ORIGINAL

In the

Supreme Court of the United States

UNITED STATES,

PETITIONER,

V.

SYLVIA L. MENDENHALL,

RESPONDENT.

No. 78-1821

Washington, D. C.
February 19, 1980

Pages 1 thru 58

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	
v.	No. 78-1821
SYLVIA L. MENDENHALL, Respondent.	

Washington, D. C.,

Tuesday, February 19, 1980.

The above-entitled matter came on for oral argument at 10:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner

F. RANDALL KARFONTA, ESQ., 600 Woodward Avenue, Detroit, Michigan 48226; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 78-1821, United States v. Mendenhall.

Mr. Frey, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, reversing respondent's conviction for possession of heroin on the ground that the heroin in question had been discovered as a result of an illegal search.

The case began when two trained DEA agents assigned to the Detroit Airport observed respondent deplane from an early morning flight from Los Angeles which they knew to be a major source city for heroin. The agents became suspicious when she exhibited unusual nervousness and scanned the terminal area as though looking for surveillance.

After following her through the airport and having their suspicions reinforced, they approached her as she was proceeding down the concourse toward the gate

for an Eastern Airlines flight to Pittsburgh. They identified themselves as federal agents and asked if she would show them some identification and her ticket. She did so and they discovered that she was traveling under an assumed name. After several more questions, they asked if she would accompany them to the nearby DEA office for further questioning, which she did.

Once inside the office, the agents asked respondent if she would consent to a search of her pocketbook and of her person, informing her that she had a right to refuse consent to the search. She consented and the ensuing search disclosed over half a pound of heroin. The entire encounter took about ten minutes.

The District Court found that the agents had a reasonable --

QUESTION: You mean preceding the search?

MR. FREY: The initial encounter in the airport concourse took about two or three minutes, and then the further events in the DEA office took another five to ten minutes.

QUESTION: Including the search?

MR. FREY: I believe that is what the evidence was. In any event, up to the point where the consent was given to the search was a relatively brief period of only a few minutes.

The District Court found that the agents had a reasonable suspicion that respondent was engaged in criminal activities at the time they first approached her, that she went to the office with the agents voluntarily in a spirit of apparent cooperation, and that she thereafter voluntarily consented to the search.

QUESTION: Mr. Frey, do you think that when you say there was a reasonable suspicion from the outset, are you talking in Terry terms or not?

MR. FREY: The District Court I think was talking in Terry terms.

QUESTION: How about you?

MR. FREY: Well, I intend to devote most of my argument to the question of whether this was a Terry stop and if so whether the quantum of suspicion was sufficient to --

QUESTION: For the moment, you are telling us what the District Court held?

MR. FREY: I am telling you what the District Court held, that's correct. I think ultimately my answer is probably no, that the standard is not the same as Terry but, rather, the lesser standard that --

QUESTION: So you don't think that at the time they first spoke to her that they had a right to pat her down?

MR. FREY: No, I don't think they had a right to pat her down and frisk her but that relates to the reasonable perception that she might be dangerous, which I don't think they had.

QUESTION: But it also depends on whether there was a reasonable suspicion of criminal activity.

MR. FREY: It does and I do think they had a right to detain her at the time they first spoke to her, that is to stop her. I'm not asserting that they had a right to frish her and they didn't frisk her.

QUESTION: You rely on the Mimm standard, do you?

MR. FREY: No, I intend to rely on Martinez-Fuerte for that proposition, becausein Martinez-Fuerte, as I will get to, the Court suggested that the quantum of suspicion that was needed for a roving patrol stop in Brignoni-Ponce was not necessary for a referral to the secondary inspection area for questioning in Martinez-Fuerte, and I think -- while I think they had enough suspicion to meet the normal Brignoni-Ponce standard in this case, I think the minimal nature of the intrusion required even less suspicion than that.

QUESTION: In other words, there is a standard below Terry that you rely on for that?

MR. FREY: Well, it is difficult to say whether

Terry -- Terry enunciated a standard on the facts of Terry and held that what was known to the officer justified the action that he took in Terry. I think that the Court's ensuing cases have made clear that the inquiry is a measurement of the degree of intrusion involved in the particular police action weighed against the degree of suspicion, the basis for the officer's action in the law enforcement needs.

QUESTION: You are taking the position -- I don't want to take too much of your time -- you are taking the position that something less than Terry can in some circumstances justify a detention against the will of the person detained?

MR. FREY: Well, I am saying that the kind of encounter that incurred in the airport between the agents and respondent Mendenhall, which we first contend was not a seizure of her person at all --

QUESTION: I understand that.

MR. FREY: -- if the Court disagrees with that contention and holds that it is a seizure, I am contending next that some suspicion that might not justify the stop of an automobile or a frisk would justify going up to somebody and asking them questions as was done here. And I am further contending that even if the Court disagrees with that, that what existed here was enough for

a Terry stop.

QUESTION: I understand.

QUESTION: Mr. Frey, you've been here often enough so that you will understand this question may be repetitious. Is my understanding that your first contention is that a simple approach by a police officer to someone and say I'd like to ask you a question is not a detention at all --

MR. FREY: Not a seizure of the person under the Fourth Amendment.

QUESTION: Not a seizure of the person under the Fourth Amendment.

MR. FREY: That is our first contention.

QUESTION: Are you contending -- I will move now into the drug office -- are you depending on her consent to a search?

MR. FREY: We are making two alternative arguments, either of which would justify a versal of the Court of Appeals decision, the first that it was supported by her consent and therefore did not have to meet other Fourth Amendment requirements, and the second that it did satisfy the requirements of the Fourth Amendment, assuming that the consent was not sufficient.

QUESTION: Why do you need the second one if you have the first one?

MR. FREY: Well, I'm not sure that you will agree with the first one and therefore --

QUESTION: What you really want to do is extend it a little, don't you?

MR. FREY: I'm not sure I understand.

QUESTION: You want to extend it beyond consent.

MR. FREY: No, our --

QUESTION: So that somebody else who doesn't consent will be forcedly held.

MR. FREY: No.

QUESTION: Isn't that what you want us to do?

MR. FREY: I believe that what you would do logically would be to first --

QUESTION: Well, why would we have to do the second one?

MR. FREY: You don't have to reach the second issue if you agree with us on the first with regard to the move to the office. The District Court sustained the move to the office on the ground of respondent's consent to go to the office. If that finding is not clearly erroneous and --

QUESTION: You were telling us what the District Court did --

MR. FREY: That is our argument.

