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United States v. Arvizu: Investigatory Stops and the Fourth Amendment

Jennifer Pelic

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UNITED STATES V. ARVIZU: INVESTIGATORY STOPS AND THE FOURTH AMENDMENT

United States v. Arvizu, 534 U.S. 266 (2002)

I. INTRODUCTION

In *United States v. Arvizu*,[1] the Supreme Court held that the Fourth Amendment does not prohibit investigatory stops as long as the facts and circumstances lead to a reasonable suspicion that the driver is engaged in criminal activity. This Note[2] argues that the decision in *United States v. Arvizu* is correct in spite of counterarguments that the decision encourages racial profiling and permits an officer to stop a vehicle for any reason. First, the prior investigatory stop cases of *United States v. Sokolow*,[3] *United States v. Cortez*,[4] and *United States v. Brignoni-Ponce*,[5] which hold that an officer may make an investigatory stop if the totality of the circumstances leads to a reasonable suspicion that criminal activity is afoot, support the *Arvizu* decision. Second, examining the facts and circumstances of each case is the best method of determining whether the investigatory stop is constitutional. Third, the reasonable suspicion analysis should view the facts and circumstances from the perspective of law enforcement because of their experience and familiarity with criminal behavior and their knowledge of common practices in illegal drug and alien smuggling. Finally, the suggested effects of racial profiling and an officer's ability to stop a vehicle for any reason will not occur because the analysis requires specific, articulable facts.

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[1] 534 U.S. 266 (2002).

[2] This Note discusses reasonable suspicion in the context of individuals who have not violated any law. For a discussion of reasonable suspicion in the context of investigative detentions after a traffic stop, see James A. Brown, *Miles of Asphalt and the Evolving Rule of Law: Are We There Yet?*, 71 J. KAN. B.A. 21, 24-28 (2002). Also, this Note was submitted for publication in December 2002 and does not reflect any recent updates.

[3] 490 U.S. 1 (1989).

[4] 449 U.S. 411 (1981).

[5] 422 U.S. 873 (1975).

II. BACKGROUND

A. FROM PROBABLE CAUSE TO REASONABLE SUSPICION

The Fourth Amendment, which protects individuals "against unreasonable searches and seizures,"[6] applies to investigatory stops where the individual has not violated any law.[7] Generally, the Fourth Amendment requires individual suspicion and probable cause to conduct a search.[8] However, in certain circumstances, individual suspicion and probable cause are replaced with reasonable suspicion due to the necessity for "swift action predicated upon the on-the-spot observations of the officer on the beat."[9]

In *Terry v. Ohio*, an officer observed two men standing on a street corner.[10] Over a period of approximately ten minutes, the officer observed the men walk down the street, peer into a store window, and return to the street corner almost twelve times between the two of them.[11] A third man next appeared, briefly spoke to the two men, and walked away.[12] The two men then walked back to the store window where they met the third man again.[13] Believing that the men were casing the store for a robbery, the officer approached the men and asked for their names.[14] When the men responded inaudibly, the officer grabbed one of the men and patted him down, discovering a gun.[15]

The Supreme Court held that the officer did not need probable cause to search for weapons because the governmental interest in detecting and

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[6] U.S. CONST. amend. IV.

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

Id.

[7] United States v. Cortez, 449 U.S. 411, 417 (1981).

[8] Chandler v. Miller, 520 U.S. 305, 308 (1997).

[9] Terry v. Ohio, 392 U.S. 1, 20 (1968). *Terry* has generated much commentary since its decision in 1968. For recent articles discussing the case, see Susan Bandes, *Terry v. Ohio in Hindsight: The Perils of Predicting the Past,* 16 CONST. COMMENT. 491 (1999); Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective,* 72 ST. JOHN'S L. REV. 891 (1998); Stephen A. Saltzburg, Terry v. Ohio: *A Practically Perfect Doctrine,* 72 ST. JOHN'S L. REV. 911 (1998).

[10] *Terry*, 392 U.S. at 5-6.

[11] *Id.* at 6.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 6-7.

[15] *Id.* at 7.

preventing crime efficiently and effectively outweighed the brief intrusion on the individual's rights.[16] Instead, the officer must rely on specific, objective facts and any inferences from those facts that "reasonably warrant that intrusion."[17] This objective test inquires whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate."[18] An officer must not rely on hunches, but only "specific reasonable inferences . . . in light of his experience."[19]

B. ROVING BORDER PATROLS AND THE TOTALITY OF THE CIRCUMSTANCES TEST

Smugglers of illegal aliens and drugs use Arizona as a route from Mexico.[20] In 2001, federal law enforcement officials seized almost 219,000 kilograms of marijuana and about 3345 kilograms of cocaine in Arizona.[21] Additionally, in the first six months of 2000, federal law enforcement officers apprehended almost 177,000 illegal aliens trying to cross the Arizona-Mexico border.[22]

The cost of detaining smugglers and illegal aliens is enormous.[23] In 1999, Arizona spent $41,217,601 detaining illegal aliens for over 900,000 days of incarceration in state and local prisons.[24] Furthermore, illegal smuggling caused over thirteen accidents in 1999 due to overcrowded vehicles.[25] One Arizona hospital estimated that its expense for treatment of illegal aliens is over $100,000.[26]

Checkpoints near the United States-Mexico border attempt to combat the illegal alien and drug smuggling problems,[27] but smugglers use scarcely

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[16] *Id.* at 22, 24-27 (employing balancing test of Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967)).

[17] *Id.* at 21.

[18] *Id.* at 21-22.

[19] *Id.* at 27.

[20] Drug Enforcement Agency, *Arizona State Factsheet on Drugs and Drug Abuse*, *at* http://usdoj.gov/dea/pubs/states/arizonaap.html (last visited Sept. 12, 2002); Federation for American Immigration Reform, *Arizona: Illegal Aliens*, *at* http://fairus.org/html/042azill.htm (last visited Oct. 13, 2002) [hereinafter FAIR].

[21] Drug Enforcement Agency, *Arizona State Factsheet on Drugs and Drug Abuse*, *at* http://usdoj.gov/dea/pubs/states/arizonaap.html (last visited Sept. 12, 2002).

[22] Glynn Custred, *The American Spectator* (Oct. 2000), *at* http://www.vdare.com/misc/custred_alien_crossings.htm (last visited Oct. 13, 2002).

[23] FAIR, *supra* note 20.

[24] *Id.* (reporting statistics from fiscal year 1999).

