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Fourth Amendment--Using the Drug Courier Profile to Fight the War on Drugs

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FOURTH AMENDMENT—USING THE DRUG COURIER PROFILE TO FIGHT THE WAR ON DRUGS

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

I. INTRODUCTION

In *United States v. Sokolow*,[1] the United States Supreme Court held that the fourth amendment[2] does not preclude the use of " 'probabilistic' facts describing 'personal characteristics' of drug couriers"[3] as a basis for a finding of "reasonable suspicion" necessary to justify a brief investigative detention of a suspected drug courier.[4] This Note explores the *Sokolow* opinions and concludes that the Court correctly held that "reasonable suspicion" did, in fact, exist in this case. This Note recognizes, however, that the Court's rationale is fraught with potentially harmful consequences. This Note reasons that the Court's failure to clearly define the factors necessary to support a finding of "reasonable suspicion" not only leaves other courts with little guidance in future cases, but might also give these Courts seemingly unbridled discretion to intrude on citizens' fourth amendment rights through the affirmation of suspect "reasonable suspicion" determinations. This Note also concludes that the *Sokolow* Court misread *Florida v. Royer*[5] in an effort to expand the permissible boundaries of a brief, investigative *Terry* stop.[6] Finally, this Note concludes that the Court improperly discounted the significance of the use of "drug-courier profiles" and the potential hazards that these profiles can create.

II. HISTORY OF REASONABLE SUSPICION STANDARD

The fourth amendment[7] requires that a seizure of a person by a

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1 109 S. Ct. 1581 (1989).

2 For the text of the fourth amendment, see *infra* note 77.

3 *Sokolow*, 109 S. Ct. at 1585-87 (quoting United States v. Sokolow, 831 F.2d 1413, 1420 (9th Cir. 1987)).

4 *Id.* at 1585-86.

5 460 U.S. 491 (1983).

6 The *"Terry* stop" terminology originated in Terry v. Ohio, 392 U.S. 1 (1967). For the rationale supporting a *Terry* stop, see *infra* notes 7-21 and accompanying text.

7 U.S. CONST. amend. IV.

law enforcement agent requires probable cause.[8] In *Terry v. Ohio*,[9] however, the United States Supreme Court developed an exception to the probable cause standard. The *Terry* majority held that certain seizures are justifiable under the fourth amendment if there is a reasonable suspicion that a person has or is about to commit a crime.[10] Since a permissible seizure based on merely reasonable suspicion, rather than probable cause, involves an additional intrusion into an individual's personal security, the "scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[11] In addition, the seizure must be justified by a legitimate governmental interest.[12] In *Terry*, the Court found that a legitimate governmental interest existed due to the presence of reasonable grounds to believe that Terry was armed and dangerous.[13] Thus, Terry presented an immediate danger to both the officers and bystanders. The reasonable suspicion exception to the probable cause standard has since been extended to other situations in which a strong governmental interest exists,[14] specifically activities involving narcotics.[15]

The *Terry* Court held that an officer may make a brief investigative detention[16] of a suspect when the officer observes suspicious conduct that leads him or her reasonably to conclude, in light of previous experiences, that criminal activity "may be afoot."[17] Since *Terry*, three important principles regarding the application of the "reasonable suspicion" standard have developed. First, an officer may not act on an "inchoate and unparticularized suspicion or 'hunch.' "[18] Instead, "some minimum level of objective justification [must be present] to validate the detention or seizure."[19] Second, in evaluating whether a particular set of factors is sufficient to support a finding of reasonable suspicion, "the totality of the circumstances—the whole picture—must be taken into account."[20] Finally,

8 *Id.* For the text of the fourth amendment, see *infra* note 77.

9 392 U.S. 1 (1968).

10 *Id.* at 30.

11 *Terry*, 392 U.S. at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

12 *Id.* at 20-21 (citing Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967)).

13 *Id.* at 30.

14 *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (purpose of investigation to verify or dispel suspicion that immigration laws were being violated).

15 *See, e.g.*, Florida v. Royer, 460 U.S. 493 (1983).

16 This brief investigative detention has become commonly referred to as a "*Terry* stop."

17 *Terry*, 392 U.S. at 30.

18 *Id.* at 27.

19 INS v. Delgado, 466 U.S. 210, 217 (1984).

20 United States v. Cortez, 449 U.S. 411, 417 (1981).

the evidence known to an officer at the time of the seizure must be evaluated "fact on fact and clue on clue"; the officer should consider the possible "inferences and deductions that might well elude an untrained person."[21]

III. Factual Background

On Sunday, July 22, 1984, Andrew Sokolow purchased from the United Airlines ticket counter at Honolulu Airport two round-trip airline tickets for a flight departing for Miami later that day.[22] Sokolow paid $2100 for the tickets from a roll of twenty dollar bills believed to contain approximately $4000.[23] The tickets had open return dates and were purchased in the names of "Andrew Kray" and "Janet Norian."[24] Sokolow gave the agent his home telephone number.[25] Sokolow was dressed in a black jumpsuit and gold jewelry.[26] He was about twenty-five years old and was accompanied by a woman who was, indeed, Janet Norian.[27] The ticket agent observed that Sokolow was acting nervously.[28] Neither Sokolow nor Norian checked any luggage.[29]

After Sokolow and Norian departed, the ticket agent notified Honolulu Police Department Officer John McCarthy of Sokolow's suspicious purchase.[30] McCarthy discovered that the telephone number Sokolow gave to the ticket agent was currently issued to a "Karl Herman."[31] Herman was Sokolow's roommate, although McCarthy was not aware of this fact at that time.[32] McCarthy could not locate a telephone listing for an "Andrew Kray" anywhere in the state of Hawaii.[33] Officer McCarthy then learned that return reservations from Miami to Honolulu in the names of Kray and Norian had been made for July 25, just three days after the couple had left.[34] The return flight was scheduled to stop in both Denver and

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21 Brief for Petitioner at 14-15, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295) (citing United States v. Cortez, 449 U.S. 411, 418-19 (1981)).

