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Abstract

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KEYWORDS: Drug Courier, Mendenhall, Profiles

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The recent United States Supreme Court decision in *United States v. Mendenhall*[1] is notable not for what the Court did decide, but for what the Court could not decide. The case's central issue, the constitutionality of the use of "drug courier profiles" by narcotics agents in airports to stop and search persons suspected of drug trafficking, was left unresolved by a splintered court.

The case reached the Court pursuant to a motion to suppress heroin allegedly acquired through an unconstitutional search and seizure[2] by Drug Enforcement Administration (DEA) agents. The Supreme Court granted *certiorari* "to consider whether any right of the respondent guaranteed by the [f]ourth [a]mendment was violated."[3]

In resolving the issues presented in *Mendenhall*,[4] the Supreme Court reviewed the use by DEA agents of the "drug courier profile," which is an "informally compiled abstract of characteristics thought typical of persons carrying illicit drugs."[5] According to the DEA, the following conduct is exhibited consistently by drug couriers, and indicates that criminal activity is afoot. A person is suspicious when he:

(1) arrives on a flight from a source city,[6]
(2) is the last passenger to deplane,
(3) is very nervous,
(4) scans the whole terminal,
(5) carries or picks up no baggage,

1. _ U.S. _, 100 S. Ct. 1870 (1980).
2. *Id.* at 1873.
3. *Id.*
4. *Id.*
5. *Id.* at _, 100 S. Ct. at 1873 n.1. The "drug courier profile" has also been described as a "check list of recurrent characteristics." United States v. Rico, 594 F.2d 320, 326 (2d Cir. 1978).
6. The place of origin for controlled substances brought into the airport in which the DEA agents are stationed. _ U.S. at _, 100 S. Ct. at 1873; United States v. Price, 599 F.2d 494, 496 (2d Cir. 1979).

(6) changes airlines for a flight out of the airport,

(7) uses currency in small denominations for ticket purchases,

(8) remains in the drug import centers, (or the source city) for only a short stopover, and

(9) uses one or more alias.[7]

Once a DEA agent detects a suspicious person fitting this drug courier profile, the agent approaches the suspect, identifies himself, and asks to see the suspect's identification and ticket. It is this initial stop and questioning which raises the issue of whether any of the suspect's fourth amendment rights have been violated.

The Supreme Court upheld the lawfulness of the initial stop and questioning of Ms. Mendenhall based upon the "drug courier profile."[8] The majority further found that the subsequent search and seizure of Ms. Mendenhall was lawful and not violative of any constitutionally protected rights because she had voluntarily accompanied the DEA agents to their airport office, and had voluntarily consented and submitted to a strip search revealing the heroin.[9]

ISSUES PRESENTED

The majority's opinion, however, did not set forth concise guide-

7. _ U.S. at _, 100 S. Ct. at 1873 n.1. United States v. Vasquez, 612 F.2d 1338 (2d Cir. 1979). United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979). United States v. Ballard, 573 F.2d 913 (5th Cir. 1978). United States v. McCaleb, 512 F.2d 717 (6th Cir. 1977). It is interesting to note that many of the characteristics of the "drug courier profile" often used to justify an initial encounter or investigatory stop and comprise part of the "reasonable suspicion" cannot be ascertained until after the individual is approached and questioned. For example, the conduct of (1) using one or more alias, (2) remaining in the drug import centers or source cities for only a short stopover and (3) traveling under an unusual itinerary, can be ascertained only after stopping the suspect and asking for his ticket and identification. In such situations, these characteristics cannot contribute to the "reasonable suspicion" that criminal activity is afoot which is necessary to lawfully intrude upon an individual's fourth amendment rights. Some courts, however, have recognized that the information acquired during the investigatory encounter cannot be used to justify it. United States v. Rico, 594 F.2d 320, 323 (2d Cir. 1979). United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977). United States v. Pope, 561 F.2d 663, 668 (6th Cir. 1977).

8. _ U.S. _, 100 S. Ct. 1870.

