

NOTE

AIRPORT DRUG STOPS: DEFINING REASONABLE SUSPICION BASED ON THE CHARACTERISTICS OF THE DRUG COURIER PROFILE

The fourth amendment¹ prohibits unreasonable searches and seizures by the government and requires that warrants that authorize searches be based on probable cause.² In construing the demands of the fourth amendment, the Supreme Court has recognized three categories of police-citizen encounters.³ Each of these categories requires striking a different balance between the government's need to search and the need to protect personal privacy.⁴ Included in the first category of encounters are communications between police and citizens involving no restraint of liberty or coercion. These encounters do not implicate the fourth amendment.⁵ The second category concerns brief, minimally intrusive investigative stops by police that qualify as seizures⁶ and that must be supported by reasonable suspicion of criminal activity to meet the requirements of the fourth amendment.⁷ Involved in the third category are highly intrusive full-scale arrests⁸ that must be based on probable cause to comply with the fourth amendment.⁹ Although

¹ The fourth amendment provides:

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

U.S. CONST. amend. IV.

² See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). For a discussion of the scope of conduct protected by the fourth amendment, see *infra* notes 37-77 and accompanying text.

³ The United States Court of Appeals for the Eighth Circuit has described the three tiers or categories into which Supreme Court decisions dealing with police-citizen encounters fall. See *United States v. Wallraff*, 705 F.2d 980, 988 (8th Cir. 1983).

⁴ *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers"); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967) (reasonableness test involves "balancing the need to search against the invasion which the search entails"); *Carroll v. United States*, 267 U.S. 132, 147 (1925) ("The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.").

⁵ *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). See *infra* notes 82-93 and accompanying text.

⁶ Throughout this note the term "seizure" is used to mean any police-citizen encounter invoking fourth amendment protections. The level of the appropriate protection will be described in the text. See *infra* notes 40-55 and accompanying text.

⁷ *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

⁸ *Dunaway v. New York*, 442 U.S. 200, 216 (1979).

⁹ "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed [by the person to be arrested].'" *Brinegar v. United States*, 338 U.S. 160, 175-76 (1948) (quoting *Carroll v. United States*,

arrests and investigative stops are seizures within the meaning of the fourth amendment,¹⁰ the Supreme Court has not established a firm boundary between those police-citizen encounters that warrant fourth amendment protection and those encounters that do not.¹¹

These fourth amendment principles are applied in police-citizen encounters in the nation's airports as well as other situations. The Drug Enforcement Administration (DEA) has established a program to stop traffic in illicit drugs that involves watching people in airports based on a drug courier profile.¹² Drug courier profiles were initiated by the DEA in 1974 at Detroit Metropolitan Airport in an effort to combat escalating drug smuggling through the nation's airways.¹³ Since this time, the program has spread to more than twenty major airports around the country.¹⁴ No single drug courier profile is used nationally. Rather, each DEA airport unit draws on its own experience within the particular airport to create and modify the characteristics composing the profile.¹⁵ Among the

267 U.S. 132, 162 (1925)). See also *Dunaway v. New York*, 442 U.S. 200, 216 (1979). For a description of the probable cause requirement, see *infra* notes 52-55 and accompanying text.

¹⁰ *United States v. Cortez*, 449 U.S. 411, 417 (1981) (brief investigatory stop constituted seizure protected by fourth amendment); *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam) (same); *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (dictum) (accosting individual and restraining freedom constitutes seizure).

¹¹ The Court's most recent attempt to resolve this problem was in *United States v. Mendenhall*, 446 U.S. 544 (1980). In *Mendenhall*, the Court failed to muster a majority for any proposition defining "seizure." Justice Stewart writing the plurality opinion concluded 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." *Id.* at 554 (plurality opinion). Justice Rehnquist joined Justice Stewart in this part of the opinion. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment and certain sections of Justice Stewart's opinion. Although Justice Powell did "not necessarily disagree" with Justice Stewart's standard for determining when a seizure has occurred, see *id.* at 560 n.1 (Powell, J., concurring), he chose not to reach the issue because he found the seizure in *Mendenhall* reasonable in any event. *Id.* at 565 (Powell, J., concurring). Justice White wrote a dissenting opinion in which Justices Brennan, Marshall, and Stevens joined. In this dissenting opinion, Justice White attacked Justice Stewart's reasoning as inconsistent with the Court's earlier decision in *Dunaway v. New York*, 442 U.S. 200 (1979). 446 U.S. at 567-71 (White, J., dissenting). See also *Florida v. Royer*, 460 U.S. 491, 502-03 (1983) (plurality opinion) (adopting *Mendenhall* standard); *Reid v. Georgia*, 448 U.S. 438, 443 (1980) (Powell, J., concurring) (*Mendenhall* issue remained unresolved). Justice Powell's concurring opinion in *Reid* was joined by Chief Justice Burger and Justice Blackmun.

¹² See generally Costantino, *Drug Courier Profiles and Airport Stops: Is the Sky the Limit?*, 3 W. NEW. ENG. L. REV. 175 (1980); Greenberg, *Drug Courier Profiles, Mendenhall and Reid: Analyzing Police Intrusions On Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49 (1981) (same) [hereinafter cited as Greenberg, *Drug Courier Profiles*]; Greene & Wice, *The D.E.A. Drug Profile: History and Analysis*, 22 S. TEX. L.J. 261, 269-79 (1982) (discussing development and use of suspect profiles).

¹³ The profile was actually developed in the early 1970's in response to skyjacking. See *United States v. Lopez*, 328 F. Supp. 1077, 1083 (E.D.N.Y. 1971). Since then profiles have been used to identify possible criminal offenders in other settings as well. Profiles have been used to detect individuals transporting marijuana on trains, see, e.g., *United States v. Johnson*, 497 F.2d 397, 398 (9th Cir. 1974); smugglers, see, e.g., *United States v. Klein*, 592 F.2d 909, 912 (5th Cir. 1979); car thieves, see, e.g., *State v. Ocha*, 112 Ariz. 582, 586, 544 P.2d 1097, 1101 (1976).

¹⁴ See Kadish & Brofman, *Drug Courier Characteristics: A Defense Profile*, 15 TRIAL 47, 48 (May 1979).

¹⁵ See *United States v. Vasquez*, 612 F.2d 1338, 1340-41 (2d Cir. 1979). In the early days of the rise of the use of the drug courier profile the characteristics were not written down, nor did agents have a clear idea of how many and what combination of characteristics was needed to be present for them to initiate the stop or arrest. *United States v. Caleb*, 552 F.2d 717, 720 (6th Cir. 1977). Later

factors incorporated in the profile are: (1) arrival from or departure to an identified source city;¹⁶ (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as a rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying thousands of dollars of currency, usually on the suspect's 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.¹⁷

In these encounters, DEA agents monitoring airports stop air travelers whose behavior matches a number of characteristics in the drug courier profile and ask to see their identification and airline ticket.¹⁸ The encounters often end in a search of the passenger's person or luggage.¹⁹ Confrontations between DEA agents and air travelers have resulted

cases indicate that the profile remains unwritten, undefined, and ambiguous. See *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 698 (E.D.N.Y. 1977) ("The profile has a chameleon-like quality; it seems to change itself to fit the facts of each case").

¹⁶ A source city is a city from which DEA agents believe that couriers bring many drugs to a particular city. See, e.g., *Florida v. Royer*, 460 U.S. 491, 493 (1983) (plurality opinion) (Miami source city for drugs distributed to New York City); *Reid v. Georgia*, 448 U.S. 438, 439 (1980) (per curiam) (DEA agents testified that Fort Lauderdale is a source city for cocaine distributed throughout the country); *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980) (plurality opinion) (DEA agents believed that Los Angeles is a source city for heroin that couriers bring to Detroit).

¹⁷ See, e.g., *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982) (en banc). The *Berry* court also detailed what they considered secondary characteristics. These characteristics include:

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

Id. at 599. Other characteristics mentioned by the *Berry* court include: checking to see if followed; attempting to leave the airport immediately; wearing unusual dress; having luggage with no tags; and attempting to conceal an association with a fellow traveler. *Id.* at 598 n.17.

¹⁸ See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 547-48 & n.1 (1980) (plurality opinion).

¹⁹ Typical procedures in which the profile is employed to help detect narcotics couriers and secure an arrest are set forth in *United State v. Van Lewis*, 409 F. Supp. 535, 538-39 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977). These procedures are as follows:

The agents observe as many incoming flights . . . as time permits. They watch deplaning passengers, mindful of information given them by airline employees and the results of their police work. When they spot a suspect who matches some or all of the characteristics in the profile, they watch that person as he or she moves from the plane through the concourse to the baggage claim area and ground transportation, adding to their store of information on the individual.

Prior to the person's leaving the airport, the agents decide whether they have a founded suspicion to stop the suspect. This decision is based upon information acquired from the airline ticket agents, from their independent police work, and from their observations of the individual as he or she arrives . . . in light of the agent's accumulated knowledge and personal experience. Occasionally, anonymous tips add to the agent's knowledge of a traveler.

If agents do not have a founded suspicion that a traveler is a courier, they turn to other duties. However, if they reasonably suspect a traveler of carrying drugs, they stop the suspect and ask for identification, including among other things the ticket receipt on which he or she is traveling. The information garnered from the identification stop is added to the agent's other information about the suspect and a second decision is made. The agent at that time either sends the person on his way or informs him of his suspicion and asks him to accompany the agent to a more private place. In some instances, this is the baggage claim agent's office; in others, the first-aid office. These

in a significant amount of litigation in the federal courts.²⁰ The question arising from these confrontations is whether the profile characteristics found in a given case support the stop. To analyze this question, determining into which category of police-citizen encounters each stop falls is necessary. At one extreme, if the stop falls into the first category of police-citizen encounters, then the drug courier profile is sufficient to support the stop because at this level the police-citizen encounter is so minimally intrusive that it does not rise to the level of a fourth amendment seizure. At the other extreme, if the stop falls into the third category of police-citizen encounters, then the drug courier profile is probably insufficient under fourth amendment standards to support the stop because at this level probable cause is necessary. In drug courier profile cases, the major unsolved fourth amendment issue, therefore, concerns stops that fall into the second category of police-citizen encounters — the investigative stop.²¹

Three recent Supreme Court decisions have considered the issue of airport drug stops based on the drug courier profile without articulating any definite standards to guide DEA agents in making stops based on the drug courier profile.²² In *United States v. Mendenhall*,²³ the Supreme Court considered for the first time the constitutionality of the drug courier profile but failed to arrive at a conclusive holding.²⁴ While a five member

are not private rooms but are places somewhat removed from the hustle and bustle of the baggage claim area, the taxi entrance, and the parking area.

At that time the agent advises the suspect of his constitutional rights, and informs him of the belief that he or she is carrying contraband drugs. The agent then requests permission to examine the suspect's suitcase or other bag. A further warning is sometimes given to the effect that, if the suspect refuses, the agent will proceed immediately to request a magistrate to issue a search warrant. Occasionally, a request to search occurs in a more public area If the person consents, a search is made. If no consent is given, the person is formally placed under arrest and the bag is opened without consent.

409 F. Supp. at 538-39.

²⁰ See *United States v. Nembhard*, 676 F.2d 193, 203-04 (6th Cir. 1982) (reasonable suspicion for stop when nervous defendants arriving from drug source city attempted to discover surveillance, simulated telephone calls, apparently tried to conceal their association, exchanged luggage, and slipped out of the airport); *United States v. Moore*, 675 F.2d 802, 808 (6th Cir. 1982) (no reasonable suspicion when defendant arrived from major drug supply center, disembarked early from plane, followed circuitous route, and appeared nervous); *United States v. Black*, 675 F.2d 129, 137 (7th Cir. 1982) (reasonable suspicion for stop when suspect was first passenger to disembark from plane, had first class ticket with substantial cash price, had different names on ticket and driver's license, appeared nervous, and gave implausible story); *United States v. Jodoin*, 672 F.2d 232, 234-35 (1st Cir. 1982) (reasonable suspicion for stop when suspect had traveled to drug source city and spent only 17 hours there before returning, had paid cash for ticket, had given no telephone number to airline, appeared nervous, used a false name, lied about the length of his stay, and claimed that the suitcase he was carrying was not his and that he had no extra clothing, identification, or airline ticket); *United States v. Elsoffer*, 671 F.2d 1294, 1297 (11th Cir. 1982) (reasonable suspicion for stop when front of airline passenger's trousers revealed bulge of unusual size and shape); *United States v. MacDonald*, 670 F.2d 910, 913 (10th Cir. 1982) (reasonable suspicion for stop when nervous suspect traveling from major drug source area checked baggage twice during trip, explained his conduct to seat companion by improbable story, and left without baggage upon arrival at destination).

²¹ See Greenberg, *Drug Courier Profiles*, *supra* note 12, at 66-68.

²² See *Florida v. Royer*, 460 U.S. 491 (1983); *Reid v. Georgia*, 448 U.S. 438 (1980); *United States v. Mendenhall*, 446 U.S. 544 (1980).

²³ 446 U.S. 544 (1980). See *infra* notes 105-66 and accompanying text.

²⁴ 446 U.S. at 547-56 (plurality opinion). See generally Note, *Fourth Amendment — Airport Searches and Seizures: Where Will the Court Land?*, 71 J. CRIM. L. AND CRIMINOLOGY 499, 501-07 (1980).

majority held that Mendenhall's consent to an investigation constituted a waiver of her fourth amendment protections, the Court split in determining whether she had ever become entitled to such protection.²⁵ Three Justices, however, who had assumed that a seizure had occurred, concluded that the drug courier profile and its application had established a reasonable suspicion necessary to warrant an investigative stop.²⁶ One month later, in *Reid v. Georgia*,²⁷ a majority of the Court held in a per curiam opinion that the defendant's characteristics and behavior that fit four characteristics of a drug courier profile,²⁸ failed to provide reasonable suspicion for an investigative stop.²⁹ In the most recent drug courier profile case, *Florida v. Royer*,³⁰ however, the plurality rejected a lower court decision that the drug courier profile is insufficient to provide the reasonable suspicion required to justify an investigative stop.³¹ The plurality found that the characteristics exhibited by the suspect, all of which were included in the drug courier profile,³² provided the reasonable suspicion necessary to justify the investigative stop.³³ These three Supreme Court opinions did not indicate whether, if at all, the profile characteristics were relied upon in finding an articulatable suspicion in each case. Moreover, because the validity of profile use in practice varies with each case, the Supreme Court will never draw any bright lines in this area of fourth amendment law. Nonetheless, by a process of elimination it is possible to conclude which drug courier profile characteristics provide reasonable suspicion and which characteristics do not by themselves provide suspicion necessary to validate an investigative stop. The precise issue on which this note focuses is whether the second category of police-citizen encounters — investigative stops — can be justified under fourth amendment jurisprudence because a person exhibits some but not all of the characteristics contained in the drug courier profile.