22 *Sokolow*, 109 S. Ct. at 1583.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* at 1584.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

Los Angeles.[35]

On July 25, Agents of the Drug Enforcement Administration (DEA) identified Sokolow at Los Angeles Airport.[36] The DEA agents observed that Sokolow "appeared to be very nervous and was looking all around the waiting area."[37] At 6:30 p.m. Sokolow arrived in Honolulu, still accompanied by Norian.[38] Sokolow was wearing the same black outfit and gold jewelry, and the couple still had not checked any of their baggage.[39] The couple exited the airport, proceeded directly towards the street, and attempted to hail a cab.[40] At that point they were approached by Agent Richard Kempshall and three other DEA agents.[41] Agent Kempshall showed his credentials, grabbed Sokolow's arm, and moved him back onto the sidewalk where Kempshall requested Sokolow's airline ticket and identification.[42] Sokolow denied having either document with him.[43] Sokolow admitted that his name was, in fact, "Sokolow," but explained that he was traveling under his mother's maiden name of "Kray."[44]

The DEA agents escorted Sokolow and Norian to the DEA office located at the airport.[45] In that office, the couple's luggage was subjected to a "sniff search" examination by a narcotics detection dog known as "Donker."[46] Donker alerted the agents to Sokolow's brown shoulder bag.[47] The agents then arrested Sokolow and informed him of his constitutional rights.[48] Sokolow decided not to make any statement at that time.[49] DEA agents secured a warrant to search Sokolow's brown shoulder bag.[50] Upon searching the bag, the agents found no illicit drugs, but did locate several suspicious items suggesting Sokolow's participation in drug trafficking.[51]

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35 *Id.*
36 *Id.*
37 Joint Appendix at 43-44, *Sokolow* (No. 87-1295).
38 *Sokolow*, 109 S. Ct. at 1584.
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.* These items included the following: two different used airline tickets in the names of Andrew Kray and James Wodehouse from Honolulu to Miami and back; Miami hotel receipts with dates corresponding to those on the used airline tickets; handwritten

Agents had Donker examine Sokolow's remaining bags once again.[52] Upon reexamination, Donker focused on a medium-sized Louis Vuitton bag.[53] Since it was 9:30 p.m. and too late to obtain another search warrant, the agents retained Sokolow's luggage, but allowed him to leave for the night.[54] The following morning Sokolow's luggage was reexamined by a different dog who confirmed Donker's findings.[55] The agents obtained a search warrant and upon examination found 1,063 grams of cocaine inside Sokolow's bag.[56]

IV. Procedural Background

Andrew Sokolow was indicted for possession with the intent to distribute cocaine.[57] Sokolow moved "to suppress the cocaine and other evidence seized from his luggage."[58] The United States District Court for Hawaii denied Sokolow's motion, finding that reasonable suspicion that he was involved in drug trafficking existed when DEA agents stopped him at Honolulu Airport.[59] Sokolow then entered a conditional plea of guilty to the charges contained in the indictment.[60]

By a divided vote, the United States Court of Appeals for the Ninth Circuit reversed Sokolow's conviction and suppressed the illegally-seized evidence.[61] The majority, applying a new two-part test, held that the DEA agents did not possess reasonable suspicion necessary to justify the stop.[62] The majority's test divided the factors potentially capable of raising reasonable suspicion into two categories.[63] The first category consisted of factors describing "ongoing

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notes indicating amounts of money owed to Sokolow from various individuals; and a personal address book which contained the names and telephone numbers of individuals who were suspected of involvement in drug trafficking. Magistrate's Report at 2, *Sokolow* (No. 87-1295).

52 *Sokolow*, 109 S. Ct. at 1584.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* The relevant federal statute provides in pertinent part: "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 U.S.C. § 841(a)(1) (1982).

58 *Sokolow*, 109 S. Ct. at 1584.

59 *Id.*

60 *Id.*

61 United States v. Sokolow, 831 F.2d 1413, 1423 (9th Cir. 1987).

62 *Id.* at 1424.

63 *Id.* at 1423.

In an earlier decision the Court of Appeals also reversed the District Court, but on

criminal activity."[64] The court determined that one factor from this first category was *always* needed to support a finding of reasonable suspicion.[65] The majority's second category consisted of "personal characteristics" of drug couriers.[66] The majority reasoned that these second category "personal characteristics" were "shared by drug couriers and the public at large"[67] and could not, standing alone, support a finding of reasonable suspicion.[68] These characteristics were to be considered only "if there was evidence of criminal behavior [(category-one factors)] and the government offered '[e]mpirical documentation' that the combination of facts at issue did not describe the behavior of 'significant numbers of innocent persons.' "[69]

The majority applied its new test and determined that the agent's stop of Sokolow was impermissible due to the absence of evidence of ongoing criminal behavior (category-one factors).[70] The dissent criticized the majority's two-part test as "overly mechanistic"[71] and "contrary to the case-by-case determination of reasonable articulable suspicion based on *all* the facts."[72]

The United States Supreme Court, realizing the serious implications on the enforcement of federal narcotics laws raised by this case, granted certiorari to review the Ninth Circuit's decision.[73]

V. SUPREME COURT OPINIONS

A. MAJORITY OPINION

In *Sokolow*, the Court explored the standard of "reasonable suspicion" in relation to the requirements necessary to justify a stop

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the basis of different reasoning. United States v. Sokolow, 808 F.2d 1366 (9th Cir.), *vacated*, 831 F.2d 1413 (9th Cir. 1987). The Court of Appeals' second decision was issued after the Government petitioned for rehearing on the ground that the court had erred in considering each of the factors known to the agents separately rather than in terms of the totality of the circumstances.

Sokolow, 109 S. Ct. at 1584 n.2.

64 *Sokolow*, 831 F.2d at 1422. These factors include the use of an alias, *id.*, or evasive movement through an airport, *id.* at 1423.

65 *Id.* at 1422.

66 *Id.* at 1420. These characteristics include cash payments for tickets, a short trip to a major source city for drugs, nervousness, type of attire, and unchecked luggage.

67 *Id.*

68 *Id.*

69 United States v. Sokolow, 109 S. Ct. 1581, 1585 (1989) (quoting United States v. Sokolow, 831 F.2d 1413, 1420 (9th Cir. 1987)).

70 *Sokolow*, 831 F.2d at 1424.

71 *Id.* at 1426.

72 *Id.* (emphasis in original).