QUESTION: -- and you were half-way through

that and you haven't even got to the Court of Appeals yet.

MR. FREY: That's correct. I'm not sure I have answered Justice Marshall's question, but --

QUESTION: It doesn't matter to me.

MR. FREY: We are not insisting that you reach the second issue about whether this would be permissible in the absence of her consent, but if you find that there was not a valid consent then we do present that second issue for your decision.

Now, the Court of Appeals reversed and in essence the court held that the factors relied upon to justify the initial encounter with respondent did not give rise to a reasonable suspicion of criminal activity because respondent's actions as observed by the agents were consistent with innocent behavior.

It further held that asking respondent to accompany the agents to the DEA office constituted an arrest requiring probable cause on the ground that respondent was not free to leave at the time this occurred. Finally, the court held that the consent to the search was not valid.

Present for decision by this Court are three questions, each of which has two sub-issues. The first question concerns the initial encounter between the agents and the respondent and whether that violated her Fourth

Amendment rights. And as I have mentioned, we contend that it did not, for two reasons: First, we contend that it was not a seizure of her person within the meaning of the Fourth Amendment; and, secondly, we contend that if it was, it was supported by the necessary degree of suspicion to justify the particular minimal intrusive encounterment.

QUESTION: And the facts were she was the last off the airplane and then she went to the American Airlines counter --

MR. FREY: Well, I would also --

QUESTION: -- and it was there that she was --

MR. FREY: Well, I can get into that in some detail, if you would like. The facts on which the agents relied were first that she came from Los Angeles which -- they were watching the flight from Los Angeles because it was known by them to be a source city of Mexican heroin. When she got off the plane, she got off last, but I think that is a sub-category of the fact that she looked around as though looking for surveillance and seemed unusually nervous, and that I think is quite clear is what triggered the agents' suspicion of her, and indeed I will argue that that in itself, because of the nature of the agents' experience would be sufficient to justify what the agents thereafter did.

They in fact followed her as she went down to the baggage area, didn't pick up any baggage --

QUESTION: Well, her baggage was checked through to Pittsburgh, wasn't it?

MR. FREY: We don't know whether she had any baggage or not. There is no --

QUESTION: If any, I mean she was enroute to Pittsburgh.

MR. FREY: I am telling you what occurred. The agent had no idea at that point whether she was getting off at Detroit or making a connection some place else. So as he described it in his testimony initially, he followed her down to the baggage area, she didn't pick up any baggage. It would have been suspicious if she had been getting off at Detroit. She then went back upstairs to the Eastern Airlines counter and appeared to the agent, asked the ticket agent at the Eastern counter for a ticket on an Eastern flight to Pittsburgh. It appeared to the agent that she was changing her flight from some other carrier to Eastern.

QUESTION: Well, American doesn't fly between --

QUESTION: Does it show as to what carrier she was booked on as far as the rest of her tickets were concerned --

MR. FREY: The record does not clearly show

what carrier. The record shows that -- he testified that it was an American Airlines ticket which --

QUESTION: That is the issuing carrier, but American Airlines doesn't fly from Detroit to Pittsburgh.

MR. FREY: Well, you say that and I accept that as true, but I'm not sure what the significance of that is in terms of -- the question is not whether the agent was right that she had originally been booked on American Airlines to Pittsburgh. We simply don't know --

QUESTION: Well, there was an agent at that airport, wasn't he?

MR. FREY: That's true, but one would presume that --

QUESTION: One would presume that they would know where the various airlines went to.

MR. FREY: I'm not sure that that is a fair question to presume. I think that is a subject which should have been explored on cross-examination. In any event, there is nothing in the record to suggest whether or not she was changing from some other carrier to Eastern. The testimony is "I stood in line directly behind her, she retrieved an airline ticket from her purse, presented that to the Eastern ticket agent and asked for a ticket, an Eastern ticket to be used on her flight from Detroit to Pittsburgh."

Now, I don't think our case is dependent on the ultimate accuracy of this observation.

QUESTION: Then what happened? She still hadn't been directly approached by the --

MR. FREY: And then the ticket agent gave her a boarding pass for the Eastern flight, she started down the concourse and at that point the agents came up to her and said we're federal agents, would you please show us your--

QUESTION: And that was the first time there was a direct --

MR. FREY: That was the first contact --

QUESTION: -- communication with her?

MR. FREY: That's correct.

QUESTION: As she was going down toward the gate --

MR. FREY: Down the concourse.

QUESTION: -- toward the Eastern gate to Pittsburgh?

MR. FREY: That's correct. That is correct.

In any event, in terms of my statement of the issues that are presented before I get into the discussion of the issues, the second issue is the validity of the transfer of the situs of the interviewer encounter from the airport concourse to the DEA terminal office. And as I suggested, we have two arguments there: One,

that it was supported by her voluntary consent and the second, that it was in any event a reasonable limited extension of a Terry stop.

By the way, at the point they went to the airport office, there is no question, I don't think it is disputed, that they had at least Terry-type reasonable suspicion because they then --

QUESTION: They had reasonable suspicion that she was armed?

MR. FREY: No.

QUESTION: That is what Terry has to do with.

MR. FREY: Well, let us say Brignoni-Ponce reasonable suspicion. Whatever the constitutional -- however high the Court chooses to set the constitutional floor for a stop based on reasonable suspicion, less than probable cause, a seizure of the person, not a frisk but a seizure of the person, a detention, this case satisfied it once the agents talked to her and found out she was traveling under an alias, because we are now close to if not over the line of probable cause, and I'm sure that constitutes suspicion or reasonable suspicion in anybody's book to justify the stop. And I don't understand the Court of Appeals to have said that there was not reasonable suspicion at that point, and I just want to make it clear that when they moved to the office,

we have now shifted our debate to whether they needed probable cause to justify that movement, and that is what the Court of Appeals held, that probable cause was necessary to support that.

QUESTION: Well, what did the Court of Appeals do with Judge DeMascio's finding that before the actual search was made there was probable cause? As I read the Court of Appeals opinion, it did nothing with it.

MR. FREY: Well, I think it is plain that they disagreed with it. The opinion is tather succinct and it --

QUESTION: Well, cryptic is the word I would use.

MR. FREY: Well, perhaps -- and it is difficult to tell, but I think one can only conclude that they did not agree with his finding that there was probable cause and that I think essentially is -- it is not something we have contended here because in our view it is not -- probable cause is not necessary for what occurred.