[25] *Id.*

[26] *Id.*

[27] The Supreme Court upheld the constitutionality of border checkpoints in *United States*

populated back roads to avoid the checkpoints.[28] As a result, the United States Border Patrol conducts roving patrols along these back roads using investigatory stops to catch smugglers trying to avoid the checkpoints.[29]

The Supreme Court first discussed "Terry stops"[30] in the context of roving border patrols in *United States v. Brignoni-Ponce*.[31] There, an officer patrolling the United States-Mexico border stopped a vehicle and questioned the occupants about their citizenship solely because the occupants looked Mexican.[32] The officer learned that all three occupants were illegally in the country and arrested them.[33]

The Court held that the stop violated the Fourth Amendment.[34] Ethnicity alone was not enough to create a reasonable belief that the individuals were illegal aliens because many United States citizens, especially in California, "appear" Mexican.[35] However, race may be a factor for an immigration investigatory stop because the probability that a Mexican is an alien is high enough to make it relevant.[36] Regardless, an officer must have "specific articulable facts, together with rational inferences from those facts . . . that the vehicles contain [illegal] aliens."[37]

The Court then articulated certain factors that may be used in examining reasonable suspicion.[38] First, the characteristics of the area may be relevant, including "its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic."[39] Second, "information about recent illegal border crossings in the area" may be relevant.[40] Third, "[t]he driver's behavior may be relevant, [such] as erratic driving or obvious attempts to evade officers."[41] Fourth, the type of vehicle may be considered in a reasonable suspicion analysis.[42] Fifth, "[t]he

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v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

[28] *Arvizu*, 534 U.S. at 269.

[29] *Id.*

[30] A "Terry stop" is an investigatory stop that involves briefly detaining and questioning an individual who has not violated the law. BLACK'S LAW DICTIONARY 1484 (7th ed. 1999); *see* Terry v. Ohio, 392 U.S. 1 (1968).

[31] 422 U.S. 873 (1975).

[32] *Id.* at 875.

[33] *Id.*

[34] *Id.* at 886-87.

[35] *Id.*

[36] *Id.* at 887.

[37] *Id.* at 884.

[38] *Id.* at 884.

[39] *Id.* at 884-85.

[40] *Id.* at 885.

[41] *Id.*

[42] *Id.*

vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide."[43] Finally, the ethnicity of the individual can be considered, assuming a trained officer is able to determine ethnicity based on haircut or dress, but it cannot be the sole factor.[44] Although these factors may be relevant, the outcome of any given case depends on the totality of the circumstances.[45]

United States v. Cortez formally adopted the totality of the circumstances test for a reasonable suspicion analysis.[46] This test contains two elements.[47] First, the assessment must examine all the circumstances of the case, including "objective observations, information from police reports . . . and consideration of the modes or patterns of operation of certain kinds of lawbreakers."[48] Based upon this information, officers draw on their experience and training in law enforcement to make inferences.[49] Second, all facts and inferences must amount to a reasonable suspicion that the individual is engaged in criminal activity.[50]

After *Cortez,* many appellate courts developed a restrictive list of permissible factors in an attempt to refine the totality of the circumstances test,[51] but the Supreme Court rejected these attempts.[52] According to the Court, not only is the notion of reasonable suspicion not easily "reduced to a neat set of legal rules,"[53] but also refining the analysis "creates unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment."[54]

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[43] *Id.*

[44] *Id.* The Ninth Circuit recently held that race is not a relevant factor any longer in a reasonable suspicion analysis due to the dramatically changing demographics in the United States. The Court noted that minorities (Hispanic, African Americans, Asians and Native Americans) comprise almost fifty percent of the population of California. The Court also noted that California, New York, Florida, Illinois, Arizona, and New Jersey each have a Hispanic population greater than one million. "Accordingly, Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens." United States v. Montero-Camargo, 208 F.3d 1122, 1134 (2000), *cert. denied,* 531 U.S. 889 (2000) (citing Adarand Constructors v. Pena, 515 U.S. 200 (1995)).

[45] United States v. Brignoni-Ponce, 422 U.S. 873, 885 at n.10 (1975).

[46] 449 U.S. 411, 417 (1981).

[47] *Id.* at 418.

[48] *Id.*

[49] *Id.* (likening officers' ability to make "common-sense conclusions about human behavior" to jurors' ability).

[50] *Id.*

[51] *See, e.g.*, United States v. Sokolow, 831 F.2d 1413 (9th Cir. 1987).

[52] United States v. Sokolow, 490 U.S. 1, 7-8 (1989).

[53] Illinois v. Gates, 462 U.S. 213, 232 (1983).

[54] *Sokolow*, 490 U.S. at 7-8.

C. THE *STANDARD* OF REVIEW FOR A REASONABLE SUSPICION ANALYSIS

In *Ornelas v. United States*, the Supreme Court stated that appellate courts must review reasonable suspicion cases de novo, while giving due weight to the factual inferences of the trial judge and law enforcement.[55] The Court employed a de novo review rather than deferring to the trial judge's determination for three reasons.[56] First, deference would create inconsistent results because each trial judge may draw different inferences from the same set of facts.[57] Second, de novo review allows "appellate courts . . . to maintain control of, and to clarify, the legal principles," because "the legal rules for . . . reasonable suspicion acquire content only through application."[58] Third, de novo review allows appellate courts to create uniform rules, giving law enforcement clearer rules to follow when deciding whether to conduct an investigatory stop.[59]

Although reasonable suspicion cases rarely have identical facts, making it difficult for a case to act as a guide to law enforcement, prior cases will have facts similar enough to current cases to provide a guide on how the case will be resolved.[60] Also, officials can view cases collectively to create a useful "body of law on the subject."[61]

De novo review is subject to the appellate court giving due weight to both local judges and law enforcement.[62] Local judges examine the facts and the inferences from those facts "in light of the distinctive features and events of the community."[63] Similarly, law enforcement officers examine the facts in light of their experience and expertise in law enforcement.[64]

Justice Scalia vigorously dissented from the *Ornelas* decision.[65] According to Scalia, appellate courts should review reasonable suspicion cases with deference to the trial court rather than de novo.[66] Reasonable

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[55] 517 U.S. 690, 697 (1996).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 697-98.
[60] *Id.* at 698.
[61] *Id.*
[62] *Id.* at 699.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 700 (Scalia, J., dissenting).
[66] *Id.* (Scalia, J., dissenting).

suspicion cases are fact-intensive, making a de novo review practically useless.[67]