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

and brief detainment of a suspected drug courier.[74] Writing for the majority,[75] Chief Justice Rehnquist noted that police can stop and briefly detain a person for investigative purposes[76] without violating the fourth amendment[77] even if probable cause does not exist, provided the officer has a "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.' "[78] Recognizing that "the concept of reasonable suspicion, like probable cause, is not 'readily or even usefully, reduced to a neat set of legal rules,' "[79] the majority criticized the Court of Appeals' effort to define such requirements in its two-part test.[80]

Observing that the fourth amendment demands " 'some minimum level of objective justification' " for making a stop,[81] Chief Justice Rehnquist stated that an officer must be capable of articulating "more than just an inchoate and unparticularized suspicion or 'hunch.' "[82] However, Chief Justice Rehnquist reasoned that a *Terry* stop could be justified even with "proof of wrongdoing [amounting to less than] . . . a preponderance of the evidence."[83] Chief Justice Rehnquist concluded by stating that in evaluating the validity of a stop, the court must consider " 'the totality of the circumstances—the whole picture.' "[84]

The majority rejected the Ninth Circuit's two-part test due to its division of evidentiary factors into discrete categories and the dif-

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74 *Id.*

75 Chief Justice Rehnquist was joined by Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy.

76 This type of stop is often referred to as a *Terry* stop. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968). For an explanation of this type of stop, see *supra* notes 7-21 and accompanying text.

77 The fourth amendment to the United States Constitution 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.

78 *Sokolow*, 109 S. Ct. at 1585 (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)). This standard was first articulated by the court in *Terry*.

79 *Sokolow*, 109 S. Ct. at 1585 (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

80 *Id.*

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

82 *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

83 *Id.* Chief Justice Rehnquist reached this conclusion through a series of analogies noting that "probable cause means 'a fair probability that contraband or evidence of a crime will be found.' " *Id.* (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). Chief Justice Rehnquist noted further that "the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause." *Id.* (citing United States v. Montoya de Hernandez, 473 U.S. 531, 541, 544 (1985)).

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

fering probative values assigned to each.[85] Chief Justice Rehnquist discounted the weight the lower court assigned to those factors which were purported to suggest evidence of "ongoing criminal activity."[86] Chief Justice Rehnquist then discussed the probative significance of the "personal characteristics" of drug couriers which the lower court relegated to category-two status.[87] The majority cited *Royer*[88] to support its conclusion that "by itself any one of these [category-two] factors is not proof of illegal conduct and is quite consistent with innocent travel[, b]ut . . . taken together they amount to reasonable suspicion."[89] The Court, citing *Terry*[90] as an example, added that "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal conduct was afoot."[91]

The Court continued by rejecting Sokolow's argument concerning the problems inherent in the use of the DEA's "drug courier profiles" and its implications on this case.[92] The Court downplayed the importance of these "profiles" and instead concentrated on the evidence based on the articulable factors upon which the trained agents were able to conclude that reasonable suspicion existed regardless of whether or not the factors present were, in fact, contained in a "drug courier profile."[93]

The majority closed its opinion by discounting Sokolow's claim that the agents neglected their "obligat[ion] to use the least intrusive means available to verify or dispel their suspicions that he was

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85 *Id.* at 1586.

86 *Id.* The majority hypothesized situations in which this type of behavior would not reflect ongoing criminal activity, such as 1) a person traveling under an alias who "wished to travel to a hospital or clinic for an operation and wished to concealed [sic] that fact," or 2) a person "taking an evasive path through an airport . . . to avoid a confrontation with an angry acquaintance or with a creditor." *Id.*

87 *Id. See supra* notes 67-69 and accompanying text.

88 Florida v. Royer, 460 U.S. 491 (1983).

89 *Sokolow*, 109 S. Ct. at 1586 (citing *Royer*, 460 U.S. at 502).

90 Terry v. Ohio, 392 U.S. 1, 22 (1968).

91 *Sokolow*, 109 S. Ct. at 1586 (citing Reid v. Georgia, 448 U.S. 438 (1980) (per curiam)).

92 *Id.* at 1587. Sokolow contends that the characteristics do not create suspicion of criminal behavior, the validity of the profile has never been established, and the profile itself has been proven to have no predictive value in the investigation of airport narcotics trafficking. Brief for Respondent at 137, *Sokolow* (No. 87-1295).

93 *Sokolow*, 109 S. Ct. at 1587. The factors believed to be contained in these drug courier profiles include the following: 1) young age; 2) casual dress; 3) last minute reservations and ticket purchases; 4) brief visits; 5) unusual or circuitous itinerary; 6) deplaning last; 7) arrival in the early morning hours; 8) concealing a travel companion; 9) cash purchase of tickets; 10) nervousness; 11) traveling under an alias; 12) visiting a "source city" for illicit drugs; and 13) use of only carry-on luggage. *See, e.g.*, Brief for Petitioner at 15-25, *Sokolow* (No. 87-1295); Reid v. Georgia, 448 U.S. 438, 441 (1980).

smuggling narcotics."[94] Relying on *Royer*,[95] Sokolow claimed that the agents should have only approached and spoken to him to verify or dispel their suspicion, instead of forcibly detaining him.[96] The Court explained that *Royer* was concerned with the length of the investigative stop, not whether or not a less intrusive means of verification existed at the time.[97] The Court concluded by discussing the practical problems associated with adopting Sokolow's view[98] such as "hampering the police's ability to make swift on-the-spot decisions"[99] and the tendency to require courts to "indulge in 'unrealistic second-guessing.' "[100]

B. DISSENTING OPINION

Writing for the dissent,[101] Justice Marshall objected to the Court's holding on the grounds that such a ruling diminishes the rights of both guilty and innocent citizens "to be secure in their persons"[102] as they travel through the airports of the United States.[103] Noting that reasonable suspicion must be based on " 'specific and articulable facts' "[104]—suggesting that a suspect is "engaged in, or [is] poised to commit, a criminal act *at that moment*"[105]—Justice Marshall concluded that "the facts about Andrew Sokolow known to the DEA agents at the time they stopped him fall short of reasonably indicating that he was engaged at the time in criminal activity."[106]

The dissent expressed great concern over the use of "drug courier profiles" such as the one relied upon by DEA agents to stop and

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94 *Sokolow*, 109 S. Ct. at 1587 (citing Brief for Respondent at 12-13, 21-23, *Sokolow* (No. 87-1295)).

95 Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion).

96 *Sokolow*, 109 S. Ct. at 1587. In *Royer*, the Court stated that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500.

97 *Sokolow*, 109 S. Ct. at 1587.

98 *Id.* In this particular case, Sokolow was about to enter into a taxicab when he was detained by the DEA agents. *Id.* Thus, the agents were presumably faced with the prospect of detaining Sokolow or having him leave via taxi from their immediate view and possibly dispose of any incriminating evidence before he could be re-located.