QUESTION: Do you have a view on whether there was probable cause?

MR. FREY: At the time of the search, I think it is quite arguable, because at the time of the search of her person which disclosed the heroin, they not only knew that she had been traveling under one alias coming

back from Los Angeles but that she had traveled on yet a different alias and going on yet a different carrier going out from Pittsburgh to Los Angeles which I would suppose is consistent with an evasive pattern that drug couriers --

QUESTION: From your answer, I don't know what your view is, whether there was probable cause or not.

MR. FREY: Well, I haven't really thought about it in the course of preparing the argument.

QUESTION: Well, have you thought whether, even if there was, whether the search was justified without consent?

MR. FREY: If there was probable cause?

QUESTION: No, no --

FREY: That is the same question, isn't it? If there was probable cause --

QUESTION: No, no. No, it isn't. If no consent, probable cause to search. Is the search okay?

MR. FREY: The search would be okay if the detention at that point was not a fruit of a prior Fourth Amendment violation, in which case there would be a separate issue.

QUESTION: What was the emergency?

MR. FREY: What was the emergency in terms of searching her person?

QUESTION: Yes.

MR. FREY: Well, they would have probable cause to arrest her if they had probable cause to search her, and the search could be made incident to an arrest.

QUESTION: Well, they never arrested her, did they?

MR. FREY: Well, I'm not sure that that would be necessary to sustain the search.

QUESTION: So you say that you just don't ever reach any of those questions because you don't care to have to decide the --

MR. FREY: We rely -- we don't ask you to decide whether this was supportable as a probable cause search. We rely on her consent, which the District Court found to be voluntary and which I don't believe the Court of Appeals questioned the voluntariness of. And if she was legally detained at the time she consented, then I think there is no basis for striking down the search. If she was illegally detained, then that raises the issue of whether the taint of the illegal detention was attenuated by --

QUESTION: Even if consent was voluntary, it might be the product of an illegal detention?

MR. FREY: It might be. Indeed, under the Court of Appeals view, it is fair to say that you could

not give a voluntary valid consent when you are in an illegal detention. Our view, of course, is that you can in the particularly way of advice of your right to refuse to consent, that attenuates the taint.

QUESTION: Of course, your view really is that there was no detention at all, isn't it?

MR. FREY: Our view is that there was no detention at the initial encounter.

QUESTION: Even in the office there was a detention.

MR. FREY: Well, I have thought about that and I am not sure what the answer is. I don't think it is necessary to our success in this case at all that it can be held that there was no detention by the time she was in --

QUESTION: The very word "detention" implies being held against somebody's will, and if she went voluntarily along with them to the office and voluntarily consented to the search and so on, there was no detention whatsoever --

MR. FREY: Yes, sir, I think that is our position.

QUESTION: -- within the dictionary meaning of that word.

MR. FREY: Although that then raises the

question which I had not planned to get into of their subjective intention to detain her as she attempted to leave.

QUESTION: Did the agent testify that if she had attempted to leave he would have stopped her?

MR. FREY: He did testify -- are you talking about when she had consented to the search?

QUESTION: What you are talking about right now. You were talking about in the corridor, weren't you?

MR. FREY: Well, in the corridor the testimony is quite ambiguous as to the point at which he would have stopped her had she --

QUESTION: But did he say that?

MR. FREY: I think it is clear from the testimony that once he found out she was traveling under an alias he would have stopped her had she attempted to leave. But our position -- and it is arguable, I have to --

QUESTION: This is a well trained witness, isn't he, and he is an intelligent experienced agent.

MR. FREY: He is a --

QUESTION: Well, can't I take what he says as being a fact in truth?

MR. FREY: I take it as a fact that he would have stopped her once he found out she was traveling

under an alias had she tried to leave.

QUESTION: Well, what exactly did he testify to?

MR. FREY: Well, the testimony -- the particular testimony that we are adverting to now was given on cross-examination in response to what seems to me a somewhat ambiguous question. He is describing the -- this is at page 18 and 19 of the appendix -- and he says they looked at her license and they had reason to believe that she was Sylvia Mendenhall. And then the question, had she put that identification in her purse and walked away from you, you would have stopped her, wouldn't you, because you wanted to ask her some more questions, and he says yes.

Now, I'm not quite clear because it is never clarified --

QUESTION: Well, couldn't the U.S. Attorney on redirect straighten that out?

MR. FREY: Yes, of course. I don't argue -- our position is that what he would have done is not material, it is only what he did do that counts. But you are right that the uncertainty as to whether -- I do not think that it is clear from this record that he intended to forcibly detain her from the very first moment he approached her. I don't think that that is at all clear from the record.

QUESTION: Well, Mr. Frey, in the office when the officer advised her that she need not consent to the search, he --

MR. FREY: He did advise her that, yes.

QUESTION: I suppose that is either directly or indirectly an assertion or an opinion that he didn't have probable cause to arrest.

MR. FREY: No, not at all, not at all, since I think the normal practice and the proper practice is to seek consent even if you do believe you have probable cause.

QUESTION: I know, but if you arrest you don't have any right to refuse to search.

MR. FREY: But you could tell somebody that they have a right to refuse a search in an effort to insure that you have secured the voluntary consent even though if they say I refuse you could then say well, I have decided that I am going to arrest you and search you.

QUESTION: So all his advice was that if you don't want to be searched, I won't search you? Is that all --

MR. FREY: He was saying --

QUESTION: I thought he was saying

MR. FREY: He was saying do you consent --

QUESTION: I thought you were saying that he was telling her she had a right to refuse, the legal right to refuse.

MR. FREY: Exactly, yes. He was telling her that she had the legal right to refuse --

QUESTION: Right.

MR. FREY: -- and we don't know if she had said no, I refuse, what would have happened.

QUESTION: Conceivably one alternative would be then sit down, young lady, until we get a warrant. That would --

MR. FREY: If the officer thought he had probable cause to search he, he might very well then have sought a warrant in order to do it. But since he obtained her consent, the question never arose as to what he should do if she didn't consent.

QUESTION: Mr. Frey, do I misunderstand the record? I was under the impression he obtained her consent before they went to the office.

MR. FREY: There are two different findings of consent by the District Court. The first is that she consented in a spirit of apparent cooperation voluntarily to go from the terminal to the nearby office, and the second is a finding that once in the office and asked for a consent to search, she voluntarily consented to be

searched.

QUESTION: Is there evidence in the record that she was asked for an additional consent in the office?