According to Scalia, precedent indicates that appellate courts should review cases with deference when: (1) "the district court is 'better positioned' than the appellate court to decide the issue," and (2) de novo review "'will not contribute to the clarity of legal doctrine.'"[68] Reasonable suspicion cases meet both requirements.[69] First, the district court is in the best position to decide the case, because reasonable suspicion cases are fact-intensive.[70] District courts have the advantage of hearing live testimony and becoming more intimate with the facts, whereas appellate courts simply rely on the record.[71] Second, a de novo appellate review will not help clarify the legal principal of reasonable suspicion.[72] Clarifying reasonable suspicion at the appellate level leads to generalizations, which is inconsistent with the facts and circumstances test of a reasonable suspicion analysis.[73]

III. FACTS AND PROCEDURAL HISTORY

A. FACTS

Douglas, Arizona[74] is a small town of approximately 14,000 residents[75] located in southeastern Arizona near the United States-Mexico border.[76] Highway 191 leads north from Douglas connecting with interstates leading to Phoenix and Tucson.[77] Just north of Douglas are the Chiricahua

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[67] *Id.* (Scalia, J., dissenting).

[68] *Id.* at 701 (Scalia, J., dissenting) (quoting Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (citing Miller v. Fenton, 474 U.S. 104, 114 (1985))).

[69] *Id.* (Scalia, J., dissenting).

[70] *Id.* at 701-02 (Scalia, J., dissenting).

[71] *Id.* (Scalia, J., dissenting).

[72] *Id.* at 703 (Scalia, J., dissenting).

[73] *Id.* (Scalia, J., dissenting).

[74] Douglas, founded 100 years ago, is primarily an agricultural and ranching community. The City of Douglas *at* http://www.discoverdouglas.com/EconDev/Economy.htm (last visited Nov. 13, 2002); the City of Douglas, *at* http://www.community.ci.Douglas.az.us/images/poster4.jpg (last visited Nov. 13, 2002) (on file with the author).

[75] According to the 2000 Census, Douglas, Arizona, has a population of 14,312. Of the 14,312 people, 12,306 are Hispanic. United States Census Bureau, *Census 2000*, *available at* http://factfinder.census.gov (last visited Nov. 13, 2002).

[76] United States v. Arvizu, 534 U.S. 266, 268 (2002).

[77] *Id.* Tucson is approximately 118 miles northwest of Douglas. The City of Douglas *at* http://www.discoverdouglas.com/EconDev/Community%20Profile.htm (last visited Nov. 11, 2002).

Mountains, which contain a national monument, camping and hiking areas, and a small lake.[78]

About thirty miles north of Douglas, at the intersection of Highway 191 and Rucker Canyon Road,[79] Border Patrol uses a checkpoint to capture illegal alien and drug smugglers.[80] In addition to the checkpoints, Border Patrol conducts roving patrols to search the back roads for smugglers attempting to avoid the checkpoint.[81] To assist the roving patrols, magnetic sensors detect vehicles traveling north on Leslie Canyon Road, an unpaved road smugglers often use to avoid the checkpoint.[82]

On January 19, 1998, Agent Clinton Stoddard ("Stoddard") was on duty at the Douglas checkpoint.[83] In the afternoon, a magnetic sensor located on Leslie Canyon Road detected a vehicle.[84] Stoddard decided to investigate the activation of the sensor for three reasons.[85] First, smugglers often use Leslie Canyon Road to avoid the checkpoint.[86] Second, the sensor was triggered during a shift change, so no roving patrols were in the area and smuggling activity generally increased during shift changes.[87] Third, Stoddard knew that another agent stopped a minivan containing marijuana in the area a few weeks earlier.[88]

Stoddard left the checkpoint heading east down Rucker Canyon Road toward Leslie Canyon Road.[89] He received another report that the vehicle triggered a second sensor on Rucker Canyon Road, suggesting that the vehicle was traveling toward him.[90] As he traveled down the road, Stoddard noticed a vehicle approaching in the distance.[91] He pulled off the road to watch the vehicle pass, believing it to be the vehicle that activated the sensors.[92] Stoddard noted that the approaching vehicle was a minivan,

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[78] The City of Douglas *at* http://www.discoverdouglas.com/EconDev/Community%20Profile.htm (last visited Nov. 13, 2002).

[79] For a map of the checkpoint area, see *Arvizu*, 534 U.S. at 278.

[80] *Id.*

[81] *Id.* at 269.

[82] *Id.*

[83] *Id.* at 269.

[84] *Arvizu*, 534 U.S. at 269. The magnetic sensors on Leslie Canyon Road face south in order to detect vehicles traveling north, presumably from Mexico. Transcript of Oral Argument at 23-24, United States v. Arvizu, 534 U.S. 266 (2002) (No. 00-1519).

[85] *Arvizu*, 534 U.S. at 269.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 269-70.

[89] *Id.* at 270.

[90] *Id.*

[91] *Id.*

[92] *Id.*

because smugglers often use them.[93] The minivan was traveling at about fifty miles per hour until it came close to Stoddard, when it rapidly slowed to about twenty-five to thirty miles per hour.[94]

In the minivan, Stoddard could see a man driving, a woman in the passenger seat, and three children in the back.[95] The man sat very stiff and straight, keeping his eyes on the road.[96] Normally, drivers usually either look at Stoddard out of curiosity or wave.[97] In addition, the children's knees were raised, suggesting their feet rested on something on the floor.[98]

Based on these initial observations, Stoddard decided to follow the minivan west down Rucker Canyon Road.[99] As he began to follow the minivan, the children started moving their hands as if they were waving at him.[100] This action was suspicious to Stoddard for three reasons.[101] First, the children waved facing forward even though Stoddard was behind the minivan.[102] Second, the children waved in an abnormal way, as if they were instructed to wave.[103] Third, the children waved for about four or five minutes.[104]

At that point, the minivan approached an intersection, turning its right turn signal on and then abruptly off.[105] Just before reaching the intersection, the driver turned his right turn signal back on and quickly turned right.[106]

The minivan's decision to turn right concerned Stoddard.[107] If the vehicle continued west down Rucker Canyon Road, it would have headed to the checkpoint.[108] If the vehicle turned left, it would have headed toward picnic and camping areas.[109] Instead, the vehicle turned right onto a road used mostly by four-wheel-drive vehicles, and more notably, the last road

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 270-71.
[101] *Id.* at 271.
[102] *Id.* at 270-71.
[103] *Id.* at 271.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*

available to avoid the checkpoint.[110] Still following the minivan, Stoddard performed a registration check over the radio.[111] The check revealed that "the minivan was registered . . . in an area notorious for alien and narcotics smuggling."[112]