9. *Id.* at _, 100 S. Ct. at 1879-80.

lines for use in resolving future cases, nor did the Court resolve all of the issues presented in the case. Three questions remain to be answered by the Court. First, whether actions of a passenger, consistent with the "drug courier profile," provide the agents with probable cause to stop, question, and seize the suspect. Second, whether such suspicious conduct supplies the agents with "reasonable suspicion," something less than probable cause, which under the fourth amendment authorizes a minimally intrusive stop and questioning. Third, whether agents can stop and question a suspect whose conduct falls within the purview of the "drug courier profile" without invoking fourth amendment protections.

Thus the question remains: Does the use of the "drug courier profile" (a means of providing agents with a cloak of authority to act on their "hunches") invest the agents with unfettered discretion to intrude on the rights of citizens? Inherent in this issue is the recognition that the conduct compiled in the "drug courier profile" is often logically consistent with innocent behavior, and may result in passengers being unnecessarily detained and their constitutional rights infringed upon to a greater or lesser degree.

Since the majority of the Supreme Court was divided on the issues concerning the initial contact between the federal agents and the suspect, the lower courts will have to address and resolve these questions on a case by case analysis.

FACTS

The fact pattern in *Mendenhall*,[10] played a major role in the Supreme Court's decision. The incident occurred in the Detroit Metropolitan Airport where DEA agents were stationed to detect unlawful narcotic traffic. Two agents observed Ms. Mendenhall as she arrived in the airport and proceeded through the terminal. Ms. Mendenhall's conduct was suspicious insofar as the agents viewed it as being consistent with the characteristics of the "drug courier profile."[11]

The agents approached Ms. Mendenhall, identified themselves, and asked to see her identification and ticket. Ms. Mendanhall pro-

10. _ U.S. _, 100 S. Ct. 1870.
11. *Id.* at _, 100 S. Ct. at 1873-74.

duced a driver's license in the name of Sylvia Mendenhall and an airline ticket issued in the name of Annette Ford, triggering further inquiry by the federal agents.[12]

In response to questioning, Ms. Mendenhall stated she had spent only two days in California. According to the "profile," this factor is indicative of illegal conduct since drug couriers while transporting narcotics often make brief stops in diverse cities. Additionally, when Agent Anderson specifically identified himself as a federal narcotics agent, Ms. Mendenhall became extremely nervous and had difficulty speaking.[13]

Based on Ms. Mendenhall's suspicious conduct, Agent Anderson asked if she would accompany the agents to the airport DEA office for further questioning.[14] The record does not include Ms. Mendenhall's verbal response to this question, but merely recites that she accompanied the agents to the office. Once at the office, an agent asked Ms. Mendenhall if she would permit a search of her person and handbag. She responded, "go ahead."[15] When a policewoman arrived to conduct the search, she asked the agents if Ms. Mendenhall had consented to the search, and the agents said she had. After the policewoman and Ms. Mendenhall had entered another room, the policewoman asked Ms. Mendenhall if she had consented to the search and she replied affirmatively. The policewoman then told Ms. Mendenhall that she

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12. *Id.*

13. *Id.* at _, 100 S. Ct. at 1874. Nervousness is one characteristic of the "drug courier profile" which is often misleading and not indicative of criminal activity. Very often individuals traveling through airports are nervous and confused due to the hectic and unfamiliar surroundings. Government officials acting on their hunches can label conduct as "extremely nervous," thereby fitting it into the profile. Thus the officers can justify approaching almost any individual walking through an airport terminal. An example of detectives acting merely on a hunch occurred in Berg v. State, 384 So. 2d 292 (Fla. 4th Dist. Ct. App. 1980), wherein the detectives observed Berg walking through the terminal in an extremely nervous manner. As Berg approached the metal detector he was shaking with an overall appearance of apprehension. Since the detectives viewed this conduct as consistent with the "drug courier profile" they approached and asked to speak with Berg. After receiving permission to inspect his bags, they discovered a white powdery laxative which they proceeded to field test three or four times. In reality, Berg was a diabetic suffering from the preliminary stages of insulin shock. The court found that the detectives were acting upon "nothing more than mere suspicion." *Id.* at 293.

14. ____ U.S. ____, 100 S. Ct. 1870.