MR. FREY: Yes, absolutely.

QUESTION: I missed it.

MR. FREY: It is quite clear. In fact, he is asked to recite in specific words the words that he used.

Now, let me turn briefly to the question of whether what happened here was a seizure. The position of respondent and of the ACLU essentially is that when a police officer approaches someone whom he finds suspicious and asks that person questions, that ought to be presumptively a seizure in the absence of a statement to the individual that they have a right to leave.

Now, as Terry makes clear, seizure is an actual restraint upon the individual's freedom to walk away. Accordingly, we agree with Professor LaFave's analysis of the problem and we quote from him in our brief, that this kind of encounter is only properly deemed a seizure if the officer is engaged in some additional conduct beyond the approach and the inquiry, whether by action or by statement that would indicate to the individual that his freedom of movement has been curtailed.

Now, the Court has not squarely decided this issue, but we do think that Terry indicates the Court's

view on it, and I refer to Footnote 16 in Terry, where the Court, in talking about whether the initial contact between the officer and Terry at which he walked up to him and asked him for identification was a seizure, saying that it didn't have to, wasn't going to decide that, the Court said obviously not all personal intercourse between policemen and citizens involve 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 such seizure took place here prior to Officer McFadden's initiation of physical contact for the purpose of searching Terry for weapons. Now, of course, if the view of respondent were correct, they could have told perfectly well that there had been a seizure because --

QUESTION: Mr. Frey, I take it your basic position is that an officer could just at random pick out somebody in an airport and do exactly -- and the same events that happened here transpired and you would say there was no violation of law.

MR. FREY: Well, I think that is our position, that there would not be a seizure but I do think --

QUESTION: And no violation of the Fourth

Amendment in any of these -- as a result of any of these events --

MR. FREY: We are talking only about walking up to somebody and asking them a couple of questions and for identification.

QUESTION: And then asking them into the office --

MR. FREY: If they consent.

QUESTION: Which you say they did

MR. FREY: We are --

QUESTION: Then the search, which you say there was consent to.

MR. FREY: Well, that would clearly be a search.

QUESTION: Yes, but it was consent to.

MR. FREY: I understand, that would be --

QUESTION: Any citizen would have no --

MR. FREY: Well --

QUESTION: -- if these same things happened to any citizen, there would be no violation of the Fourth Amendment.

MR. FREY: Well, I think there is a difference because -- the difference is that when you come to a search, you are talking about an action which is in fact governed by the Fourth Amendment.

QUESTION: Yes, but you say there was consent.

MR. FREY: That's right. I say it is lawful,

yes, it is consistent with --

QUESTION: Well, your position is that it does not violate the Fourth Amendment.

MR. FREY: Well, I think there is a difference between saying that a particular incident does not implicate the Fourth Amendment and saying that an incident does not violate the Fourth Amendment, and in the one case I would say it is not implicated and the other not violated.

QUESTION: Then in any event, the answer to my question is any citizen picked out at random would not have had his Fourth Amendment rights violated by these events?

MR. FREY: Had he agreed to cooperate right down the road --

QUESTION: As happened here.

MR. FREY: -- as happened here.

QUESTION: As you say happened here.

MR. FREY: Now, let me just -- I just want to emphasize again Martinez-Fuerte because I don't think we made this point quite clear in our brief. But in Martinez-Fuerte what was involved was an initial stop at a check-point followed by a referral to a secondary inspection area based essentially on the officer's suspicion and nothing more than an indication of Mexican ancestry on the part of the passengers of the car. That

unquestionably is a seizure of the occupants of the car within the meaning of the Fourth Amendment, and yet the Supreme Court upheld that on the basis of suspicion that they said was not to satisfy the requirements for stopping an automobile in Brignoni-Ponce.

Now, in this case what everyone may conclude about the suspicion that existed on the part of the officers, I think there was a great deal more than the suspicion that was considered satisfactory in Martinez-Fuerte.

I would like to reserve the balance of my time. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Karfonta.

ORAL ARGUMENT OF F. RANDALL KARFONTA, ESQ.,
ON BEHALF OF THE RESPONDENT

MR. KARFONTA: Mr. Chief Justice, and may it please the Court: I am Randall Karfonta, representing Sylvia Mendenhall in this case.

Initially, I would briefly like to clarify some of the facts on this record. First of all, the agents were looking for basically any citizen to stop. There was no information that any specific heroin was coming to Detroit, nor were they looking for any specific individual.

As far as the lack of baggage factor goes, a close reading of the record will show that at the hearing the agent didn't contend that this was of continuing significance; rather, the government has continued to argue it in their briefs.

As far as the detention in the office, the record contains no written or oral consent. It is absolutely barren of any consent to going to that office. Once Sylvia Mendenhall was in that office, she was asked to take a seat and then for the first time the matter of a search was raised. The matter of a strip search was first raised after the consent was allegedly given, and at that point Sylvia Mendenhall said I have to catch my plane, I've got to leave, and she was told that she would be free to leave if she had nothing on her. She kept repeating that and, as the testimony states, then began taking her clothes off, taking her time.

As to the matter of time that was raised during the prosecutor's argument, the time as is reflected on the record was five to six minutes until the consent to search was given, but the record does not reflect how long it took to call the female officer for the female officer to come to the office and for the actual search itself to begin.

Our first contention is that the defendant was

arrested within the meaning of the Fourth Amendment when she was in that private locked DEA office for the purpose of a search of her body. The entire transaction, the design and execution was for an investigatory seizure to search Sylvia Mendenhall. A reasonable person in those circumstances could only believe that they were under arrest. She was not told she was free to leave. She was not asked when her plane was leaving, and the setting of the office itself makes that clear.

The facts in this case are nothing like any of the stop facts this Court has discussed. I believe as far as this Court has gone was in United States v. Brignoni-Ponce, and in that case we are talking about searches that were usually -- or stops, rather, that were usually a minute in duration and involved a visual inspection. There were no exigences present in this case.

Rather, the detention in this case is much more and is merely exactly like the detention in Dunaway v. New York, where Dunaway was transported to a police station, placed in an interrogation room and was not informed that he was free to leave. The only difference here was that Sylvia Mendenhall was also being held in communicado.

We have examined the case law of this Court

and we have found three criteria for determining the point of arrest -- freedom of movement, the purpose of the detention, and the duration of the detention.

QUESTION: You say there was no right or power on the part of the officers to ask her questions and ask to see her ticket in the circumstances that existed here?