Based on his observations and the registration check, Stoddard stopped the minivan to briefly investigate.[113] The driver revealed that his name was Ralph Arvizu.[114] Stoddard asked Arvizu if he could search the minivan and Arvizu consented.[115] During his search, Stoddard found over 128 pounds of marijuana with a street value of almost $100,000.[116]

Stoddard arrested Arvizu who was charged with possession with intent to distribute marijuana.[117] During trial, Arvizu moved to suppress the evidence, because "Stoddard did not have reasonable suspicion to stop the vehicle as required by the Fourth Amendment."[118]

B. THE TRIAL COURT UPHELD THE INVESTIGATORY STOP

The District Court held that Stoddard had reasonable suspicion to believe that Arvizu was involved in criminal activity.[119] According to the District Court, ten factors, taken together, led Stoddard to have reasonable suspicion:

> 1) smugglers used the road in question to avoid the border patrol station; 2) Arvizu drove by within an hour of a Border Patrol shift change; 3) a minivan stopped on the same road a month earlier contained drugs; 4) minivans are among the types of vehicles commonly used by smugglers; 5) the minivan slowed as it approached the Border Patrol vehicle; 6) Arvizu appeared rigid and stiff, and did not acknowledge the officer; 7) the officer did not recognize the minivan as a local car; 8) the children's knees were raised, as if their feet were resting on something on the floor of the van; 9) the children waved for several minutes but not towards the officer; and 10) the van was registered to an address in a neighborhood notorious for smuggling.[120]

Because Stoddard had reasonable suspicion, the District Court denied Arvizu's motion to suppress and he was found guilty of possession.[121]

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[110] *Id.*
[111] *Id.*
[112] *Id.* at 271.
[113] *Id.*
[114] *Id.*
[115] *Id.* at 271-72.
[116] *Id.* at 272.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] United States v. Arvizu, 232 F.3d 1241, 1248 (9th Cir. 2000).
[121] *Id.*

C. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT REVERSED THE TRIAL COURT

The Ninth Circuit found that Stoddard did not have reasonable suspicion to stop Arvizu based on the facts of the case.[122] Judge Reinhardt, writing for the court, began by expressing the difficulty of applying facts and circumstances tests due to the introduction of "a troubling degree of uncertainty and unpredictability into the process."[123] As a result, the court wanted the decision to "clearly delimit . . . which certain factors may be considered by law enforcement officers in making stops such as the stop involved here."[124]

According to the Ninth Circuit, the District Court improperly relied on seven factors that have no place in a reasonable suspicion analysis.[125] First, the minivan slowing rapidly was an inappropriate factor, because precedent prohibits relying on slowed speed.[126] Slowing down when seeing law enforcement was a perfectly natural response.[127] Second, precedent prohibits Arvizu's failure to acknowledge Stoddard as a factor.[128] Not waving to an officer may demonstrate that a person is unfriendly, but not a criminal.[129] Third, the children's waving was not relevant to the analysis.[130] If every bizarre act of a child was relevant, law enforcement could stop almost any parent.[131] Also, if Arvizu's failure to wave was a factor, then it was inconsistent to allow the children's waving to be a factor.[132] Fourth, the fact that an officer stopped a minivan containing marijuana on the same road a month earlier was an inappropriate factor.[133] An officer hardly can infer that all minivans on the road contain drugs based on one isolated

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[122] *Arvizu,* 232 F.3d at 1251. The Ninth Circuit's opinion, originally filed on July 7, 2000, was amended on December 1, 2000. Many of the changes add the phrase "in this case," presumably to emphasize the importance of examining the facts and circumstances of each case.

[123] *Id.* at 1248.

[124] *Id.*

[125] *Id* at 1248-51.

[126] *Id.* at 1248-49 (citing United States v. Montero-Camargo, 208 F.3d 1122, 1136 (9th Cir. 2000); United States v. Garcia-Camacho, 53 F.3d 244, 247 (9th Cir. 1995)).

[127] *Id.* at 1249.

[128] *Id.* (citing United States v. Hernandez-Alvarado, 891 F.2d 1414, 1419 (9th Cir. 1989)).

[129] *Id.* (citing *Garcia-Camacho*, 53 F.3d at 247; Gonzalez-Rivera v. INS, 22 F.3d 1441, 1446 (9th Cir. 1994)).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

incident.[134] Fifth, Stoddard's inability to recognize Arvizu's minivan was irrelevant to a reasonable suspicion analysis.[135] Both locals and tourists use the road on which Arvizu was stopped, so "it is hardly surprising that a Border Patrol agent would not recognize every passing car."[136] Sixth, the minivan's registration to an address in an area known for alien and drug smuggling was an inappropriate factor.[137] Not all individuals have control over where they live due to financial difficulties.[138] Also, Stoddard did not explain how he knew the reputation of the area.[139] Last, the children's raised knees were irrelevant to the analysis.[140] Although it suggests their feet were propped on cargo, the cargo just as easily could have been picnic and camping supplies as it was marijuana.[141]

After discussing the seven factors that did not belong in the reasonable suspicion analysis, the Ninth Circuit focused on the remaining three factors relied on by the District Court.[142] First, the fact that Arvizu was driving on a road smugglers frequently use was not particularly significant, because both locals and tourists use the road either as a shortcut or to visit the national monument.[143] Second, the fact that Arvizu drove a minivan, a vehicle smugglers use often, is also insignificant, because minivans are a popular family vehicle in the United States.[144] Finally, the fact that Arvizu was on the road during a shift change is not significant, because the time was actually forty-five minutes before the shift change.[145] According to the court, these three factors "are not enough to constitute reasonable suspicion either singly or collectively."[146]

The Ninth Circuit suppressed the marijuana evidence, because Stoddard did not have reasonable suspicion to conduct an investigatory stop.[147]

The Supreme Court granted certiorari to determine whether Stoddard had reasonable suspicion as required under the Fourth Amendment to stop

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[134] *Id.*
[135] *Id.*
[136] *Id.* at 1250.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 1250-51.
[141] *Id.*
[142] *Id.* at 1251.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.* at 1251-52.