15. *Id.*

would have to disrobe, and in response, Ms. Mendenhall stated that she "had a plane to catch."[16] After being assured by the policewoman that there would be no delay if she were not carrying narcotics, Ms. Mendenhall disrobed without further comment. As she was disrobing, Ms. Mendenhall handed to the policewoman two packages from her clothing, one of which appeared to contain heroin. The agents then arrested Ms. Mendenhall for possession of contraband.[17]

THE SUPREME COURT'S ANALYSIS

1. The Fourth Amendment's Applicability

The Supreme Court began its factual analysis by establishing that Ms. Mendenhall, as she walked through the airport, was protected by the fourth amendment[18] which 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 persons and things to be seized.[19]

In *Katz v. United States*,[20] the Supreme Court held that the fourth amendment protects "people, not places,"[21] and thus established that the fourth amendment protects more than an " 'area' viewed in the abstract."[22] The fourth amendment protects what an individual "seeks to preserve as private, even in an area accessible to the public."[23] "[T]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of secret affairs."[24] Additionally, the Supreme Court

16. *Id.*
17. *Id.*
18. *Id.* at _, 100 S. Ct. at 1875.
19. U.S. CONST. amend. IV.
20. 389 U.S. 347 (1967).
21. *Id.* at 351.
22. *Id.*
23. *Id.*
24. Terry v. Ohio, 392 U.S. 1, 8-9 (1968).

has recognized that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint of interference of others, unless by clear and unquestionable authority of law."[25]

2. *Was There a "Seizure" of Ms. Mendenhall?*

After establishing that Ms. Mendenhall was clothed with constitutional safeguards, the Supreme Court turned its attention to whether the actions of the DEA agents violated her constitutional rights. In its analysis, the majority's consensus broke down. Justice Stewart was joined only by Justice Rehnquist in Part II-A of his opinion, which concluded that Ms. Mendenhall was not "seized" since fourth amendment safeguards were not triggered when she was approached and questioned by the DEA agents.[26] Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the result, but found that Ms. Mendenhall *was* seized within the meaning of the fourth amendment.[27]

Justices Stewart and Rehnquist stated their belief that police officers can question people in the street without the officers' conduct falling within the parameters of the fourth amendment as long as the individual being questioned has not been "seized." In this situation, there is "no intrusion upon that person's liberty or privacy as would under the constitution require some particularized and objective justification."[28] According to Justices Stewart and Rehnquist when such encounters occur between officials and citizens, the citizens can ignore the

25. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

26. _ U.S. at _, 100 S. Ct. at 1873. In United States v. Elmore, 595 F.2d 1036, the Fifth Circuit addressed the question of when a seizure occurs in an encounter between police officers and citizens. In its step by step analysis, the court made a refined judgment as to exactly when the seizure occurred. The court concluded that no seizure occurred until the agent took the suspect's ticket to the airline counter to check the suspect's story. The court arrived at this decision since the encounter involved no force, no physical contact, and no show of authority other than when the agents identified themselves as federal law enforcement officials. *Id.* at 1042.

27. *Id.* at _, 100 S. Ct. at 1880.

28. *Id.* at _, 100 S. Ct. at 1876.

questions addressed to them and freely walk away.[29]

3. *Terry's Guidelines*

Following this premise, Justices Stewart and Rehnquist state that "the distinction between an intrusion amounting to a 'seizure' of the person, and an encounter that intrudes upon no constitutionally protected interest is illustrated by the facts in *Terry v. Ohio.*"[30]

In *Terry,* the Supreme Court was dealing with an encounter between a citizen and a policeman on patrol investigating suspicious circumstances. The plainclothes policeman observed two men standing on a corner. One of them walked past some stores and looked specifically into one store window. While on his return to the corner, the man again spied into the same store window, and upon arriving at the corner, the two men again conferred briefly with each other. The second man repeated this routine and peered twice into the same store window. These two men made twelve trips: "pacing, peering, and conferring."[31] At one point, as the two men were conversing on the corner, they were joined by a third man. After observing these three men for twelve minutes, the police officer was "thoroughly suspicious."[32] He approached them, "identified himself as a police officer and asked for their names."[33]

The Court stated that "at this point his [the policeman's] knowledge was confined to what he [had] observed. He was not acquainted with any of the three men by name or sight, and he had received no information concerning them from any other source."[34]

In response to the officer's question, the three men "mumbled something."[35] Instantaneously, the officer "grabbed petitioner Terry,

29. *Id.* However, courts have recognized that encounters between citizens and officials often inherently involve restraints on individuals' freedom to freely walk away. The cloak of authority surrounding a government official often results in submission on the part of citizens, who are not free to disregard the demands of officers. Johnson v. United States, 333 U.S. 10, 13 (1848). State v. Frost, 374 So. 2d 593 (Fla. 3d Dist. Ct. App. 1979).

