel concerning ownership of luggage or knowledge of its contents. *See, e.g.*, United States v. Carhee, 27 F.3d 1493, 1495-96 (10th Cir. 1994) (after initially stating that his suitcase belonged to one of his companions, defendant claimed a man known only as "Ronnie" paid him to transport it across the country, "no questions asked," and that he had no knowledge of the combination or its contents); United States v. Nunley, 873 F.2d 182, 184 (8th Cir. 1989) (after a consensual search of defendant's purse revealed cocaine, she claimed she did not own the bag, could not remember how she obtained it, and did not know how the cocaine got inside it).

[208] *See, e.g.*, United States v. Hooper, 935 F.2d 484, 488 (2d Cir. 1991) (suspect gave odd statement that "his people" had put "stuff" in the suitcase he was carrying); United States v. Sterling, 909 F.2d 1078, 1080 (7th Cir. 1990) (defendant initially stated she had packed the suitcase herself, but then claimed a friend had done so when asked whether it

tions are relevant to a determination of reasonable suspicion because they reveal an attempt by the courier to disassociate himself from the contents of the luggage. It is unlikely that an innocent traveler transporting luggage for a friend, or one whose bags had been packed by someone else, would be as concerned with the possibility that another person had placed some form of contraband inside before a search revealed narcotics.

These instances demonstrate that the consensual interrogation of drug trafficking suspects may bear heavily on a determination of reasonable suspicion by revealing key information related to the suspect's guilt. Although some persons may respond to questions with lies and "half-truths" in order to avoid embarrassment or for some other legitimate reason, innocent passengers are unlikely to do so after the agent has identified himself as an officer of the law. Therefore, the fact that a suspect offers such statements, especially without being prompted by an officer, warrants considerable weight.

D. *Erroneously Criticizing Use of the Profile as Inconsistent with* Terry v. Ohio

Assertions that focusing on travelers matching the drug courier profile leads to seizures based on the "hunch" proscribed by *Terry*[209] are equally unfounded. The profile merely assists narcotics officers in determining which passengers to investigate; the fact that an individual matches part of the profile does not by itself provide a sufficient basis for reasonable suspicion.[210]

In determining whether an officer's suspicion was reasonable as a matter of law, courts consider not solely whether the suspect's behavior conformed to the profile, but the degree to which the activity indicates involvement in criminal endeavors. For example, in *Sokolow* the Supreme Court found the defendant's payment for tickets with cash relevant to the determination of reasonable suspicion not merely due to its consistency with the drug courier profile, but also because paying with such a large sum of cash constitutes suspicious activity.[211] In *United States v. Withers*, the officers reasonably suspected the defendant of transporting drugs based on her conspicuous display of multiple signs of nervousness — which indicate criminal activity — rather than on the mere fact that she had appeared more anxious than the ordinary traveler.[212] By examining the totality of the circumstances, courts that uphold temporary detentions as reasona-

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contained narcotics); United States v. Yearwood, 805 F. Supp. 596, 599 (N.D. Ill. 1992) (defendant claimed his cousin had packed his luggage).

[209] *See* Hall, *supra* note 169, at 1020 ("In *Terry*, the Court expressly prohibited stops made on the basis of an officer's good faith belief of a suspect's guilt. Drug courier profiles not only encourage this kind of stop, they demand it. . . . Indeed, the 'hunch' prohibited by *Terry* is essential to a drug courier profile."); *see also* Coulter, *supra* note 11, at 1326; Sax, *supra* note 169, at 342-43.

[210] *See* Karnes v. Srutski, 62 F.3d 485, 490 (6th Cir. 1995); United States v. Harrison, 667 F.2d 1158, 1161 (4th Cir.), *cert. denied*, 457 U.S. 1121 (1982).

[211] *See supra* note 144 and accompanying text.

[212] *See supra* notes 166-67 and accompanying text.

ble do so because the defendant's behavior closely resembles that of a drug courier, rather than merely because it matches a specific set of characteristics.

