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COMMENTS

Drug Trafficking at Airports — The Judicial Response

KATHLEEN MAHONEY*

The magnitude of the illegal drug trafficking problem facing the United States today has caused the state and federal governments to step up their efforts to curb narcotics dealing and distribution. Focusing on governmental attempts to apprehend drug couriers at national airports, this article examines the judicial response to the fourth amendment issues raised by searches and seizures of suspected couriers. The author suggests that the seriousness of the drug trafficking problem has led some courts to bend traditional fourth amendment principles.

Traffic in illegal drugs has become a troublesome national problem¹ that has reached crisis proportions in South Florida.² Preventing the distribution of drugs within the United States and apprehending drug dealers have thus become major objectives of federal, state, and local law enforcement agencies.

Because most illegal drug traffic originates outside the United States, major narcotics dealers and local wholesalers employ drug couriers or “mules” to import and distribute the drugs. These couriers usually use the fastest available means of transportation—the

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

United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) (Powell, J., concurring).

2. “South Florida is being inundated with a multi-million dollar narcotic drug traffic derived in large part from sources outside the country. That traffic by any standard is corrupting this society and simultaneously bringing with it an unprecedented degree of violence and murder” *Royer v. State*, 389 So. 2d 1007, 1015, 1023 (Fla. 3d DCA 1980) (rehearing en banc) (Hubbart, J., concurring), *review denied*, 397 So. 2d 779 (Fla.), *cert. granted*, 102 S. Ct. 631 (1981).

commercial airlines. In an attempt to stem the illegal drug traffic, state and federal governments have established airport surveillance teams to identify and apprehend drug couriers. In a typical case, a plainclothes officer stationed at an airport will spot a person displaying the characteristics of a drug courier. The agent will approach the suspect and request identification, and then compare the identification with the suspect's airline ticket to ascertain whether he is using an alias. Frequently, the agent will also request the suspect's permission to search his luggage. This article will examine the constitutionality of this police-citizen encounter.³

The fourth amendment to the United States Constitution governs searches of luggage and seizures of individuals by government agents. The amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"⁴ Searches and seizures of drug couriers at airports raise four important fourth amendment issues that this comment will address:

First, does an encounter between a suspected drug courier and a government agent constitute a fourth amendment seizure of the suspect?

Second, if the suspect is seized, can the seizure be justified by the constitutional standard of probable cause or articulable suspicion?

Third, if the suspect consents to a search, is that consent voluntary?

Fourth, if the suspect is illegally seized, but voluntarily consents to a luggage search, is the contraband seized nevertheless "fruit of the poisonous tree" that must be excluded at trial?

1. *Does an encounter between a suspected drug courier and a government agent constitute a fourth amendment seizure of the*

3. This article will not discuss the government's efforts to protect the public from air piracy through the use of hijacker profiles, magnetometers, or the limited searches of persons and their carry-on baggage before boarding an airplane. Such "airport security measures . . . instituted to detect a prospective hijacker, are reasonable and constitutionally justified as a limited and relatively insignificant intrusion of privacy viewed against the grave necessity to protect an aircraft and its passengers and crew." *Shapiro v. State*, 390 So. 2d 344, 349 (Fla. 1980); see *United States v. Clay*, 638 F.2d 889 (5th Cir.), *cert. denied*, 451 U.S. 917 (1981); *United States v. Gorman*, 637 F.2d 352 (5th Cir. 1981); *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *Pyszka v. State*, 400 So. 2d 486 (Fla. 5th DCA 1981); *Oishi v. State*, 400 So. 2d 480 (Fla. 5th DCA 1981).

4. U.S. CONST. amend. IV.

suspect?

Litigation involving seizures of drug couriers at airports is a recent phenomenon; the first federal appellate decision was reported in 1977.⁵ In addressing the constitutional issues presented by these confrontations, therefore, many federal and state courts, including the Supreme Court of the United States, have applied the traditional fourth amendment analysis used in cases involving seizures of pedestrians and motor vehicles.⁶

Historically, courts equated the "seizures" contemplated by the fourth amendment with "arrests."⁷ An individual was seized when he was subject to the custodial restraint of arrest or station-house booking. Since 1968, however, Supreme Court decisions have expanded the concept of seizure to include not only technical arrests, but also less intrusive investigatory detentions or "stops."⁸ As the Court stated in *Davis v. Mississippi*,⁹ "[n]othing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"¹⁰

Although lower courts have found that a "mere contact" between a government agent and a private citizen is not necessarily a "seizure,"¹¹ the Supreme Court has never recognized a distinction between an "investigatory detention" or "stop" amounting to a fourth amendment seizure, and a "mere contact." In defining the concept of seizure, the Court has held that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."¹² Further, "even though the purpose of the stop is limited and the resulting detention quite brief,"¹³ there has been a seizure within the meaning of the fourth amendment.¹⁴ On the other hand, the Court held in *Terry v. Ohio*¹⁵ that

5. *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

6. *E.g.*, *United States v. Brignoni-Ponce*, 442 U.S. 873 (1975), discussed in Kadish & Brofman, *Drug Courier Characteristics: A Defense Profile*, TRIAL, May 1979, at 47, 49.

7. *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

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

9. 394 U.S. 721 (1969).

10. *Id.* at 726-27 (footnote omitted).

11. *United States v. Wylie*, 569 F.2d 62, 67 (D.C. Cir. 1977) (police department regulations distinguished "contacts" from "investigative 'stops'"), *cert. denied*, 435 U.S. 944 (1978).

12. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

13. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

14. Even if the officer's purpose is merely to ask the suspect for identification, the stop is a seizure. *Brown v. Texas*, 443 U.S. 47 (1979).

"[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."¹⁶ It is from this language in *Terry* that the "mere contact" argument is derived.¹⁷

Many federal courts of appeals have applied these standards to airport encounters and found that a fourth amendment seizure occurs either when the government agent initially approaches the individual, identifies himself, and asks for the suspect's identification and airline ticket,¹⁸ or when the agent subsequently begins to question the suspect.¹⁹ Other federal courts of appeals have concluded that a seizure occurs when a government agent questions an individual after telling the individual he is suspected of carrying narcotics.²⁰ In the United States Court of Appeals for the Fifth Circuit, the rule seems to be that an initial police-citizen encounter, which includes limited questioning and the production of identification and an airline ticket, is "merely a police-citizen contact" that does not constitute a fourth amendment seizure.²¹ A seizure does occur, however, when an officer takes and retains the sus-

15. 392 U.S. 1 (1968).

16. *Id.* at 19 n.16.

17. *United States v. Wylie*, 569 F.2d 62, 66-67 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978).

18. *Accord* *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980) (suspect seized when detective held out credentials and blocked suspect's path); *see* *United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980); *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *United States v. Andrews*, 600 F.2d 563 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979); *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979); *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977). *But see* *United States v. Elmore*, 595 F.2d 1036, 1042 (5th Cir. 1979) (suspect seized when officer retained suspect's airline ticket), *cert. denied*, 447 U.S. 910 (1980).

