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# DRUG COURIER PROFILES: AN INFRINGEMENT ON FOURTH AMENDMENT RIGHTS

by Irene Dey

## I. INTRODUCTION

Drug courier profiles were developed in the early 1970s as part of an effort to reduce the flow of drugs into the United States. The profiles gained wide use by the Drug Enforcement Agency (DEA) at airports and, due to their success, gained much popularity with state and local law enforcement agencies. Although there is no national drug courier profile, each agency uses similar characteristics in composing its own profile. However, within each profile there are many inconsistencies.

Drug courier profiles have gained much popularity since the 1970s and have been used in many situations, from airports to interstate roads. With the increased use of profiles, many legal issues, particularly relating to the Fourth Amendment, have arisen. The government's interests in controlling crime and public safety need to be weighed against the intrusiveness of stops and seizures related to drug courier profiles, as well as the potential for prejudice as a result of the widespread use of race and gender as components of the profiles.

## II. HISTORY

Since 1974, the DEA has assigned highly skilled agents to major airports as part of a nationwide program to intercept drug couriers.<sup>1</sup> The Drug Courier Profile guides agents in identifying characteristics that experience has shown to be relevant in identifying suspects.<sup>2</sup> The DEA claims that when agents first started this detail at the airport they did not know exactly what they were looking for, since the majority of cases involved information from law enforcement agencies or airline personnel.<sup>3</sup> As time went on, the DEA began to see a pattern in the characteristics, and agents began using these patterns to pick out individuals suspected to be narcotic couriers.<sup>4</sup>

In the first few months of the program at Detroit Metropolitan Airport, seventy-seven searches out of

<sup>1</sup> Florida v. Royer, 460 U.S. 491, 508, n.2 (1983) (citing United States v. Mendenhall, 446 U.S. 544, 562 (1980)).

<sup>2</sup> See Royer, 460 U.S. 491. See also *infra* text accompanying notes 25-29.

<sup>3</sup> *Id.* at 525.

<sup>4</sup> See *id.* (citing United States v. McLain, 452 F. Supp. 195, 199 (E.D. Mich. 1977)).

ninety-six encounters turned up drugs.<sup>5</sup> Out of 141 people searched, 122 people were arrested.<sup>6</sup> DEA agents working at New York's LaGuardia airport estimated that approximately 60% of the people who fit the drug courier profile characteristics were found to be carrying drugs.<sup>7</sup> The success of DEA drug courier profiling prompted many state and local law enforcement agencies to give their officers training in this area.<sup>8</sup> However, drug courier profiles have not been determined to provide any set mathematical formula for establishing grounds for a belief that criminal activity is afoot.<sup>9</sup> A court might conclude that, simply because these characteristics are contained in a "profile", they should not be given any more or less weight in determining whether an officer's suspicion is well founded.<sup>10</sup>

## III. WHAT IS A DRUG COURIER PROFILE?

Although there is no single "national" profile, drug courier profiles for each law enforcement office are all very similar.<sup>11</sup> Drug courier profiles describe

<sup>5</sup> See *id.* (citing United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011, 98 S. Ct. 722, 54 L. Ed. 754 (1980)).

<sup>6</sup> Mendenhall, 446 U.S. at 562 (citing Van Lewis, 409 F. Supp. at 539). After the first 18 months of the program, agents searched 141 people in 96 separate encounters, arresting 122 people and finding substances in 96 of the encounters. Two of the agents in this program arrested Mendenhall.

<sup>7</sup> Royer, 460 U.S. at 525 (citing United States v. Price, 599 F.2d 494, 501, n.8 (2d Cir. 1979)).

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* However, the use of drug courier profiles has played an important role in a number of lower court decisions such as: United States v. Forero-Rincon, 626 F.2d 218 (2d Cir. 1980); United States v. Hill, 626 F.2d 429 (5th Cir. 1980); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980), *cert. denied*, 450 U.S. 923, 101 S.Ct. 1374, 67 L.Ed.2d 352 (1981); United States v. Beck, 598 F.2d 497 (9th Cir. 1979); United States v. Price, 599 F.2d 494 (2d Cir. 1979); United States v. Vasquez, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 857 (1980); United States v. Ballard, 573 F.2d 913 (5th Cir. 1978); United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Scott, 545 F.2d 38 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066, 97 S.Ct. 796, 50 L.Ed.2d 784 (1977); United States v. Diaz, 503 F.2d 1025 (3d Cir. 1974).

<sup>10</sup> See *id.* (stating that each case will turn on its own facts, the existence of characteristics repeatedly found in drug smugglers in each particular case is to be considered accordingly when determining if there are grounds to believe further investigation is appropriate.)