Arvizu,[148] "because of its importance to the enforcement of federal drug and immigration laws."[149]

IV. THE SUPREME COURT DECISION

A. THE MAJORITY OPINION

Chief Justice Rehnquist wrote the opinion for a unanimous Court, holding that Stoddard had the requisite level of reasonable suspicion needed under the Fourth Amendment to stop Arvizu based on all facts and circumstances of the case.[150]

Rehnquist first briefly discussed the current state of the law regarding investigatory stops.[151] The Fourth Amendment, which prohibits unreasonable searches, applies to investigatory stops where the driver has not violated a traffic law.[152] Law enforcement may conduct investigatory stops if the officer has "reasonable suspicion to believe that criminal activity 'may be afoot.'"[153] The officer's reasonable suspicion must be based on objective facts and inferences from those facts that a reasonable law enforcement officer would draw and not based on hunches.[154] When taken together, the facts and inferences must lead the officer to believe that criminal activity may be afoot.[155] This totality of the circumstances test allows officers to use their experience to draw inferences from facts that otherwise may mean little to the average citizen.[156]

Rehnquist acknowledged that "the concept of reasonable suspicion is somewhat abstract," but stressed the importance of not setting hard-fast rules.[157] Hard-fast rules create "unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment."[158]

Next, Rehnquist criticized the Ninth Circuit for its sharp departure in their analysis from the totality of the circumstances test.[159] The Ninth

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[148] United States v. Arvizu, 532 U.S. 1065 (2001) (granting writ of certiorari and motion to proceed *in forma pauperis*).

[149] United States v. Arvizu, 534 U.S. 266, 273 (2002).

[150] *Arvizu*, 534 U.S. at 277-78.

[151] *Id.* at 273.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 273-74.

[155] *Id.* at 273.

[156] *Id.*

[157] *Id.* at 274.

[158] *Id.* (quoting United States v. Sokolow, 490 U.S. 1, 7-8 (1989).

[159] *Id.*

Circuit used a "divide-and-conquer" analysis, looking at each factor individually to see whether each factor led to reasonable suspicion.[160] However, *Terry v. Ohio*[161] and *United States v. Sokolow*[162] prohibit analyzing each factor individually.[163] Although each factor individually may appear innocent, the factors taken together may amount to reasonable suspicion.[164]

Rehnquist also criticized the Ninth Circuit for attempting "to 'clearly delimit' an officer's consideration of certain factors to reduce 'troubling . . . uncertainty.'"[165] This attempt "underestimates the usefulness of the reasonable-suspicion standard in guiding officers in the field."[166] The entire purpose of the de novo standard of review in reasonable suspicion cases is to allow appellate courts to unify and clarify precedent.[167] In doing so, although the "factual 'mosaic'" in each case may differ, "'two decisions when viewed together may usefully add to the body of law on the subject.'"[168]

Rehnquist then gave two examples of how the Ninth Circuit's "approach would . . . seriously undercut the 'totality of the circumstances' principles."[169] The first example is Arvizu's slowed speed and failure to acknowledge Stoddard.[170] These actions may be meaningless on a busy highway in San Francisco, but may be quite odd on a road in a scarcely populated area of Southeastern Arizona.[171] This example shows the importance for law enforcement officers to evaluate all factors together "in light of . . . specialized training and familiarity with the customs of the area's inhabitants."[172]

Second, the children's waving was an example of the Ninth Circuit's misapplication of the totality of the circumstances analysis.[173] The waving was not mere child's play, but "'methodical,' 'mechanical,' and

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[160] *Id.*
[161] 392 U.S. 1 (1968).
[162] 490 U.S. 1 (1989).
[163] *Arvizu*, 534 U.S. at 266-67, 274-75.
[164] *Id.*
[165] *Id.* at 275 (quoting United States v. Arvizu, 232 F. 3d 1241, 1248 (9th Cir. 2000)).
[166] *Id.* at 275.
[167] *Id.*
[168] *Id.* (quoting Ornelas v. United States, 517 U.S. 690, 697-98 (1989)).
[169] *Id.*
[170] *Id.* at 275-76.
[171] *Id.*
[172] *Id.* at 276.
[173] *Id.*

'abnormal,'" as Stoddard demonstrated to the District Court.[174] The Ninth Circuit, unable to see Stoddard demonstrate what he saw, should have given due weight to Stoddard and the District Court, both of whom saw the waving and made the reasonable assumption that the children were doing something other than playing.[175]

Rehnquist then concluded "[i]t was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that respondent had set out from Douglas along a little-traveled route used by smugglers to avoid the 191 checkpoint."[176] Rehnquist emphasized that "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct."[177] In this case each factor, when viewed separately, has an innocent explanation, but when viewed collectively, is enough to lead to reasonable suspicion.[178] Stoddard's investigatory stop of Arvizu, therefore, was not a violation of the Fourth Amendment.[179]

The Court reversed the Ninth Circuit's holding[180] and remanded the case for further proceedings.[181]

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[174] *Id.* (quoting App. to Pet. for Cert. 25a).

[175] *Id.*

[176] *Id.* at 277.

[177] *Id.* (citing Illinois v. Wardlow, 528 U.S. 119, 125 (2000)).

[178] *Id.* at 277-78.

[179] *Id.*

[180] Apparently, the Ninth Circuit chose to ignore the Supreme Court's decision in deciding other reasonable suspicion cases. After the Ninth Circuit decided *Arvizu*, but before the Supreme Court heard the case, the Ninth Circuit ruled on a boarder patrol case similar to *Arvizu*. In *United States v. Sigmond-Ballesteros*, 247 F.3d 943 (9th Cir. 2001), the court ruled that the officer did not have reasonable suspicion to stop a vehicle. The court examined each individual factor's relevance and appropriateness, and determined that each factor had an innocent explanation. *Id.* After the Supreme Court ruled on *Arvizu*, the Ninth Circuit amended its decision in *Sigmund-Ballesteros*. United States v. Sigmond-Ballesteros, 285 F.3d 1117 (9th Cir. 2002). The amended decision changed the earlier decision very little, only adding that it must look at the totality of the circumstances. *Id.* at 1121. Later, the Ninth Circuit denied a petition for rehearing en banc, but not without a vigorous dissent. United States v. Sigmond-Ballesteros, 309 F.3d 545, 545-50 (9th Cir. 2002). Judge Kleinfeld, writing on behalf of himself and five other judges, criticized the two judges who refused rehearing: "Here we go again. The decision that we have decided not to rehear en banc defies a Supreme Court decision that reversed a previous decision of ours, making the identical error, arguably creates a mistaken rule on 'profiling,' and reduces America's ability to patrol its borders." *Id.* at 545-46.