19. *Cf.* *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (investigatory stop occurred when agents asked suspect to accompany them to airport office for questioning). If an agent did not have an opportunity to ask questions because the suspect fled immediately after the agent approached and identified himself, the initial encounter was not a stop. *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977).

20. *United States v. Robinson*, 625 F.2d 1211, 1216-17 (5th Cir. 1980) (remanded for determination of whether a reasonable person would feel free to leave after being accused of carrying narcotics); *see* *United States v. Martell*, 654 F.2d 1356 (9th Cir. 1981); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978); *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977).

21. *United States v. Berry*, 636 F.2d 1075, 1079 (5th Cir.), *reh'g granted*, 649 F.2d 385 (5th Cir. 1981); *United States v. Pulvano*, 625 F.2d 1151, 1155 (5th Cir. 1980).

pect's identification or ticket.²² If the officer takes the suspect to an office in the terminal for questioning, the Fifth Circuit agrees with the Second and Sixth Circuits that this, too, represents a fourth amendment seizure.²³

The Florida appellate courts did not decide any drug courier cases until 1979.²⁴ Since then, many district courts of appeal have either evaded the issue or assumed that a seizure occurs as soon as an officer approaches a suspect, asks for his identification and airline ticket, and begins to question him.²⁵ Other courts have addressed the issue directly and found that a seizure occurs when the officer retains the suspect's identification and ticket. At this point, the courts have concluded that the individual was not reasonably free to leave.²⁶ If an officer merely approaches a suspect, requests identification and an airline ticket, and asks if he can speak to the suspect, the District Court of Appeal, Third District, has specifically held that only a "pre-detention encounter" occurs.²⁷ Such an encounter does not constitute a fourth amendment seizure until the officer actually retains the ticket and identification.²⁸

Because of the varied and inconsistent opinions, the litigation involving seizures of suspected drug couriers finally reached the Supreme Court in 1980, in the cases of *United States v. Mendenhall*²⁹ and *Reid v. Georgia*.³⁰ The specific issue of seizure, however,

22. *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980); *accord United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980).

23. *See United States v. Jefferson*, 650 F.2d 854 (6th Cir. 1981); *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981); *United States v. Pulvano*, 625 F.2d 1151 (5th Cir. 1980); *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *United States v. Andrews*, 600 F.2d 563 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977); *United States v. Hunter*, 550 F.2d 1066 (6th Cir. 1977).

24. *State v. Frost*, 374 So. 2d 593 (Fla. 3d DCA 1979).

25. *See State v. Henry*, 390 So. 2d 92 (Fla. 3d DCA 1980); *Robinson v. State*, 388 So. 2d 286 (Fla. 1st DCA 1980); *State v. Champion*, 383 So. 2d 984 (Fla. 4th DCA 1980); *State v. Mitchell*, 377 So. 2d 1006 (Fla. 3d DCA 1979); *Husted v. State*, 370 So. 2d 853 (Fla. 3d DCA 1979). *But see State v. Grant*, 392 So. 2d 1362 (Fla. 4th DCA 1981).

26. *E.g.*, *State v. Frost*, 374 So. 2d 593 (Fla. 3d DCA 1979); *accord Royer v. State*, 389 So. 2d 1007, 1015 (Fla. 3d DCA 1980) (rehearing en banc) (not only had suspect's ticket and luggage been retained, but suspect had been accused of carrying narcotics and confined in small airport interrogation room), *review denied*, 397 So. 2d 779 (Fla.), *cert. granted*, 102 S. Ct. 631 (1981).

27. *Login v. State*, 394 So. 2d 183, 188 (Fla. 3d DCA 1981).

28. *Id.*

29. 446 U.S. 544 (1980).

30. 448 U.S. 438 (1980).

remains unresolved, underscoring its conceptual difficulty.

The facts of *Mendenhall* are typical of many drug courier stops at airports. Two Drug Enforcement Agency (DEA) agents observed Ms. Mendenhall when she arrived in Detroit on a flight from Los Angeles. Because her conduct was purportedly similar to that of drug couriers, the agents approached her, identified themselves, and asked to see her identification and airline ticket. After limited questioning, the agents returned Mendenhall's ticket and driver's license.³¹

Neither the trial court nor the Sixth Circuit Court of Appeals considered whether the agents had seized Mendenhall. Apparently, the litigants and lower courts assumed that a seizure had occurred.³² Nonetheless, Justice Stewart, writing for the plurality, believed that "exceptional circumstances" justified considering this issue even though it had not been raised below,³³ and proceeded to hold that no seizure had occurred.³⁴ In a separate opinion, Justice Powell found that the question whether a seizure had taken place was "extremely close,"³⁵ but decided to assume for the purposes of his opinion that the agents had seized Mendenhall.³⁶ The four dissenting Justices also believed that a seizure had occurred, but disagreed with the plurality's use of objective factors.³⁷ The dissent suggested that the case should have been remanded for a determination of the seizure issue after an evidentiary hearing.³⁸ Given the sharp division of the Supreme Court, the precedential value of *Mendenhall* on this issue is questionable.³⁹

In the second drug courier case presented to the Supreme Court, *Reid v. Georgia*,⁴⁰ the lower courts and litigants again as-

31. 446 U.S. at 547-48.

32. *Id.* at 551 n.5.

33. *Id.*

34. *Id.* at 555.

35. *Id.* at 560 n.1 (concurring opinion).

36. *Id.* at 560.

37. *Id.* at 569-70 & nn.3-4 (White, J., dissenting).

38. *Id.* at 571.

39. See *United States v. Berry*, 636 F.2d 1075, 1078 (5th Cir.) ("[T]he plurality opinion of the Supreme Court in *Mendenhall* is not binding precedent on this court concerning the 'seizure' issue . . ."), *reh'g granted*, 649 F.2d 385 (5th Cir. 1981); see also *United States v. Pulvano*, 629 F.2d 1151, 1154 (5th Cir. 1980); *United States v. Robinson*, 625 F.2d 1211, 1214-15 (5th Cir. 1980).

For perceptive analyses of the *Mendenhall* decision and its precedential value, see Greenberg, *Drug Courier Profiles, Mendenhall and Reid: Analyzing Police Intrusions on Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49 (1981), and Case Comment, *Criminal Law: Drug Courier Profiles, United States v. Mendenhall*, 5 NOVA L.J. 141 (1980).