This note, by examining the three drug courier profile cases decided by the Supreme Court thus far, will suggest that certain characteristics in the drug courier profile need to be present to provide the reasonable suspicion necessary to justify an investigative stop. First, the note explains the three categories of police-citizen encounters identified by the

(analyzing *Mendenhall* as seminal decision in law of drug courier profile stops) [hereinafter cited as Note, *Airport Searches and Seizures*].

²⁵ 446 U.S. at 557 (plurality opinion). Applying the totality of the circumstances test enunciated in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court concluded that Mendenhall freely and voluntarily consented to the search. *Id.* at 557-60 (plurality opinion).

²⁶ 446 U.S. at 565 (Powell, J., concurring).

²⁷ 448 U.S. 438 (1980) (per curiam). See *infra* notes 167-95 and accompanying text.

²⁸ *Id.* at 440-41. The four drug courier profile characteristics were: (1) arrival from a source city; (2) arrival at time diminished law enforcement (early morning); (3) appearance of trying to conceal that defendant and companion were traveling together; (4) having no luggage other than shoulder bag. *Id.*

²⁹ *Id.*

³⁰ 460 U.S. 491 (1980). See *infra* notes 196-329 and accompanying text.

³¹ *Id.* at 495 n.7 (plurality opinion).

³² In *Royer's* case, the detectives' attention was attracted by the following facts considered to be within the profile:

(a) Royer was carrying American Tourister luggage, which appeared to be heavy, (b) he was young, apparently between 25-35, (c) he was casually dressed, (d) he appeared pale and nervous, looking around at other people, (e) he paid for his ticket in cash with a large number of bills, and (f) rather than completing the airline identification tag to be attached to checked baggage, which had space for a name, address and telephone number, Royer wrote only a name and the destination.

Id. at 493 n.2 (plurality opinion).

³³ *Id.* at 502 (plurality opinion).

Supreme Court and the application of fourth amendment jurisprudence to each category. Next, the second category of police-citizen encounters — the investigative stop — will be examined in more depth. This discussion will include the historical development of the investigative stop and constraints circumscribing the use of the investigative stop imposed by the fourth amendment. The three drug courier profile cases that have reached the Supreme Court will then be discussed. These cases are *United States v. Mendenhall*,³⁴ *Reid v. Georgia*,³⁵ and *Florida v. Royer*.³⁶ This discussion of the three drug courier profile cases will argue that the Court has given its approval to the use of the drug courier profile characteristics in the nation's airports to support the second category of police-citizen encounters — the investigative stop. Since deciding these three cases, however, the Court has not explicitly stated the guidelines that lower courts should use in applying fourth amendment jurisprudence to the drug courier profile. Nonetheless, by examining the characteristics of each defendant in these three cases it is possible to piece together the guidelines courts should use in determining whether reasonable suspicion justified the investigative stop.

1. THE SCOPE OF FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

The fourth amendment³⁷ prohibits "unreasonable searches and seizures" by the government.³⁸ Courts determine the reasonableness of a search or seizure by balancing the intrusiveness of the search or seizure against the consequent benefit of such a search or seizure to the public.³⁹ The scope of fourth amendment protection against unreasonable seizures is not easily defined. The Supreme Court has not conclusively delineated when contact between police and citizens becomes so intrusive that fourth amendment

³⁴ 446 U.S. 544 (1980). For a discussion of this case, see *infra* notes 105-66 and accompanying text.

³⁵ 448 U.S. 438 (1980) (per curiam). For a discussion of this case, see *infra* notes 167-195 and accompanying text.

³⁶ 460 U.S. 491 (1983). For a discussion of this case, see *infra* notes 196-329 and accompanying text.

³⁷ See *supra* note 1 for text of the fourth amendment.

³⁸ The term "government" also refers to administrative searches. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 598 (1981) (fourth amendment protections extend to mine inspections under federal statute); *Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978) (fourth amendment protections extend to searches of fire-gutted building by inspectors).

The fourth amendment does not apply, however, to intrusions by private individuals. *Burdeau v. McDowell*, 256 U.S. 465, 473-75 (1921) (fourth amendment inapplicable when former employee took papers incriminating discharged employee from office safe and desk and turned them over to the Justice Department); *United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981) (fourth amendment inapplicable when private airline security agent searched package for drugs after receiving a tip from the Drug Enforcement Administration (DEA), even though DEA agent was present at the search). The fourth amendment does apply, however, to private persons if the private persons are regarded as an instrument or an agent of the state. *Coolidge v. New Hampshire*, 403 U.S. 443, 487-88 (1971).

³⁹ See, e.g., *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967) (reasonableness test involves "balancing the need to search against the invasion which the search entails"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (reasonableness depends "on a balance between the public interest and, the individual's right to personal security free from arbitrary interference by law officers").

jurisprudence applies.⁴⁰ Although the Court has not defined the exact point where a police-citizen encounter is subject to fourth amendment jurisprudence, it has divided these police-citizen encounters into three categories.⁴¹ These three categories are: stops for questioning,⁴² investigative stops,⁴³ and full scale arrests.⁴⁴ The first category, stops for questioning, are generally the least intrusive encounters.⁴⁵ These stops usually involve the approach and questioning of a willing person in a public place and are devoid of detention and coercion.⁴⁶ Stops for questioning are not considered seizures under the fourth amendment.⁴⁷ The second category, an investigative stop, usually involves an intermediate level of intrusion.⁴⁸ Such a stop must be supported by reasonable, specific, articulable suspicion, a standard less than probable cause, and may be accompanied by a limited search of the suspect for weapons.⁴⁹ If unreasonable in length or purpose, an investigative stop may become an arrest.⁵⁰ The third category, an arrest, is the most intrusive encounter. An arrest exists when a police officer forcibly deprives a person of liberty by taking that person into custody and subjecting the person to a thorough search.⁵¹ To effect a valid arrest, the police must have probable cause.⁵² Probable cause exists when, at the time the arrest is made,⁵³ the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to lead a prudent person to believe that the suspect has committed or is committing an

⁴⁰ *Royer*, 460 U.S. at 506 (plurality opinion) (no "litmus paper" test for distinguishing consensual encounters from seizure or for determining when seizure exceeds bounds of investigative stop).

⁴¹ 460 U.S. at 498-500 (plurality opinion) (defining three categories of police-citizen encounters).

⁴² *See, e.g., Mendenhall*, 446 U.S. at 551-54 (plurality opinion).

⁴³ *See, e.g., United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

⁴⁴ *See, e.g., Royer*, 460 U.S. at 489-99 (plurality opinion); *Dunaway v. New York*, 442 U.S. 200, 212-13, 216 (1979).

⁴⁵ *See, e.g., United States v. Price*, 599 F.2d 494, 496-98 n.4 (2d Cir. 1979) ("arguably" no fourth amendment seizure when police follow suspect from airport and question suspect on street, and suspect denies ownership of bag carried from airport); *United States v. Elmore*, 595 F.2d 1036, 1042 (5th Cir. 1979) (no seizure when federal narcotics agents, without showing force or physical contact, approach citizen for identification at airport; seizure occurs when agents take ticket to verify suspect's response).

⁴⁶ *United States v. Price*, 599 F.2d 494, 501 (2d Cir. 1979); *United States v. Elmore*, 595 F.2d 1036, 1041 (5th Cir. 1979).

⁴⁷ *United States v. Price*, 599 F.2d 494, 501 (2d Cir. 1979); *United States v. Elmore*, 595 F.2d 1036, 1041 (5th Cir. 1979).

⁴⁸ *See, e.g., United States v. Hammond*, 666 F.2d 435, 437 (9th Cir. 1982) (investigative stop when police officers ordered defendant to get out and place hands on back of car); *United States v. Streifel*, 665 F.2d 414, 419 (2d Cir. 1981) (investigative stop when Coast Guard officers ordered freighter to stop, enforced order by firing shots in front of its bow, and boarded freighter); *United States v. Phillips*, 664 F.2d 971, 1002 (5th Cir. 1981), *cert. denied*, 461 U.S. 948 (1982) (investigative stop when undercover agent pointed gun at defendant and ordered him to stop after agent perceived immediate threat of harm to his partner); *United States v. Tate*, 648 F.2d 939, 941 (4th Cir. 1981) (investigative stop when detectives ordered defendant to pull car over to check defendant's license and registration).

⁴⁹ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

⁵⁰ *See id.* at 21-22 (only reasonable suspicion necessary to justify "stop and frisk" because intrusion less severe than that of traditional arrest).

⁵¹ *See Beck v. Ohio*, 379 U.S. 89, 90-91 (1964).

⁵² *See U.S. CONST. amend. IV; Beck v. Ohio*, 379 U.S. 89, 92 (1964).

⁵³ *See, e.g., United States v. Hansen*, 652 F.2d 1374, 1390 (10th Cir. 1981) (probable cause must exist at moment of arrest).

offense.⁵⁴ Although courts do not require proof beyond a reasonable doubt, an officer's mere suspicion of criminal activity is insufficient to establish probable cause.⁵⁵

As a general rule, courts prefer that a neutral and detached magistrate, rather than a law enforcement officer on the street, determine the existence of probable cause required to justify searches of property belonging to persons suspected of engaging in criminal activity, as well as arrests.⁵⁶ If the judge or magistrate concludes on the basis of probative evidence⁵⁷ that probable cause exists, both to link the person or items sought to the criminal activity and to indicate that the person or items will be found in the place to be searched, then the judge will issue a warrant.⁵⁸ A search or seizure conducted without this warrant is presumptively unreasonable,⁵⁹ although the presumption may be overcome in a number of narrowly defined situations.⁶⁰ Traditionally, although warrants were not required in all circumstances,⁶¹ the requirement of probable cause was treated as an

⁵⁴ *Beck v. Ohio*, 379 U.S. 89, 91 (1964). For recent cases in which courts have not found probable cause to arrest and consequently invalidated the arrest and subsequent search, see, e.g., *United States v. Moore*, 675 F.2d 802, 808 (6th Cir. 1982) (no probable cause to arrest defendant when defendant left plane arriving from major drug supply center among first passengers and walked through terminal, taking circuitous route and looking about in nervous fashion); *United States v. Morin*, 665 F.2d 765, 770 (5th Cir. 1982) (no probable cause to arrest when defendant exhibited characteristics of drug courier profile, defendant had previous narcotics conviction, and was suspected of smuggling drugs from Colombia, airline ticket indicated use of an alias, and detector dogs showed some interest in but did not attack a checked bag).

⁵⁵ See *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (only the probability and not a prima facie showing of criminal activity is the standard of probable cause); see also *Brinegar v. United States*, 338 U.S. 160, 175 (1948) (mere suspicion insufficient to give probable cause).

⁵⁶ *Steagald v. United States*, 451 U.S. 204, 212 (1981); *United States v. Johnson*, 333 U.S. 10, 14 (1947); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932). See *Blair v. United States*, 665 F.2d 500, 507 (4th Cir. 1981) (dictum) (warrant supported by probable cause and issued by neutral and detached magistrate generally required for valid search). In reviewing the validity of a warrant issued by a magistrate, the court will consider only the information that had been brought to the magistrate's attention at the time he issued the warrant. *United States v. Lockett*, 674 F.2d 843, 845 (11th Cir. 1982).

⁵⁷ *Black's Law Dictionary* defines probative evidence as follows: "In the law of evidence, having the effect of proof, tending to prove, or actually proving. Testimony carrying quality of proof and having fitness to induce conviction of truth, consisting of fact and reason cooperating or coordinate factors." *BLACK'S LAW DICTIONARY* 1082 (5th ed. 1979).

⁵⁸ 3 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 441-43 (1978).

⁵⁹ See *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). Courts do not require an impartial judicial determination of probable cause for public felony arrest if the arresting officer himself validly determines that he has probable cause to arrest. In *United States v. Watson*, 423 U.S. 411 (1976), for example, the Supreme Court endorsed the common law rule that police may make a warrantless public felony arrest based solely on probable cause. *Id.* at 414, 421-22; accord *United States v. Collins*, 668 F.2d 819, 820-21 (5th Cir. 1982) (per curiam) (statute authorizing Secret Service agents to make a warrantless arrest codifies common law rule reaffirmed in *Watson*); *United States v. Robertson*, 650 F.2d 84, 86 (5th Cir. 1980) (exigent circumstances not constitutionally required to justify warrantless arrest in public place when probable cause exists), cert. denied, 454 U.S. 1100 (1981); *United States v. Tate*, 648 F.2d 939, 943 (4th Cir. 1981) (warrantless public felony arrest when license check revealed that car defendant was driving was stolen).

The police are often thought to have a vested interest in conducting searches. The magistrate, therefore, acts as a buffer between the police officer, who is "engaged in the often competitive enterprise of ferreting out crime." *Steagald*, 451 U.S. at 212.

⁶⁰ For a discussion of these limited exceptions, see *infra* notes 65-68 and accompanying text.

⁶¹ See, e.g., *United States v. Watson*, 423 U.S. 411, 416-19 (1976) (felony arrests in public places); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (hot pursuit).

absolute.⁶² Thus, the standard of probable cause represented the minimum justification necessary to make the kind of intrusion involved in an arrest reasonable under the fourth amendment.