Furthermore, since the drug courier profile assists in the identification of those passengers who exhibit *several* of its characteristics,[213] the chances that an innocent traveler will attract the attention of a narcotics officer are minimal. With only a short period of time to identify drug couriers before they quickly leave the premises, effective law enforcement requires officers to disregard individuals displaying only a few common traits and focus upon those who form a more substantial match to the profile.[214] Thus the profile allows the typical innocent passenger to remain free from police intervention — even though he may manifest some behavior consistent with the profile — while minimizing the risk that the drug courier will proceed unnoticed.

E. *The Reliability and Effectiveness of the Drug Courier Profile*

Critics often challenge the reliability of the drug courier profile by asserting that law enforcement officials have failed to demonstrate its effectiveness through statistical analysis. One commentator's view best summarizes the typical argument of these critics:

> If the federal government were as successful as it claims, one might expect it to provide data to support its assertions. It comes as no surprise, however, that the government does not keep statistics on how many people are seized because they fit drug profiles. And, of course, the government keeps no statistics on how many (or how few) of these seizures result in the discovery of drugs.[215]

The federal government counters as follows:

> [T]he kinds of factors that are important to experienced agents in deciding whether to stop a person traveling through an airport are not readily susceptible to empirical or statistical proof. . . . [O]rdering experienced narcotics agents to justify their investigative decisions with statistical proof [would reject] the use of inferences based on common sense and the shared experi-

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[213] *See* United States v. Sokolow, 831 F.2d 1413, 1420 (9th Cir. 1987) (describing the drug courier profile as a set of "personal characteristics shared by drug couriers and the public at large, but which, *when present in sufficient number*, arguably serve to identify drug couriers") (emphasis added), *rev'd*, 490 U.S. 1 (1989).

[214] *See* United States v. Ramirez-Cifuentes, 682 F.2d 337, 347 (2d Cir. 1982) ("Agents must act almost instantaneously to determine which, if any, of the scores of people arriving at the airport may be carrying illegal drugs . . . It is obviously critical that they not waste their time following or chasing innocent people.").

[215] Maclin, *supra* note 54, at 1327 n.322; *see also* United States v. Weaver, 966 F.2d 391, 397 (8th Cir. 1992) (Arnold, C.J., dissenting); United States v. McKines, 933 F.2d 1412, 1413 (8th Cir.) (Lay, C.J., dissenting), *cert. denied*, 502 U.S. 985 (1991); Bothwell v. State, 300 S.E.2d 126, 137 (Ga.) (Smith, J., dissenting), *cert. denied*, 463 U.S. 1210 (1983); Brief for Respondent at 137, United States v. Sokolow, 490 U.S. 1 (1989) (No. 87-1295); Cloud, *supra* note 168, at 873; LaFave, *supra* note 191, at 481-82.

ence of agents in the field.[216]

Requiring the use of statistical analysis to validate the drug courier profile would simply be misleading. Even if one could calculate the percentage of stopped passengers found to be transporting narcotics, a very low rate would not necessarily render use of the profile objectionable. The Supreme Court has upheld other law enforcement programs — such as sobriety checkpoints and mandatory illegal alien searches — which intrude upon the privacy of the individual even though such programs yield arrest rates of less than two percent of all subjects stopped.[217] Were courts to require agents to attain a high ratio of arrests to stops pursuant to use of the drug courier profile, officers would be forced to refrain from stopping an individual until they were as sure as possible that the suspect was trafficking drugs. Such a practice would result in the forfeiture of a large number of convictions, since officers obtain much of the most significant evidence against a suspect during the consensual interview. For this reason courts have required only reasonable suspicion, rather than probable cause, to justify a temporary detention.

Statistics focusing on the overall impact of the drug courier profile demonstrate its effectiveness. In the first eighteen months of its use in a Detroit airport surveillance program, DEA agents searched 141 people in 96 encounters, found drugs in 77 of those encounters, and made 122 arrests.[218] Justice Rehnquist has referred to these statistics as a measure of the profile's success,[219] although some scholars have questioned their reliability and significance. Some commentators point out that these figures take into account only encounters resulting in searches, disregarding those in which only a stop occurred.[220] However, a con-

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[216] Brief for the United States at 33-34, *Sokolow* (No. 87-1295).

[217] The Court has approved a sobriety checkpoint program which produced only two arrests out of 126 automobiles stopped, *see* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990), and upheld an illegal alien checkpoint policy which yielded an arrest in only 0.12% of the cars stopped, *see* United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Unlike the use of the drug courier profile, a stop pursuant to those programs was not voluntary; the individual had no choice but to submit to the temporary seizure. Thus the intrusion was greater than that of a consensual encounter pursuant to use of the profile.