30. 392 U.S. 1.

31. *Id.* at 6.

32. *Id.*

33. *Id.* at 6-7.

34. *Id.* at 7.

35. *Id.*

spun him around . . . , and patted down the outside of his clothing."[36]

In *Terry v. Ohio,* the majority found that the police officer "seized" the petitioner "when he took hold of him and patted down the outer surfaces of his clothing."[37] However, after discussing the circumstances in *Terry,* the Court concluded that the seizure was reasonable despite the interference with Terry's personal security. Thus, there was no violation of the fourth amendment's prohibition against unreasonable searches and seizures.[38]

In *Mendenhall,*[39] by simultaneously discussing the majority and concurring opinions in *Terry,* Justices Stewart and Rehnquist suggested that no "seizure" occurs when a police officer questions a citizen on the street, since the Court in *Terry* found that no seizure occurred when the officer stopped and questioned the three men.[40]

However, a careful analysis of the opinions in *Terry* reveals that the majority of the Supreme Court did not decide the issue of whether a "seizure" took place before the officer physically restrained Terry. The majority stated in a footnote:

> We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, 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. We cannot tell with any certainty upon this record whether any "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons. . . . [41]

In his concurring opinion in *Terry,* Justice White spoke of interro-

36. *Id.*
37. *Id.* at 9.
38. *Id.* at 30-31.
39. _ U.S. _, 100 S. Ct. 1870.
40. *Id.* at _, 100 S. Ct. at 1876.
41. 392 U.S. at 19 n.16. The Fifth Circuit in United States v. Elmore, 595 F.2d 1036, analyzed the *Terry* decision concluding that the Court did not discuss the propriety of an investigatory seizure.

gation during an investigatory stop.[42] The interpretation given this concurring opinion by Justices Stewart and Rehnquist is that since nothing in the constitution prevents a police officer from addressing questions to individuals in the streets, constitutional rights are not violated if a person is briefly restrained and questioned.[43]

A close analysis of Justice White's separate concurring opinion reveals that he did not state absolutely that no seizure occurs during a brief encounter with a police officer. Rather, he set forth that the individual's constitutional rights were "not necessarily violated."[44] The majority of the Supreme Court in *Terry* specifically did not decide this issue.[45]

Analyzing encounters between citizens and police officers demonstrates that these contacts involve varying degrees of coerciveness. When a police officer on the beat approaches a citizen and asks, "Sir, may I talk to you a moment,"[46] the question suggests that the individual is free to leave if he so desires.[47] On the other hand, when a federal agent in an airport stops a citizen whose conduct is consistent with the "drug courier profile," identifies himself as a DEA agent, and asks for the suspect's identification and ticket, the situation strongly suggests that the individual is not free to leave, and that any attempt to do so would be met with opposition.[48]

In *Mendenhall,*[49] the record clearly showed that Ms. Mendenhall was not free to ignore the federal agents and walk away. Footnote six of Justices Stewart and Rehnquist's opinion states that the DEA agents would have detained Ms. Mendenhall had she attempted to leave.[50] The federal agent's subjective intention to restrain the respondent was relevant insofar as it was conveyed to Ms. Mendenhall.[51] Unfortu-