Over the years, the Supreme Court has propounded exceptions to the fourth amendment requirement of a warrant based on probable cause.⁶³ Situations in which a warrant is not required under fourth amendment jurisprudence can be grouped into three types of exceptions: consent searches; routine searches of nonsuspects; and searches of criminal suspects justified by circumstances that make obtaining a warrant impracticable.⁶⁴ The consent exception to the warrant rule has free and voluntary consent as its most basic requirement.⁶⁵ Voluntariness is a question of fact to be determined from the "totality of the circumstances" surrounding the case.⁶⁶ The "routine search" exception, by contrast, rests upon public policy considerations of protecting the community. This exception involves instances where no reason exists to suspect particular persons of criminal activity, but protection of people and property requires routine searches.⁶⁷

⁶² See *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (value of probable cause, as standard for arrest under the fourth amendment, is a necessary accommodation between individual's right to privacy and state's duty to control crime).

⁶³ See generally C. WHITEHEAD, CRIMINAL PROCEDURE, AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 4.03, at 108 (1980).

⁶⁴ Professor Amsterdam, Professor of Law, Stanford University, has so conceptualized the exceptions to the warrant rule. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358-60 (1974).

⁶⁵ *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Only a person with the authority and capacity to waive fourth amendment guarantees can consent to a warrantless search. See, e.g., *United States v. Ochoa-Aimanza*, 623 F.2d 676, 677-78 (10th Cir. 1980) (six-year old child lacked capacity and authority to waive fourth amendment rights of the occupants of the house). For the consent to a search to be effective, the agents conducting the search must know that consent was given. See *United States v. Glasby*, 576 F.2d 734, 737 (7th Cir. 1978), cert. denied, 439 U.S. 854 (1979) (government cannot rely on consent to search when agents who forced entry into apartment unaware that defendant had granted consent to other agents).

The scope of a consent search may not exceed the limitations or purposes agreed to by the person giving consent. See *Gould v. United States*, 255 U.S. 298, 310 (1921) (consent for business acquaintance to wait in office does not constitute consent to acquaintance's extensive search of office on behalf of the state).

⁶⁶ See *Schneekloth v. Bustamonte*, 412 U.S. 212, 223-24 (1973) (totality of the circumstances determines voluntariness of consent). Factors relevant to this determination include the following. First, the circumstances under which the defendant came into custody is relevant, see *Mendenhall*, 446 U.S. at 559 (plurality opinion) (surroundings of DEA office, where search conducted, not inherently coercive when defendant agreed to go there). Second, the defendant's awareness of the right to withhold consent is relevant, see *id.* at 558-59 (plurality opinion) (knowledge of right to refuse search highly relevant to determination of consent). The Supreme Court, however, has held that knowledge of the right to withhold consent is not a prerequisite to voluntary consent. *Schneekloth v. Bustamonte*, 412 U.S. 212, 234 (1973). Third, the defendant's performance of cooperative acts is relevant, see *United States v. Marin*, 669 F.2d 73, 83 (2d Cir. 1982) (consent voluntary when arrestee not coerced or physically restrained opened automobile trunk for the DEA agent). Fourth, the defendant's age, intelligence and education are relevant, see *Mendenhall*, 446 U.S. at 558 (plurality opinion) (race, age, sex and level of education are relevant to determination of consent; 22 year old black female with eleventh grade education plainly capable of knowing consent). Finally, the nature of the police behavior is relevant, see *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968) (consent faulty when police falsely claimed possession of a warrant).

⁶⁷ One example of such a warrantless search is a random search of persons crossing the border into the United States and their vehicles, luggage, and other personal effects, because of the need to

Finally, the "exigent circumstances" exception to the warrant rule concerns situations where a warrant procedure would be fruitless or impracticable, such as when law enforcement officers confront criminal suspects or encounter criminal evidence. The strong public policy interest in apprehending criminals and evidence permits this warrantless search in a number of limited situations.⁶⁸ One of these circumstances is the investigative stop, which is the major focus of this note.⁶⁹

If a government official conducts a search or seizure unsupported by probable cause,⁷⁰ or if the situation does not fall under one of the exceptions to the warrant rule,⁷¹ then a violation of the fourth amendment has occurred.⁷² Violations of fourth amendment proscriptions against unreasonable searches or seizures are redressed by application of the exclusionary rule.⁷³ The exclusionary rule requires the suppression of any evidence that is either the direct⁷⁴ or indirect product of illegal police conduct.⁷⁵ The indirect

enforce custom and immigration laws. *See* *United States v. Garcia*, 672 F.2d 1349, 1354 (11th Cir. 1982) (border search does not require probable cause because it is derived from right to control who and what may enter the country). Another example of a warrantless search is a search of an airline passenger prior to boarding due to the danger of air piracy. *See* *United States v. Skipworth*, 482 F.2d 1272, 1276 (5th Cir. 1973) (travelers who present themselves for boarding on an airplane, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion). A further example of a warrantless search is a search of vehicles lawfully in police custody to safeguard property inside vehicles from loss. *See* *South Dakota v. Opperman*, 428 F.2d 364, 368-72, 375-76 (1976) (car impounded for parking violations may be searched). Finally, searches of business premises licensed to distribute regulated items such as liquor and firearms are permitted without warrants. *See* *United States v. Biswell*, 406 U.S. 311, 314 (1971) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-76 (1970) (liquor).

⁶⁸ A warrant is not required in several situations because the resort to the warrant procedure would be fruitless or impracticable. One of these situations is a search incident to a valid arrest. *See* *United States v. Robinson*, 414 U.S. 218, 235 (1973) (authority to search a person incident to arrest depends on the need of the police to disarm the suspect and to discover evidence). Another situation falling under this exception to the warrant requirement is the seizure of items in plain view. *See* *Coolidge v. New Hampshire*, 403 U.S. 433, 446 (1971) (plurality opinion) (the plain view exception to the warrant requirement permits the seizure of evidence seen by the police when they have prior independent justification for being present at the point of observation, when the perceived items' evidential value is readily apparent, and when the discovery of evidence is inadvertent). The police may also conduct a warrantless search due to exigent circumstances. *See, e.g.,* *United States v. Santana*, 427 U.S. 38, 43 (1976) (to prevent destruction of evidence); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (to protect the public); *United States v. Mesa*, 660 F.2d 1070, 1078 (5th Cir. 1981), *reh'g and reh'g en banc denied*, 667 F.2d 93 (5th Cir. 1981) (to protect themselves). Another example where a warrantless search is permitted is the search of vehicles. *Arkansas v. Sanders*, 442 U.S. 753, 761 (1979). The final example where a warrantless search is permitted is an investigative stop. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

⁶⁹ For a discussion of this exception to the warrant requirement, see *infra* notes 79-96 and accompanying text.

⁷⁰ *See supra* notes 52-55 and accompanying text.

⁷¹ *See supra* notes 64-68 and accompanying text.

⁷² *See* U.S. CONST. amend. IV.

⁷³ The exclusionary rule is a judicially created doctrine. *See* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (evidence seized in violation of defendant's fourth amendment rights excluded from state criminal trial); *United States v. Weeks*, 232 U.S. 383, 398 (1914) (evidence seized in violation of defendant's fourth amendment rights excluded from criminal trial). For a discussion of the rule, see Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than An Empty Blessing*, 62 JUDICATURE 337, 343-44 (1979); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 67-68 (1978).

⁷⁴ *Michigan v. DeFillippo*, 443 U.S. 31, 39 (1979) (evidence directly seized pursuant to a search incident to an invalid arrest is commonly viewed as an illegal search in itself).

⁷⁵ The indirect evidence or fruit of the poisonous tree doctrine was first applied in *Silverthorne*

product of the illegal police conduct, also known as the "fruit of the poisonous tree," however, may be admitted if the government demonstrates that this indirect evidence was discovered independently of the direct evidence.⁷⁶ Recently, the Supreme Court narrowed the scope of the exclusionary rule by creating a "good-faith" exception. This exception has two aspects. First, if a police officer reasonably relied on a warrant that later is found to be invalid, the evidence will no longer be barred from use in the prosecution's case-in-chief.⁷⁷ Second, evidence will be admitted even if it was obtained pursuant to a warrant that failed to provide an accurate description of the items to be seized.⁷⁸

II. THE INVESTIGATIVE STOP: *TERRY V. OHIO* AND ITS PROGENY

An investigative stop, the second category of police-citizen encounters, is a seizure not rising to the level of an arrest.⁷⁹ Such a stop is permitted in circumstances where probable cause is lacking, but the officer is able to articulate specific facts and inferences that lead to a reasonable suspicion of criminal activity.⁸⁰ A stop based on reasonable suspicion may become an arrest if unreasonable in length or purpose, and is then valid only if supported by probable cause.⁸¹

Terry v. Ohio is the leading case in applying fourth amendment jurisprudence to the investigative stop.⁸² In *Terry*,⁸³ the Court recognized for the first time that the fourth

Lumber Co. v. United States, 251 U.S. 385 (1920). Justice Holmes' description of the concept and the limits of its use is still instructive:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id. at 392.

⁷⁶ See *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963). Not all evidence is fruit of the poisonous tree just because it would not have been discovered but for the primary illegality. The test is "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting J. MAGUIRE, *EVIDENCE OF GUILT* 221 (1959)).

⁷⁷ *United States v. Leon*, 104 S. Ct. 3405 (1984).

⁷⁸ *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984).

⁷⁹ See *Dunaway v. New York*, 442 U.S. 200, 208-09 (1979) (citing *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968)).

⁸⁰ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

⁸¹ *Dunaway v. New York*, 442 U.S. 200, 210-12 (1979) (finding arrest occurred because police restrained suspect's liberty beyond brief intrusion entailed by an investigatory stop). See generally Chapter, *Appellate Decisions*, 22 ARIZ. L. REV. 211 (1980) (discussing importance of determining scope of investigative detention) [hereinafter cited as Chapter, *Appellate Decisions*].

⁸² 392 U.S. 1 (1968).

⁸³ In *Terry*, a plainclothes policeman observed three men who appeared to be casing a store for a hold-up. *Id.* at 5. When the officer approached the men and asked what they were doing, one of the suspects "mumbled something." *Id.* at 6-7. Suspecting imminent danger, the officer grabbed the defendant, spun him around, patted down the outside of his clothing, and discovered a concealed weapon. *Id.* at 7.

In the companion case to *Terry*, *Sibron v. New York*, 392 U.S. 40 (1968), the Court avoided the resolution of the seizure issue because the record was unclear. *Id.* at 68.

See generally LaFave, *Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 40, 51 (1968); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 181 (1968).

amendment protects individuals from certain police activities even though such activities are less intrusive than arrests and full searches.⁸⁴ The reasonableness of such lesser intrusions, the *Terry* Court stated, is determined by balancing the individual's privacy interests against the state's interest in effective crime prevention and detection, and against law enforcement agents' more immediate interest in protecting themselves and other potential victims of violence.⁸⁵

The *Terry* Court believed it had set out a narrow exception to the general requirement of probable cause.⁸⁶ The Court limited its decision to stop and frisk situations initiated to prevent a crime.⁸⁷ In *Terry*, the Court held that when a law enforcement officer has reason to believe that a suspect is armed and dangerous and nothing in the initial stages of the encounter dispels that suspicion, the officer may act to ensure his and others' safety during the investigation by conducting a carefully limited protective search of the suspect's outer clothing.⁸⁸

Although the *Terry* Court brought the stop and frisk procedure within the purview of fourth amendment protection, it did not consider the constitutional propriety of an investigative seizure for the purpose of detention and interrogation.⁸⁹ Four years later, in

⁸⁴ Prior to *Terry*, unreasonable search and seizure analysis was based on arrest, probable cause for arrest, and warrants based on probable cause. See *Dunaway v. New York*, 442 U.S. 200, 207-08 (1979).

The *Terry* Court itself recognized that it was dealing in a new area of police activity. 392 U.S. at 9-10. See also *Adams v. Williams*, 407 U.S. 143, 153 (1972) (Marshall, J., dissenting).

⁸⁵ In balancing the two interests, the Court stated that a court must "focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Terry*, 392 U.S. at 20-21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967)) (brackets in original).

The balancing process weighs three factors: the public interest of the intrusion, the extent of the intrusion into one's privacy, and the extent the intrusion advances public interest. See *Brown v. Texas*, 443 U.S. 47, 50-51 (1978); *Delaware v. Prouse*, 440 U.S. 648, 654 (1978).

See generally Chapter, *Appellate Decisions*, *supra* note 81, at 213 (*Terry* Court employed balancing test to weight degree of intrusion against need of intrusion because the Court recognized that police must have a "set of flexible responses"); Chapter, *Constitutional Law*, 10 GOLDEN GATE L. REV. 112, 114 (1980) (*Terry* rationale allows police greater flexibility because it adopts sliding scale model of fourth amendment requirements).

⁸⁶ Specifically, the Court held that an investigative stop and frisk is a reasonable police practice "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the person with whom he is dealing may be armed and presently dangerous." *Terry*, 392 U.S. at 30. Under these circumstances, the Court said that the police officer is entitled to "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.* Other cases have mentioned the limited nature of the *Terry* stop. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979); *Dunaway v. New York*, 442 U.S. 200, 210 (1979).

⁸⁷ *Terry*, 392 U.S. at 30.

⁸⁸ *Id.* at 30-31.