MR. KARFONTA: Your Honor, I believe that under Brown v. Texas it is clear that when they asked to see her driver's license, required her to answer questions and then required her to give them her airline ticket, that she had been seized within the Fourth Amendment.

QUESTION: You say required her.

MR. KARFONTA: Yes.

QUESTION: The Court has said on a number of occasions that officers may ask you questions quite freely of citizens and citizens have a right to refuse to answer if they want to.

MR. KARFONTA: That's correct, but I believe that this Court unanimously held just last term in Brown v. Texas that when the officers detained the appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. It seems to me that --

QUESTION: Well, is there a difference between

saying come over here, I want to ask you a few questions, and simply coming up to a person and saying what's your name? I mean is there a separate concept of detention as opposed to simply posing a question to a person?

MR. KARFONTA: I think there is, Your Honor. The government has referred to Mr. LaFave's treatise and I know that in his treatise he makes the differentiation between an adversarial contact, which is how I would characterize this case, and seeking information from citizens in general regarding community matters.

QUESTION: Well, when do you become adversary?

MR. KARFONTA: I believe in this case it was adversary from the beginning because --

QUESTION: Is that because of something that was in the officer's mind or is it something that was in her mind?

MR. KARFONTA: I believe that it would be in the officer's mind, in her mind and also the objective circumstances.

QUESTION: Of course, there was certainly some tension in her mind because she knew she had heroin, but the officer didn't know that she had heroin.

MR. KARFONTA: Well, I think that in terms of looking at the consent issue, that Schneckloth indicates that in determining consent you have to consider the

vulnerable subjective state of mind of the person from whom consent is being sought.

QUESTION: You mean if the person in fact has a packet of heroin on their person or in a package in their possession, then that gives them some special category?

MR. KARFONTA: I don't believe so. I guess what I'm saying is I think on this record --

QUESTION: When you suggested vulnerability --

MR. KARFONTA: Yes. Well, I --

QUESTION: -- I suppose a person who has got a packet of heroin does indeed feel somewhat vulnerable.

MR. KARFONTA: That's true, Judge. I think the argument I am trying to make is that here the testimony was that the point this consent, this alleged consent to the detention was given, Sylvia Mendenhall was so nervous she was unable to speak, barely able to put her license in her purse, back in her purse, and I think that Schneckloth says that the subjective state of mind of an individual is very important in determining the consent.

QUESTION: Mr. Karfonta, supposing the police are investigating a dead body they found on a lawn in front of somebody's house and they see a neighbor looking over and the policeman simply calls over and he says do you know anything about this, is that a detention or

arrest or Terry stop?

MR. KARFONTA: No, I don't believe it is.

QUESTION: Suppose the neighbor comes over to the scene that Mr. Justice Rehnquist has described, and then the police officer says will you please just wait here for a few minutes, I want to ask you some questions -- arrest, detention?

MR. KARFONTA: Probably not arrest or detention, but --

QUESTION: Suppose then the person began to go away and the officer said I want you to stay here, there has been a homicide, and I want you to stay here as a material witness -- arrest?

MR. KARFONTA: Probably.

QUESTION: Probably arrested then.

MR. KARFONTA: As I was first discussing, in Dunaway v. New York the Court held that freedom of movement is a controlling factor in determining the point of arrest. Here I believe the objective circumstances, the fact that Sylvia Mendenhall was not told she was free to go, and the fact that in fact she was not free to go indicate satisfaction of that factor.

Secondly, we look to the purpose of the detention. Here the purpose of the detention was not to maintain the status quo, it was not for identification

purposes. The officer testified that on the concourse he was satisfied that this person was Sylvia Mendenhall. Rather, the only purpose in going to that office was to search for narcotics, and Sbron v. New York and Ybarra v. Illinois indicate that when the purpose is to search for narcotics that probable cause is required because that situation is an arrest.

Finally, the length of the detention, United States v. Brignoni-Ponce says detention must be brief. In that case, the detentions were ordinarily about a minute. Here, Sylvia Mendenhall was not told she was free to leave. In their Court of Appeals pleadings, the government has indicated that if a person refuses consent in the DEA office, DEA then seeks a search warrant. In the companion case, in an en banc hearing in this case, the officer testified "well, then we told Mr. Camacho that it would take us an hour or three or four hours to obtain this search warrant." No time was ever specified in this case. It was a potentially indefinite detention.

I think the law of this Court is clear, that once Sylvia Mendenhall was in that interrogation office, the situation was an arrest; and, further, I think common sense indicates that this is an arrest situation.

There was no consent to that detention. As I have indicated, the record is barren of any verbal or

written consent to that detention. Sylvia Mendenhall was not told she had any choice about going to that office.

QUESTION: The District Court found that there was consent, that she voluntarily went to the office and that finding was in no way disturbed by the Court of Appeals, as I read the record.

MR. KARFONTA: Well, I would answer that --

QUESTION: Am I mistaken about that?

MR. KARFONTA: I would say on the second point you are mistaken in the sense that they said there was no consent to the --

QUESTION: To the search.

MR. KARFONTA: You're right, Judge, Your Honor, but --

QUESTION: Am I mistaken or not?

MR. KARFONTA: No, you're not. What I would indicate though is that this record is totally barren of anything indicating consent to the detention, therefore the finding of the District Court is easily clearly erroneous, there is nothing on this record indicating that.

Further, the burden is on the prosecution, there is no reason to think that she would have chosen this in communicado detention, she was extremely nervous, all these facts militate against a free and voluntary

consent. But most importantly, there is nothing on this record stating any consent to a detention.

QUESTION: Suppose as you are leaving the court room today one of the officers approaches you and says, "Mr. Rodak, the clerk of the court would like to see you for a few minutes," what do you think your situation is? Are you detained, are you arrested, or what?

MR. KARFONTA: No, I don't think so.

QUESTION: If you go there, to his office and the secretary says, "Well, Mr. Rodak is on the telephone, will you sit down and wait for five minutes," are you detained?

MR. KARFONTA: I don't think this is the kind of adversarial confrontation between a police officer and a citizen --

QUESTION: Is that perhaps partly because you know that you have no heroin on you or no contraband of any kind?

MR. KARFONTA: No, that question is like when did you stop beating your wife.

QUESTION: Not at all. Not at all. You have emphasized the vulnerability of a witness. You would go very freely because you don't feel very vulnerable about anything, do you, in this setting?