42. 392 U.S. at 34.
43. _ U.S. at _, 100 S. Ct. at 1876.
44. 392 U.S. at 35. In fact, Justice White's analysis recognized that the circumstances of an encounter were critical. In *Terry* he agreed that proper circumstances existed to approach and detain the suspect.
45. *Id.* at 19 n.16.
46. United States v. Wylie, 569 F.2d 62, 68 (D.C. Cir. 1977).
47. *Id.*
48. _ U.S. _, 100 S. Ct. 1870.
49. *Id.*
50. *Id.* at _, 100 S. Ct. at 1877 n.6.
51. *Id.*

nately, the record before the Supreme Court did not contain the specifics of the intention conveyed to Ms. Mendenhall. Certainly, the thoughts, beliefs, and motivations of the participants set the atmosphere of any encounter and may affect their actions during it. Thus, if the record had been more complete, perhaps it would have shown that a seizure had occurred. Possibly, a better solution, in a situation where the record is insufficient in cases involving fourth amendment rights, is to remand for further evidentiary hearings on the issue[52] rather than to assume that no seizure occurred.[53]

In discussing whether a seizure had occurred during the initial encounter in *Mendenhall,* Justices Stewart and Rehnquist broadly defined "seizure" as "when by means of physical force or a show of authority an [individual's] freedom of movement is restrained."[54] This definition encompasses circumstances where no physical force or touching occurs and where the suspect makes no attempt to leave. Two examples set forth in Stewart and Rehnquist's opinion include: (1) when the presence of several officers is threatening; and (2) when the language or voice of the officers indicates that the suspect will not be allowed to leave.[55] In ascertaining whether a "seizure" occurs in such circumstances, Justices Stewart and Rehnquist would consider whether "in view of all the circumstances . . . , a reasonable person would have believed that he was not free to leave."[56]

In *Mendenhall,* Justices Stewart and Rehnquist found that no seizure had occurred during the initial approach since (1) the record did not contain any evidence that Ms. Mendenhall's actions were restrained in any way;[57] and (2) the record did not indicate that she had any objective reason to believe she was not free to end the conversation and proceed on her way.[58] Such evidence was absent from the record since the parties had argued the case in the lower courts on the assumption that Ms. Mendenhall had been "seized" when she was ap-

52. *Id.* at _, 100 S. Ct. at 1886 (dissenting opinion). Obviously police can talk to citizens without violating their constitutional rights.
53. *Id.* at _, 100 S. Ct. at 1876.
54. *Id.* at _, 100 S. Ct. at 1877.
55. *Id.*
56. *Id.*
57. *Id.* at _, 100 S. Ct. at 1878.
58. *Id.*

proached in the concourse.[59]

To the concurring justices, the question of whether Ms. Mendenhall had been seized was not resolved easily in light of conflicting precedent.[60] There is case law supporting a finding that Ms. Mendenhall was seized by the agents. For example, in *Terry v. Ohio,*[61] the Court emphasized that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[62] The Court expanded on this thought, and stated that when a citizen is "stopped" by police he is "seized" within the meaning of the fourth amendment, and some "specific and articulable" justification must be shown to "reasonably warrant" the intrusion.[63]

In *Brown v. Texas,*[64] a case which involved the seizure of an individual in circumstances analogous to *Mendenhall,* the Supreme Court noted that when the officers approached Brown and asked him to identify himself, "they performed a seizure of his person subject to the requirements of the [f]ourth [a]mendment."[65] However, "seizures" of individuals have been found in situations involving less of an intrustion than that which occurred in *Terry.* In *United States v. Coleman,*[66] the

59. *Id.* at _, 100 S. Ct. at 1875 n.5, 1885 (dissenting opinion).

60. *Id.* at _, 100 S. Ct. at 1880 n.1.

61. 392 U.S. 1.

62. *Id.* at 16.

63. *Id.* at 21.

64. 443 U.S. 47 (1979). In *Brown,* while cruising in a patrol car, two police officers observed Brown and another man walking away from each other in an alley. Believing that the two men either had been together or were about to meet until the patrol car appeared, one officer approached Brown and asked him to identify himself and to explain what he was doing. When Brown refused to identify himself, the officer replied that he was in a "high drug problem area." *Id.* at 48-49. The second officer then frisked Brown and found nothing.

65. *Id.* at 50.

66. 450 F. Supp. 433 (E.D. Mich. 1978). In *Coleman,* a DEA agent observed Coleman as he deplaned at the Detroit Metropolitan Airport, from a flight arriving from Los Angeles, "the most significant distribution point for heroin in the country." *Id.* at 439. Coleman carried no hand luggage and walked directly through the terminal without stopping to claim any baggage. A woman met Coleman outside the terminal and they both proceeded toward the parking lot. The federal agent approached them, identified himself, and asked Coleman to produce some identification and his airline ticket.