⁸⁹ *Id.* at 19 n.16. The *Terry* Court stated: "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention and/or interrogation.'" *Id.* See Chapter, *Appellate Decisions*, *supra* note 81, at 227 (*Terry* rationale standing alone not applicable to police detentions not involving frisk of suspect's person). In dictum, however, the Court approved of seizures in certain circumstances based upon "reasonable suspicion." 392 U.S. at 22. The Court stated that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Id.*

Adams v. Williams,⁹⁰ the Court extended *Terry* by applying the reasonable suspicion standard to a police officer's stop of a suspect and seizure of his weapon.⁹¹ The Court held that a "brief stop of a suspicious individual, 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."⁹² Consequently, after *Adams*, the *Terry* standard has been applied to the detention of suspects and prevention of crimes.⁹³

According to this reasonable suspicion standard developed in *Terry* and applied in *Adams*, a police officer is justified in stopping an individual for interrogation on the basis of "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion."⁹⁴ Reasonable suspicion is raised by actions that, although apparently innocent in themselves to the untrained observer, could be interpreted by the officer, in light of his experience, to merit further investigation.⁹⁵ Mere inarticulable hunches, however, are insufficient to meet this standard.⁹⁶ In sum, for purposes of fourth amendment analysis, the Supreme Court has recognized three categories of police-citizen encounters. At the first level are police-citizen encounters involving no restraint on freedom of movement through physical force or show of authority that do not trigger fourth amendment protection.⁹⁷ At the second level are brief investigative stops that a court will uphold based on the totality of circumstances if "the detaining officers . . . have a particularized and objective basis for suspecting the particular person stopped of criminal activity."⁹⁸ At the third level are detentions so intrusive that probable cause is necessary to validate them.⁹⁹

The stopping of an individual at an airport by DEA agents or other law enforcement authorities because the individual's behavior matches a number of characteristics in the drug courier profile may implicate these fourth amendment considerations.¹⁰⁰ If the stop falls within the first level of police-citizen encounters it is considered so minimally intrusive that it does not rise to the level of a fourth amendment seizure.¹⁰¹ The stop is

⁹⁰ 407 U.S. 143 (1972).

⁹¹ *Id.* at 145-46. In *Adams*, a police officer, acting on an informant's tip, approached the defendant's car, tapped on the window, and asked the defendant to open the door. *Id.* at 144-45. The defendant rolled down the window instead, and the officer reached in and removed a gun from the defendant's waistband, exactly where the informant said it would be located. *Id.* at 145. A search incident to the subsequent arrest uncovered drugs and illegally possessed weapons. *Id.*

⁹² *Id.* at 146.

⁹³ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), which involved federal agents' use of roving border patrols to detect the smuggling of illegal aliens across the Mexican border. *Id.* at 876-77. In a holding similar to *Terry* and *Adams*, the Court found that the government's interest outweighed the minimal intrusion into personal privacy that the official conduct created. *Id.* at 881. Although the Court disapproved of the random stopping of automobiles, it held that federal border patrol agents may constitutionally seize an individual motorist when they stop a vehicle after forming a reasonable suspicion that the vehicle contains aliens illegally entering the country. *Id.* at 882-84.

⁹⁴ *Adams*, 407 U.S. at 145-46.

⁹⁵ *Terry*, 392 U.S. at 21.

⁹⁶ *Id.* at 22.

⁹⁷ *Mendenhall*, 446 U.S. at 551-54 (plurality opinion).

⁹⁸ *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

⁹⁹ *Royer*, 460 U.S. at 498-99 (plurality opinion); *Dunaway v. New York*, 442 U.S. 200, 212-13, 216 (1979).

¹⁰⁰ See *supra* notes 12-17 and accompanying text.

¹⁰¹ See *supra* notes 45-47 and accompanying text.

thus valid even if the officer had no reason to stop the individual. If the stop falls into the second category of police-citizen encounters, the investigative stop, reasonable suspicion is necessary to justify the stop and an accompanying limited search under the principles enunciated in *Adams and Terry*.¹⁰² If the encounter falls into the third category, probable cause is necessary to justify the stop and any search conducted incident to the stop.¹⁰³

The Supreme Court has rendered three decisions concerning the constitutional validity of the use of the drug courier profile: *Mendenhall*, *Reid*, and *Royer*. Each of these cases involved the investigation of suspected drug smugglers in airports who were singled out because they exhibited characteristics found in the drug courier profiles. These decisions failed to articulate explicitly what profile characteristics are necessary to find the reasonable suspicion sufficient to justify the investigative stop.¹⁰⁴ Nonetheless, after analyzing the characteristics in *Mendenhall*, *Reid*, and *Royer* it is possible to hypothesize what characteristics are necessary to support an investigative stop. The following section will analyze each of the Court's drug courier profile cases to date and explain which characteristics of the profile must be present to establish the reasonable suspicion necessary to justify the investigative stop.

III. ANALYSIS OF THE SUFFICIENCY OF DRUG COURIER PROFILE CHARACTERISTICS TO PROVIDE REASONABLE SUSPICION TO JUSTIFY AN INVESTIGATIVE STOP

A. United States v. Mendenhall

In *United States v. Mendenhall*¹⁰⁵ the Supreme Court considered for the first time the fourth amendment ramifications of airport drug stops based on the drug courier profile.¹⁰⁶ The issue before the Court was whether sufficient cause to justify an investigative stop is provided because a traveler matched certain characteristics of the drug courier profile.¹⁰⁷ Although the Court held that the "stop" of the defendant was constitutional, it failed to muster a majority to agree on the rationale upholding the constitutionality of the stop.¹⁰⁸ The decision thus provided little information to guide the lower courts in ruling on the validity of stops based on the drug courier profile.¹⁰⁹

In *Mendenhall*, two DEA agents observed a woman leaving a plane at the Detroit Metropolitan Airport.¹¹⁰ The agents, believing the woman's behavior fit a drug courier profile,¹¹¹ approached her, identified themselves as federal agents, and asked to see her

¹⁰² See *supra* notes 48-50 and 79-93 and accompanying text.

¹⁰³ See *supra* notes 50-55 and accompanying text.

¹⁰⁴ See *Florida v. Royer*, 460 U.S. 491 (1983); *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam); *United States v. Mendenhall*, 446 U.S. 544 (1980).

¹⁰⁵ 446 U.S. 544 (1980).

¹⁰⁶ See generally Note, *supra* note 24, at 501-07 (analyzing *Mendenhall* as seminal decision in law of drug courier profile stops).

¹⁰⁷ The majority consisted of Chief Justice Burger and Justices Stewart, Rehnquist, Powell and Blackmun.

¹⁰⁸ See 446 U.S. at 547-48 (Stewart, J., minority opinion in part); *id.* at 546 (Burger, C.J., Powell and Blackmun, J.J., joining in part of Justice Stewart's opinion).

¹⁰⁹ See *id.* at 547-48 (Stewart, J., minority opinion in part); *id.* at 546 (Burger, C.J., Powell and Blackmun, J.J., joining in part of Justice Stewart's opinion).

¹¹⁰ *Id.* at 547 (plurality opinion). The plane originated in Los Angeles which is considered a source city.

¹¹¹ *Id.* at 547 n.1 (plurality opinion). According to the agents, the defendant attracted their attention because she had arrived on a flight from Los Angeles, a major source of heroin brought to

identification and airplane ticket.¹¹² Her identification bore her true name, but the airplane ticket was issued in another name.¹¹³ The agents returned her identification and asked her to accompany them to the DEA office for further questioning.¹¹⁴ She accompanied the agents to the office and once there consented to a body search.¹¹⁵ Upon discovering heroin in her clothing, the agents placed Mendenhall under arrest.¹¹⁶

Prior to trial, Mendenhall moved to suppress the introduction into evidence of the heroin obtained in the body search in the DEA office on the ground that the evidence obtained was the product of an unconstitutional search.¹¹⁷ Conceding both that Mendenhall had been seized within the meaning of the fourth amendment and that probable cause had not existed and no warrant had been obtained for the ensuing search, the government contended that Mendenhall had consented.¹¹⁸ The district court denied the defendant's motion to suppress.¹¹⁹ According to the court, the agent's approach and request for information was a permissible investigative stop¹²⁰ and the defendant had not been placed under arrest nor otherwise detained when she accompanied the agents to their office "voluntarily and in the spirit of apparent cooperation."¹²¹ The court concluded that the consent to search was freely and voluntarily given.¹²² The United States Court of Appeals for the Sixth Circuit reversed, holding that the initial stop of Mendenhall was impermissible because it was not based upon reasonable suspicion of criminal activity. In the alternative, the court found that even if the initial stop was permissible, the officer's request that Mendenhall accompany them to their private office constituted an arrest without probable cause.¹²³ Additionally, the Sixth Circuit found that the consent

Detroit. *Id.* She appeared nervous and was the last person to leave the plane. She "scanned" the whole area. *Id.* She proceeded past the baggage area without retrieving any luggage, and she changed to a different airline for a departing flight. *Id.*

The attorneys for Mendenhall argued in their brief that passengers commonly transfer airlines boarding a connecting flight that departs from a stop-over point. *Id.* They also argued that often no opportunity arises for air travelers to claim luggage when they are merely deplaning before changing airlines to continue their trip. *Id.* The original carrier usually transfers the luggage of its passenger directly to the airline that will fly the passengers to their final destination. *Id.*

¹¹² *Id.* at 547-48 (plurality opinion).

¹¹³ *Id.* at 548 (plurality opinion). Mendenhall's driver's license used her real name. *Id.* Her airline ticket was issued in the name of "Annette Ford." *Id.* When Mendenhall was questioned as to the discrepancy, she said that she "just felt like using that name." *Id.* Further questioning revealed that she had been in California only two days. *Id.* The agents then identified themselves as federal narcotics agents, at which point Mendenhall became very nervous. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 548-49 (plurality opinion). Once in the DEA office, one of the agents asked Mendenhall if she would permit a search of her handbag and person. *Id.* The agent informed her that she had the right to refuse, but she nevertheless agreed to the search. *Id.* A strip search uncovered two small packages of heroin. *Id.*

¹¹⁶ *Id.* at 549 (plurality opinion).

¹¹⁷ *Id.* at 549 & n.2 (plurality opinion). The district court's decision was unreported.

¹¹⁸ *Id.* at 550-51 (plurality opinion).

¹¹⁹ *Id.* at 549 (plurality opinion).

¹²⁰ The *Mendenhall* Court found the stop permissible under both *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). 446 U.S. at 549 (plurality opinion).

¹²¹ 446 U.S. at 549 (plurality opinion).

¹²² *Id.*

¹²³ *Id.* at 549-50 & n.2 (plurality opinion) (noting that the opinion of the court of appeals was also unreported).

was not voluntary, primarily because the court deemed the consent to be the fruit of an illegal detention.¹²⁴

The government appealed to the Supreme Court. In a five-to-four decision the Supreme Court reversed the court of appeals.¹²⁵ Chief Justice Burger and Justices Rehnquist, Powell, and Blackmun, joined Justice Stewart's opinion, finding that the defendant had voluntarily accompanied the agents and consented to the search.¹²⁶ These five Justices also held that the seizure was constitutional, but all five did not agree on a rationale.¹²⁷ Only Justice Rehnquist joined the part of Justice Stewart's opinion concluding that the stop was constitutional because the defendant had not been seized.¹²⁸ Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurring in the judgment, assumed the stop did constitute a seizure, but found it constitutional because the officers had reasonable suspicion that the defendant was engaging in criminal activity.¹²⁹

Justice Stewart, in the part of his opinion joined only by Justice Rehnquist, argued that no seizure had occurred when the defendant was approached by the agents in the airport concourse, asked for identification, and asked a few questions.¹³⁰ Justice Stewart viewed the events merely as a police-citizen encounter that did not violate any constitutionally protected interest.¹³¹ In reaching this conclusion, he noted that nothing in the Constitution prevents a "peace officer" from addressing questions to anyone on the streets or in an airport.¹³² Because Justice Stewart ruled that no seizure had occurred, he did not reach the issue of whether a defendant's conduct matching the drug courier profile would provide reasonable suspicion when a seizure did take place.¹³³ He went on to agree with the district court's finding that no arrest had taken place when the defendant was asked to go to the DEA office and that the defendant's subsequent consent to the search was voluntary.¹³⁴

In his concurring opinion, Justice Powell did not address Justice Stewart's contention that a seizure had not occurred because this issue had not been considered by the courts below.¹³⁵ Justice Powell assumed that the initial encounter constituted a fourth amendment seizure for purposes of his opinion.¹³⁶ This assumption allowed Justice Powell to consider whether the characteristics from the drug courier profile that the defendant exhibited provided a reasonable suspicion to justify the investigative stop.¹³⁷ He con-

¹²⁴ *Id.* at 549-50 (plurality opinion). On rehearing en banc, the court of appeals reaffirmed its original decision. 596 F.2d 706, 707 (6th Cir. 1979) (en banc). See *supra* notes 75-76 for a discussion of the fruit of the poisonous tree doctrine.

¹²⁵ 446 U.S. at 560 (plurality opinion).

¹²⁶ *Id.* at 558 (plurality opinion).

¹²⁷ Chief Justice Burger and Justices Blackmun and Powell refused to join the part of Justice Stewart's majority opinion that found no seizure had occurred. 446 U.S. at 560 (Powell, J., concurring).

¹²⁸ *Id.* at 546 (Stewart, J., minority opinion in part).

¹²⁹ *Id.* at 563-64 (Powell, J., concurring).

¹³⁰ *Id.* at 555-56 (Stewart, J., minority opinion in part).

¹³¹ *Id.* Justice Stewart thought that this was a level-one encounter that did not implicate the fourth amendment. See *supra* notes 45-47 and accompanying text.

¹³² *Id.* at 552 (Stewart, J., minority opinion in part).

¹³³ *Id.* at 551 (Stewart, J., minority opinion in part).

¹³⁴ *Id.* at 555-56 (Stewart, J., minority opinion in part).

¹³⁵ *Id.* at 560-66 (Powell, J., concurring). Justice Powell was joined by Justice Blackmun and Chief Justice Burger.