40. 448 U.S. 438 (1980).

sumed that the defendant had been seized. In *Reid*, the defendant and a companion arrived in Atlanta on a flight from Fort Lauderdale. Because their behavior was consistent with that of drug couriers, a DEA agent approached them outside the terminal. The agent identified himself and asked for their identification and ticket stubs.⁴¹ The litigants did not raise the seizure issue before the Supreme Court. Unlike the splintered *Mendenhall* opinion, eight of the nine Justices assumed in *Reid* that the initial encounter was a seizure.⁴² Justice Powell, in his concurring opinion, noted that the state courts had decided *Reid* before the Supreme Court addressed the seizure issue in *Mendenhall*.⁴³ Since the *Reid* decision did not address the initial seizure issue, the question "remains open for consideration by the state courts in light of the opinions in *Mendenhall*."⁴⁴

Despite the questionable efficacy of the *Mendenhall* opinion, it does posit a test for determining the existence of a seizure, regardless of whether a police-citizen encounter occurs at the airport or on the street. The *Mendenhall* Court held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁴⁵

This test seemingly would be adequate, were it not for its questionable application by Justice Stewart. Under his "reasonable person" test, a seizure might consist of "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."⁴⁶ This approach is too restrictive, for it ignores the social pressures inherent in most police-citizen encounters.⁴⁷ It also fails to recognize that the fourth amendment governs situations in which there is no evidence of intimidation.⁴⁸ Regarding an encounter between a government agent and a citizen at an airport, one court stated:

41. *Id.* at 439.

42. Justice Rehnquist dissented. *Id.* at 442.

43. *Id.* at 443.

44. *Id.*

45. 446 U.S. at 554 (footnote omitted).

46. *Id.*

47. See *United States v. Turner*, 628 F.2d 461, 466 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2325 (1981).

48. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

True, defendant could have ignored the agent and refused to converse with him, but such conduct on [his] part would have been, at the very least, a breach of etiquette, an act of discourtesy and incivility which would not be expected of the ordinary, reasonable person innocent of crime. In the opinion of this Court, when an officer, upon a show of authority accosts a *suspect* and takes advantage of social pressures which inhibit the suspect from declining to deal with him, he restrains the suspect's liberty to the extent required to constitute a *Terry* stop.⁴⁹

The "reasonable person" test cannot adequately safeguard fourth amendment rights if courts do not consider these social pressures.

In deciding seizure issues, courts should also consider the officer's motive for initiating the encounter. The Supreme Court of Florida suggested this approach in *Mullins v. State*.⁵⁰ Justice Alderman discussed motive in distinguishing between seizures and mere contacts:

I recognize, however, that instances will arise where there will be legitimate contact between a police officer and a citizen, not based upon "founded suspicion" or "probable cause," which may result in the subsequent arrest of the citizen for a crime detected by the police officer as a result of the legitimate contact. For example, a police officer in the performance of his duty may stop to assist a motorist who has a flat tire or may stop a woman bicyclist at night to warn her of the presence of a rapist in the area. If during these legitimate encounters with the motorist or the woman, the police officer observes stolen stereo equipment in the motorist's automobile or smells the odor of marijuana emanating from the woman and sees a plastic bag containing what appears to be marijuana protruding from her pocket, he may lawfully seize the evidence.

. . . The difference between these examples and the present case is that the police officer in this case was not attempting to assist the defendant in any way but had stopped him on a bare suspicion that he was violating the law.⁵¹

Thus, courts can examine a police officer's motives to distinguish a neutral or positive encounter from one instigated by an officer who suspects criminal activity.

If this approach were applied to seizures at airports, an indi-

49. *United States v. Coleman*, 450 F. Supp. 433, 439 (E.D. Mich. 1978) (footnote omitted), *quoted in State v. Frost*, 374 So. 2d 593, 597 (Fla. 3d DCA 1979).

50. 366 So. 2d 1162 (Fla. 1978), *cert. denied*, 444 U.S. 883 (1979).

51. *Id.* at 1163 (concurring opinion).

vidual stopped or detained by a government agent who suspected him of carrying narcotics would be entitled to constitutional safeguards because the stop would fall within the purview of the fourth amendment.⁵² If, on the other hand, an individual asked an officer for directions, or an officer merely attempted to aid someone obviously in distress, the encounter would not implicate fourth amendment rights because the officer's motivation was neutral or positive. Arresting officers, unlike defendants, ordinarily are required to testify at suppression hearings. Consequently, the officer's reasons for initiating the contact usually will be comparatively easy to ascertain. The customary reticence of defendants at these hearings renders application of the *Mendenhall* "reasonable person" test problematical, however, because conclusions about the defendant's perceptions of the stop must be inferred from other evidence.

2. *If the suspect is seized, can the seizure be justified by the constitutional standard of probable cause or articulable suspicion?*

The fourth amendment protects persons from unreasonable seizures.⁵³ When a government agent stops a suspected drug courier at an airport because the suspect fits the drug courier profile, it must be determined whether the seizure was "reasonable." The seizure is reasonable only if it is supported by probable cause or "specific and articulable facts which . . . reasonably warrant that intrusion."⁵⁴

The drug courier profile is a list of characteristics that the DEA believes are common to drug couriers.⁵⁵ Initially developed in 1974 by DEA agents at the Detroit Metropolitan Airport, the profile is now used by agents at other airports, including Miami's.⁵⁶ The narcotics detail at each airport occasionally supplements the general list of characteristics with its own successful observations. Because the profile differs to some extent from airport to airport, it has been characterized as "loosely formulated."⁵⁷

52. That is, the officer must have probable cause or a reasonable, articulable suspicion. See *infra* text accompanying notes 53-89.

53. See *supra* text accompanying note 4.

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

55. *United States v. Price*, 599 F.2d 494, 502 n.10 (2d Cir. 1979).

56. See, e.g., *Greenberg*, *supra* note 39, at 52 n.24.

57. *United States v. Smith*, 574 F.2d 882, 883 n.1 (6th Cir. 1978); *United States v. Pope*, 561 F.2d 663, 666 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717, 719 (6th Cir. 1977).

For a general history and description of the drug courier profile, see *United States v.*

Although law enforcement officers have been trained to use the profile, the list of characteristics is informal and unwritten.⁵⁸ During the course of litigation, however, many of the characteristics have been revealed. The primary characteristics are: (1) travel to and from major drug "source cities" such as New York, Los Angeles, Miami, and Fort Lauderdale; (2) a short visit; (3) use of an alias; (4) absence of luggage other than carry-on bags, especially for long-distance trips that normally would require extra clothing; (5) the purchase of airline tickets with cash in small denominations; (6) unusual nervousness, including the appearance of looking around for law enforcement officers; and (7) carrying large amounts of cash.⁵⁹ This list is by no means exhaustive. Indeed, the profile frequently seems to change to fit the facts of each case.⁶⁰ At a suppression hearing in 1977, a DEA agent candidly "testified that the profile in a particular case consists of anything that arouses his suspicions."⁶¹

Use of the drug courier profile is not complex. It simply "involves visual observation and investigation of a particular individual and developing a sensitivity to a number of details that either increase or decrease the likelihood that a person is a courier."⁶² Law enforcement officers monitor flights from source cities and focus on anyone who matches any of the profile characteristics. If further observation confirms the agent's initial suspicion, the agent

Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); Kadish & Brofman, *supra* note 6.

58. *United States v. Price*, 599 F.2d at 502 n.10 (2d Cir. 1979); *United States v. Lewis*, 556 F.2d 385, 389 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977).

59. *United States v. Elmore*, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980); *United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1978); *United States v. Pope*, 561 F.2d 663, 666 n.3 (6th Cir. 1977); *United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717, 719-20 (6th Cir. 1977); *United States v. Van Lewis*, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); Kadish & Brofman, *supra* note 6, at 48.