The court found from the moment that the DEA agent identified himself and began

District Court for the Eastern District of Michigan stated that police officers can subject an individual to a "seizure" during an investigatory stop by taking advantage of "social pressures which inhibit the suspect from declining to deal with him [the police officer]."[67] In other words, the suspect is seized because he is not free to ignore the police officer and walk away.[68]

4. *The Concurring Justices Apply a Balancing Approach*

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in part and joined in the judgment. Justice Powell assumed that the initial stop constituted a seizure and analyzed the situation accordingly. The concurring justices stated that they would have held "the federal agents had reasonable suspicion that the respondent was engaging in criminal activity and, therefore, that they did not violate the [f]ourth [a]mendment by stopping the respondent for routine questioning."[69]

In *Mendenhall,* since the stop constituted a seizure it had to be justified in order to satisfy the fourth amendment requirements. The categories of police conduct into which this encounter could fall were limited to (1) an investigatory stop which requires reasonable suspicion; or (2) an arrest or its equivalent which requires probable cause.[70]

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to ask Coleman questions, a "Terry stop had been effected." Therefore, the stop had to be based on reasonable suspicion to meet the requirements of the fourth amendment. The court held that the stop of Coleman was not based on reasonable suspicion of criminal activity and was not constitutionally valid.

67. *Id.*

68. *Id.*

69. _ U.S. at _, 100 S. Ct. at 1880.

70. Dunaway v. New York, 442 U.S. 200 (1979). The bulk of the lower court cases have found that investigatory stops merely based on conduct consistent with the "drug courier profile" cannot be justified on either probable cause or reasonable suspicion grounds. United States v. Rico, 594 F.2d 320. United States v. Ballard, 573 F.2d 913. United States v. Pope, 561 F.2d 663 (6th Cir. 1977). State v. Battleman, 347 So. 2d 637 (Fla. 3d Dist. Ct. App. 1979). State v. Frost, 347 So. 2d 593. However, there are a few cases that state that there may arise a set of facts in which the existence of profile characteristics constitute reasonable suspicion to warrant the intrusion of an investigatory stop. United States v. McCaleb, 522 F.2d 717, 720. State v. Mitchell, 377 So. 2d 1006, 1008 (Fla. 3d Dist. Ct. App. 1979).

In *Terry v. Ohio,*[71] the Court established that reasonable investigatory stops satisfy the fourth amendment's proscription against unreasonable searches and seizures. The Court concluded that the warrant clause could not apply, as a practical matter, to police conduct which is "necessarily swift action predicated upon the on the spot observations of the officer."[72] However, the Court emphasized that police must obtain warrants for searches and seizures whenever practicable.[73]

In assessing the reasonableness of seizures which are less intrusive than traditional arrests, courts have used a "balancing test" to assure that the individual's reasonable expectation of privacy is not arbitrarily intruded upon by police officers[74] "engaged in the often competitive enterprise of ferreting out crime."[75] Whether a stop constitutes a seizure turns on the circumstances of each case. Some of the factors considered by courts when determining the reasonableness of a "seizure" include: "(1) the public interest served by the seizure, (2) the nature and scope of the intrusion, (3) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise,"[76] and the individual's right to personal security and privacy.[77]

The balancing test applied to fourth amendment issues originated in *Camara v. Municipal Court.*[78] In that case, the Court was dealing with the warrant provision of the fourth amendment and the quantum of evidence necessary to secure a warrant on less than probable cause. The Court proceeded to apply a "reasonableness" test to this fourth amendment activity by balancing the "need to search against the invasion which the search entails."[79]

This balancing test to determine reasonableness of warrants under the fourth amendment was subsequently applied in *Terry v. Ohio*[80] to a

71. 392 U.S. 1.
72. *Id.* at 20.
73. *Id.*
74. Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignon-Prince, 422 U.S. 873 (1975).
75. Johnson v. United States, 333 U.S. 10, 14 (1948).
76. _ U.S. at _, 100 S. Ct. at 1881.
77. 443 U.S. at 50-51; 440 U.S. at 654-55; 422 U.S. at 879-83; 392 U.S. at 20-22.
78. 387 U.S. 523 (1967).
79. *Id.* at 536-37.
80. 392 U.S. 1.