¹³⁶ *Id.*

¹³⁷ *Id.*

cluded that the drug courier profile and its application had established a reasonable suspicion that Mendenhall was involved in criminal activity sufficient to warrant the investigative stop.¹³⁸

In analyzing the reasonableness of the stop, Justice Powell first found that a strong public interest was served by the seizure,¹³⁹ stating that "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit."¹⁴⁰ He then found that the nature and scope of the intrusion in this case was quite modest.¹⁴¹ Justice Powell noted that the stop was made in a public area near airline employees from whom she could have sought aid if she was in danger.¹⁴² The officers, moreover, questioned the defendant only briefly, did not physically restrain her, and did not display weapons.¹⁴³ Considering these factors, Justice Powell found that "[t]he respondent could not reasonably have felt frightened or isolated from assistance."¹⁴⁴

Justice Powell then discussed the drug courier profile.¹⁴⁵ He commented that statistics showed that the profile program was successful in apprehending drug smugglers.¹⁴⁶ He then noted that the drug enforcement agents were specially trained to combat drug distribution and that the agents' knowledge of drug dealers' methods may be relied on to give rise to a reasonable suspicion of criminal activity.¹⁴⁷ After discussing the agents' years of experience with drug traffic, Justice Powell evaluated the conduct of the defendant actually observed by the agents.¹⁴⁸ He went through each of the characteristics that the agent observed and accepted the agent's assessment that each of these characteristics was a legitimate characteristic for identifying a drug courier.¹⁴⁹ In the opinion, Justice Powell never discussed whether these characteristics were distinguishable from innocent conduct.¹⁵⁰ Instead, Justice Powell emphasized that the agents were specially trained to detect drug couriers¹⁵¹ and indicated that conduct of the defendant, which may have appeared innocent to a layman, might have an entirely different meaning to a trained law enforcement official.¹⁵² Justice Powell, however, did not completely endorse the use of the profile in all airport drug stops.¹⁵³ Reasonable suspicion, indicated Justice Powell, may not be provided by reliance upon the drug courier profile itself.¹⁵⁴ Rather, suggested Justice Powell, "each case raising a Fourth Amendment issue must be judged on its own facts."¹⁵⁵

¹³⁸ *Id.* at 563-64 (Powell, J., concurring).

¹³⁹ *Id.* at 561 (Powell, J., concurring).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 565 (Powell, J., concurring).

¹⁴² *Id.* at 563 (Powell, J., concurring).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 563-65 (Powell, J., concurring).

¹⁴⁶ *Id.* at 564 n.4 (Powell, J., concurring).

¹⁴⁷ *Id.* at 564 (Powell, J., concurring). The agent who initiated the stop and questioning of the defendant had ten years of experience in drug enforcement. *Id.*

¹⁴⁸ *Id.* at 564-65 (Powell, J., concurring).

¹⁴⁹ *Id.* The characteristics identified by the DEA agent and testified to at trial to be typical of drug couriers included nervous behavior, last to deplane, scanning gate area, claiming no baggage, and changing planes. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 563, 565 (Powell, J., concurring).

¹⁵² *Id.* at 563 (Powell, J., concurring).

¹⁵³ *Id.* at 565 n.6 (Powell, J., concurring).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

In sum, Justice Powell found that the defendant's conduct in *Mendenhall*, which matched several characteristics in the drug courier profile, had established the reasonable suspicion necessary to justify the investigative stop.¹⁵⁶

Justice White, in a dissenting opinion joined by Justices Brennan, Marshall, and Stevens assumed, just as Justice Powell had, that a seizure had occurred when Mendenhall was stopped by the agents.¹⁵⁷ Unlike the concurring Justices, however, the dissenting Justices believed that the seizure was unlawful because the officers lacked the requisite "reasonable suspicion" for an investigative stop.¹⁵⁸ Justice White found that Mendenhall's conduct was "the kind of behavior that could reasonably be expected of anyone changing planes in an airport terminal."¹⁵⁹ Like Justice Powell, Justice White did not analyze the conduct exhibited by the defendant and observed by the agents.¹⁶⁰ In Justice White's view, the agents' observations that Mendenhall was the last person to deplane from a flight originating in a "major source city," that Mendenhall claimed no luggage and changed airlines, were insufficient to provide reasonable suspicion.¹⁶¹ Justice White concluded that these characteristics could be attributed to purely innocent behavior and therefore the agents' belief that the defendant was a drug courier could be based only on "his inchoate and unparticularized suspicion" or 'hunch.' "¹⁶²

The Court in *Mendenhall* considered the constitutionality of seizing passengers on the basis of their conformance with the profile, but failed to arrive at a conclusive holding.¹⁶³ Two members of the majority did not consider the constitutionality of the drug courier profile because they found no seizure and thus no fourth amendment protection.¹⁶⁴ The remaining three members of the majority declined to address the seizure issue specifically but assumed that a justifiable seizure had occurred in light of Mendenhall's conformance with the drug courier profile.¹⁶⁵ The four dissenters found the stop to be a seizure and concluded that conformance with the profile, without other facts did not provide the requisite justification for a seizure.¹⁶⁶ In sum, three Justices found articulatable suspicion based on the profile and four Justices found articulatable suspicion lacking based on the profile. Thus, after *Mendenhall*, the constitutionality of seizing airplane passengers on the basis of their conformance with the drug courier profile was in doubt. The next drug courier profile case decided by the Court, *Reid v. Georgia*, did little to alleviate this confusion.

¹⁵⁶ *Id.* at 565 (Powell, J., concurring).

¹⁵⁷ 446 U.S. at 565 (White, J., dissenting). Justice White criticized Justice Stewart for reversing the judgment of the court of appeals on the basis of a fact-bound standard which the defendant did not litigate in the lower court. *Id.* at 570-71 (White, J., dissenting).

¹⁵⁸ *Id.* at 572 (White, J., dissenting).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 572-73 (White, J., dissenting).

¹⁶¹ *Id.*

¹⁶² *Id.* at 573 (White, J., dissenting) (quoting *Terry*, 392 U.S. at 27).

¹⁶³ *Id.* at 547-56 (plurality opinion). See *United States v. Palvano*, 629 F.2d 1151, 1154 (5th Cir. 1980) (*Mendenhall* did not resolve seizure issue); *United States v. Robinson*, 625 F.2d 1211, 1214 (5th Cir. 1980) (*Mendenhall* not dispositive on seizure issue).

¹⁶⁴ 446 U.S. at 555-60 (plurality opinion). Justice Stewart joined by Justice Rehnquist offered this perspective.

¹⁶⁵ *Id.* at 560 & n.1 (Powell, J., concurring). Justice Powell joined by Chief Justice Burger and Justice Blackmun offered this perspective.

¹⁶⁶ 446 U.S. at 566 (White, J., dissenting). Justice White joined by Justices Brennan, Marshall, and Stevens offered this perspective.

B. Reid v. Georgia

One month after the *Mendenhall* decision, the Supreme Court in *Reid v. Georgia* again considered the constitutionality of airport drug stops.¹⁶⁷ In *Reid*, the Court held in an eight-to-one per curiam opinion, that the defendant's characteristics and behavior corresponding to characteristics set forth in the drug courier profile failed to provide the reasonable suspicion of criminal activity necessary to justify an investigative stop.¹⁶⁸ The stop, therefore, was held unconstitutional by the Court.¹⁶⁹

In *Reid*, a DEA agent observed the defendant, Reid, and another man proceed separately through the Atlanta airport.¹⁷⁰ The agent stopped these men because they were exhibiting behavior consistent with the drug courier profile.¹⁷¹ After identifying himself, the agent asked each man to produce identification and airline ticket stubs.¹⁷² The men did as requested.¹⁷³ The airline ticket stubs showed that the tickets had been purchased with the defendant's credit card and that the men had just returned from a one-day trip to Fort Lauderdale.¹⁷⁴ Having examined the stubs, the agent asked the men whether they would return to the terminal for a search of their persons and bags.¹⁷⁵ They agreed to accompany the agent, but as they entered the terminal with the agent, Reid tried to run away.¹⁷⁶ Before Reid was apprehended, he abandoned his shoulder bag.¹⁷⁷ The agent found cocaine in the bag.¹⁷⁸

The trial court granted Reid's motion to suppress, finding that the cocaine was obtained as a result of a seizure not supported by a reasonable suspicion of criminal activity.¹⁷⁹ Holding that the defendant's matching of a number of characteristics in the drug courier profile constituted the reasonable suspicion necessary to justify the stop, the Georgia Court of Appeals reversed.¹⁸⁰ The appellate court concluded that Reid had consented to return to the terminal and that his attempted flight had provided probable cause to search the abandoned bag.¹⁸¹

The Supreme Court vacated the judgment of the Georgia Court of Appeals.¹⁸² The *Reid* Court viewed the drug courier profile much differently than the concurring opinion in *Mendenhall*.¹⁸³ In *Reid* the Court described the profile as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics."¹⁸⁴

¹⁶⁷ 448 U.S. 438 (1980) (per curiam).

¹⁶⁸ *Id.* at 440-41.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 439.

¹⁷¹ *Id.* For a list of the drug courier profile characteristics found in *Reid*, see *supra* note 28.

¹⁷² *Reid*, 448 U.S. at 439.

¹⁷³ *Id.*

¹⁷⁴ *Id.* Fort Lauderdale is considered a "source city" for cocaine. *Id.* Departing by plane from a source city is considered one of the characteristics of the drug courier profile. *Id.* See *supra* note 16.

¹⁷⁵ 448 U.S. at 439.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 439-40.

¹⁸¹ *Id.* at 440.

¹⁸² *Id.* at 441-42.

¹⁸³ *Id.* at 441. In *Mendenhall*, the concurring Justices found the profile to be part of a "highly specialized law enforcement operation." *Mendenhall*, 446 U.S. at 562 (Powell, J., concurring).

¹⁸⁴ 448 U.S. at 440-41.

As a matter of law, the *Reid* Court found that the DEA agent could not have reasonably suspected Reid of criminal activity based on the few profile characteristics the agent observed.¹⁸⁵ According to the *Reid* Court three of the four profile characteristics observed — departure from a known center of cocaine smuggling; time of arrival early in the day; and lack of luggage other than a shoulder bag — were common to many innocent travelers.¹⁸⁶ The Court reasoned that travelers would be subject to “virtually random seizures” if the Court were to attach legal significance to these facts.¹⁸⁷ The majority found that the fourth observation relating to Reid’s particular conduct where Reid walked in front of his traveling companion and occasionally looked backward at him as they proceeded through the concourse was “simply too slender a reed to support the seizure in this case.”¹⁸⁸ In sum, because the four characteristics corresponding to the profile that the defendant exhibited did not provide a sufficient basis for an investigative stop, the seizure was deemed unconstitutional.¹⁸⁹

The three Justices who had concurred in *Mendenhall* — Chief Justice Burger and Justices Powell and Blackmun — also concurred in *Reid*.¹⁹⁰ Justice Powell wrote his concurring opinion to emphasize that in neither *Mendenhall* nor *Reid* had he considered whether a seizure had taken place because it had not been raised in the courts below.¹⁹¹ He instead assumed, as he had in *Mendenhall*, that a seizure had occurred.¹⁹² Justice Powell dealt with the legality of the seizure only in a footnote.¹⁹³ In this footnote, he agreed with the majority that the seizure was invalid because “the fragmentary facts apparently relied upon by the DEA agents in this case” did not justify a seizure.¹⁹⁴

In *Mendenhall*, the Court considered the constitutionality of seizing passengers on the basis of their conformance with a drug courier profile, but failed to arrive at a conclusive holding. One month later, in *Reid*, the Court rejected the notion that the agent’s stopping of Reid based solely on conformance with the profile was a seizure supported by reasonable suspicion. Following these decisions, the lower federal courts, in reviewing drug courier profile cases, arrived at inconsistent holdings on the issue of whether the profile provided the reasonable suspicion necessary to justify an investigative stop.¹⁹⁵ Assuming that an investigative stop of an airport traveler by an agent is a fourth amendment seizure, the courts must have some guidelines for determining a justification for that seizure. The Supreme Court once again had the opportunity to resolve the constitutionality of the

¹⁸⁵ *Id.* at 441.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See *id.* at 442-43 (Powell, J., concurring). Justice Rehnquist dissented, finding that no seizure had occurred and therefore no fourth amendment rights were violated. *Id.* at 442 (Rehnquist, J., dissenting).

¹⁹¹ *Id.* at 442-43 (Powell, J., concurring).

¹⁹² *Id.* at 443 (Powell, J., concurring). Justice Powell emphasized that he did not necessarily disagree with Justice Stewart’s standard formulated in *Mendenhall* of when a seizure had occurred, but rather considered the issue open. *Id.*

¹⁹³ *Id.* at 442 n.1 (Powell, J., concurring).

¹⁹⁴ *Id.*

¹⁹⁵ For example, the Eighth Circuit in *United States v. Deggendorf*, 626 F.2d 47 (8th Cir. 1980), cert. denied, 446 U.S. 986 (1980), found that the initial encounter with the defendant was a seizure justified by reasonable suspicion. *Id.* at 51-2. The Eleventh Circuit in *United States v. Elsoffer*, 671 F.2d 1294 (11th Cir. 1982), held that a seizure had occurred at the moment the defendant’s ticket was taken and retained by the DEA agent. *Id.* at 1297.

drug courier profile in providing reasonable suspicion in the recent case of *Florida v. Royer*. Instead, Justice White's plurality opinion failed to address directly the specific quantum of reasonable suspicion based on the drug courier profile needed to support an investigative stop, and focused instead on the permissible scope of such a stop once it had been initiated.

C. *Florida v. Royer*

In *Florida v. Royer*,¹⁹⁶ the Supreme Court reviewed a lower court's decision that addressed the question of whether the initial stop based on the drug courier profile constituted a seizure.¹⁹⁷ A plurality of the Court rejected the view of the Florida District Court that the drug courier profile is insufficient to provide the reasonable suspicion necessary for an investigative stop.¹⁹⁸ The plurality opinion, which noted that all of the characteristics exhibited by *Royer* were included in the drug courier profile, did not articulate any other basis from which reasonable suspicion could be derived.¹⁹⁹ Even though the Court found that the facts included in the drug courier profile created reasonable suspicion to justify the stop, the Court held that the subsequent police intrusion was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity.²⁰⁰ Consequently, the plurality found that *Royer's* consent was tainted by the illegal detention and was ineffective to justify the search.²⁰¹

The events in *Royer* began at the Miami International Airport in 1978.²⁰² Two plainclothes law enforcement officers²⁰³ approached *Royer*, the defendant, at Miami International Airport after their observations indicated that he fit a drug courier profile, which had been developed in conjunction with the DEA profile on alleged drug couriers.²⁰⁴ The officers stopped *Royer* in the airport concourse and identified themselves as police officers.²⁰⁵ They asked him if he would be willing to speak with them.²⁰⁶ Upon request, but without oral consent, the officers obtained *Royer's* driver's license and airline ticket.²⁰⁷ Examination revealed that the license and the ticket bore different names.²⁰⁸ When the officers questioned *Royer* about the discrepancy, he became nervous.²⁰⁹ At this point, the officers identified themselves as narcotics agents and informed *Royer* that they

¹⁹⁶ 460 U.S. 491 (1983).