Secondary characteristics used in Atlanta, for example, are

(1) making a telephone call immediately after arrival; (2) use of a taxicab to leave the airport rather than being met by family or friends or using public transportation; (3) association with a known narcotics dealer; (4) a false telephone number given to the airline reservations service; (5) traveling companions who attempt to conceal their association; and (6) the switching of baggage check claim stubs with other individuals.

Id. (footnote omitted) (citing *United States v. Thomas*, No. CR 78-223A (N.D. Ga. 1978)).

60. *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 698 (E.D.N.Y. 1977).

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

62. *United States v. Van Lewis*, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

must then decide whether to stop the suspect before he leaves the airport.⁶³

Stopping suspects is reasonable only if officers possess either "probable cause" or an "articulable and reasonable suspicion."⁶⁴ Probable cause exists if "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [individual] had committed or was committing an offense."⁶⁵ Probable cause justifies an arrest as well as a search of the suspect and, arguably, his carry-on luggage.⁶⁶

In the early drug courier profile cases, the government argued that an individual's conformance to the profile would give a narcotics agent the probable cause needed to effect an arrest. Federal and Florida courts generally have rejected this argument because usually "there is no direct evidence that crime has been committed In short, the 'smoking gun' is lacking."⁶⁷

Critics have faulted the absence of guidelines regarding the number of characteristics a suspect must manifest before an officer can justifiably stop him.⁶⁸ Whether an individual "fits the profile" is, therefore, left to the subjective judgment of the officer. In addition, critics distrust the profile because too many of the "suspicious" characteristics are "consistent with complete innocence."⁶⁹ "[T]he profile is too amorphous to be integrated into a legal stan-

63. *Id.*

64. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); see *Terry v. Ohio*, 392 U.S. 1 (1968).

65. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); accord *Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

66. *Chimel v. California*, 395 U.S. 752 (1969).

67. *United States v. Van Lewis*, 409 F. Supp. 535, 543 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); see *United States v. Place*, 660 F.2d 44, 49 (2d Cir. 1981); *United States v. Ballard*, 573 F.2d 913, 915 (5th Cir. 1978); *United States v. Smith*, 574 F.2d 882, 884 (6th Cir. 1978); *United States v. Lewis*, 556 F.2d 385, 389 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *United States v. Craemer*, 555 F.2d 594, 596 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977); *Royer v. State*, 389 So. 2d 1007, 1015, 1019 (Fla. 3d DCA 1980) (rehearing en banc), *review denied*, 397 So. 2d 779 (Fla.), *cert. granted*, 102 S. Ct. 631 (1981); *State v. Mitchell*, 377 So. 2d 1006, 1008 (Fla. 3d DCA 1979); *State v. Frost*, 374 So. 2d 593, 596 (Fla. 3d DCA 1979).

68. See, e.g., *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978) (four characteristics insufficient to justify stop); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978) (two characteristics insufficient); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977) (four characteristics insufficient, stop upheld for other reasons); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977) (four characteristics insufficient).

69. *Royer v. State*, 389 So. 2d 1007, 1015-16 (Fla. 3d DCA 1980) (rehearing en banc), *review denied*, 397 So. 2d 779 (Fla.), *cert. granted*, 102 S. Ct. 631 (1981); accord *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980); *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979).

dard",⁷⁰ it cannot effectively govern official conduct.

Failing to persuade the courts that conformance to the profile establishes the requisite probable cause to justify an arrest, the government has argued that airport stops of suspected drug couriers should fall within a limited exception to the probable cause standard. Under this exception, the seizure of an individual is reasonable if the officer has enough facts to support a "reasonable and articulable suspicion."⁷¹ The nature of the stop permitted under this lower standard is quite different from a formal arrest based on probable cause.

The "reasonable and articulable suspicion" standard originated with *Terry v. Ohio*.⁷² In *Terry*, the Supreme Court of the United States stated that it is the governmental interest in "effective crime prevention and detection . . . which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."⁷³ If an officer can articulate specific reasons that, based on his experience, reasonably cause him to suspect an individual, he may effect an investigatory "stop," a seizure less intrusive than an arrest.⁷⁴ This stop permits an officer to approach an individual, request identification, and ask questions. If the information elicited allays the officer's suspicion, no further detention is warranted. If, however, the investigation confirms the officer's initial suspicion of criminal activity, probable cause exists to arrest and thoroughly search the individual.⁷⁵

Proponents of drug courier profiles argue that in airport narcotics cases, government agents may stop suspects whose behavior conforms to the supposed stereotype. In *United States v. Mendenhall*,⁷⁶ for example, the defendant had manifested the following

70. *United States v. Lewis*, 556 F.2d at 389.

71. "[A]ny curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam).

72. 392 U.S. 1 (1968).

73. *Id.* at 22.

74. *Id.* at 26; accord *Brown v. Texas*, 443 U.S. 47, 50 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81 (1975); *United States v. Bowles*, 625 F.2d 526, 536 n.13 (5th Cir. 1980).

75. A *Terry* investigatory stop only permits an officer to search a person whom the officer suspects is carrying a weapon. Even then, the search is limited to a cursory search of the outer clothing. 392 U.S. at 30. Because of the security measures taken by airports, drug couriers seldom carry weapons. Kadish & Brofman, *supra* note 6, at 49.

76. 446 U.S. 544 (1980).

profile characteristics: travel from a major narcotics source city (Los Angeles) to a narcotics distribution city (Detroit), nervousness, deplaning last, scanning the entire terminal area in an apparent effort to spot narcotics agents, failing to claim luggage, and changing airlines for her departure from Detroit.⁷⁷ Justice Powell and two other Justices found that the government agents possessed reasonable and articulable suspicion when they seized Mendenhall in the airport terminal.⁷⁸ The four dissenting Justices, however, thought that the officers' suspicions did not justify the stop.⁷⁹ One month later in *Reid v. Georgia*,⁸⁰ a per curiam opinion, the Court held that similar profile characteristics⁸¹ were *not* sufficient to form an articulable suspicion.⁸²

Advocates of the drug courier profile emphasize, as did Justice Powell, that the public's compelling interest in detecting drug traffickers justifies using the profile to provide articulable suspicion for an investigative stop.⁸³ In *Royer v. State*,⁸⁴ Judge Hubbard of the Florida District Court of Appeal, Third District, agreed: "The gravity of the governmental interest in suppressing the drug traffic is, therefore, considerable, and that interest is surely served by the temporary seizure of air travelers at the Miami International Airport for further investigation."⁸⁵

77. *Id.* at 547 n.1.

78. *Id.* at 565 (concurring opinion). Although he had argued that Mendenhall's conformance to the profile characteristics was sufficient to establish articulable suspicion, Justice Powell also stated that "reliance upon the 'drug courier profile' [would not] necessarily demonstrate reasonable suspicion. Each case raising a Fourth Amendment issue must be judged on its own facts." *Id.* at 565 n.6.

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

80. 448 U.S. 438 (1980).