<sup>11</sup> Kimberly J. Winbush, Annotation, *Propriety of Stop and Search By Law Enforcement Officers Based Solely on Drug Courier Profile*, 37 ALR 5th 1, 8 (1996)[hereinafter Winbush article].

characteristics generally associated with narcotics traffickers.<sup>12</sup> These traits may mean nothing to the untrained eye, but to law enforcement officers with special training they may lead officers to believe a suspect is involved in drug trafficking.<sup>13</sup> These traits supposedly are ones that "normal travelers" do not exhibit<sup>14</sup> and, which experience has shown, allow officers to identify as relevant.<sup>15</sup>

### A. Components/Characteristics

Common elements of many drug courier profiles include: twenty to thirty-five years of age, travel to or from a drug source or destination city,<sup>16</sup> numerous previous trips to those cities, remaining at the destination city for a short period of time, making reservations just prior to flight departure time, non-stop flights,<sup>17</sup> paying in cash,<sup>18</sup> false call back number given to airline,<sup>19</sup> travels alone, travels early in the morning when law enforcement is more lax, deplanes among first or last passengers, exhibits nervous behavior, walks hurriedly through the terminal, scans others in the airport "as if doing counterintelligence," makes a phone call soon after deplaning, wears flashy, baggy, or expensive clothing, carries little or no luggage, luggage has no identification on it, uses public transportation, and race.<sup>20</sup> These factors are thought to assist law enforcement officials in curbing the actions of drug traffickers.

### B. Inconsistencies

There are many inconsistencies among drug courier profiles. As previously indicated, the suspect being first to deplane,<sup>21</sup> as opposed to the suspect

being the last to deplane is a key element.<sup>22</sup> However, individuals deplaning at a time somewhere in between have also been used in drug courier profiles.<sup>23</sup> Some drug courier profiles include the purchase of one-way tickets,<sup>24</sup> round-trip tickets,<sup>25</sup> nonstop flights,<sup>26</sup> and/or changing planes.<sup>27</sup> Carrying no luggage, new suitcases,<sup>28</sup> carrying a gym bag,<sup>29</sup> traveling alone,<sup>30</sup> and traveling with a companion<sup>31</sup> have also been cited as components of some drug courier profiles. Furthermore, suspects who act too calm<sup>32</sup> or too nervous<sup>33</sup> may fall within the parameters of some drug courier profiles.

Some inconsistencies allow officers to make determinations, such that the outcome will place the suspect under scrutiny, no matter which way the pendulum swings. Inconsistencies are not rare; in fact, they are present in almost every drug courier profile.<sup>35</sup> This "chameleon-like way of adapting to any particular set of observations"<sup>36</sup> enhances the risk of reflexive reliance on a profile of drug courier characteristics.<sup>37</sup>

## IV. THE FOURTH AMENDMENT

Drug courier profile stops have been determined to be "seizures" for purposes of the Fourth Amendment.<sup>38</sup> The Fourth Amendment guarantees

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<sup>22</sup> *Mendenhall*, 446 U.S. 544.

<sup>23</sup> *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2d Cir. 1980).

<sup>24</sup> *United States v. Sullivan*, 625 F.2d 594 (4th Cir. 1980).

<sup>25</sup> *United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977).

<sup>26</sup> *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977).

<sup>27</sup> *United States v. Sokolow*, 808 F.2d 1366, 1370 (9th Cir. 1987), *vacated*, 831 F.2d 1413 (1987).

<sup>28</sup> *Craemer*, 555 F.2d at 595.

<sup>29</sup> *Sullivan*, 625 F.2d 594.

<sup>30</sup> *United States v. Sanford*, 658 F.2d 342, 343 (5th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982).

<sup>31</sup> *United States v. Smith*, 574 F.2d 882, 883 (6th Cir. 1978).

<sup>32</sup> *United States v. Fry*, 622 F.2d 1218, 1219 (5th Cir. 1980).

<sup>33</sup> *United States v. Himmelwright*, 551 F.2d 991, 992 (5th Cir. 1977), *cert. denied*, 434 U.S. 902 (1977).

<sup>34</sup> *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979).

<sup>35</sup> *See supra* notes 22 - 35 and accompanying text.

<sup>36</sup> *Sokolow*, 490 U.S. at 11 (citing 831 F.2d 1413, 1418 (9th Cir. 1987) (Marshall J. dissenting)).

<sup>37</sup> *See id.*

<sup>38</sup> *Reid v. Georgia*, 448 U.S. 438, 440, 100 S. Ct. 2752 (1980). There are three basic categories of encounters with police. The first is the encounter where the individual is free to leave and not answer the officer's questions. This type of encounter is not a seizure for purposes of the Fourth Amendment. *Mendenhall*, 446 U.S. 544. The second encounter is the

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<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *Royer*, 460 U.S. at 525, n.6.