"confrontation on the street between [a] citizen and [a] policeman investigating suspicious circumstances,"[81] involving less than probable cause. As the majority in *Terry* read the fourth amendment, it prohibited "not all searches and seizures, but unreasonable searches and seizures."[82] The Supreme Court went on to state that "the central inquiry under the fourth amendment is reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."[83] The Supreme Court then applied the "balancing test" to determine the reasonableness of the policeman's conduct in stopping and frisking the suspect and found that the officer was acting upon reasonable suspicion that criminal activity was afoot, thus justifying the intrusion into the individual's constitutionally protected rights.[84]

The concurring justices in *Mendenhall,*[85] applied this balancing test. First, the justices found a great public interest in detecting individuals involved in drug trafficking, a great problem "affecting the health and welfare of our population."[86]

Second, the Court considered the DEA's "nationwide program to intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States"[87] and found it to be a well-planned and effective federal law enforcement program."[88] The justices stated that the special training, experience and expertise of law enforcement officials are factors to be weighed in determining the reasonableness of the stop.[89] The agents' "expertise" considered important by the concurring justices, included the use by the agents of the "drug courier profile . . . [describing] characteristics generally associated with narcotics traffickers"[90] compiled through the DEA's highly specialized operation.[91] The justices stated that an agent's "knowledge

81. *Id.* at 4.
82. *Id.* at 9.
83. *Id.* at 19.
84. *Id.* at 30.
85. _ U.S. at _, 100 S. Ct. at 1880.
86. *Id.* at _, 100 S. Ct. at 1880.
87. *Id.*
88. *Id.* at _, 100 S. Ct. at 1883.
89. *Id.*
90. *Id.* at _, 100 S. Ct. at 1881.
91. *Id.* at _, 100 S. Ct. at 1881, 1883.

of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices"[92] are among the circumstances that can give rise to reasonable suspicion.[93] "Law enforcement officers may rely on the 'characteristics of the area,' and the behavior of a suspect who appears to be evading police contact."[94] Further, "a trained law enforcement agent may be 'able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."[95]

Third, the justices reviewed the factors which led to the stop and questioning of Ms. Mendenhall, including that she:

(1) appeared very nervous,
(2) attempted to evade detection,
(3) deplaned after all the other passengers,
(4) scanned the terminal,
(5) walked " 'very, very slowly' "[96]
(6) claimed no baggage, and
(7) changed airlines for the flight out of Detroit.

The district court held that this conduct, observed by the DEA agents before stopping and questioning Ms. Mendenhall, provided reasonable suspicion to make the investigatory stop. The concurring justices agreed with this conclusion.[97]

The conduct observed by the DEA agents was consistent with the "drug courier profile." In this case, reliance on this profile demonstrated reasonable suspicion. However, the justices pointed out that each case must be "judged on its own facts."[98]

Finally, the Court evaluated the intrusion upon Ms. Mendenhall's rights and found it to be minimal considering that: (1) two plainclothes agents approached the respondent in a public area; (2) the agents identified themselves; (3) the agents asked the respondent to produce some identification and her airline ticket; and (4) the agents asked a few

92. *Id.* at __, 100 S. Ct. at 1882.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at __, 100 S. Ct. at 1883.
98. *Id.* n.6.

brief questions.[99]

In summary, on the issue of the initial encounter between the agents and Ms. Mendenhall, the members of the Court only agreed that the stop was lawful. Justices Stewart and Rehnquist found that there was no seizure, while Justices Powell, Burger and Blackmun assumed there was a seizure but found that it was based on reasonable suspicion.

PRECEDENTIAL VALUE

What does this decision offer to the lower courts as precedent? How does the Supreme Court answer the following questions confronting the lower courts?

(1) Is a suspect who is approached by federal agents in an airport for questioning because his conduct is consistent with the "drug courier profile" seized within the meaning of the fourth amendment? Justices Stewart and Rehnquist said "no;" Justices Powell, Burger and Blackmun did not discuss the question.

(2) Is an initial stop lawful? The majority of the Court said "yes."