81. The defendant's profile characteristics in *Reid* were: 1) travel from a narcotics source city (Fort Lauderdale) to a narcotics distribution city (Atlanta); 2) an early morning arrival; 3) separation from a traveling companion; and 4) the absence of any luggage other than shoulder bags. *Id.* at 440-41.

82. *Id.* at 441. Lower federal appellate courts interpreting the *Reid* decision have found that although *Reid* "constitutes the Court's first authoritative holding with respect to the quantum of information necessary to support a reasonable suspicion of criminal activity in the context of the 'drug courier profile,'" *United States v. Robinson*, 625 F.2d 1211, 1217 (5th Cir. 1980), and "[a]lthough not a complete rejection of the drug courier profile, the Supreme Court's opinion implicitly admonishes the lower courts to consider carefully cases decided on the basis of the drug courier profile, ascribing little weight to characteristics that describe large numbers of innocent travelers." *United States v. Berry*, 636 F.2d 1075, 1081 (5th Cir.), *reh'g granted*, 649 F.2d 385 (5th Cir. 1981).

83. *Mendenhall*, 446 U.S. at 565 (concurring opinion); *accord United States v. Fry*, 622 F.2d 1218, 1221 (5th Cir. 1980); *State v. Grant*, 392 So. 2d 1362, 1365 (Fla. 4th DCA 1981).

84. 389 So. 2d 1007, 1015 (Fla. 3d DCA 1980) (rehearing en banc), *reweiv denied*, 397 So. 2d 779 (Fla.), *cert. granted*, 102 S. Ct. 631 (1981).

85. *Id.* at 1024 (concurring opinion).

Judicial preoccupation with a major societal problem should not, however, displace traditional fourth amendment analysis. Courts should be reluctant to discard fundamental principles, such as freedom from governmental intrusion, when society's concerns are not clearly compelling. The courts have reacted to this concern and the criticism directed at the profile.⁸⁶ Federal and Florida appellate courts agree that a suspect's mere conformance to the profile does not necessarily provide the reasonable and articulable suspicion needed for a valid *Terry* or investigative stop.⁸⁷ As Judge Fay pointed out in *United States v. Pulvano*,⁸⁸

[W]e have very serious concern with the practice of routinely stopping and questioning citizens traveling through airports on wholly domestic flights. We are not unmindful of the DEA's difficult task of eliminating drug trafficking in this country, nor the catastrophic results when they are unable to accomplish their objective. Drug abuse poses a serious threat to some of the most valuable assets of our society; namely our children and our families. Nonetheless, there is an equally substantial interest in all citizens in being free from unreasonable government intrusions

86. See *supra* text accompanying notes 68-70.

87. See *Reid v. Georgia*, 448 U.S. 438, 441 (1980); *United States v. Herbst*, 641 F.2d 1161, 1167 (5th Cir. 1981); *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir.), *cert. denied*, 101 S. Ct. 3111 (1981); *United States v. Price*, 599 F.2d 494, 502 n.10 (2d Cir. 1979); *United States v. Rico*, 594 F.2d 320, 326 (2d Cir. 1979); *United States v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978); *United States v. Smith*, 574 F.2d 882, 884 (6th Cir. 1978); *United States v. Pope*, 561 F.2d 663, 668 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977); *United States v. Nembhard*, 512 F. Supp. 15, 17 (E.D. Mich. 1980); *Royer v. State*, 389 So. 2d 1007, 1015, 1019 (Fla. 3d DCA 1980) (rehearing en banc), *review denied*, 397 So. 2d 779 (Fla.), *cert. granted*, 102 S. Ct. 631 (1981); *State v. Frost*, 374 So. 2d 593, 596 n.4 (Fla. 3d DCA 1979). *But see United States v. Fry*, 622 F.2d 1218, 1221 (5th Cir. 1980).

One or more suspicious, nonprofile characteristics or circumstances, in addition to conformance with the drug courier profile, can suffice to constitute the reasonable and articulable suspicion that justifies an investigative stop. See *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980) (conformance plus evidence of planned escape); *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979) (conformance plus defendant and friend periodically behaved like strangers), *cert. denied*, 447 U.S. 911 (1980); *United States v. Andrews*, 600 F.2d 563 (6th Cir.) (conformance plus anonymous tip), *cert. denied*, 444 U.S. 878 (1979); *United States v. Roundtree*, 596 F.2d 672 (5th Cir.) (conformance plus bulge in defendant's pant leg), *cert. denied*, 444 U.S. 871 (1979); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979) (conformance plus agent's prior knowledge that defendant was a suspected heroin dealer), *cert. denied*, 447 U.S. 910 (1980); *United States v. Price*, 599 F.2d 494 (2d Cir. 1979) (conformance plus hasty departure from airport); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978) (conformance plus abdominal bulge); *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978) (conformance plus prior police surveillance indicating that defendant had made heroin connection); *State v. Mitchell*, 377 So. 2d 1006 (Fla. 3d DCA 1979) (conformance plus reliable informant's tip, and known drug trafficker had driven defendant to airport).

88. 629 F.2d 1151 (5th Cir. 1980).

in their daily lives. It is one of the basic tenets on which this nation was founded and through which we have grown into the world's guiding beacon for the principles of freedom and democracy.

. . . It is the potential for infringing the rights of these citizens that causes us to question the propriety of interrogating individuals on the basis of a drug courier profile.⁸⁹

3. *If the suspect consents to a search, is that consent voluntary?*

After stopping a suspected drug courier, an officer ordinarily tries to confirm his suspicions by searching the suspect's luggage for contraband. The Supreme Court of the United States has held, in at least two cases, that the fourth amendment does not permit the officer to search the luggage without a warrant issued on the basis of his reasonable belief that the luggage contains illegal drugs.⁹⁰ Because the officer may not be able to detain the suspect long enough to procure a search warrant, the officer will typically rely on an established and well-defined exception to the warrant requirement: the suspect's *consent* to be searched.⁹¹

The Supreme Court held in *Schneckloth v. Bustamonte*⁹² that valid consent requires "voluntariness."⁹³ The extensive case law concerning voluntary confessions has aided courts in defining voluntariness in fourth amendment consent to search cases.⁹⁴ The decisions balance the need for police questioning as an effective law enforcement technique against society's belief that the police must use the technique fairly. Although there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen,"⁹⁵ a careful scrutiny of the surrounding circumstances will determine whether the suspect voluntarily consented to the search.⁹⁶

The "totality of the circumstances" test is applied in search and seizure cases to determine whether the consent was given freely, or was the product of explicit or implicit coercion or du-

89. *Id.* at 1155 n.1.

90. *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

91. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

92. *Id.*

93. *Id.* at 248. The Court explicitly refused to apply the "knowing and intelligent waiver" standard to consent cases. *Id.* at 246.

94. *Id.* at 223-24.

95. *Id.* at 224.