¹⁹⁷ *Id.* at 493 (plurality opinion).

¹⁹⁸ *Id.* at 495-96 n.7 (plurality opinion).

¹⁹⁹ *Id.* at 502 (plurality opinion).

²⁰⁰ *Id.* at 503 (plurality opinion). *Royer* is also valuable because it carves out the territory for the investigative stop originating in *Terry* and *Adams*. For a discussion of *Terry* and *Adams*, see *supra* notes 79-96 and accompanying text.

²⁰¹ 460 U.S. at 503 (plurality opinion).

²⁰² *Id.* at 493 (plurality opinion).

²⁰³ The detectives were from the Dade County, Florida public safety department assigned to the county's organized crime bureau. *Id.*

²⁰⁴ For a list of the drug courier profile characteristics that attracted the officers' attention, see *supra* note 32. For a discussion of the drug courier profile developed by the DEA, see *supra* notes 12-21 and accompanying text.

²⁰⁵ 460 U.S. at 493-94 (plurality opinion).

²⁰⁶ *Id.* at 494 (plurality opinion).

²⁰⁷ *Id.*

²⁰⁸ The airline ticket taken by the officers bore the name "Holt," while the driver's license bore his real name "Royer." *Id.*

²⁰⁹ *Id.* *Royer's* explanation of the discrepancy was that his friend had made the reservation in the name of "Holt." *Id.*

suspected him of transporting narcotics.²¹⁰ The officers, still retaining both the airline ticket and driver's license, then asked Royer to accompany them to a small private office.²¹¹ Royer complied with the request.²¹² Meanwhile, without Royer's consent, one of the officers retrieved Royer's two suitcases from the baggage claim area and brought the luggage to the office.²¹³ In the office, the detectives, upon receiving Royer's consent,²¹⁴ opened the two suitcases.²¹⁵ After finding a total of sixty-five pounds of marijuana in the two suitcases, the officers placed Royer under arrest.²¹⁶ Fifteen minutes had elapsed from the time the agents initially stopped Royer until his arrest upon discovery of the marijuana.²¹⁷

At Royer's trial for felony possession of marijuana, the prosecution attempted to introduce the evidence obtained in the search of the suitcases.²¹⁸ Royer made a motion to suppress this evidence that the trial court denied, finding no violation of the fourth amendment.²¹⁹ The trial court found that Royer's consent to the search had been voluntary and was thus valid.²²⁰ Even if the consent had not been valid, the trial court stated, the search was nonetheless constitutional because the officers' conduct toward Royer had been reasonable.²²¹ The trial continued and Royer was ultimately convicted.²²²

Royer appealed the trial court's denial of the motion to suppress to the district court of appeals.²²³ This intermediate appellate court, sitting en banc, reversed the conviction holding that the airport search had violated the fourth amendment.²²⁴ The appeals court held that Royer had been involuntarily confined within the room without probable cause, and that the involuntary detention had exceeded the limited restraint permissible during investigatory stops.²²⁵ In addition, the appeals court held that under the "fruit of the

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* Royer did not orally reply to this request but nonetheless accompanied the agents. *Id.*

²¹³ The two suitcases contained an identification tag bearing only the name "Holt" and the destination "La Guardia." *Id.* Royer did not explain why these tags, as well as his airline ticket, bore the name "Holt." *Id.* The room to which Royer accompanied the agents, approximately forty feet away, adjacent to the concourse, was later described by one of the narcotic agents as a "large storage closet" located in the stewardesses' lounge and containing shelves, a small desk and two chairs. *Id.*

²¹⁴ Royer was asked if he would consent to the search of the two pieces of luggage. *Id.* at 494 (plurality opinion). Although he said nothing, he produced a key and unlocked one of the suitcases, in which marijuana was found. *Id.* When asked if he objected to a search of the second suitcase, Royer replied in the negative but told the narcotic agents that he did not know the combination to the lock on the suitcase. *Id.* at 494-95 (plurality opinion). The agent then asked Royer if they could break it open. *Id.* Royer did not object. *Id.*

²¹⁵ *Id.* at 495 (plurality opinion).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* The trial court's decision on the motion to suppress is unreported. *Id.* at 495 n.4 (plurality opinion).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* Following the denial of the motion to suppress, Royer changed his plea from "not guilty" to "nolo contendere." *Id.* By pleading "nolo contendere," which is in effect equivalent to pleading guilty, Royer was able to reserve the right to appeal the denial of the motion to suppress. *Id.* Royer was sentenced to two years of probation with a thirty-day jail sentence imposed as a condition of the probation. *Royer v. State*, 389 So. 2d 1007, 1008 (Fla. Dist. Ct. App. 1979), *aff'd*, 460 U.S. 491 (1983).

²²³ 460 U.S. at 495 (plurality opinion).

²²⁴ *Id.* The case was reheard en banc. *Id.* at 495 n.6 (plurality opinion).

²²⁵ *Id.* at 495 (plurality opinion).

poisonous tree" doctrine,²²⁶ the evidence gathered pursuant to Royer's consent was tainted by the unlawful confinement.²²⁷ The appeals court concluded that the drug courier profile alone was insufficient to establish the reasonable suspicion necessary to justify an investigative stop.²²⁸

Upon the reversal of Royer's conviction by the appeals court, the State of Florida filed a petition for certiorari with the United States Supreme Court, which granted the petition.²²⁹ A fragmented Court affirmed the Florida appeals court's decision reversing Royer's conviction.²³⁰ A majority among the plurality and dissenters held that the initial stop had not been a seizure.²³¹ This majority further held that once the stop had become a seizure, reasonable suspicion had existed to justify the investigative stop.²³² A different majority of Justices found that at some point after the initial stop, the officers' seizure had matured into an arrest unsupported by probable cause.²³³ Thus, according to this second majority of Justices, Royer's consent and the consequent search were tainted by this illegal arrest.²³⁴

Justice White, joined by Justices Marshall, Powell, and Stevens, wrote the plurality opinion.²³⁵ Justice White began his analysis with a set of "preliminary observations" covering a variety of principles applicable to investigative stops for questioning.²³⁶ First, Justice White explained that consent was necessary to search Royer's luggage.²³⁷ In reaching this conclusion, Justice White reasoned that since no warrant, no probable cause, or no exigent circumstances existed to search Royer's luggage, the validity of the search depended on Royer's consent.²³⁸ Justice White noted that the government bore the burden of proving that this consent was freely and voluntarily given.²³⁹ This burden of demonstrating consent was not satisfied, Justice White stated, by a mere showing that the defendant submitted to perceived lawful authority where the defendant felt he had no choice.²⁴⁰

Continuing with his discussion of preliminary observations, Justice White outlined

²²⁶ See *supra* notes 75-76 and accompanying text for a discussion of the fruit of the poisonous tree doctrine.

²²⁷ 460 U.S. at 495 (plurality opinion).

²²⁸ *Id.* at 495 n.7 (plurality opinion). The court dismissed such profiles as little more than "neutral" factors which point to innocence as readily as guilt. 389 So. 2d at 1019.

²²⁹ See 454 U.S. 1079 (1981).

²³⁰ Justice White delivered the plurality opinion, in which Justices Marshall, Powell and Stevens joined. 480 U.S. at 493 (plurality opinion). Justice Powell also authored a concurring opinion. *Id.* at 508 (Powell, J., concurring). Justice Brennan filed an opinion concurring in the result only. *Id.* at 509 (Brennan, J., concurring). Justice Blackmun filed a dissenting opinion. *Id.* at 513 (Blackmun, J., dissenting). Justice Rehnquist filed a separate dissenting opinion in which Chief Justice Burger and Justice O'Connor joined. *Id.* at 519 (Rehnquist, J., dissenting).

²³¹ *Id.* at 501 (plurality opinion); *id.* at 513-14 (Blackmun, J., dissenting); *id.* at 523 (Rehnquist, J., dissenting). Justice Brennan was the only member of the Court who found that the initial stop was unlawful. See *id.* at 509 (Brennan, J., concurring).

²³² *Id.* at 502 (plurality opinion); *id.* at 523 n.3 (Rehnquist, J., dissenting).

²³³ *Id.* at 503 (plurality opinion); *id.* at 509 (Powell, J., concurring); *id.* at 509 (Brennan, J., concurring).

²³⁴ *Id.* at 507-08 (plurality opinion); *id.* at 509 (Brennan, J., concurring).

²³⁵ *Id.* at 493-508 (plurality opinion).

²³⁶ *Id.* at 497 (plurality opinion).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

the three categories of police-citizen encounters.²⁴¹ The first category, he discussed, the approach and questioning of a willing person in a public place, does not fall under fourth amendment scrutiny.²⁴² Justice White emphasized that law enforcement officers do not violate the fourth amendment by merely stopping a person and asking him a few questions, assuming the person is willing to listen.²⁴³ The answers obtained from this type of encounter, the plurality noted, may be offered in evidence in a criminal prosecution.²⁴⁴ Having established that this mere questioning of an individual does not convert the encounter into a seizure requiring objective justification, Justice White cautioned that under a nonseizure encounter the individual must be free to leave the questioner at any time.²⁴⁵

The second category of police-citizen encounters set forth by Justice White involved the brief investigative stop of an individual.²⁴⁶ These stops qualify as seizures, Justice White noted, and satisfy fourth amendment strictures "if there is articulatable suspicion that a person has committed or is about to commit a crime."²⁴⁷ The *Terry* decision, Justice White stated, had created this limited exception to the general rule that any seizure of a person was invalid unless justified by probable cause.²⁴⁸ Justice White suggested that an important public interest in the seizure of drug smugglers occasioned this exception.²⁴⁹ This public interest, however, Justice White cautioned, needed to be carefully balanced against the desire to prevent unwarranted intrusion into personal security.²⁵⁰

The third category of police-citizen encounters Justice White discussed involved those seizures more intrusive than an investigative stop.²⁵¹ These encounters, explained Justice White, amounted to a full scale arrest and were valid only if supported by probable cause.²⁵² Justice White cautioned that *Terry v. Ohio* and its progeny in permitting the investigative stop had created an extremely limited exception to the general rule against seizures of persons without probable cause.²⁵³ This exception, according to Justice White, must be limited to avoid approaching the conditions of an arrest.²⁵⁴

Justice White then noted that, although the exigent circumstances provide justification for a warrantless search, if these investigative stops are based on reasonable suspicion

²⁴¹ *Id.* at 497-99 (plurality opinion).

²⁴² *Id.* at 497-98. This is the category one police-citizen encounter, discussed *supra* notes 45-47 and accompanying text.

²⁴³ 460 U.S. at 497-98 (plurality opinion).

²⁴⁴ *Id.* at 497 (plurality opinion).

²⁴⁵ *Id.* at 498 (plurality opinion).

²⁴⁶ *Id.* at 498-99 (plurality opinion). This is the category two police-citizen encounter, discussed *supra* notes 48-50 and 79-93 and accompanying text. This part of Justice White's opinion clearly carves out the area of police-citizen encounters first established in *Terry* and *Adams*. For a discussion of *Terry* and *Adams*, see *supra* notes 79-96 and accompanying text.

²⁴⁷ 460 U.S. at 498 (plurality opinion).

²⁴⁸ *Id.* at 499 (plurality opinion).

²⁴⁹ *Id.* at 499-500 (plurality opinion).

²⁵⁰ *Id.* at 500 (plurality opinion).

²⁵¹ *Id.* This is the category three police-citizen encounter, discussed *supra* notes 50-55 and accompanying text.

²⁵² 460 U.S. at 500 (plurality opinion).

²⁵³ *Id.*

²⁵⁴ *Id.* Justice White based this proposition on *Dunaway v. New York*, 442 U.S. 200 (1979). In that case, a suspect had not been formally arrested, yet was taken to a police station and interrogated for an hour. *Id.* at 203. The *Dunaway* Court held that the incriminating statements were inadmissible because this investigative stop was too intrusive. *Id.* at 207.

rather than probable cause, the scope of the intrusion must nevertheless be tailored to the justification of the stop.²⁵⁵ Specific limits to the scope of the investigative stop were not set forth by Justice White because he reasoned that the scope of the intrusion permitted will vary with the particular facts and circumstances of the case.²⁵⁶ Justice White did, however, set forth two general rules governing the permissible scope of the intrusion.²⁵⁷ First, Justice White reasoned, an investigative detention, "must be temporary and last no longer than is necessary to effectuate the purposes of the stop."²⁵⁸ Second, "the investigative methods," Justice White stated, "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."²⁵⁹

Having set forth the three categories of police-citizen encounters, Justice White next articulated the principle that tainted evidence is inadmissible.²⁶⁰ Specifically, Justice White noted, if an individual is illegally detained and gives a voluntary statement, the statement is nonetheless inadmissible because it is the product of the illegal detention and not the result of an independent act of free will.²⁶¹

Applying these principles to the facts before it, the plurality upheld the appeals court's reversal of Royer's conviction.²⁶² Royer's consent to the search had been invalid, Justice White explained, because it was given during an illegal seizure.²⁶³ The seizure, reasoned Justice White, had been illegal because the bounds of a permissible investigative stop had been exceeded.²⁶⁴ The stop had matured into an arrest unsupported by probable cause.²⁶⁵ Thus, according to Justice White, Royer's consent and the consequent search were tainted by this illegal arrest.²⁶⁶

In finding that the investigative stop was supported by reasonable suspicion but that the bounds of the investigative stop had been exceeded, Justice White addressed three arguments advanced by the state to support the officers' actions.²⁶⁷ Justice White found "untenable" the state's first argument that the entire encounter was consensual.²⁶⁸ While agreeing that the officers' conduct in taking Royer's license and ticket was not a seizure, Justice White nevertheless found that a seizure occurred once the officers identified themselves as narcotics agents, told Royer they suspected him of transporting drugs, and asked him to accompany them to the DEA office.²⁶⁹ Justice White reasoned that these actions by the police constituted a seizure because they amounted to a "show of official

²⁵⁵ 460 U.S. at 500 (plurality opinion).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 501 (plurality opinion).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 501-07 (plurality opinion).