(3) Why is the initial stop lawful? Justices Stewart and Rehnquist found that the fourth amendment provides no protection to individuals who have not been "seized." Therefore, since Ms. Mendenhall was not "seized," the stop was outside the parameters of the fourth amendment, and legal. Justices Powell, Burger and Blackmun found that the seizure was based on reasonable suspicion, satisfying the fourth amendment. Thus, the Court's decision on these issues supplies the lower courts with no more guidance than they had previously. Subsequent decisions of the Supreme Court have not addressed these unresolved issues, nor provided the lower courts with any additional guidance.

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99. *Id.* at __, 100 S. Ct. at 1882. However, the opinion did not state whether the DEA agents returned to Ms. Mendenhall her identification and airline ticket before asking if she would accompany them to the airport DEA office. The Fifth Circuit has held that a seizure occurs when the agents take the suspect's ticket. 592 F.2d 1036. Logically, an individual is not free to proceed on his own way when he has no ticket and no identification. If the facts were to establish that the agents kept the documents, Justices Stewart and Rehnquist should have found a seizure of Ms. Mendenhall at that instant.

In a *per curiam* opinion in *Reid v. Georgia,*[100] the Supreme Court did not consider whether an investigatory stop based on the "drug courier profile" constituted a seizure within the meaning of the fourth amendment. The state court had not analyzed the issue but had assumed that a routine identification stop and questioning constituted a "seizure."[101]

The Supreme Court disposed of the case on its facts, concluding that "the agent could not as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of [the] observed circumstances,"[102] which were "too slender a reed to support a seizure."[103] Therefore, the DEA agent did not *lawfully* seize Mr. Reid.[104]

MS. MENDENHALL'S "CONSENT" TO BE SEARCHED

In *Mendenhall,*[105] after the majority found that the initial stop and questioning of Ms. Mendenhall was lawful, it still had to determine whether she had consented to accompany the federal agents to the airport DEA office, and whether she subsequently had consented to a search of her person. If voluntary consent is found to have been given by an individual capable of consenting, then such a search, limited to the scope of the consent, is reasonable under the fourth amendment.[106] Voluntary consent eliminates the necessity for justifying the search with a warrant or probable cause. In a situation where the prosecution relies upon "consent" to justify a search, the prosecution has the burden of proving that the consent was voluntary,[107] and voluntariness must be determined by the totality of the circumstances.[108]

The district court had found that Ms. Mendenhall had voluntarily accompanied the agents to the DEA office in the airport, and her vol-

100. _ U.S. _, 100 S. Ct. 2752 (1980).
101. *Id.*
102. *Id.* at _, 100 S. Ct. at 2754.
103. *Id.*
104. *Id.*
105. _ U.S. _, 100 S. Ct. 1870.
106. Schenecloth v. Bustamonte, 412 U.S. 218 (1973).
107. Bumper v. North Carolina, 391 U.S. 543 (1968).
108. 412 U.S. 218.

untary action thereby eliminated the need for probable cause.[109]

The majority of the Court, in reviewing the evidence before the trial court which included no show of force or threats, found that "the totality of the evidence . . . was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers . . . . "[110]

Finally, the Court considered whether the respondent's consent to the search was "valid." The majority found ample evidence to support a finding that the consent was voluntary and valid, including: (1) the respondent was twenty-two years old with an eleventh grade education; (2) she was expressly told twice she was free to refuse consent; and (3) she twice "unequivocally" consented to the search.[111]

CONCLUSION

The Supreme Court's objective in granting *certiorari* was to consider "whether any right of the respondent guaranteed by the [f]ourth [a]mendment was violated."[112] Since the majority found that the initial stop was lawful, and not violative of any of Ms. Mendenhall's rights under the fourth amendment, the Court accomplished its goal. However, the lower courts must still deal with conflicting analyses and rationales upon which to base future decisions involving investigatory stops based on less than probable cause such as that supplied by the "drug courier profile."

Mary Ann Duggan

109. _ U.S. at _, 100 S. Ct. at 1879.
110. *Id.*
111. *Id.* at _, 100 S. Ct. at 1879-80.
112. *Id.* at _, 100 S. Ct. at 1873.