MR. KARFONTA: On the other hand, if one of

the DEA agents, some of whom I know, came up to me and said we want you to go into this little room off the corridor here, away from the court room and we're going to have a little talk with you about some of the things you said, I would be a little apprehensive. But if it was going to Mr. Rodak's office, I don't think this is the kind of adversarial confrontation between a police officer and a citizen that the commentators in the cases envisioned.

QUESTION: Would you consider it adversarial if the particular citizen has no contraband, no drugs, no firearms or --

MR. KARFONTA: I think that is the entire part of the defense's contention in this case, is on the kinds of factors, this person was stopped and then arrested, it could apply to the search of anyone anywhere on just basically nothing. I think that is the point, that the Fourth Amendment doesn't allow these kinds of wholesale intrusions.

QUESTION: Do you think the Court of Appeals set aside or disturbed the finding of consent to the search in the drug office?

MR. KARFONTA: I definitely do.

QUESTION: By direct statement or by inference?

MR. KARFONTA: I believe what the Court of

Appeals said was that there was no consent to the search in this case within the meaning of United States v. McCaleb.

Just one more point on the consent to the detention, and that is that Bumper v. North Carolina also makes it very clear that mere acquiesence in the face of authority is not the kind of free and voluntary consent that is required.

Secondly, we contend that there was no reasonable suspicion for the stop when all the agents knew that the point of the stop was that Sylvia Mendenhall had flown from Los Angeles to Detroit, was the last person off the airplane and noticed the agents.

Now, the government has argued --

QUESTION: And was traveling under an assumed name.

MR. KARFONTA: I was speaking of the point of the initial search, Your Honor. The government has additionally argued two factors, transfer of airline plans and lack of baggage. Those both are facts that evaporated prior to the stop in this case. Great emphasis has been placed in these cases, these airport profile cases on the experience of the agents, but I think that in order to -- that experience is a two-way street, that when the agents see something that negates suspicion, that should

stop them from detaining a citizen.

Here the agents proceeded to detain the citizen even though there was no transfer of airlines factor in this case. The government has argued that these experienced agents are familiar with all the airline schedules. Well, in this case the agent testified on the record that he was not familiar with the relevant airline schedules. Further, there is no showing on this record that would support his conclusion that she was changing airlines. This experienced agent should have known that when she went to that Eastern counter and they said all you need to get on that plane is a boarding pass, that she was already scheduled on that flight. Further, had he known the airline's schedule or taken a moment to check it, he would have found that there was no American flight from Detroit to Pittsburgh.

This transferred airlines factor has appeared in no other case. In fact, in other arrests in reported opinions that occurred at Detroit Metropolitan Airport, using direct flights was the factor in those cases. Second --

QUESTION: What if in this case she had been booked from Los Angeles to Minneapolis, she immediately arrives in Minneapolis, goes to the counter of an airline that has a flight from Minneapolis to New York and

switches her ticket or perhaps buys a ticket from Minneapolis to New York, and the agent says that's unusual because you could have easily booked directly out of Los Angeles to New York without going to Minneapolis. Is that a permissible profile factor to consider?

MR. KARFONTA: Well, Judge, Your Honor, I believe that you have to consider everything that the agent actually knew and in our brief we contend that the profile itself does not arise reasonable suspicion and none of the Courts of Appeals have held it has.

QUESTION: You think nothing short of probable cause then is sufficient to even warrant further interrogation?

MR. KARFONTA: No, I believe that when there is reasonable suspicion and there are Sixth Circuit Court of Appeals and Seventh Circuit Court of Appeals cases that have found reasonable suspicion, but then a proper stop, an investigatorial stop and reasonable suspicion is proper.

QUESTION: But you don't think that any rather strange conduct in airline routing and sudden changes of destinations are permissible factors in a profile?

MR. KARFONTA: Oh, yes, I do because I think that it is common law that such things as flight can be considered in arrest situations, and so I think all factors can be considered. I think that is a very elusive factor,

but certainly all factors ought to be considered.

As I indicated, the lack of baggage factor also evaporated prior to the stop in this case. The agent didn't even contend that it was of continuing significance to him; rather, the government has continued to argue it. At any rate, once he knew she was going on to Pittsburgh, through common sense or through the airline regulations he should have realized that she would have no baggage with her.

Proper police practice in this case I believe would have been to continue the surveillance, as has been done in a number of Second Circuit cases, such as United States v. Oates. They knew she wasn't leaving the airport, they could have called ahead to Pittsburgh if they wanted to watch her and set up a proceeding to detain a citizen.

Looking quickly at the factors they did know, the flight from Los Angeles to Detroit, it seems that in these profile cases the government has virtually characterized almost every city as being a source or a place you go through or destination --

QUESTION: If you are right, what could have been done in Pittsburgh? There is no probable cause, there is no probable cause, either in Detroit or Pittsburgh.

MR. KARFONTA: That's correct, Your Honor, but I used the example of the United States v. Oates, when they got to Pittsburgh, a bulge mysteriously appeared, that he had talked with a known narcotics dealer, the traveling companion was a known narcotics addict --

QUESTION: But in this case you are suggesting, well, it is very easy, the government just could have wired ahead or telephoned ahead to Pittsburgh. But if you are correct, that there is no probable cause, there is no probable cause. If this seizure and search violated the constitutional rights of your client in Detroit, a seizure and search would equally have violated those rights in Pittsburgh, would it not?

MR. KARFONTA: That's correct, Your Honor. What I am indicating is that if they had continued their investigation perhaps something else would have turned up.

QUESTION: You mean, for example, if they got to Pittsburgh they might have telephoned Pittsburgh and said watch this woman when she gets off; if, one, she is last to leave the plane, and, two, she looks nervous, and, three, she doesn't in fact have any luggage to pick up, then stop her and arrest her, something like that?

MR. KARFONTA: No, no.

QUESTION: Well, what are the additional factors that you suggest might supplement what Mr. Justice Stewart

just put to you?

MR. KARFONTA: I am indicating --

QUESTION: You said some other factors might show up.

MR. KARFONTA: I guess I am indicating that since those are the same factors we have in Detroit, and since I don't feel that those factors have very much value, that those factors occurring twice would not have been --

QUESTION: Well, why don't you take the three that I have just mentioned, suppose they did occur, the agent found in Pittsburgh she was the last to leave the plane, as she had been before --

MR. KARFONTA: Right.

QUESTION: -- and that she did not have any luggage, in fact even though that is quite a long trip to be without luggage, and third, she acted in a very nervous manner in the same way the telephone call had described her conduct previously, do you think those might finally reach a point where it would cross over the line?