²⁶⁸ *Id.* at 501 (plurality opinion).

²⁶⁹ *Id.* Justice White noted: "Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for purposes of the Fourth Amendment." *Id.*

authority such that a reasonable person would have believed that he was not free to leave."²⁷⁰

Next, Justice White dismissed the state's contention that even if Royer had been seized, reasonable suspicion existed to justify the investigative stop and that the encounter, therefore, had not amounted to an arrest.²⁷¹ Justice White agreed with the state that reasonable suspicion existed to detain Royer based on the characteristics listed in the drug courier profile.²⁷² Justice White agreed that adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him were established by the officers' discovery that Royer was traveling under an assumed name, together with the facts already known to the officers — the fact that Royer paid cash for a one-way ticket, the method of checking his luggage, and Royer's appearance and conduct in general.²⁷³ Justice White found, however, that when Royer produced his key to the suitcases, in response to the officers' request, the detention exceeded the scope of an investigative stop permitted by *Terry*.²⁷⁴

In ruling that the bounds of the investigative stop had been exceeded, Justice White also found that the law enforcement officers' conduct toward Royer was more intrusive than necessary during the investigative detention.²⁷⁵ No reason existed, Justice White stated, to move Royer from the concourse to the DEA office.²⁷⁶ The removal of Royer to the office, Justice White found, served no purpose other than to change the nature of the police-citizen encounter from an investigative stop to a full-scale arrest.²⁷⁷ Justice White articulated three alternative police procedures that could have made the detention legal.²⁷⁸ First, Justice White noted that the encounter would have been consensual if the officers had returned Royer's driver's license and airplane ticket and informed him that he was free to go.²⁷⁹ Second, Justice White suggested that moving Royer from the concourse to the office would not have turned the investigative stop into an arrest if the purpose of the move was safety and security of either the officers or the public.²⁸⁰ Third, Justice White noted that the use of a dog trained to discover drugs might have been feasible and less intrusive than opening Royer's luggage.²⁸¹ Justice White reasoned that if the dog had not reacted to Royer or his luggage then Royer could have left immediately.²⁸² If, on the other hand, the dog had smelled something suspicious, then sufficient probable cause would have existed to justify an arrest.²⁸³

After finding that the officers' conduct was too intrusive, Justice White rejected the state's final argument that Royer had not been illegally detained because probable cause to arrest him existed by the time he gave his consent to the search of his luggage.²⁸⁴ The

²⁷⁰ *Id.* at 502 (plurality opinion) (quoting *Mendenhall*, 446 U.S. at 554 (plurality opinion)).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 502-03 (plurality opinion).

²⁷⁵ *Id.* at 504 (plurality opinion).

²⁷⁶ *Id.* at 504-05 (plurality opinion).

²⁷⁷ *Id.* at 505 (plurality opinion).

²⁷⁸ *Id.* at 505-06 (plurality opinion).

²⁷⁹ *Id.* at 504 (plurality opinion).

²⁸⁰ *Id.* at 504-05 (plurality opinion).

²⁸¹ *Id.* at 505-06, 505 n.10 (plurality opinion).

²⁸² *Id.* at 506 (plurality opinion).

²⁸³ *Id.*

²⁸⁴ *Id.* at 507 (plurality opinion).

plurality found insufficient probable cause upon the facts surrounding the police-citizen encounter.²⁸⁵ Justice White reasoned that the observation of a nervous young man with two heavy suitcases who paid cash for an airline ticket to a target city, which led to an inquiry that revealed that the ticket had been purchased under an assumed name, did not supply probable cause for the arrest.²⁸⁶

Justice White, in sum, explicitly endorsed the use of the three-tier theory of the fourth amendment. Finding that the officers' stop was a second-tier police-citizen encounter — an investigative stop — Justice White determined that the DEA officers had adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage to verify or dispel their suspicions.²⁸⁷ Justice White did not mention explicitly that the drug courier profile provided the reasonable suspicion. The characteristics cited by Justice White that gave rise to the reasonable suspicion, however, are all listed in the profile.²⁸⁸ Justice White gave no other indication that other characteristics existed to support the reasonable suspicion. Justice White concluded, however, that the seizure of Royer's airline ticket, driver's license, and luggage, when considered with his detention in a small office and the failure of the officers to inform him that he was free to go, exceeded the permissible limits of an investigative stop.²⁸⁹ Consequently, according to Justice White, the police-citizen encounter amounted to a full scale arrest, unaccompanied by probable cause and, therefore, violated the fourth amendment.²⁹⁰ Royer's subsequent consent to the search of his luggage, Justice White further concluded, was tainted by this illegality.²⁹¹

Two Justices wrote concurring opinions in *Royer*. Justice Powell, a member of the *Royer* plurality, wrote a concurring opinion simply "to repeat that the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit."²⁹² Justice Powell emphasized that police-citizen encounters in airports warrant special consideration because airlines are a major means of drug trafficking and because the agents who stop the suspects are highly skilled in detecting drug traffickers.²⁹³ Justice Powell also found that these encounters warrant special consideration because the officers are guided by the drug courier profile.²⁹⁴ Although Justice Powell did not explicitly find that the drug courier profile had provided reasonable suspicion to justify stopping Royer, he endorsed its use, finding the characteristics that make up the profile relevant in identifying drug smugglers.²⁹⁵

Justice Brennan, concurring only in the result, agreed with the plurality that at some point the actions of the police exceeded the bounds of an investigative stop, but disagreed that the initial stop was not a seizure.²⁹⁶ Justice Brennan found instead that this seizure was an investigative stop unsupported by reasonable suspicion.²⁹⁷ On finding the initial

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 502 (plurality opinion).

²⁸⁸ *Id.* See *supra* note 32 for a list of the characteristics.

²⁸⁹ 460 U.S. at 502-03 (plurality opinion).

²⁹⁰ *Id.* at 507 (plurality opinion).

²⁹¹ *Id.* at 507-08 (plurality opinion).

²⁹² *Id.* at 508-09 (Powell, J., concurring).

²⁹³ *Id.* at 508 (Powell, J., concurring).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 509-13 (Brennan, J., concurring).

²⁹⁷ *Id.* at 509-11 (Brennan, J., concurring).

contact illegal, Justice Brennan emphasized that he did not consider all police-citizen encounters seizures.²⁹⁸ Justice Brennan argued, however, that in this case Royer was impermissibly seized when the police identified themselves and asked for Royer's driver's license and airline ticket.²⁹⁹ According to Justice Brennan, a seizure had occurred at this point because the officers had engaged in a "show of authority" and had restrained Royer's liberty.³⁰⁰ Royer, reasoned Justice Brennan, could not have felt free to walk away once these events had occurred.³⁰¹

Having established that Royer was seized during the initial contact, Justice Brennan noted that to justify such a seizure, "an officer must have a reasonable suspicion of criminal activity based on 'specific and articulable facts.'"³⁰² Using this standard, Justice Brennan suggested that the facts upon which the officers relied in first approaching Royer, all of which were contained in the drug courier profile, failed to provide the reasonable suspicion of criminal activity necessary to justify a seizure.³⁰³ Justice Brennan objected to the use of these particular profile characteristics as the basis for reasonable suspicion because he believed that the characteristics either considered together or individually were consistent with innocent behavior.³⁰⁴

Justice Blackmun, writing one of the two dissenting opinions in *Royer*, agreed with the plurality that a seizure had occurred, although he did not identify the exact point.³⁰⁵ Justice Blackmun also agreed that no probable cause existed when the officers opened the suitcases, but he found the seizure valid based on the existence of reasonable suspicion.³⁰⁶ In reaching this finding, Justice Blackmun stated that probable cause was not necessary in an airport drug trafficking case such as the one in *Royer*.³⁰⁷ Justice Blackmun reached this conclusion after balancing the competing interests involved.³⁰⁸ According to Justice Blackmun, on one side of the balance rests the desire to minimize the intrusion upon an individual's privacy,³⁰⁹ and on the other side rests the special law enforcement interest in permitting such an intrusion to prevent illegal actions that would otherwise go undetected.³¹⁰ In weighing these competing interests, Justice Blackmun found that probable

²⁹⁸ *Id.* at 511 (Brennan, J., concurring).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 511-12 (Brennan, J., concurring).

³⁰¹ *Id.* at 512 (Brennan, J., concurring).

³⁰² *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

³⁰³ *Id.*

³⁰⁴ *Id.* The characteristics that Justice Brennan considered to be consistent with innocent behavior were those found solely in the profile on which the officers relied upon in stopping Royer. These characteristics included that Royer was carrying heavy suitcases; that he was young; that he was casually dressed; that he was pale, nervous, and looked around at other people; that he paid cash for his airline ticket with small bills; and that he did not completely fill out his luggage identification cards. *Id.*

³⁰⁵ *Id.* at 513-19 (Justice Blackmun, dissenting). Justice Blackmun concurred in the Court's adoption of the fourth amendment seizure standard used by Justice Stewart in *Mendenhall*. *Id.* at 514 (Blackmun, J., dissenting).

³⁰⁶ *Id.* at 519 (Blackmun, J., dissenting). In reaching this conclusion, Justice Blackmun relied on the Court's treatment of automobile stops. *Id.* at 515-16 (Blackmun, J., dissenting). He distinguished this case from *Dunaway*, where a suspect was taken from his neighbor's home and involuntarily transported to the police station in a police car. *Id.* Royer was stopped in a major international airport which Justice Blackmun reasoned held a lesser magnitude of privacy than a home. *Id.* at 518 (Blackmun, J., dissenting).

³⁰⁷ *Id.* at 519 (Blackmun, J., dissenting).

³⁰⁸ *Id.* at 518 (Blackmun, J., dissenting).

³⁰⁹ *Id.*

³¹⁰ *Id.*

cause was not necessary because of society's strong interest in overcoming the obstacles in detecting drug trafficking.³¹¹

Justice Blackmun did recognize that as an encounter proceeds, a greater degree of reasonable suspicion is needed to justify continuing the stop.³¹² In this case, however, Justice Blackmun suggested that a greater degree of reasonable suspicion was not necessary due to the short length of the detention and the politeness of the officers, as well as Royer's consent to the office detention and the search.³¹³ Justice Blackmun, however, did not articulate the basis for the reasonable suspicion.³¹⁴ Although the police-citizen encounter in *Royer* was based on the drug courier profile, Justice Blackmun never mentioned the profile's relevance in airport drug stops.³¹⁵ To the extent, however, that all the characteristics displayed by Royer were part of the profile, and Justice Blackmun found that these characteristics provided reasonable suspicion, it can be assumed that he believed the profile in this case provided reasonable suspicion to justify the stop.

Justice Rehnquist, writing a dissenting opinion joined by Chief Justice Burger and Justice O'Connor,³¹⁶ agreed with the plurality that when the police officers first apprehended Royer no seizure occurred.³¹⁷ Justice Rehnquist also agreed that the facts known to the officers provided reasonable suspicion to support the investigative stop.³¹⁸ Justice Rehnquist disagreed, however, that the officers' conduct following the initial conversation with Royer was unreasonable.³¹⁹ The entire police-citizen encounter, according to Justice Rehnquist, was therefore lawful under the fourth amendment.³²⁰

In reaching the conclusion that the seizure was valid, Justice Rehnquist expressly approved the use of the drug courier profile.³²¹ In a lengthy footnote, Justice Rehnquist stated that the use of the drug courier profile to establish reasonable suspicion is part of an officer's accumulated knowledge and is not amenable to the bright-line rule proposed by the Florida court.³²² Justice Rehnquist stressed that the determination must be made on a case-by-case basis considering the totality of the circumstances.³²³

In sum, a plurality of the Court in *Florida v. Royer* relied on and expanded the three-tier theory of the fourth amendment.³²⁴ A majority of the Court found that the stop of Royer, which was considered a second-tier investigative stop, was supported by the requisite amount of reasonable suspicion.³²⁵ The plurality opinion in *Royer* expressed its

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 518-19 (Blackmun, J., dissenting).

³¹⁴ *Id.*

³¹⁵ *Id.* at 513-19 (Blackmun, J., dissenting).

³¹⁶ *Id.* at 519-32 (Rehnquist, J., dissenting).

³¹⁷ *Id.* at 523 n.3 (Rehnquist, J., dissenting).

³¹⁸ *Id.* at 525 (Rehnquist, J., dissenting). Justice Rehnquist did not discuss the probable cause issue here because he found that the officers had a reasonable suspicion to justify the detention. *Id.* at 523-25 (Rehnquist, J., dissenting).

³¹⁹ *Id.* at 520 (Rehnquist, J., dissenting). Justice Rehnquist stated: "Analyzed simply in terms of 'reasonableness' as the term is used in the Fourth Amendment, the conduct of the investigating officers toward Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence." *Id.*

³²⁰ *Id.* at 530 (Rehnquist, J., dissenting).

³²¹ *Id.* at 525 n.6 (Rehnquist, J., dissenting).

³²² *Id.* The state court had concluded that conformity with the drug courier profile, "without more," is insufficient to establish even reasonable suspicion that criminal activity is afoot. *See id.*

³²³ *Id.*

³²⁴ *Id.* at 497-99 (plurality opinion).