99 *Id.*

100 *Id.* (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985) (quoting United States v. Sharpe, 470 U.S. 675, 686, 687 (1985))). In retrospect it seems possible always to imagine a less intrusive way to detain a suspect.

101 Justice Marshall was joined by Justice Brennan.

102 U.S. CONST. amend. IV; *see supra* note 77.

103 *Sokolow*, 109 S. Ct. at 1588 (Marshall, J., dissenting).

104 *Id.* (Marshall, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

105 *Id.* (Marshall, J., dissenting) (emphasis in original). The court also cited as examples Brown v. Texas, 443 U.S. 47, 51 (1979), and Terry v. Ohio, 392 U.S. 1, 30 (1968).

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

detain Sokolow.[107] Believing that the use of such mechanistic criteria can "only dull the officer's ability and determination to make sensitive and fact-specific inferences 'in light of his experiences,' "[108] Justice Marshall expressed his fear that the reliance on drug courier profiles "runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention."[109] Justice Marshall explained that his fear is justified by the extensive case history[110] which demonstrates the manner in which drug courier profiles can be manipulated to match almost "any particular set of observations."[111] The dissent analogized the instant case to *Reid v. Georgia*,[112] a case in which the Supreme Court held that a collection of similar facts was insufficient to amount to reasonable suspicion.[113] In that case the Court found that the only observation that the agents cited as indicative of criminal activity was the fact that Reid "preceded another person and occasionally looked backward at him as they proceeded through the concourse."[114] The *Reid* Court reasoned that such a fact did not, of itself, provide reasonable suspicion that Reid was engaged in criminal activity at that time.[115] The Court explained that such evidence only represented an "inchoate and un-

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

108 *Id.* (Marshall, J., dissenting) (quoting *Terry*, 392 U.S. at 27).

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

110 *Id.* at 1588-89 (Marshall, J., dissenting). These cases include the following: *compare* United States v. Moore, 675 F.2d 802, 803 (6th Cir. 1982) (suspect was first to deplane), *cert. denied*, 460 U.S. 1068 (1983) *with* United States v. Mendenhall, 446 U.S. 544, 564 (1980) (last to deplane) *and* United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980) (deplaned from middle); *compare* United States v. Sullivan, 625 F.2d 9, 12 (4th Cir. 1980) (one-way tickets) *with* United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977) (round-trip tickets); *compare* United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (non-stop flight) *with* United States v. Sokolow, 808 F.2d 1366, 1370 (9th Cir. 1987) (changed planes); *compare Craemer*, 555 F.2d at 595 (no luggage) *with* United States v. Sanford, 658 F.2d 342, 343 (5th Cir. 1981) (gym bag), *cert. denied*, 455 U.S. 991 (1982) *and Sullivan*, 625 F.2d at 12 (new suitcases); *compare* United States v. Smith, 574 F.2d 882, 883 (6th Cir. 1978) (traveling alone) *with* United States v. Fry, 622 F.2d 1218, 1219 (5th Cir. 1980) (traveling with companion); *compare* United States v. Andrews, 600 F.2d 563, 566 (6th Cir. 1979) (acted nervously), *cert. denied*, 444 U.S. 878 (1979) *with* United States v. Himmelwright, 551 F.2d 991, 992 (5th Cir. 1977) (acted too calmly), *cert. denied*, 434 U.S. 902 (1977).

111 *Sokolow*, 109 S. Ct. at 1588-89 (Marshall, J., dissenting).

112 448 U.S. 438 (1980). The four observations made by agents in that case were the following: 1) Reid and a companion arrived in Atlanta from Fort Lauderdale, a source city for cocaine; 2) They had arrived early in the morning, when law enforcement activity is minimal; 3) Reid and his companions carried only shoulder bags; 4) Reid and his companion appeared to be concealing the fact that they were traveling together. *Id.* at 441.

113 *Id.*

114 *Id.*

115 *Id.*

particularized suspicion or 'hunch.' "[116] The *Reid* Court discounted the agents' other evidence as non-probative because it "describe[d] a very large category of presumably innocent travelers."[117] Noting that nervousness was the only behavioral characteristic Sokolow exhibited that might suggest "criminal activity," Justice Marshall discounted such evidence as perfectly consistent with innocent modern-day air travel, rather than one's involvement in criminal activity due to the widespread "news accounts . . . of plane crashes, near-collisions, and air terrorism."[118]

After downplaying Sokolow's nervousness, the dissent continued by attacking the remaining characteristics as "scarcely indicative of criminal activity."[119] The dissent referred to the fact that Sokolow took a brief trip to Miami with only carry-on luggage as " 'describ[ing] a very large category of presumably innocent travelers.' "[120] The fact that Miami is a "source city for illicit drugs"[121] was not significant in Justice Marshall's view because thousands of innocent travelers arrive and depart each day from Miami, as well as from the exhaustive list of cities referred to as "source cities" from past DEA testimony.[122] The phone number Sokolow gave the ticket agent, which was not listed in his name, is not suggestive of criminal activity, the dissent explained, because it is common practice for a phone to be listed in the name of one roommate and not the other.[123]

The dissent also cautioned against the assertion that the character of Sokolow's attire was in some way probative of his involvement in criminal activity.[124] Justice Marshall criticized the proposition and explained:

> For law enforcement officers to base a search, even in part, on a pop guess that persons dressed in a particular fashion are likely to commit crimes not only stretches the concept of reasonable suspicion beyond recognition, but also is inimical to the self-expression which the choice

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116 *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

117 *Id.* For a list of these factors, see *supra* note 112.

118 *Sokolow*, 109 S. Ct. at 1590 (Marshall, J., dissenting).

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

120 *Id.* (Marshall, J., dissenting) (quoting *Reid*, 448 U.S. at 441).

121 *Id.* at 1583.

122 *Id.* at 1590 (Marshall, J., dissenting). Justice Marshall suggested that nearly every major city may be characterized by the Drug Enforcement Administration as a "source city for illicit drugs." *See, e.g.*, United States v. Buenaventura-Ariza, 615 F.2d 29, 31 n.5 (2d Cir. 1980).

123 *Sokolow*, 109 S. Ct. at 1590 (Marshall, J., dissenting). This was, in fact, exactly what happened in this case; Sokolow's number was listed under his roommate's name of "Karl Herman." *Id.* at 1584.