[218] *See* Florida v. Royer, 460 U.S. 491, 525 n.6 (1983) (Rehnquist, J., dissenting) (citing United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd sub nom.* United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978)); United States v. Mendenhall, 446 U.S. 544, 562 (1980) (Powell, J., concurring) (referring to the same data). Use of the drug courier profile also produced significant results in Atlanta. During the first seven months of its use in 1977, law enforcement officials removed 13 pounds of heroin, 19 pounds of cocaine, nearly 100 pounds of marijuana, and more than 20,000 dosage units of other illicit narcotics from the drug market. *See* United States v. Bowles, 625 F.2d 526, 534 n.10 (Former 5th Cir. 1980). Forty-eight of 72 searches resulted in the discovery of narcotics, while only eight of those 72 failed to produce evidence of criminal activity. *See id.*

[219] *See Royer*, 460 U.S. at 526 n.6 (Rehnquist, J., dissenting).

[220] *See* Maclin, *supra* note 54, at 1324 n.317; Cloud, *supra* note 168, at 876 n.137.

sensual interview — during which the officer does not detain the individual — does not infringe upon the liberty of the suspect.[221] Therefore, including voluntary encounters in the calculation of suspects arrested per passenger stopped would distort the percentage and nullify its significance.

Addressing the effectiveness of the drug courier profile, some critics argue that the couriers caught through its use "are generally at low levels in the drug organizations"[222] and conclude that the impact of airport stops is minimal.[223] Regardless of the typical courier's position in the drug trade hierarchy, dealers often trust the trafficker with the task of delivering enormous quantities of illicit drugs.[224] In the first six years of the profile's use at Miami International Airport, the Metro-Dade Police Department arrested over 1000 people and seized more than $1 billion worth of narcotics.[225] The effectiveness of the profile thus becomes apparent when measured in terms of law enforcement officials' success in intercepting large amounts of drugs before they reach and ultimately harm the public.

F. *Deference to the Expertise of Narcotics Agents*

Several commentators allege that the drug courier profile reaps the benefit of "lax judicial scrutiny"[226] and deem the courts too deferential to the testimony of law enforcement personnel. Summarizing the arguments of many of his colleagues, one critic asserts that "[t]he courts have rarely demanded [proof that the profile distinguishes drug couriers from innocent travelers], often uncritically accepting government claims in support of the profile. No court has been more guilty of these sins of omission than the United States Supreme Court."[227]

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[221] *See supra* notes 51-59 and accompanying text.

[222] Hall, *supra* note 169, at 1027; *see also* Bob Sablatura, *The Border War: Major Traffickers Evade High-Tech Drug War*, HOUSTON CHRON., Aug. 17, 1992, at A1.

[223] *See* Greenberg, *supra* note 184, at 74 ("[O]ccasional arrests of drug couriers accomplish little towards defeating the operations of 'highly organized . . . sophisticated criminal syndicates.' "); Hall, *supra* note 169, at 1027.

[224] *See, e.g.*, United States v. Weaver, 966 F.2d 391, 393 (8th Cir. 1992) (suspect carried more than six pounds of crack cocaine); United States v. Cooke, 915 F.2d 250, 251 (6th Cir. 1990) (five kilograms of cocaine); United States v. Loyd, 837 F. Supp. 922, 924 (N.D. Ill. 1993) (24 kilograms of 90% pure cocaine); United States v. Borrero, 770 F. Supp. 1178, 1184 (E.D. Mich. 1991) (two kilograms of cocaine worth approximately $560,000).

[225] Reginald Stuart, *Drug Squad Tell of Success in Using Profile*, N.Y. TIMES, Mar. 28, 1983, at B14 (quoting a sergeant with the Miami-Dade Police Department).

[226] Cloud, *supra* note 168, at 845.

[227] *Id.* Sandra Guerra has also stated that the Supreme Court "has given virtually free reign to the police in conducting drug interdiction operations by upholding every new method it has reviewed," Guerra, *supra* note 84, at 1110, and characterizes the Court as "seemingly oblivious to the legitimate interests of innocent travelers." *Id.* at 1115; *see also* Bernstein, *supra* note 149, at 1011, 1015 (criticizing "the Supreme Court's reliance on officers' training and experience" and stating that such deference "provides a 'wild-card' to allow officers to justifiably seize almost anyone").