[181] *Arvizu*, 534 U.S. at 278. The issues on remand were whether: (1) Arvizu voluntarily consented to Stoddard's search, and (2) the search exceeded the scope of consent by not only searching the van but also the duffel bags inside the van. United States v. Arvizu, 2002 WL 464507 (9th Cir. 2002). The Ninth Circuit held that Arvizu's consent was voluntary, because Stoddard did not coerce Arvizu or have Arvizu in his custody when he asked for

B. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia joined the opinion of the Court because it followed *Ornelas v. United States*,[182] which dictates a de novo review with due weight to the inferences of law enforcement and local judges.[183] However, he reiterated his view expressed in his *Ornelas* dissent that giving due weight to the trial court's inferences (instead of factual findings) is incompatible with a de novo review.[184] A de novo review permits the Court of Appeals to review the trial court's inferences and conclusions (but not factual findings), but this type of review is prohibited in the reasonable suspicion with due weight review.[185]

Scalia concluded by noting, "even holding the Ninth Circuit to no more than the traditional methodology of de novo review, its judgment here would have to be reversed."[186]

V. ANALYSIS

The Supreme Court properly held that Stoddard's investigatory stop of Arvizu did not violate the Fourth Amendment. First, the Court's decision is consistent with precedent. Second, the facts and circumstances analysis used by the Court is superior to setting hard-fast rules. Third, the analysis properly views the facts and inferences from local law enforcement's point of view. Finally, racial profiling and the ability of law enforcement to stop vehicles for any reason will not occur based on the *Arvizu* decision.

A. THE SUPREME COURT PROPERLY UPHELD THE INVESTIGATORY STOP BECAUSE PRECEDENT REQUIRES A TOTALITY OF THE CIRCUMSTANCES TEST

The Supreme Court properly held that the investigatory stop was within the Fourth Amendment because the Court followed precedent in its decision. Under *United States v. Sokolow*,[187] *United States v. Cortez*,[188] and

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consent. *Id.* The Ninth Circuit also held that Stoddard's search did not exceed the scope of Arvizu's consent, because the consent included the duffel bags. *Id.* Even if the consent did not include the duffel bags, Stoddard had probable cause to search the bags, because of the smell of marijuana coming from the bags. *Id.*

[182] 517 U.S. 690, 699 (1996).

[183] *Arvizu*, 534 U.S. at 278 (Scalia, J., concurring).

[184] *Id.* (Scalia, J., concurring).

[185] *Id.* (Scalia, J., concurring).

[186] *Id.* (Scalia, J., concurring).

[187] 490 U.S. 1 (1989).

[188] 449 U.S. 411 (1981).

United States v. Brignoni-Ponce,[189] the Court must examine all facts and reasonable inferences collectively to determine whether the officer had reasonable suspicion to believe the individual was engaged in criminal activity.[190] In *Arvizu*, the Supreme Court examined all the facts and the inferences Stoddard made collectively to determine that those facts and inferences amounted to a reasonable suspicion that Arvizu was engaged in criminal activity.

A proper reasonable suspicion analysis identifies specific facts, including objective observations and information received from police reports, and views them from the perspective of the law enforcement officer, allowing him or her to draw any inferences that are reasonable.[191] These facts and inferences are next examined collectively to determine if they lead to reasonable suspicion that the individual is engaged in criminal activity.[192]

In *Arvizu*, the Supreme Court properly identified the facts and observations Stoddard used in deciding to stop Arvizu, and viewed them in light of Stoddard's experience as a border patrol agent:

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[189] 422 U.S. 873 (1975).

[190] *Sokolow*, 490 U.S. at 7-9; *Cortez*, 449 U.S. at 417-18; *Brignoni-Ponce*, 422 U.S. at 884-85.

[191] *Cortez*, 449 U.S. at 418; *Brignoni-Ponce*, 422 U.S. at 884.

[192] *Cortez*, 449 U.S. at 418.

Table 1[193]

Fact	Viewed In Light of Officer Stoddard's Experience
A vehicle triggered a magnetic sensor on a back road near a Border Patrol checkpoint.	• Drug and illegal alien smugglers often use the road to circumvent the checkpoint. • Local ranchers and forest service personnel mostly use the road. • A vehicle containing marijuana triggered the same sensor about a month earlier.
The vehicle triggered the sensor during a Border Patrol shift change.	• Smugglers time their activity to coincide with shift changes, because no officers are patrolling the area.
The vehicle was a minivan.	• Minivans are a popular vehicle for smugglers. • A minivan containing drugs was stopped a month earlier.
The minivan slowed significantly as it approached the Border Patrol vehicle.	
The driver of the minivan sat erect and did not acknowledge the border patrol agent.	• Most drivers either wave or look at border patrol agents out of curiosity.
The children in the backseat of the minivan had their knees raised.	• The children had their feet propped on something.
The children waved for four to five minutes.	• The waving appeared odd and mechanical. • The children waved forward, even though the officer was behind the vehicle.
The minivan turned north onto Kuykendall Cutoff Road.	• Kuykendall is the last road available to avoid the checkpoint. • Kuykendall is an unpaved road, usually only used by four-wheel drive vehicles.
A registration check revealed the minivan was registered to an address close to the border.	• The address was located in an area known for smuggling.

After compiling the facts and circumstances, the Court then examined them collectively, instead of looking at the appropriateness of each factor

[193] The facts in this table are set forth in *United States v. Arvizu*, 534 U.S. 266, 269-71, 276 (2002) and Brief for the Petitioner at 6, United States v. Arvizu, 534 U.S. 266 (2002) (No. 00-1519).

like the Ninth Circuit.[194] A totality of the circumstances test views all factors as a whole rather than reviewing them individually to determine whether the officer had reasonable suspicion.[195] Looking at the facts and circumstances as a whole, the Court determined that Stoddard had the requisite reasonable suspicion to stop Arvizu.[196] The Court properly disregarded the fact that there were alternative possibilities to Arvizu's conduct (such as picnicking or camping), because a reasonable suspicion analysis does not require certainty that the individual is engaged in criminal activity.[197]

In the end, the Supreme Court followed precedent. The Court examined the circumstances collectively as viewed from a trained law enforcement officer to conclude that reasonable suspicion existed.