124 *Id.* at 1590 (Marshall, J., dissenting).

of wardrobe may provide.[125]

While conceding that major cash purchases are less common today than in the past,[126] the dissent denied that Sokolow's payment for his airline tickets in cash was in any way suggestive of "ongoing criminal activity."[127] The dissent recognized that a person spending large amounts of cash may be trying to launder proceeds from earlier criminal acts, but noted that "investigating completed episodes of crime goes beyond the appropriately limited purview of the brief, *Terry*-style seizure."[128]

Finally, the dissent concluded by denying the appropriateness of a seizure in this situation.[129] The dissent reasoned that since the agents had ascertained that Sokolow's voice was, in fact, the voice on the answering machine at the telephone number he gave the ticket agent, they could have easily determined where Sokolow lived and could have continued their investigation in a manner less intrusive to Sokolow's constitutional rights.[130]

VI. ANALYSIS

In *Sokolow*, the Supreme Court reversed the ruling of the Ninth Circuit and decided to admit the cocaine seized from Sokolow by finding that reasonable suspicion did, in fact, exist at the time he was stopped by drug enforcement agents.[131] While the Court was correct in overturning the lower court's ruling[132] and in finding that

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

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

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

128 *Id.* (Marshall, J., dissenting). For the rationale behind the *Terry* stop, see *supra* notes 7-21 and accompanying text.

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

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

131 *Id.* at 1587.

132 United States v. Sokolow, 831 F.2d 1413 (9th Cir. 1987). The Ninth Circuit based its decision on a poorly formulated and unsupported two-part test. *See supra* notes 62-72, 85-91 and accompanying text. The two-part test clashed with precedent by requiring the presence of ongoing criminal activity (category-one factors) and by stating that "personal characteristics of drug couriers" (category-two factors) were relevant only "if there was evidence of ongoing criminal behavior [category-one]," *Sokolow*, 109 S. Ct. at 1585 (citing *Sokolow*, 831 F.2d at 1420), and "the Government offered '[e]mpirical documentation' that the combination of facts at issue did not describe the behavior of 'significant numbers of innocent people.' " *Id.* (quoting *Sokolow*, 831 F.2d at 1420). In doing so, the Ninth Circuit seemingly ignored the Supreme Court's holdings in Terry v. Ohio, 392 U.S. 1, 22 (1968) ("a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation"), and Reid v. Georgia, 448 U.S. 438, 441 (1980) ("there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal conduct was afoot").

There would also be practical problems associated with the Ninth Circuit's holding. For instance, the ruling would greatly hamper the ability of agents to make the type of

reasonable suspicion did exist, the Supreme Court's ruling presents many problems to both citizens and courts.

The majority agreed that the validity of a brief investigative stop requires " 'some minimal level of objective justification,' "[133] taking into consideration " 'the totality of the circumstances—the whole picture.' "[134] While this holding rests more squarely with precedent, the Court leaves many serious questions unanswered.

A. SPECIFIC APPLICATION TO *SOKOLOW*

Numerous factors present in *Sokolow* suggested Sokolow was involved in suspicious activity.[135] In retrospect, the DEA's decision to stop Sokolow appeared proper because its suspicion was, in fact, confirmed by the presence of cocaine in Sokolow's bag. The propriety of the stop, however, does not depend on whether or not cocaine was found, but rather whether the facts known to the agents at the time of the seizure support a conclusion that reasonable suspicion existed.[136]

Nevertheless, the factors known to the agents at the time of the seizure certainly justify a finding of "reasonable suspicion." The facts go far beyond "some minimum level of objective justification"[137] to the point where it would seem difficult even to hypothesize an innocent person traveling in the manner that Sokolow did.[138] For example, it would be hard to understand why an innocent trav-

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quick, on-the-spot determinations for which the *Terry* stop was originally developed and require agents to consult statistical data whenever confronted with a "reasonable suspicion" suspect. Brief for Petitioner at 12, *Sokolow* (No. 87-1295). In addition, agents would not be permitted to stop a suspect unless there was an actual observation of "ongoing criminal activity," no matter how suspicious a combination of category-two factors was present. *Id.*

133 *Sokolow*, 109 S. Ct. at 1585 (quoting INS v. Delgado, 466 U.S. 210, 217 (1984)).

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

135 *See supra* notes 22-44 and accompanying text.

136 The fact that Sokolow was traveling under an alias is not a factor to be considered in this particular case to justify the seizure because the DEA agents did not become aware of the use of the alias until after the seizure had occurred. *Sokolow*, 109 S. Ct. at 1590 n.3.

137 *See Delgado*, 466 U.S. at 217.

138 Of course, it is not necessary to show that no innocent explanation is possible. Such a level of proof would go beyond that needed even in a criminal trial to support guilt beyond a reasonable doubt. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 317 n.9, 326 (1979); Holland v. United States, 348 U.S. 121, 139-40 (1954). The Court also addressed this standard in Reid v. Georgia, 448 U.S. 438, 441 (1980) ("there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot"). *See also* United States v. Price, 599 F.2d 494, 502 (2d Cir. 1979) ("[i]t must be rare indeed that an officer observes behavior consistent only with guilt and incapable of innocent interpretation").

eler would take a trip in May from Honolulu to Miami[139] and stay just forty-eight hours when the flight itself takes approximately twenty hours.[140] Furthermore, Sokolow paid $2100 for the tickets out of a roll of twenty dollar bills containing approximately $4000.[141] In addition, while the DEA agents did not know at the time of the stop that Sokolow was using an alias, they did have reason to believe he was.[142] Finally, Sokolow wore casual clothing, a large amount of gold jewelry, had only carry-on luggage,[143] and "acted nervously and was looking around the waiting area."[144] Since the "reasonable suspicion" requisite is relatively low,[145] it is obviously apparent that the stop of Sokolow was justified. Nevertheless, instances in which a traveler was actually innocent, yet possessed the above-mentioned characteristics, would be so rare that the limited intrusion of an investigative stop on these innocent travelers would be outweighed by the governmental[146] and societal interests involved in the reduction of narcotics trafficking.[147]

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139 Sokolow's travel becomes particularly suspicious because Miami has been identified as a source city for cocaine. *Sokolow*, 109 S. Ct. at 1583.

140 This certainly doesn't make sense for a pleasure traveler because the similarities in the climates and attractions of Miami and Honolulu hardly justify such a lengthy and expensive trip for only two days.