Use of the drug courier profile allows the officer to rely not only on his own judgment of whether a particular passenger appears suspicious, but on the expertise of the hundreds of law enforcement experts who assisted with the development of the profile.[228] This enables the officer to measure his judgment against an objective standard that has been repeatedly tested by the courts in order to determine whether the circumstances warrant temporary detention of the suspect. The profile thus serves as a safeguard for the rights of innocent passengers who manifest sufficient abnormal behavior to attract the suspicion of a narcotics agent, but who have not exhibited the requisite behavior to justify a temporary detention.

Furthermore, as Justice Powell has stated, "[i]n view of the extent to which air transportation is used in the drug traffic, the fact that the stop at issue is made by trained officers in an airport warrants special consideration."[229] The drug courier profile serves as a law enforcement device utilized by highly-skilled narcotics agents who "may be 'able to perceive and articulate meaning in a given conduct which would be wholly innocent to the untrained observer.'"[230] Thus, absent a detention based on the mere hunch proscribed by *Terry* and its progeny,[231] courts should consider the expertise of the officer and the countless law enforcement officials who have created a profile based on the characteristics of the typical drug courier.[232] As Chief Justice Rehnquist has noted, evidence gathered through the use of the drug courier profile "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[233]

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[228] *See* Florida v. Royer, 460 U.S. 491, 525 n.6 (1983) (Rehnquist, J., dissenting) ("[I]n training police officers, instruction focuses on what has been learned through the collective experience of law enforcers. The 'drug courier profile' is an example of such instruction."); United States' Petition for Certiorari at 17, United States v. Mendenhall, 446 U.S. 544 (1980) (plurality opinion) (No. 78-1821) ("In deciding whether to detain a person for questioning it seems to us plainly appropriate — indeed commendable — for an agent to rely not only on his own experience but also on the collective experience of his colleagues and predecessors [embodied in the 'drug courier profile."); Brief for the United States at 33-34, United States v. Sokolow, 490 U.S. 1 (1989) (No. 87-1295).

[229] *Royer*, 460 U.S. at 508 (Powell, J., concurring).

[230] Brown v. Texas, 443 U.S. 47, 52 n.2 (1979); *see also* United States v. Cortez, 449 U.S. 411, 418 (1981).

[231] *See supra* note 78 and accompanying text.

[232] The Court of Appeals for the Second Circuit has warned, "[T]he fact that an officer is experienced does not require a court to accept all of his suspicions as reasonable, nor does mere experience mean that the agent's perceptions are justified by the objective facts." United States v. Buenaventura-Ariza, 615 F.2d 29, 36 (2d Cir. 1980). This viewpoint is entirely appropriate; a fair system of criminal justice requires that courts not blindly defer to the expertise of law enforcement personnel. The Supreme Court, however, has recognized that experience should be considered when analyzing the reasonableness of the officer's suspicion. *See supra* note 72 and accompanying text.

[233] *Royer*, 460 U.S. at 525 n.6 (Rehnquist, J., dissenting) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

VII. CONCLUSION

Since the drug trafficker possesses the extraordinary ability to camouflage himself among ordinary airline passengers, the difficulty inherent in identifying drug traffickers commands, rather than merely justifies, use of the drug courier profile to distinguish the guilty party from the innocent traveler. The legitimate government objective of preventing the flow of illegal drugs within this country outweighs the minimal intrusion upon the public, especially when officers employ drug-sniffing canines to search the luggage of trafficking suspects.

Effective law enforcement requires the preservation of the totality of the circumstances approach and the examination of each case based on its own facts. The automatic dismissal of the relevance of particular profile characteristics violates this standard. Courts must thus abandon the presumption that certain characteristics embodied in the profile represent those of innocent passengers, and consider the fact that the Drug Enforcement Administration has based the profile on patterns of behavior displayed by those known to transport drugs via this country's airlines. Only then will the drug courier profile enable law enforcement officials to protect the innocent from the scourge of narcotics use and drug-related violence.

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