96. *Id.* at 248.

ress.⁹⁷ If the consent to search was involuntary, "any search based solely upon such consent will be deemed void under the fourth amendment. Because illegally obtained evidence may not be admissible at trial, the validity of the consent will many times determine the viability of the subsequent prosecution."⁹⁸

The analysis of the surrounding circumstances must include the "possibly vulnerable subjective state" of the suspect who authorizes the search.⁹⁹ The suspect should be "plainly capable of a knowing consent."¹⁰⁰ Factors such as education, intelligence, and the officer's failure to advise the suspect of his rights are important.¹⁰¹ The government must also clearly show that the individual freely permitted or expressly invited the search.¹⁰² Mere submission or acquiescence to authority is never sufficient to establish voluntariness; rather it suggests coercion.¹⁰³ "Where there is coercion there cannot be consent."¹⁰⁴ The *Schneckloth* Court cautioned that "no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."¹⁰⁵

Determining the voluntariness of a suspect's consent to the search given after he has been validly seized typically poses few difficulties in the airport narcotics stop and search cases. Federal and Florida courts have consistently upheld consents if the seizures were based on probable cause or articulable suspicion.¹⁰⁶

97. *Id.* at 227.

98. Comment, *Governmental Deception in Consent Searches*, 34 U. MIAMI L. REV. 57, 60 (1979) (footnotes omitted).

99. *Schneckloth*, 412 U.S. at 229.

100. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980).

101. *Schneckloth*, 412 U.S. at 248.

102. *United States v. Herbst*, 641 F.2d 1161, 1167 (5th Cir. 1981); *United States v. Goldstein*, 635 F.2d 356, 362 (5th Cir.), *cert. denied*, 101 S. Ct. 3111 (1981); *United States v. Black*, 510 F. Supp. 989, 993 (N.D. Ill. 1981); *United States v. Nembhard*, 512 F. Supp. 15, 19 (E.D. Mich. 1980); *Bailey v. State*, 319 So. 2d 22, 27-28 (Fla. 1975); *Taylor v. State*, 355 So. 2d 180, 183 (Fla. 3d DCA), *cert. denied*, 361 So. 2d 835 (Fla. 1978); *Mobley v. State*, 335 So. 2d 880, 882-83 (Fla. 4th DCA 1976), *cert. denied*, 341 So. 2d 1085 (Fla. 1977).

103. See *United States v. Mendenhall*, 446 U.S. at 576 (White, J., dissenting); *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *United States v. Jefferson*, 650 F.2d 854, 858 (6th Cir. 1981); *State v. Lanxon*, 393 So. 2d 1194, 1195 (Fla. 3d DCA 1981); *Robinson v. State*, 388 So. 2d 286, 291 (Fla. 1st DCA 1980).

104. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

105. 412 U.S. at 228.

106. See *United States v. Williams*, 647 F.2d 588 (5th Cir. 1981); *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981); *United States v. Berry*, 636 F.2d 1075 (5th Cir.), *reh'g granted*, 649 F.2d 385 (5th Cir. 1981); *United States v. Goldstein*, 635 F.2d 356 (5th Cir.), *cert. denied*, 101 S. Ct. 3111 (1981); *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Turner*, 628 F.2d 461 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2325 (1981);

The difficulty arises when the courts find that the officer did not have grounds for seizing the suspect. Although not conclusive, the illegal seizure of the suspected drug courier is a factor weighted heavily in determinations of voluntariness. Consequently, the government's showing of voluntariness must meet a higher degree of proof if the suspect's consent to the search follows an invalid seizure.¹⁰⁷

Because the suspected drug couriers usually cannot ascertain whether the stop or arrest is illegal, most suspects naturally assume that they must submit to the authority of the officers.¹⁰⁸ Courts consider consent under these circumstances to be indicative of mere acquiescence to the illegal assertion of authority, unless the government offers strong evidence to the contrary.¹⁰⁹ Therefore, an illegal arrest raises a presumption of involuntariness.¹¹⁰ "[A]ny serious illegal actions by a law enforcement officer, such as an illegal arrest, almost always render involuntary any subsequent consent to search given by the victim of the illegal action."¹¹¹

If the police subject the suspected drug courier to an illegal investigatory detention, the issue of voluntariness is less clear-

United States v. Bowles, 625 F.2d 526 (5th Cir. 1980); United States v. Vasquez, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980); United States v. Vasquez-Santiago, 602 F.2d 1069 (2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); United States v. Price, 599 F.2d 494 (2d Cir. 1979); United States v. Rico, 594 F.2d 320 (2d Cir. 1979); United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Canales, 572 F.2d 1182 (6th Cir. 1978); State v. Grant, 392 So. 2d 1362 (Fla. 4th DCA 1981); State v. Mitchell, 377 So. 2d 1006 (Fla. 3d DCA 1979); Myles v. State, 374 So. 2d 83 (Fla. 3d DCA 1979); Case Comment, *Fourth Amendment—Airport Searches and Seizures: Where Will the Court Land?*, 71 J. CRIM. L. & CRIMINOLOGY 499 (1980).

107. United States v. Jefferson, 650 F.2d 854, 858 (6th Cir. 1981); United States v. Troutman, 590 F.2d 604, 606 (5th Cir. 1979); United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978); United States v. McCaleb, 552 F.2d 717, 721 (6th Cir. 1977); *cf.* United States v. Page, 302 F.2d 81, 84 (9th Cir. 1962) (burden greater if defendant has been arrested).

108. Bailey v. State, 319 So. 2d 22, 28 (Fla. 1975).

109. There may be a few rare instances in which a valid consent could be made after an illegal arrest, provided that circumstances were so strong, clear and convincing as to remove any doubt of a truly voluntary waiver. However, ordinarily consent given after an illegal arrest will not lose its unconstitutional taint.

Id. at 27-28; see Royer v. State, 389 So. 2d 1007, 1015, 1019-20 (Fla. 3d DCA 1980) (rehearing en banc), *review denied*, 397 So. 2d 779 (Fla.), *cert. granted*, 102 S. Ct. 631 (1981). In Royer, the defendant was confined in a small interrogation room after the initial investigatory stop. The court viewed this as tantamount to an arrest. *Id.* at 1018.

110. Norman v. State, 379 So. 2d 643, 646-47 (Fla. 1980); Robinson v. State, 388 So. 2d 286, 290 (Fla. 1st DCA 1980).

111. Taylor v. State, 355 So. 2d 180, 184 (Fla. 3d DCA), *cert. denied*, 361 So. 2d 835 (Fla. 1978).

cut¹¹² because investigatory stops involve less coercion, detention, and intimidation than an arrest.¹¹³ Federal and Florida courts have considered evidence that the police warned the suspect of his right to refuse to consent as a highly significant factor in the determination of voluntariness.¹¹⁴ Other factors have been minimized as a result.