141 *Sokolow*, 109 S. Ct. at 1583. Twenty-one hundred dollars is certainly a high price to pay for a two-day vacation. The fact that Sokolow paid for it in cash also raises suspicion because people rarely make $2100 purchases using cash, and rarely carry a roll of twenty-dollar bills containing nearly twice that amount. *Id.* at 1586. Cash payment also makes it doubtful that Sokolow was on a business trip because the majority of business travelers pay their expenses by check or credit cards in order to seek reimbursement or for business or tax records. *Id.* at 1586.

142 The Court thought there was reason to believe Sokolow was traveling under an alias because the name he gave the airline ticket agent did not match the name listed under the telephone number he gave. *Id.* at 1586 n.3.

143 *Id.* at 1583. Seemingly the use of carry-on luggage was Sokolow's effort to prevent a baggage handler from accidentally opening his bag or to prevent the bag from coming into the possession of a mistaken traveler.

144 *Id.* Presumably, this behavior is a typical reaction by someone acting in an illegal manner who fears detection.

145 Chief Justice Rehnquist reasoned that a *Terry* stop could be justified even with "proof of wrongdoing amounting to less than a preponderance of the evidence." *See supra* note 83.

146 *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21-27 (1968) (discussion of the balancing of governmental interests against the intrusion on an individual's fourth amendment rights).

147 The importance of stopping narcotics trafficking was articulated by Justice Powell in United States v. Mendenhall, 446 U.S. 544 (1980):

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs

B. PROBLEMS WITH MAJORITY'S HOLDING

While the Court was correct in determining that Sokolow possessed characteristics that were "reasonably suspicious," the Court's holding provides little guidance for future courts in making "reasonable suspicion" determinations. This problem results from the Court's failure to draw a clear line as to the factors or combination of factors necessary to support a finding of "reasonable suspicion." While the facts in Sokolow were sufficient to justify an investigative stop,[148] lower courts will be left guessing as to what level of conduct would meet the "reasonable suspicion" standard.

A comparison of the Court's holding with precedent, likewise, provides a confusing pattern. In *Reid*,[149] the Court found a set of factors which were "strikingly similar"[150] to be insufficient to establish "reasonable suspicion."[151] On the other hand, in *Royer*,[152] the Court held that the factors present, though also similar,[153] were sufficient to justify an investigative stop to confirm or dispel suspicion that Royer was a drug courier.[154]

It would thus appear that the Supreme Court draws the "reasonable suspicion" line somewhere between *Royer* and *Reid*. Much of the confusion surrounding the exact location of this line is a result of the amorphous set of characteristics upon which DEA agents often rely in making "reasonable suspicion" determinations, and the way that these characteristics are seemingly adapted to meet any particular situation.[155]

. . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

Id. at 561-62 (Powell, J., concurring in part).

148 *See supra* notes 135-147 and accompanying text.

149 Reid v. Georgia, 448 U.S. 438 (1980).

150 United States v. Sokolow, 109 S. Ct. 1581, 1589 (1989) (Marshall, J., dissenting).

151 *Reid*, 448 U.S. at 438. See *supra* note 112 and accompanying text for a list of the factors present in *Reid*.

152 Florida v. Royer, 460 U.S. 491 (1983).

153 The factors known at the time Royer was seized included the following:

(1) Royer was carrying American Tourister Luggage, which appeared to be heavy, (2) [Royer] was young, apparently between [the ages of] 25-35, (3) he was casually dressed, (4) he appeared pale and nervous, looking around at other people, (5) he paid for his ticket in cash with a large number of bills, and (6) rather than completing the airline identification tag to be attached to checked baggage, which had a space for a name, address, and telephone number, Royer wrote only a name and the destination.

Id. at 493 n.2.

154 *Id.* at 502. The Court, however, affirmed the reversal of Royer's conviction of felony possession of marijuana based on the fact that "Royer was involuntarily detained in a manner that exceeded the limited restraint permitted in Terry v. Ohio, 392 U.S. 1 (1968)." *Royer*, 460 U.S. at 492.

155 *See supra* note 110 and accompanying text.

Furthermore, the Supreme Court's reliance on officers' training and experience creates additional problems. For example, it is highly possible that a court could affirm an officer's belief that "reasonable suspicion" existed, even though such belief was not warranted, by hiding behind a phrase such as "the evidence known to an officer must be viewed, 'fact on fact and clue on clue,' in light of the inferences and deductions that a trained and experienced officer would reach, 'inferences and deductions that might well elude an untrained person.' "[156]

This problem is compounded by the current uproar in the United States concerning the detection of illicit drugs and the effective enforcement of narcotics laws.[157] Under the prevalent mood in today's society, it is highly conceivable that a court would affirm a rather suspect "reasonable suspicion" determination by the seizing officer if the questionable search did, in fact, turn up illicit drugs. This result is unacceptable and represents a serious intrusion upon a person's constitutional rights. Furthermore, a series of decisions confirming this view would provide an incentive for officers to search those persons whose conduct and characteristics could best be described as falling below the level of "reasonable suspicion" necessary to justify a stop. This problem is especially serious considering the unavailability of effective recourse which a victim of an unjustified search possesses.[158]

The Supreme Court majority furthers the intrusive effects of its decision by conveniently misreading the Court's earlier decision in *Royer*.[159] Sokolow contended "that the agents were obligated to use the least intrusive means available to verify or dispel their suspicions

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156 Brief for Petitioner at 14-15, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295) (quoting United States v. Cortez, 449 U.S. 411, 418-19 (1981)); *see also* Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality opinion); United States v. Mendenhall, 446 U.S. 544, 563-64 (1980) (Powell, J. concurring); Brown v. Texas, 443 U.S. 47, 52 n.2 (1979) (a trained and experienced officer can "perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer"); United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) ("[i]n all situations the officer is entitled to assess the facts in light of his experience"); *Terry*, 392 U.S. at 27 ("due weight must be given . . . to the specific reasonable inferences which [the officer] . . . is entitled to draw from the facts in light of his experience").

157 *See supra* note 147.

158 In most cases involving unlawful seizures, the best result for such victims is merely the exclusion of such evidence. A fruitless search by the agents, however, of an innocent victim provides that victim with little recourse because the victim faces the difficult task of proving damages as a result of the intrusion upon his or her rights. *See, e.g.*, Carey v. Piphus, 435 U.S. 247 (1978) (plaintiffs required to prove actual damages to recover for mental and emotional distress as a result of denial of their procedural rights without due process).