MR. KARFONTA: Not to raise reasonable suspicion, no, I don't.

QUESTION: And what was the point of your suggestion that they wait until they get to Pittsburgh?

MR. KARFONTA: The point of my suggestion was that very often in continuing an investigation additional factors do turn up and sometimes they don't, and then you cannot proceed to detain a citizen.

QUESTION: Well, you said one of them would be that if on arrival in Pittsburgh she was met by a person known to the Pittsburgh agent as a drug dealer, of course, there you are so far over the line that you are leaving no room for any analysis at all, are you?

MR. KARFONTA: I don't believe that is true. I think that in looking at the case law, the Sixth Circuit and the Second Circuit have both held that mysterious bulges such as in one case, a person was seen walking with an odd gait, with an odd bulge in the crotch area indicating that there was something concealed there, I think those kinds of factors can begin to create reasonable suspicion. I don't think these totally innocuous things, where there is no tie-in with criminal activity, can present justification for stopping a citizen.

As to the nervousness factor, it is difficult to hypothesize on a more common characteristic to airline passengers than nervousness.

QUESTION: When they are getting on or when they are getting off?

MR. KARFONTA: As far as I personally, I would

say that would be from the time I leave home until the time I arrive at my destination away from the airport.

Following the government's case here, I believe it is similar to Brown v. Texas as there is no tie-in with criminal activity. In Spenell v. United States, Mr. Justice White worte in concurrence, no one would suggest that just anyone getting off the 10:30 train dressed as Draper was, with a brisk walk and carrying a zipper bag, should be arrested for carrying narcotics. I query whether Mr. Justice White would have felt differently had Draper been last off the train.

Other circuits have reviewed circumstances very similar to this case. We cited United States v. Ballard, a Fifth Circuit case, in our brief, at pages 37 and 38. And I recently last week sent a recent Second Circuit opinion, United States v. Buena Venture, and they reach the same obvious result, that this is not a sufficient cause for stopping a citizen.

The drug courier profile itself is an amorphous unwritten conglomeration of characteristics which the government characterizes as constantly changing. Some courts have commented that the profile seems to change itself with the facts of each case. In fact, if you look at the characteristics we have listed in our footnotes, you would see there would be a rare airline passenger

that would not fit several of these characteristics, and this is particularly true given the agent's ability to find satisfaction of a profile factor, regardless of the facts. There is no national profile, there is no Detroit Metropolitan Airport profile, and there is no Agent Anderson profile.

The Courts of Appeals have refused to uphold the stops of citizens based on this profile because of the recommendation of the power to do so would allow basic searches of citizens anywhere without cause.

I would like -- as far as any discretion reducing aspect of the profile, what the profile really is is a screen for the abuse of government power because the agents pick and choose among the many that it describes.

Finally -- I see my time is short -- the consent to the search in this case was not freely and voluntarily given. Schneckloth speaks of a familiar territory case, where it is always very congenial, the defendant was with five or six friends, where the interrogation in a remote station house inapposite. Here that is exactly the setting we have. Sylvia Mendenhall was in that setting, she was quite shaken. She was not told she was free to leave, she was not told she had any choice about the detention.

The first time anything about a search was

mentioned was when she was inside that room. The first time anything about a strip search was mentioned was after the alleged consent was given, and then she revoked the consent by saying, well, I have a plane to catch and she was told, well, if you don't have anything on you, you don't have anything to worry about. She kept saying, well, I have a plane to catch and she was slow in taking her clothing off.

Finally, we would contend that the alleged consent here was also the product of an arrest without probable cause and a stop without reasonable suspicion and that taint was not removed.

QUESTION: Does the record show how much of a layover there was between the two flights?

MR. KARFONTA: No, it does not.

QUESTION: Then we don't know whether she was under pressure of time or not, do we?

MR. KARFONTA: We do not. It is clear that for consent the burden is on the prosecution to show that consent was free and voluntary.

Like Brown v. Illinois and New York v. Dunaway, here there was a party of purposefulness and an expedition for evidence undertaken in the hope that something would turn up. We contend that the methodology here was to cause -- and this has been characterized by the

Eastern District of Michigan Court -- to cause surprise, fright and confusion.

I think the law of this Court is clear on each of these points and, moreover, I think common sense supports our contention. I think the contentions of the government would be basically to do away with the case by case approach in Fourth Amendment cases and this our Constitution does not allow.

QUESTION: Mr. Karfonta, before you sit down, you take the position that had she refused -- that the record shows that if she had refused to go to the office, that the officers would have required her to do, that they had intended to detain her. Do you have any position on what the record indicates would have happened if after the female officer had come into the room and told her to take her clothes off, that if she had refused to do that, what would have happened?

MR. KARFONTA: (no response)

QUESTION: You do say that she didn't realize until that happened that she was going to be -- that there was going to be a strip search. Does the record tell us what she would have done and what would have happened if she had refused to take that additional step?

MR. KARFONTA: I believe defense counsel cross-examined both the agent and the female officer as to each

point -- was she free to go at the point of the stop, was she free to go at the point of arrest, was she free to go at the point of consent, and at each point the answer was no.

I would like to clarify one point of my position that you just mentioned in your question, and that was -- I'm not sure I can remember it, but our position on the consent to the detention is that the record is barren of any consent and therefore the District Court was clearly erroneous.

QUESTION: Well, there is testimony at page 12 of the appendix by the officer that before she went to the office she gave some kind of consent, and I thought it read consent to the search of the purse and the person. Am I wrong on that?

MR. KARFONTA: What it says here is, "I asked her to accompany myself and Agent Myhills to our office which was very nearby," but there is no indication that she was told she had any choice. There is no indication of any written or oral consent and the record does show that she was so nervous at that point that she could hardly speak nor return her identification to her purse.

QUESTION: Suppose we disagreed with you and the Court of Appeals, I take it, with respect to probable cause. Suppose we thought there was probable cause to

arrest in the office, what would your argument be then?

MR. KARFONTA: I suppose my argument would be at that point that if there were no exigencies, that a search warrant should have been sought.

QUESTION: Well, there is probable cause to arrest and you claim there was an arrest. You argue consistently all through that there was an arrest.

MR. KARFONTA: That's correct.

QUESTION: Well, you don't need a warrant to search incident to arrest, do you?

MR. KARFONTA: No, you don't.

QUESTION: And you don't need a warrant to arrest on probable cause.

MR. KARFONTA: No.