B. HARD-SET RULES SEVERELY RESTRICT INVESTIGATORY STOPS AND THEIR EFFECTIVENESS

If the Supreme Court adopted the Ninth Circuit's approach in *Arvizu*,[198]—analyzing each factor individually to determine whether it is appropriate in a reasonable suspicion analysis—it would be impossible to conduct an investigatory stop within the Fourth Amendment. First, certain factors have more significance in particular geographic areas or, alternatively, no significance at all, creating difficulty in developing uniform factors applicable throughout the country or to all criminal activity. Second, only permitting certain factors provides an easy way for criminals to beat the system by providing them with a list of what to do to avoid an investigatory stop. A totality of the circumstances test, on the other hand, provides flexibility to meet the needs of a particular geographic area or criminal activity.

Requiring law enforcement officers to consider only certain factors would hinder their ability to conduct an investigatory stop due to the inability to construct a list of factors relevant to all geographic areas or criminal activity. For example, the fact that the officer does not recognize the individual or vehicle may be relevant in a small town with no tourists but is meaningless in a large city like Chicago.[199] In addition, allowing the

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[194] *Id.* at 277.

[195] United States v. Sokolow, 490 U.S. 1, 7-8 (1989).

[196] *Arvizu,* 534 U.S. at 277.

[197] Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (using as an example Terry v. Ohio, 392 U.S. 1 (1968)).

[198] United States v. Arvizu, 217 F.3d 1224 (9th Cir. 2000).

[199] Another geographically relevant factor is rental vehicles from Florida, Texas, Maryland, New York and New Jersey, but this factor is only relevant in locations a good

type of vehicle as a permissible factor may be relevant in smuggling cases where certain vehicles are used frequently but not relevant in prostitution cases where there is no consistent vehicle type. Because of the difficulty in setting a complete list of factors applicable to all geographic areas and criminal activities, law enforcement would have difficulty finding enough factors to constitute reasonable suspicion to justify stopping any individual.

Even if the Court could construct a list of factors relevant to all geographic areas, this list would allow criminals to avoid an investigatory stop. Many criminals are smarter than society would like to believe. For instance, criminals scout Border Patrol shift changes for times of unpatrolled areas[200] and remove door panels to hide drugs inside them.[201] If the courts set a restrictive list of permissible factors, criminals could adapt their behavior to avoid enough factors to prevent reasonable suspicion.

In the end, hard-set rules are improper for a reasonable suspicion analysis. Not only are defined rules difficult to construct as applicable to all geographic areas and criminal activity, but they also provide a guide for criminals attempting to avoid detection.

C. THE FACTS SHOULD BE VIEWED FROM THE PERSEPCTIVE OF LOCAL LAW ENFORCEMENT

A reasonable suspicion analysis should view the facts and inferences from the point of view of the officer conducting the stop. Local law enforcement officers are on the streets observing, investigating and arresting individuals. Officers know the habits of criminals and signs of crime that a judge or juror might not know.[202] For example, in *Ornelas v. United States,* an officer who had searched almost 2000 cars for drugs was aware that drug smugglers often use Oldsmobiles because of the ease of hiding the drugs in interior panels.[203] When he noticed a loose, rusty screw on an interior panel of an Oldsmobile, the officer drew on this knowledge to infer the panel had been removed to smuggle drugs.[204] To the average citizen, however, the loose, rusty screw would have suggested an older car that was falling apart.[205] Consequently, courts should view the facts and

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distance from these states and with little tourism. *See* Drug Courier Profile Indicators, *at* http://www.cass.net/~w-dogs/lcour.htm (last visited Oct. 13, 2002).

[200] *See Arvizu*, 534 U.S. at 269.

[201] *See* Ornelas v. United States, 517 U.S. 690, 693 (1989).

[202] *See id.* at 700.

[203] 517 U.S. 690, 693 (1996).

[204] *Id.*

[205] *Id.* at 700.

circumstances in light of law enforcement's experience, because it provides them insight on criminal behavior.

Professor Anthony Thompson suggests that law enforcement officers inevitably rely on stereotypes rather than experience when assessing the facts and circumstances.[206] In order to process information quickly and simply, the human brain uses categories such as race, ethnicity, and gender to store information.[207] When an officer evaluates situations to determine if they are consistent with criminal activity, an officer relies on categorization to find traits that they believe are associated with criminal activity.[208] Consequently, "stereotyping would appear integral to the police officer's world."[209]

In order to prevent law enforcement from abusing the power of discretion or relying on inappropriate stereotypes,[210] the courts provide a check on the reasonableness of the factors and inferences used by the officer.[211] When an officer conducts an investigatory stop that is challenged, the officer must identify the factors and inferences relied upon as well as the basis for the reliance.[212] The court will uphold the stop under the Fourth Amendment only if the officer can articulate such factors.[213] If the officer instead relies on stereotypes and hunches, the stop will violate the Fourth Amendment.[214]

In the end, the facts and inferences should be viewed from the perspective of the officer conducting the stop because their training and experience in law enforcement provides them with knowledge beyond that of the average citizen. The courts review this power for abuse by requiring the officer to articulate specific facts and circumstances.

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[206] Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983-92 (1999).

[207] *Id.* at 983-86.

[208] *Id.* at 986-87.

[209] *Id.* at 987.

[210] For a detailed discussion on the possible abuse of police power, see Frank Rudy Cooper, *The Un-balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 884-89 (2002) ("[L]aw enforcement's call for a drug war has influenced the United States Supreme Court to accept racial profiling and limit appellate review of police activity."); Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 915-19 (2002) ("[P]olice may rely excessively on race in criminal investigation and emphasize it over all else.").

[211] *See* Ornelas, 517 U.S. at 697.

[212] United States v. Sokolow, 490 U.S. 1, 7 (1989); United States v. Cortez, 449 U.S. 411, 418 (1981).

[213] *See Sokolow*, 490 U.S. at 7; *Cortez*, 449 U.S. at 418.

[214] *See Sokolow*, 490 U.S. at 7; *Cortez*, 449 U.S. at 418.

D. THE SUGGESTED EFFECTS OF THE REASONABLE SUSPICION ANALYSIS IN *ARVIZU* WILL NOT OCCUR

Scholars criticize the reasonable suspicion analysis for encouraging racial profiling and permitting an officer to stop a vehicle for any reason. Neither criticism is valid.