159 Florida v. Royer, 460 U.S. 491 (1983).

that he was smuggling narcotics."[160] Sokolow based his contention on Justice White's majority opinion in *Royer*.[161] Justice White stated that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[162] The *Sokolow* majority narrowly construed this statement as being "directed at the length of the investigative stop, not at whether the police had a less intrusive means to verify their suspicions before stopping Royer."[163] In so holding, the Court ignored the very next line in the *Royer* opinion, which states, "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in *scope* and duration to satisfy the conditions of an investigative seizure."[164] Thus, the *Sokolow* Court tries to limit the officer's obligation to use the least intrusive investigative means reasonably available to time only, while the *Royer* Court explicitly extended such obligation to both scope and time.

In misreading the *Royer* decision, the Court attempted to do more than necessary in this particular case. The Court still could have reached the same result in *Sokolow* by faithfully following *Royer*. It is important to remember that when Sokolow was stopped by DEA agents he was about to enter a taxicab.[165] The majority claimed that Sokolow's interpretation of *Royer* would "unduly hamper the police's ability to make swift on-the-spot decisions"[166] and it would force reviewing courts to "indulge in 'unrealistic second-guessing.' "[167] The dissent, on the other hand, believed no seizure was in order at the time and that the agents should have merely engaged in "routine police investigation, which may ultimately generate sufficient information to blossom into probable cause."[168] Furthermore, the dissent was confident that the agents possessed enough information about Sokolow that "it is unreasonable to suggest that, had Sokolow left the airport, he would have been gone

160 United States v. Sokolow, 109 S. Ct. 1581, 1587 (1989) (citing Brief for Respondent at 12-13, 21-23, *Sokolow* (No. 87-1295)).

161 *Royer*, 460 U.S. at 491.

162 *Id.* at 500.

163 *Sokolow*, 109 S. Ct. at 1587.

164 *Royer*, 460 U.S. at 503 (emphasis added).

165 *Sokolow*, 109 S. Ct. at 1584.

166 *Id.* at 1587.

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

168 *Id.* at 1588 (Marshall, J., dissenting). Presumably the agents should have merely questioned Sokolow in an effort to confirm or dispel their suspicions that he was engaged at that time in narcotics smuggling.

forever and thus immune from subsequent investigation."[169]

Under the circumstances present in *Sokolow*, it is apparent that both the majority and the dissent handled this issue incorrectly. The dissent was incorrect in its suggestion that Sokolow should not have been seized at the time. While under most circumstances it would be less intrusive and probably preferable first to question a suspect to "verify or dispel the officer's suspicion"[170] rather than to seize him, this was not one of those situations because Sokolow was about to enter a taxicab and depart from the airport, presumably beyond the officer's immediate surveillance.[171] The dissent is also incorrect in stating that the agents could have resumed their investigation of Sokolow at a later time.[172] Drug smuggling is an art which relies on quick movement and deceptive tactics. It is therefore highly probable that once Sokolow left the airport he would have disposed of his illicit possessions within a very short period of time. Thus, if the agents resumed their investigation at a later date, it is unlikely that they would have been able to catch Sokolow with the illicit drugs still in his possession.

The majority, likewise, is incorrect in its use of the "hampering police activity" proposition.[173] While it is true that, in retrospect, there will almost always appear to be a less intrusive means available for an officer to conduct a search, and therefore such a requirement would both "unduly hamper the police's ability to make swift on-the-spot decisions"[174] and require courts to "indulge in 'unrealistic second-guessing,' "[175] this is not the applicable standard. Rather, the proper standard, as articulated in *Royer*, is whether "the investigative methods employed [were] . . . the least intrusive means *reasonably* available to verify or dispel the officer's suspicion."[176]

Since Sokolow was about to enter a taxicab,[177] it appears that the least intrusive means that the officers reasonably possessed at that time, to verify or dispel their suspicions, was to actually seize Sokolow. Thus, the agent's seizure of Sokolow could not be invali-

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169 *Id.* at 1590 (Marshall, J., dissenting). "Sokolow, after all, had given the airline his phone number, and the DEA, having ascertained that it was indeed Sokolow's voice on the answering machine at that number, could have learned from that information where Sokolow resided." *Id.* (Marshall, J., dissenting).

170 *Id.* at 1587 (citing Brief for Respondent at 12-13, 21-23, *Sokolow* (No. 87-1295)).

171 *Id.* at 1587.

172 *Id.* at 1590 (Marshall, J., dissenting).

173 *Id.* at 1587; *see supra* note 166 and accompanying text.

174 *Id.* at 1587.

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

176 Florida v. Royer, 460 U.S. 491, 500 (1983) (emphasis added).

177 *Sokolow*, 109 S. Ct. at 1587.

dated on the grounds that the agents did not use the least intrusive means reasonably available. Consequently, the Court could have been faithful to the holding in *Royer*, while at the same time upholding the agent's search of Sokolow. Instead, the Court chose to misread *Royer*, while at the same time severely intruding on future citizens' fourth amendment rights.[178]

C. THE USE OF DRUG COURIER PROFILES

An important issue in *Sokolow* is the significance which attaches to a narcotics officer's use of a drug courier profile[179] to identify potential drug smugglers. The use of such a profile in the identification of Sokolow became apparent from Agent Kempshall's testimony, in which he stated that Sokolow's behavior "had all the classic aspects of a drug courier."[180]

The *Sokolow* majority downplayed the significance of the use of the drug courier profile by the seizing officer, stating "[W]e do not agree with respondent that our analysis is somehow changed by the agent's belief that his behavior was consistent with one of the DEA's 'drug courier profiles.' "[181] In contrast, the majority chose to concentrate strictly on the factors articulated by the officers—factors the majority deemed to be sufficient.[182]

The dissent, on the other hand, correctly regarded the use of drug courier profiles as highly significant and extremely improper.[183] Sokolow argued that the use of these profiles is dangerous because 1) the validity of the profile has never been established,[184] 2) "the profile itself has been proven to have no predictive value in the investigation of airport narcotics trafficking,"[185] and 3) the characteristics of the profile are not themselves objec-

178 The incorrectness and the potential dangers of the *Sokolow* holding is exhibited by the fact that a literal interpretation of such ruling would seemingly approve of any search, no matter how intrusive, provided the search was carried out in a short period of time.

179 "The 'drug courier profile' is an abstract of characteristics found to be typical of persons transporting illegal drugs." *Royer*, 460 U.S. at 493 n.2.

180 *Sokolow*, 109 S. Ct. at 1587 n.6.

181 *Id.* at 1587 (quoting Brief for Respondent at 14-21, *Sokolow* (No. 87-1295)).