³²⁵ *Id.* at 502 (plurality opinion); *id.* at 523 n.3 (Rehnquist, J., dissenting).

approval of the characteristics of the profile present in *Royer* by rejecting the view of the Florida District Court of Appeals, that behavior matching the characteristics found in the profile is insufficient to provide reasonable suspicion.³²⁶ The plurality, which noted that all the characteristics exhibited by *Royer* were found in the profile, did not articulate any other basis from which reasonable suspicion could have been derived.³²⁷ Justice Rehnquist, dissenting, also found that possession of these particular characteristics provided reasonable suspicion to justify the stop.³²⁸ Although a majority found the profile sufficient to provide reasonable suspicion, no opinion articulated the number of profile characteristics necessary to provide the necessary level of suspicion of criminal activity to justify an investigative stop of a suspected drug smuggler at an airport.³²⁹

IV. THE DRUG COURIER PROFILE AND DETERMINING REASONABLE SUSPICION

Whether reasonable suspicion existed to justify the stops in *Mendenhall*, *Reid*, and *Royer* was determined by the presence of elements of the drug courier profile.³³⁰ In all three cases, the suspects were singled out by law enforcement agents because they matched a profile. Beyond the fact that the behavior of the defendants *Mendenhall*, *Reid* and *Royer* conformed to certain characteristics found in a profile, nothing else provided reasonable suspicion.

In *Mendenhall*, the defendant attracted the attention of the agents based on four characteristics found in the drug courier profile. First, the defendant arrived in Detroit from Los Angeles, a "source" city. Second, *Mendenhall* was the last to deplane and had a nervous appearance. Third, she claimed no baggage, and fourth, *Mendenhall* changed airplanes for a flight out of Detroit.³³¹ Three Justices in *Mendenhall* found reasonable suspicion based on these characteristics to justify an investigative stop of the suspected drug smuggler,³³² four justices disagreed,³³³ and two never reached the question.³³⁴ The defendant in *Reid* was stopped by an agent because his behavior matched four drug courier profile characteristics. First, the defendant arrived from a source city. Second, he arrived at a time of diminished law enforcement activity — early morning. Third, *Reid* attempted to conceal that he was traveling with another person, and fourth, he checked no baggage.³³⁵ In *Reid* a majority of the Court refused to acknowledge that these profile

³²⁶ *Id.* at 493 (plurality opinion).

³²⁷ *Id.* at 502 (plurality opinion).

³²⁸ *Id.* at 523 n.3 (Rehnquist, J., dissenting).

³²⁹ After *Royer*, the Eighth Circuit in *United States v. Wallraff*, 705 F.2d 980, 989 (8th Cir. 1983), concluded that reasonable suspicion existed for a stop when the suspect who was circumstantially linked to a recent drug shipment, traveled under false identity, acted nervous, and did not claim his luggage at the airport. See also *United States v. Moore*, 675 F.2d 802 (6th Cir. 1983); *United States v. Ilazi*, 563 F. Supp. 730 (D. Minn. 1983).

³³⁰ *Mendenhall*, 446 U.S. at 547-48 & n.1 (plurality opinion); *Reid*, 448 U.S. at 441-42; *Royer*, 460 U.S. at 502 (plurality opinion).

³³¹ 446 U.S. at 547 n.1 (plurality opinion).

³³² *Id.* at 563-64 (Powell J., concurring). Justice Powell was joined by Chief Justice Burger and Justice Blackmun.

³³³ *Id.* at 564 (White, J., dissenting). Justice White's dissent was joined by Justices Brennan, Marshall and Stevens.

³³⁴ *Id.* at 546 (Stewart, J., minority opinion in part). Justice Stewart was joined by Justice Rehnquist.

³³⁵ 448 U.S. at 439.

characteristics provided reasonable suspicion to justify the investigative stop.³³⁶ Six factors found in the drug courier profile caused the agents to stop Royer. First, he carried heavy suitcases of the type commonly used by drug smugglers. Second, he was nervous and looked around as though he were looking for police. Third, the defendant paid cash for his airline ticket. Fourth, he did not write a full name and address on his baggage. Fifth, Royer was young, and sixth, he was casually dressed.³³⁷ In *Royer*, a majority of the Court found that possession of these particular characteristics provided reasonable suspicion to justify the stop.³³⁸

A comparison of the *Mendenhall*, *Reid*, and *Royer* profiles reveals that there is no single profile used nationwide.³³⁹ In fact, not only do profile elements vary from one law enforcement agency to another, they also vary from airport to airport.³⁴⁰ Although the profile characteristics in these cases vary, it is possible to hypothesize what combination of characteristics are necessary to provide reasonable suspicion of criminal activity to justify an investigative stop. This final section, by comparing the profile characteristics in *Mendenhall*, *Reid*, and *Royer*, will articulate which elements of the drug courier profile apparently must be present in a given case to justify an investigative stop of a suspected drug smuggler.

In *Mendenhall*, since a majority of the Court never reached the seizure issue, they had no occasion to discuss whether the drug courier profile, either alone or in combination with other factors, provides reasonable suspicion to justify an investigative stop.³⁴¹ Three members of the majority in a separate concurring opinion did, however, examine the propriety of using the profile and seemingly gave their approval of this technique.³⁴² Justice Powell, in writing his concurring opinion provided a detailed analysis of the Supreme Court's view on the drug courier profile.³⁴³ The profile was regarded by Justice Powell as a sophisticated law enforcement technique worthy of judicial deference.³⁴⁴ Justice Powell accepted the characteristics constituting the profile as being relevant to establish reasonable suspicion to justify a stop.³⁴⁵ Justice Powell also accepted, without question, the agent's conclusions regarding the suspect's nervousness and that the suspect was scanning the area for the purpose of detecting drug enforcement officers.³⁴⁶ Justice Powell considered no other rationale for the suspect's behavior.

If the Court adopted Justice Powell's approach to evaluating the drug courier profile characteristics, then the Court's analysis of these cases would not involve an examination of the factors found in the profile itself. The Court would assume without question that the factors found in the profile were relevant in detecting criminal behavior. The focus of

³³⁶ *Id.* at 441.

³³⁷ 460 U.S. at 493 n.2 (plurality opinion).

³³⁸ *Id.* at 502 (plurality opinion); *id.* at 523 n.3 (Rehnquist, J., dissenting).

³³⁹ *Mendenhall*, for example was approached in part because she claimed no baggage, while Royer was approached in part because of the kind of luggage he carried.

³⁴⁰ See *supra* notes 14-15 and accompanying text.

³⁴¹ See SEARCH & SEIZURE L. REP. 35, 36 (1980) (*Mendenhall* Court did not resolve profile issue because two members of the majority found that no fourth amendment seizure had occurred).

³⁴² 446 U.S. at 565 n.6 (Powell, J., concurring) (agents had reasonable suspicion to stop particular defendant because agents could reasonably associate defendant's observed conduct with criminal activity).

³⁴³ *Id.* at 563-65 (Powell, J., concurring).

³⁴⁴ *Id.* at 564 n.4 (Powell, J., concurring).

³⁴⁵ *Id.* at 564-65 (Powell, J., concurring).

³⁴⁶ *Id.* at 565 (Powell, J., concurring).

the analysis would then center on whether the combination of those factors presented was enough to establish suspicion.

Although the concurring Justices in *Mendenhall* accepted the profile characteristics at face value, they did indicate that these characteristics might not, in all cases, provide reasonable suspicion.³⁴⁷ This statement was predictive of the Court's future actions. These same Justices, concurring in the per curiam opinion in *Reid*, found that the four factors presented there that were part of the profile were insufficient to establish reasonable suspicion.³⁴⁸ The Court stated that the agents' observation that Reid's behavior matched the courier characteristics of trying to conceal that he was traveling with another person was a "hunch," not a "fair inference," and was at any rate, "too slender a reed to support the seizure in this case."³⁴⁹ The Court discounted the other three characteristics — travel from a source city, arrival at a time of diminished law enforcement activity, and no checked baggage — on the ground that these characteristics did not relate to Reid's "particular conduct."³⁵⁰ This result suggests that the Court will assess profiles in a two-step process. The first step is to determine if the profile characteristics are particularized so that the police can differentiate the suspect from innocent travelers. The court then discounts those factors that are not particular to a given suspect, as it did in *Reid*. In step two, the Court determines whether the particularized factors fairly support the reasonable suspicion to justify an investigative stop. The *Reid* Court established that the one particular characteristic — attempting to conceal travel with another person — along with the other three nonparticularized characteristics did not satisfy the test of reasonable suspicion.

In *Royer*, five additional Justices joined the *Mendenhall* plurality in finding that the profile characteristics exhibited by Royer provided reasonable suspicion to justify the second tier police-citizen encounter — an investigative stop.³⁵¹ These Justices from both the plurality and dissenting opinions established that the combination of profile characteristics found in *Royer* satisfied the requirement of reasonable suspicion. Significantly, the plurality did not explicitly overrule its earlier decision in *Reid* when it handed down *Royer*. By not overruling *Reid*, a majority of the Court has set a minimum number of particular characteristics of the profile that will provide reasonable suspicion to justify an investigative stop. A drug courier profile stop, where only one characteristic relates to particular conduct, such as the one in *Reid*, will not be enough to satisfy the requirement of reasonable suspicion to justify the stop.

These three cases, therefore, have not explicitly articulated those characteristics of the profile that provide reasonable suspicion. Based on the three decisions, however, speculating about which factors might provide reasonable suspicion to stop an individual for investigative questioning in an airport is possible. In order to draw any inferences from these cases, a comparison of the characteristics of the profile that led the police to stop the suspect in each case is necessary. The following characteristic of the profile was

³⁴⁷ *Id.* at 565 n.6 (Powell, J., concurring).

³⁴⁸ 448 U.S. at 440-41.

³⁴⁹ *Id.* at 441.

³⁵⁰ *Id.*

³⁵¹ As Justice Rehnquist noted in his dissent, while the plurality did not address the use of the drug courier profile in narcotics investigations, it affirmed a decision of the Florida District Court of Appeals which fashioned a "bright line rule that conformity with such a profile, without more, is insufficient to establish even reasonable suspicion that criminal activity is afoot." 460 U.S. at 525 n.6 (Rehnquist, J., dissenting).

present in both *Mendenhall* and *Reid*: arrival from a source city.³⁵² In addition to this common element four additional factors were present in *Mendenhall*. Specifically, the factors found in *Mendenhall* but not in *Reid* were that the suspect in *Mendenhall* was the last to deplane, scanned the entire area, appeared "very nervous," and changed airlines during her trip.³⁵³ In comparison, the factors in *Reid* not found in *Mendenhall* were that the suspect in *Reid* arrived early in the morning and tried to conceal the existence of a traveling companion.³⁵⁴ From these two cases it is arguable that the defendant's particular conduct of nervousness and scanning of the airport concourse in *Mendenhall* are the characteristics that might have made the difference in the *Mendenhall* plurality's assessment of what constitutes reasonable suspicion. The remaining factors in *Mendenhall* not found in *Reid* — being last to deplane and changing airlines — are arguably consistent with innocent behavior. Since these characteristics do not relate to a person's particular conduct, they do not provide an officer with additional suspicion of criminal behavior. Of the three characteristics found in *Reid* but not *Mendenhall* — arrival at a time of diminished law enforcement activity, failure to check baggage, and concealment of travel with another person — only the last characteristic is related to the suspect's particular conduct. This characteristic standing alone was not sufficient to justify the stop.

Royer adds little to the analysis of what combination of profile characteristics provides reasonable suspicion. One conclusion that can be reached is that if the suspect possesses the characteristics present in both *Mendenhall* and *Royer*, reasonable suspicion would exist. Specifically, if an agent stops a suspected drug smuggler who has the characteristics of *Mendenhall* — arriving from a source city, being last to deplane, claiming no baggage, and changing airplanes³⁵⁵ — plus the characteristics of *Royer* — carrying heavy suitcases, paying cash for an airplane ticket, not writing full name on baggage, being young and casually dressed — combined with the common factor of nervousness, reasonable suspicion would be established.³⁵⁶ Finally, if *Reid*'s two-step process is applied, the only particular conduct found in *Mendenhall* and *Royer* is nervousness. This particular characteristic alone, like the one particular characteristic in *Reid* — concealing travel with another person — will not in itself provide reasonable suspicion. Nonetheless, nervousness is the one characteristic found in *Royer* and *Mendenhall* but not in *Reid*. Since the *Mendenhall* plurality and the *Royer* majority upheld the use of a profile where nervousness was a characteristic, and *Reid* disallowed the use of a profile where nervousness was lacking, nervousness appears to be the one element that the court has determined must be present, along with other factors, in all cases.

CONCLUSION

The United States Supreme Court has rendered three decisions on the constitutional validity of the drug courier profile. All three cases involve the investigation of suspected drug smugglers who were stopped by drug agents in airports because their behavior matched a drug courier profile. After the *Royer* decision, the validity of a stop of a suspected drug smuggler will be evaluated by the Court using a three-tier framework. The first tier consists of police-citizen encounters that are so minimally intrusive that they

³⁵² *Reid*, 448 U.S. at 441; *Mendenhall*, 446 U.S. at 547 n.1 (plurality opinion).

³⁵³ *Mendenhall*, 446 U.S. at 547 n.1 (plurality opinion).

³⁵⁴ *Reid*, 448 U.S. at 441.

³⁵⁵ *Mendenhall*, 446 U.S. at 547 n.1 (plurality opinion).

³⁵⁶ 460 U.S. at 493 n.2 (plurality opinion).

do not rise to the level of a fourth amendment seizure. The second tier consists of seizures less intrusive than a full arrest that are supported by reasonable suspicion, a standard lower than probable cause. The third tier consists of those seizures which are so intrusive, such as an arrest, that probable cause as determined by a magistrate, or in exigent circumstances, by the police themselves, is required. The focus of this note has been on the use of drug courier profile to uphold the second tier of police-citizen encounters — the investigative stop.

Mendenhall, *Reid*, and *Royer* established that while particular investigations based upon drug courier profiles may be invalidated by the Court, it is unlikely the Court will find that the use of the profile in and of itself is unconstitutional. The Court, however, has not established what characteristics found in the profile will establish reasonable suspicion. Moreover, because the profile varies from case to case, the Court will not draw any bright lines in determining which combinations of characteristics provide reasonable suspicion and which combinations do not. As this note demonstrates, the validity of profile use will depend on whether the combination of particular conduct along with the discounted nonparticularized conduct establishes reasonable suspicion.

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