QUESTION: So what would be your argument if we disagreed with you about probable cause? The District Court found probable cause.

MR. KARFONTA: The District Court actually -- and I'm glad you give me a chance to clarify this -- I think the District Court was wrong. The District Court said that at the point they first reached the office, there was no probable cause. Where the District Court found probable cause was after they went through her purse. That is where the District Court found probable cause. And although I disagree with that, the District

Court specifically said no probable cause when they first got to the office.

QUESTION: But they found consent to search the purse.

MR. KARFONTA: That's correct.

QUESTION: At what point did the officers find out that she had three different names, that is two in addition to her true name?

MR. KARFONTA: That point was on the concourse. No, I'm sorry, the ticket in another name was found out on the concourse. The third name was found after they went through her purse.

QUESTION: Well, you still haven't answered my question. Suppose we find that the officers, contrary to your position, the officers validly acquired probable cause at some point prior to the search, prior to the strip search, would you say you have lost your case or not, or would you have some other argument?

MR. KARFONTA: Well, I guess I would say at that point that it would be a search incident to arrest.

QUESTION: That sounds like --

MR. KARFONTA: At the point that they have consent to search her purse, I would contend that that would be a product, a tainted product of the illegal stop.

QUESTION: You say you would argue it would be

the product of an illegal arrest?

MR. KARFONTA: Or an illegal stop.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Frey?

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. FREY: Yes, I have a couple of minor points and one I think of fairly major importance that I hope to be able to talk about.

The first point is on the question of where she was going, whether she was going on American Airlines. You are being asked to take judicial notice of facts for the first time in the Supreme Court. I think there is a lot of difficulty with doing that in a case where the respondent's own lawyer in the District Court was not aware of this supposedly obvious factor. Indeed, everybody conceded in the District Court that she was changing her flight and the whole case was argued on that basis. There was no exploration on cross-examination, and the Fourth Amendment does not require that he be right in his belief that she was changing flights but only that he have some basis that would add to his suspicion.

Now, with regard to Brown v. Texas, it has absolutely no bearing on this case because in Brown v. Texas, Brown was convicted of failing to give his

identification after having been lawfully stopped. It would have availed the State of Texas nothing to argue that he was not stopped in that case, since that would have been a confession of error, and the Court makes quite clear in its opinion that since the conviction can be sustained only if he was lawfully stopped, the question is whether the facts known justified a stop. There was no occasion in Brown to discuss whether the initial encounter was a stop.

QUESTION: Well, Mr. Frey, on your direct argument, your initial argument you weren't taking any position on whether there was or was not probable cause to arrest. I take it then I really judge the case on the assumption that there never was probable cause to arrest prior to the search?

MR. FREY: Well, that raises the problem of what we've presented to the Court in our petition for certiorari and whether you are free -- I mean the District Court did find that there was probable cause to arrest and search --

QUESTION: Do you defend that or not?

MR. FREY: We haven't asked for review on that ground, but I would defend that. I think --

QUESTION: Well, the Court of Appeals thought there wasn't probable cause.

MR. FREY: I understand that.

QUESTION: So we judge the case on the assumption that the officers never validly acquired probable cause to arrest?

MR. FREY: I think you would certainly be well within propriety to do so since we didn't challenge that conclusion of the District Court.

Now, let me get to the critical point in this case which is the question of whether there was a flimsy basis for the stop, assuming that the Court determines that this was a Fourth Amendment seizure of her person. There is a wide gulf between the respondent's position and ours, and I think respondent's position is that you must have virtually probable cause in order to have a stop on founded suspicion, and his reference to Draper was extremely revealing because, of course, the question in Draper was probable cause and not founded suspicion.

Now, in the present case Agent Anderson had ten years of experience in drug enforcementand was many months stationed at the Detroit airport. Now, during this period he received specialized training and he watched tens of thousands, probably hundreds of thousands of passengers and participated in a substantial number of drug arrests.

Now, when he saw respondent deplane and scan

nervously, as though looking for surveillance, it does not strain credulity to accept that Agent Anderson knew the difference between the nervousness of people who are scared of flying, worried about missing a connection --

QUESTION: Can you tell us how often he was wrong?

MR. FREY: The record does not tell you.

QUESTION: He was right this time, but we don't know whether maybe one out of ten or nine out of ten.

MR. FREY: But what we are talking about, the record does not indicate, although there is an opinion which does in the Garcia case in the Eastern District of New York which indicates that very few people are stopped. In that particular case, they had watched nine flights come in during the day before they stopped a single -- approached a single person and in that case it was I think quite clearly a stop. We are not talking about picking large numbers of people out. We are not talking about an invidious selection of people for stopping.

QUESTION: You're not, but if I understood your answer to Mr. Justice White, your position if sustained in this case would allow you to make virtually random stops if you could get the kind of sequence of events you got here.

MR. FREY: The first position that this is

not a seizure within the meaning of the Fourth Amendment would allow a police officer without violating the Fourth Amendment to approach somebody and ask a question, that's correct.

QUESTION: And the sequence of events ends up in an office upstairs in the airport with the suspect taking his clothes off?

MR. FREY: The Fourth Amendment would be implicated at that point, at the point of the search.

QUESTION: But not violated.

MR. FREY: But not violated in these events.

QUESTION: Mr. Solicitor General, as I understand your argument, it would not be random stops if all of these facts existed.

MR. FREY: I've now moved to the argument about whether there is founded suspicion if this is a stop and there we are saying that the Fourth Amendment does apply, and I am saying that we have a very limited intrusion and the experience of the agents --

QUESTION: If this issue which you now describe as critical we need address only if we are not persuaded on the consent sequence?

MR. FREY: That's right.

QUESTION: If there was consent all along the line, we don't have to decide that.

MR. FREY: You would have to decide it -- you have to decide with respect to the initial encounter in the airport concourse whether (a) it was not a Fourth Amendment seizure or (b) if it was it was lawful, because otherwise what ensued following that encounter was arguably a fruit of the initial illegality. So the consents -- we are only relying on the consent in the sense that her voluntary cooperation at this stage in showing her identification --

QUESTION: Well, perhaps a combination of things. You of course argue in part that the initial encounter was nothing more than asking a bystander a question, in effect. If we accepted that point and everything after that was consent, then we wouldn't have to reach the --

MR. FREY: You would not have to reach the question of whether there was founded suspicion or probable cause at any point, that is correct.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:17 o'clock a.m., the case in the above-entitled matter was submitted.)

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