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

183 *See supra* notes 107-111 and accompanying text.

184 Brief for Respondent at 19, *Sokolow* (No. 87-1295). The government has never proven that the drug courier profile accurately identifies drug couriers. Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. REV. 843, 875-77 (1985).

185 Brief for Respondent at 20-21, *Sokolow* (No. 87-1295) (citing Cloud, *supra* note

tively suspicious of criminal behavior.[186]

The fact that the characteristics set forth in the drug courier profile are not objectively suspicious becomes apparent from the instances where the profile has been inconsistently applied in the past.[187] For instance, deplaning first should not be held to be objectively suspicious[188] if deplaning last or from the middle is also objectively suspicious.[189] Likewise, traveling alone should not be held to be objectively suspicious[190] if traveling with a companion is also held to be suspicious.[191] Indeed, one agent has testified that "the profile in a particular case consists of anything that arouses his suspicions."[192]

Further compounding this problem is the notable difficulty involved in the judicial review of a seizure where "reasonable suspicion" was based on conformance with a drug courier profile.[193] The notion that "each case raising a Fourth Amendment issue must be judged on its own facts"[194] is central to the concept of judicial review. "No 'litmus-paper' test[195] can determine whether or not the police possessed sufficient facts to justify the seizure of an individual."[196] The drug courier profile, as used, seems to be the epitome of the "litmus-paper" test the Court had earlier rejected. It is potentially even more damaging because a ruling court evaluates the facts "based upon the fair inferences in light of the agent's experience."[197] Thus, the dangers of an ever changing drug-courier profile, seemingly adapted to each situation, and validated based on an officer's "experience," provides a "wild-card" to allow officers to justifiably seize almost anyone.[198]

184, at 886-920). Empirical data has shown that the profile used to identify drug couriers lacks predictive value for that purpose. *Id.*

186 Brief for Respondent at 16-18, *Sokolow* (No. 87-1295).

187 For examples of instances in which the drug courier profile has been inconsistently applied, see *supra* note 110.

188 Deplaning first has been held to be a factor which could be used in a "reasonable suspicion" determination. *See, e.g.* United States v. Moore, 675 F.2d 802, 808 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983).

189 *See supra* note 110.

190 Traveling alone has been held to be a factor which could be used in a "reasonable suspicion" determination. *See, e.g.*, United States v. Smith, 574 F.2d 882, 885 (6th Cir. 1978).

191 *See supra* note 110.

192 United States v. Chamblis, 425 F. Supp. 1330, 1333 (E.D. Mich. 1977).

193 Brief for Respondent at 15-16, *Sokolow* (No. 87-1295).

194 United States v. Mendenhall, 446 U.S. 544, 565 n.6 (1980) (Powell, J., concurring).

195 Cloud, *supra* note 184, at 857 (quoting Florida v. Royer, 460 U.S. 491, 506 (1983) (White, J., plurality opinion)).

196 *Id. See supra* notes 22-44 and accompanying text.

197 Terry v. Ohio, 392 U.S. 1, 30 (1968).

198 The Second Circuit warned of this problem in United States v. Buenaventura-

"Independent judicial review is an illusion if a new drug courier profile is produced to fit each seizure."[199] Furthermore, "to place undue reliance upon the agent's perceptions and conclusions would be to completely surrender the court's power and responsibility of critically evaluating whether a seizure is justified by a suspicion that is reasonable and a factual basis that is articulable."[200]

While the drug courier profile might be a valuable tool for DEA agents in fighting the war against drugs, its use is plagued with numerous pitfalls. It is, therefore, apparent that the *Sokolow* dissent correctly identified the significance of the use of drug courier profiles. While the profile's ever-changing nature makes effective judicial review impossible, a stagnant profile would likewise be without value because drug couriers will easily adapt their behaviors to avoid detection from a profile-focused officer.[201]

VII. CONCLUSION

The *Sokolow* decision resulted from the Supreme Court's efforts to correct a poorly formulated and unsupported two-part test[202] which emerged from the Ninth Circuit. In reversing the Ninth Circuit, the *Sokolow* Court reached a decision which rested more squarely with precedent and was harmonious with the circumstances presented in the case. The *Sokolow* rationale, however, presents many potentially harmful consequences.

In failing to clearly define the combination of factors necessary to support a finding of "reasonable suspicion," the *Sokolow* Court lends little guidance to other Courts faced with the task of reviewing a *Terry* stop. Furthermore, this failure to set objective guidelines erodes the concept of judicial review by allowing Courts to affirm questionable "reasonable suspicion" determinations by placing blind reliance on an officer's training and experience.[203]

The *Sokolow* Court furthered the intrusive nature of its opinion by misreading its earlier holding in *Royer*.[204] By misreading the *Royer* decision, the *Sokolow* Court seemingly permits any type of seizure, no matter how intrusive, provided it is carried out in a

Ariza, 615 F.2d 29 (2d Cir. 1980): "The fact that an officer is experienced does not require a court to accept all of his suspicions as reasonable, nor does mere experience mean that the agent's perceptions are justified by the objective facts." *Id.* at 36.

199 Cloud, *supra* note 184, at 858.

200 *Buenaventura-Ariza*, 615 F.2d at 37.

201 United States v. Sokolow, 109 S. Ct. 1581, 1589 n.1 (1989).

202 *See supra* notes 62-72 and accompanying text.

203 *See supra* note 156 and accompanying text.

204 Florida v. Royer, 460 U.S. 491 (1983).

timely manner. This ruling is contrary to *Royer*, which expressly stated that the "seizure must be sufficiently limited in both scope and duration."[205]

Finally, the Court refused to recognize the significance and potential dangers associated with the use of drug courier profiles as a basis for determining "reasonable suspicion." In contrast, the dissent correctly addressed the hazards of relying on a profile that has never been established to be valid,[206] has been proven to have no predictive value,[207] and consists of factors which are not objectively suspicious.[208]

Overall, the *Sokolow* decision appears correct as applied to the particular facts presented to the Court. While such a ruling was proper as applied to Sokolow and will seemingly provide a much needed boost to law enforcement agents in the nation's war on narcotics, the intrusive effects of the *Sokolow* ruling on all citizens' fourth amendment rights is far too great to justify the Court's rationale.

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205 *Royer*, 460 U.S. at 503.
206 *See supra* note 184 and accompanying text.
207 *See supra* note 185 and accompanying text.
208 *See supra* notes 186-192 and accompanying text.