4. *If the suspect is illegally seized, but voluntarily consents to a luggage search, is the contraband seized nevertheless "fruit of the poisonous tree" that must be excluded at trial?*

The analysis of airport narcotics searches does not end with a judicial determination that a suspected drug courier voluntarily consented to the search after an illegal detention. As the court in *United States v. Robinson*¹¹⁵ pointed out, the suspect's voluntary consent does not automatically remove the taint of an illegal seizure. "[V]oluntariness is merely a threshold requirement. The 'causal connection' between the illegal seizure and the consent to search must be independently examined . . . in light of the policies to be served by the fourth amendment exclusionary rule."¹¹⁶ The rule is calculated to deter unlawful police conduct and preserve ju-

112. Factors tending to indicate involuntariness include detaining the suspect in unfamiliar surroundings; the presence of several government agents; telling the suspect that he must either consent to the search or continue to be detained until the agents can obtain a search warrant; and the absence of explicit oral or written consent. Factors indicative of voluntariness are average education and intelligence, and no period of prolonged questioning. *United States v. McCaleb*, 552 F.2d 717, 721 (6th Cir. 1977). Compare *State v. Lanxon*, 393 So. 2d 1194 (Fla. 3d DCA 1981) (despite notification of right to refuse consent, officer's statements accusing defendant of transporting narcotics, coupled with threat that trained dog would sniff her luggage at her destination, were sufficiently coercive to negate consent) with *State v. Parsons*, 389 So. 2d 1207 (Fla. 3d DCA 1980) (warnings and written waiver sufficient to make consent voluntary, despite being told that warrant would be sought if consent form was not signed).

113. See *United States v. Moeller*, 644 F.2d 518, 520 (5th Cir.), cert. denied, 102 S. Ct. 669 (1981); *United States v. Lara*, 638 F.2d 892, 898 (5th Cir. 1981); *United States v. Berd*, 634 F.2d 979, 984-85 (5th Cir. 1981); see also *supra* text accompanying notes 73-75.

114. See *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980); *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979). But see *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977). One court found that because the defendant did not receive a warning, his consent was probably involuntary. *United States v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978). In *Schneekloth v. Bustamonte*, 412 U.S. 218, 249 (1973), however, the Supreme Court of the United States held that proof of an individual's knowledge of his right to refuse to consent is not an indispensable prerequisite to voluntariness. Rather, a fourth amendment warning is merely one of several factors weighed. *Id.*

115. 625 F.2d 1211 (5th Cir. 1980).

116. *Id.* at 1220; see *United States v. Berry*, 636 F.2d 1075, 1081 n.10 (5th Cir.) (approval of *Robinson* analysis), *reh'g granted*, 649 F.2d 385 (5th Cir. 1981).

dicial integrity by prohibiting the admission of evidence obtained illegally.¹¹⁷

In *Wong Sun v. United States*,¹¹⁸ the Supreme Court assessed the admissibility of oral statements that the defendant had made as a result of the unlawful conduct of federal narcotics agents. The Court held that the statements were "the 'fruit' of official illegality," and had to be excluded at trial.¹¹⁹ The test was "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."¹²⁰ Evidence acquired during an "unlawful invasion" must be freely given to purge "the primary taint."¹²¹

Wong Sun failed to establish definite standards for determining when a consent is sufficiently voluntary to prevent the application of the exclusionary rule. The Supreme Court confronted the issue in *Brown v. Illinois*.¹²² The case involved a murder suspect who had been arrested and subsequently interrogated at the police station. The suspect confessed to his role in the crime after the police advised him of his *Miranda*¹²³ rights.¹²⁴ Although the Illinois state courts conceded that the police had arrested Brown without probable cause,¹²⁵ the courts adopted and applied a per se rule that the *Miranda* warnings broke the causal connection between the illegal arrest and the evidence produced.¹²⁶

The Supreme Court of the United States reversed, holding that although the administration of *Miranda* warnings may have made the subsequent confession voluntary,

the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the

117. *Elkins v. United States*, 364 U.S. 206, 217, 222 (1960); see *Stone v. Powell*, 428 U.S. 465 (1976); *Mapp v. Ohio*, 367 U.S. 643 (1961).

118. 371 U.S. 471 (1963).

119. *Id.* at 485.

120. *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT § 5.07, at 221 (1959)).

121. 371 U.S. at 486.

122. 422 U.S. 590 (1975).

123. *Miranda v. Arizona*, 384 U.S. 436 (1966).

124. 422 U.S. at 594.

125. *Id.* at 596.

126. *Id.* at 597, 603.

primary taint."¹²⁷

The Court articulated a four-factor test in determining whether Brown's consent to the questioning broke the causal connection with his unlawful arrest:

The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. . . . The *Miranda* warnings are an important factor. . . . But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant.¹²⁸

Applying this four-factor analysis, the Court specifically held that the *Miranda* warnings did not suffice to purge the taint of Brown's prior illegal seizure.¹²⁹ The Court concluded that the lapse of less than two hours between Brown's arrest and confession was not enough to justify ignoring the initial illegality.¹³⁰ The Court also stated that "there was no intervening event of significance whatsoever,"¹³¹ thereby implicitly rejecting *Miranda* warnings as an intervening circumstance. Finally, the Court stressed the flagrancy of the officers' misconduct: Brown had been arrested "in the hope that something might turn up."¹³²

The basis of the Court's holding that *Miranda* warnings do not purge the taint of an illegal seizure was revealed only indirectly in the opinion. "*Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation."¹³³ In a footnote to this statement, the Court added, "The *Miranda* warnings in no way inform a person of his Fourth Amendment rights . . .";¹³⁴ rather, the warnings are directed to fifth amendment interests.¹³⁵ This raises the important question whether a fourth amendment warning, specifically advising a suspect of his right to refuse a search, renders an ensuing consent sufficiently voluntary to purge the taint of an illegal

127. *Id.* at 601-02 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)).

128. 422 U.S. at 603-04 (footnotes and citation omitted).

129. *Id.* at 605.

130. *Id.* at 604-05.

131. *Id.* at 604.

132. *Id.* at 605.

133. *Id.* at 601 (footnote omitted).

134. *Id.* at 601 n.6.

135. *Id.* at 601.

seizure.

In cases involving suspected drug couriers, defendants have frequently argued that an illegal seizure taints any subsequent consensual search even if a fourth amendment warning was given. Therefore, the "fruit" of the search should be subject to the exclusionary rule. Most courts have rejected this argument.¹³⁶ This development poses serious questions respecting the continued efficacy of fourth amendment guarantees. The significance that the United States Court of Appeals for the Fifth Circuit attaches to warnings is illustrative. In *Bretti v. Wainwright*,¹³⁷ the court viewed a specific fourth amendment warning as another factor to consider in determining whether a consent was valid: "While warnings prior to a consensual search may not have the same indispensability as those required prior to a confession, . . . they do help ensure that the consent is free, voluntary, and untainted by the arrest's possible illegality."¹³⁸ Later cases, such as *United States v. Williams*¹³⁹ and *United States v. Fike*,¹⁴⁰ suggest that the Fifth Circuit is adopting *sub silentio* a rule that the administration of fourth amendment warnings renders consensual searches sufficiently voluntary to dissipate the taint of an antecedent illegal seizure.¹⁴¹

These decisions cannot be reconciled with the analysis in *Brown v. Illinois*.¹⁴² First, the "temporal proximity" of the illegal search and consent in the drug courier cases is usually a matter of minutes—well under the two-hour span that was considered too short in *Brown*.¹⁴³ Second, a major purpose of the exclusionary rule

136. *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979); *State v. Howard*, 394 So. 2d 440 (Fla. 3d DCA 1981); *Husted v. State*, 370 So. 2d 853 (Fla. 3d DCA 1979); *St. John v. State*, 363 So. 2d 862 (Fla. 4th DCA 1978); see *United States v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978); *Royer v. State*, 389 So. 2d 1007, 1015, 1019-20 (Fla. 3d DCA 1980) (rehearing en banc), *review denied*, 397 So. 2d 779 (Fla.), *cert. granted*, 102 S. Ct. 631 (1981).