Many critics of the reasonable suspicion test contend that the test permits racial profiling, because it uses stereotypes and profiles.[215] These stereotypes draw conclusions of criminal activity based on the race of the individual under the assumption that certain races are more likely to commit crimes than other races.[216]

Contrary to this criticism, racial profiling is not encouraged, and certainly not allowed in a reasonable suspicion analysis.[217] At one time, the Supreme Court permitted race as a factor in immigration cases,[218] but recent cases suggest it is no longer a permissible factor.[219] Even when the Court may have permitted race as a factor, the officer still needed enough other objective factors and reasonable inferences to amount to reasonable suspicion, making race almost superfluous to the analysis.[220] Furthermore, *Arvizu* does not support racial profiling for three reasons. First, the District Court, the Ninth Circuit, and the Supreme Court did not rely on race or ethnicity as a factor.[221] Second, the record suggests that Stoddard did not know Arvizu's ethnicity.[222] Finally, assuming arguendo Stoddard did know Arvizu's ethnicity, it was not until he had stopped Arvizu that he could have discovered his ethnicity.[223]

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[215] Cooper, *supra* note 210, at 869-76; Johnson, *supra* note 210, at 900-06; David A. Harris, *The Stories, Statistics, and the Law: Why "Driving While Black" Matters,* 84 MINN. L. REV. 265, 310-19 (1997). For a general discussion on racial profiling, see Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack,* 102 COLUM. L. REV. 1413 (2002); David Rudovsky, *Breaking the Pattern of Racial Profiling,* 38 JTLA TRIAL 29 (Aug. 2002). For a detailed list of articles and books on the use of race in deciding to arrest or stop an individual, see Thompson, *supra* note 206, at 1013 n.1.

[216] Cooper, *supra* note 210, at 870-72.

[217] *See* United States v. Montero-Camargo, 208 F.3d 1122, 1134 (2000), *cert denied* 531 U.S. 889 (2000); United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975).

[218] *Brignoni-Ponce*, 422 U.S. at 885.

[219] *Montero-Camargo*, 208 F.3d at 1134.

[220] *E.g.*, *Brignoni-Ponce,* 422 U.S. at 885 (race alone not enough to conduct an investigatory stop of a vehicle).

[221] United States v. Arvizu, 534 U.S. 266 (2002); United States v. Arvizu, 232 F.3d 1241 (9th Cir. 2000).

[222] *See* Brief for the Petitioner at 41a-42a, 68a, *Arvizu* (No. 00-1519). Arvizu indicated he was born and raised in Arizona, spoke unbroken English, and did not appear an illegal alien. *Id.*

[223] *See* Brief for the Petitioner at 108a, *Arvizu* (No. 00-1519). Stoddard asked if Miranda

Adding to the criticism, Professor David Moran contends that the reasonable suspicion test permits an officer to stop a vehicle for any reason.[224] Professor Moran finds it appalling that the Court would permit the investigatory stop in *Arvizu*:

> [I]t would be hard to imagine less suspicious behavior than a man driving a minivan containing several children near a national monument in the middle of the afternoon, slowing down for a police car without looking at the officer, and then continuing on his way scrupulously obeying all traffic laws while the children wave more or less in the direction of the officer.[225]

According to Professor Moran, the Supreme Court's ruling that the facts in *Arvizu* are enough to create reasonable suspicion permits officers to take completely innocent facts and invent reasons for finding reasonable suspicion.[226]

If the facts of *Arvizu* had been as so simply described, the Supreme Court decision would have been incorrect. However, Professor Moran colors some of the facts while omitting other facts, reinforcing the importance of utilizing the totality of the circumstances test. For instance, Professor Moran suggests that the children were waving "more or less in the direction of the officer,"[227] whereas the children really were waving in the exact opposite direction of the officer, toward no one.[228] Also, although Arvizu was driving near a national monument, Professor Moran failed to acknowledge that Arvizu was not driving to see the monument, because he was not driving to or away from the monument.[229] Examining all of the facts and circumstances rather than just a chosen few demonstrates that Stoddard had enough evidence to believe that Arvizu was engaged in criminal activity, without the need to invent inferences to find reasonable suspicion.

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rights read in English or Spanish. *Id.* Although Stoddard asked if Arvizu wanted his Miranda rights read in English or Spanish, this action is not indicative that Stoddard knew Arvizu was Hispanic. Officers often give Miranda rights in various languages to be sure they do not violate an individual's Fifth Amendment rights. *See* David R. Jankowsky & Eric R. Sherman, *Custodial Interrogations,* 90 GEO. L.J. 1240, 1241 n.500 & 502, 1251 n.537, 1252 n.543, 1264 (2002).

[224] David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time,* 47 VILL. L. REV. 815, 833-37 (2002).

[225] *Id.* at 835.

[226] *Id.* at 836-37.

[227] *Id.* at 835.

[228] Brief for the Petitioner at 6, *Arvizu*, (No. 00-1519). The Supreme Court stated in its opinion that the children's waving may be considered, but it has little weight in the analysis. United States v. Arvizu, 534 U.S. 266, 277 (2002).

[229] *Arvizu*, 534 U.S. at 271-72.

Disregarding Professor Moran's misstatements, the reasonable suspicion analysis prevents officers from inventing inferences from completely innocent facts, because it requires officers to provide some basis for their inference.[230] In addition, the inference must be a logical and reasonable deduction from the facts.[231] Therefore, officers would have difficulty inventing factors, because the analysis requires them to explain the basis for the factors in order to show their decision to stop the individual was reasonable.

In the end, criticism of the reasonable suspicion analysis and *Arvizu* decision are unfounded, because race is not permitted as a factor in a reasonable suspicion analysis and *Arvizu* does not allow an officer to take innocent facts and construe them to invent reasonable suspicion.

VI. CONCLUSION

The Supreme Court's holding in *United States v. Arvizu* does not declare any new law, but merely provides another example of what amounts to reasonable suspicion.[232] The Court followed precedent, invoking the totality of the circumstances test to uphold the investigatory stop. This test is the appropriate method for evaluating an investigatory stop for reasonable suspicion, because it is adaptable to all geographic areas and criminal activity. Also, it properly views the facts from the perspective of the stopping officers, allowing them to draw from their experience and training in deciding to stop the vehicle. Furthermore, case law suggests that the test does not encourage racial profiling or permit an officer to stop a vehicle for any reason, preventing those challenges to the totality of the circumstances test.

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[230] *See* United States v. Cortez, 449 U.S. 411, 417 (1981).

[231] *See id.*

[232] Lieutenant Colonel Michael R. Stahlman, *New Developments in Search and Seizure: More than Just a Matter of Semantics,* 2002 ARMY LAW. 31, 39 (May 2002)

> [T]he significance of United States v. Arvizu lies more with its facts than on any new twists or changes in the law. [T]he facts vary dramatically among these 'vehicle stop' cases. *Arvizu* provides a good set of facts along with the Supreme Court's analysis on how those facts adequately raised a reasonable suspicion.

Id.