137. 439 F.2d 1042 (5th Cir.), *cert. denied*, 404 U.S. 943 (1971).

138. *Id.* at 1046 (citations omitted); accord *Husted v. State*, 370 So. 2d 853, 854 (Fla. 3d DCA 1979) ("[S]uch a warning breaks the connection with any prior illegal police activity so as to render a subsequent consent un-'tainted,' uncoerced, and truly voluntary in character.").

139. 647 F.2d 588 (5th Cir. 1981). *Williams* and two other recent Fifth Circuit cases, *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981) and *United States v. Turner*, 628 F.2d 461 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2325 (1981), indicate that DEA agents recite from cards similar to those used to advise suspects of their *Miranda* rights.

140. 449 F.2d 191 (5th Cir. 1971).

141. *Williams*, 647 F.2d at 591; *Fike*, 449 F.2d at 194.

142. 422 U.S. 590 (1975).

143. *Id.* at 604. *But cf.* *Sizemore v. State*, 390 So. 2d 401, 404-05 (Fla. 3d DCA 1980) (even though suspect was seized illegally, fourth amendment warnings and elapse of thirty

is to deter unlawful police conduct.¹⁴⁴ If the "fruit" of illegal seizures were admissible, narcotics agents would seldom be deterred from randomly and illegally stopping nervous airline passengers waiting to depart from Miami International Airport.¹⁴⁵ As the Supreme Court stated in *Davis v. Mississippi*,¹⁴⁶ "[t]he exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment."¹⁴⁷

The Court's opinion in *Brown* stated that "[t]he question whether [the 'fruits' of official misconduct are] the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive."¹⁴⁸ In contrast, many federal and Florida courts have attached too much significance to the administration of a fourth amendment warning. As the Supreme Court noted critically in *Dunaway v. New York*,¹⁴⁹ "[t]his betrays a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in *Brown*."¹⁵⁰ Recognizing this confusion, the Fifth Circuit in *United States v. Robinson*¹⁵¹ found that a suspected drug courier's acquiescence to a search was voluntary.¹⁵² The agents' request was polite and accompanied by an effective warning.¹⁵³ Nevertheless, the court remanded the case for a determination of whether the connection between the illegal stop and the consensual search was sufficiently attenuated to deny the defendant's motion to suppress the evidence.¹⁵⁴ If fourth amendment warnings alone were sufficient to purge the taint of illegal seizures, "[a]ny incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'"¹⁵⁵

minutes rendered consent valid), *review denied*, 399 So. 2d 1145 (Fla. 1981).

144. See *supra* text accompanying note 117.

145. See *United States v. Berry*, 636 F.2d 1075, 1080 n.8 (5th Cir.), *reh'g granted*, 649 F.2d 385 (5th Cir. 1981).

146. 394 U.S. 721 (1969).

147. *Id.* at 724.

148. 422 U.S. at 603.

149. 442 U.S. 200 (1979).

150. *Id.* at 219; *accord* *United States v. Robinson*, 625 F.2d 1211, 1220 (5th Cir. 1980).

151. 625 F.2d 1211 (5th Cir. 1980).

152. *Id.* at 1218.

153. *Id.* at 1219.

154. *Id.* at 1220.

155. *Brown v. Illinois*, 422 U.S. at 602-03 (citing *Mapp v. Ohio*, 367 U.S. 643, 648

Conclusion

The transportation of narcotics has become a critical problem nationally, as well as in Florida. To combat this problem, the DEA and local police agencies have initiated programs to apprehend suspected drug couriers at airports. The seizures and searches raise a number of constitutional issues: 1) the initial police-citizen encounter may constitute a fourth amendment seizure; 2) the seizure may not be constitutionally justified; 3) the suspect's subsequent consent to a luggage search may not be voluntary; and 4) the incriminating evidence obtained as a result of the seizure may be "fruit of the poisonous tree," and, consequently, excluded at trial despite the suspect's voluntary consent.

The seriousness of the problem of drug trafficking has caused some courts to bend traditional fourth amendment principles. But, as one judge stressed, "[t]here is no separate body of Fourth Amendment law applicable to domestic airport stops by the DEA."¹⁵⁶ The Supreme Court of the United States cautioned nearly a century ago in *Boyd v. United States*.¹⁵⁷

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.¹⁵⁸

In short, the magnitude of the drug trafficking problem cannot be permitted to overwhelm the constitutional rights involved. Alternative means should be found to combat the distribution of narcotics.¹⁵⁹

(1961)).

156. *United States v. Vasquez*, 612 F.2d 1338, 1344 (2d Cir. 1979), cert. denied, 447 U.S. 907 (1980).

157. 116 U.S. 616 (1886).

158. *Id.* at 635.

159. A related line of cases involving "dog sniff alerts" suggests one possible alternative. In such cases, airport narcotics agents who suspect someone because he fits the drug courier profile will locate that person's luggage in the baggage room. The agents then use a highly trained canine to sniff the suitcase in a luggage lineup before the individual claims it. The dog will assume a "positive alert" position if it detects certain kinds of contraband in the

suitcase.

Courts have consistently held that a dog sniff does not constitute a fourth amendment search. Furthermore, a positive reaction from the dog can constitute probable cause both to arrest the individual who subsequently claims the luggage and to procure a warrant for a search of the luggage following the arrest. *United States v. Goldstein*, 635 F.2d 356 (5th Cir.), *cert. denied*, 101 S. Ct. 3111 (1981); *United States v. Sullivan*, 625 F.2d 9 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *United States v. Solis*, 536 F.2d 880 (9th Cir. 1976); *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Fulero*, 498 F.2d 748 (D.C. Cir. 1974); *State v. Ricano*, 393 So. 2d 1136 (Fla. 3d DCA 1981); *State v. Mosier*, 392 So. 2d 602 (Fla. 3d DCA 1981); *Bouler v. State*, 389 So. 2d 1197 (Fla. 5th DCA 1980); *Harpold v. State*, 389 So. 2d 279 (Fla. 3d DCA 1980), *review denied*, 397 So. 2d 777 (Fla. 1981); *see Sizemore v. State*, 390 So. 2d 401 (Fla. 3d DCA 1980), *review denied*, 399 So. 2d 1145 (Fla. 1981); *Mata v. State*, 380 So. 2d 1157 (Fla. 3d DCA), *review denied*, 389 So. 2d 1112 (Fla. 1980).