<sup>15</sup> *See id.* at 491, n.2.

<sup>16</sup> Drug source cities or destinations originally included Miami, Ft. Lauderdale, New York City, Los Angeles, and Detroit. Now, basically any large city can be considered a drug source city.

<sup>17</sup> Recently, changing flights has also been used as part of a drug courier profile. *See infra*, note 20.

<sup>18</sup> Usually in bills of small denominations. *See Winbush* article, *supra* note 12.

<sup>19</sup> This may also include a number that is not registered in the persons name, but may be the actual residence where the traveler resides. *See United States v. Sokolow*, 490 U.S. 1 (1989).

<sup>20</sup> *See Winbush* article, *supra* note 12.

<sup>21</sup> *United States v. Moore*, 675 F.2d 802, 803 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983).

protection to each citizen from unreasonable searches and seizures and applies to each state through the Fourteenth Amendment.<sup>39</sup> Fourth Amendment analysis often turns on the warrant clause, which requires a warrant to be issued prior to a search or seizure, provided there is probable cause.<sup>40</sup> The United States Supreme Court has held that a search or seizure is unreasonable if not supported by probable cause.<sup>41</sup> Even though the amendment itself does not give a remedy for those whose rights have been violated,<sup>42</sup> the Supreme Court has attempted to preserve the integrity of the Fourth Amendment by excluding from trial all evidence obtained from an illegal search and seizure.<sup>43</sup> Searches and seizures that do not meet the Fourth Amendment's warrant or probable cause requirements may still be constitutionally permissible in some instances, however.<sup>44</sup> Presently, there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails."<sup>45</sup> When a court

finds that the government's interest outweighs the relative intrusiveness of the search or seizure, generally the search and seizure are considered reasonable, satisfying the Fourth Amendment.<sup>46</sup>

In the landmark decision of *Terry v. Ohio*,<sup>47</sup> the Supreme Court extended the balancing test. In *Terry*, a police officer had been patrolling in downtown Cleveland when he observed two men standing on a corner that "didn't look right."<sup>48</sup> The officer believed the men were "casing a job" and approached them. Suspecting that the men were armed, the officer grabbed Terry, patted him down and recovered a pistol.<sup>49</sup> The Court was faced with a situation in which a police officer had briefly detained and searched an individual without probable cause, also known as a "stop and frisk."<sup>50</sup> The Court applied the balancing test to this "stop and frisk," and decided that the search and seizure were reasonable under the Fourth Amendment.<sup>51</sup>

To determine whether the "stop and frisk" was reasonable, the Court first examined what government interests would be furthered by these actions.<sup>52</sup> The Court ultimately decided a stop and frisk could be reasonable under the Fourth Amendment so long as an officer's ability to stop and search people without probable cause is restricted.<sup>53</sup> In the *Terry* decision, the Court created the "reasonable suspicion standard," which involved a two part test.<sup>54</sup> The first part of the test restricts "stops" where no probable cause exists to situations where "reasonable, articulable suspicion exists that criminal activity is afoot."<sup>55</sup> However, the Court stated that an officer's good faith belief, or "hunch," that the individual was acting suspiciously would not be enough to be

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"stop" where the individual does not feel free to leave, which is a seizure under the Fourth Amendment. *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (revising the standard of what is considered a "stop"). The third encounter is that where the individual is "arrested", or placed in the officer's custody. The arrest is also a seizure under the Fourth Amendment. *Royer*, 460 U.S. 491 (stating that behavior matching the "so-called drug courier profile" is enough to establish reasonable suspicion for a detention).

<sup>39</sup> See *Ker v. California*, 374 U.S. 23, 30 (1963).

<sup>40</sup> U.S. Constitution, Amend. IV; see also *United States v. Harris*, 403 U.S. 573, 577 (1971); *Henry v. United States*, 361 U.S. 98, 100 (1959). Both cases noted that probable cause is necessary to support a search warrant.

<sup>41</sup> *Wong Sun v. United States*, 371 U.S. 471 (1963) (stating that the amendment deems the search or seizure reasonable if all of the requirements are satisfied).

<sup>42</sup> See *infra* note 53.

<sup>43</sup> Hall, *supra* note 2, at 1012 (citing *Mapp v. Ohio*, 367 U.S. 643 (1961) which held that the exclusionary rule is a "deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words'"). See also WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1 (3d ed.), § 1.1, at 3-20 (2d ed. 1987).

<sup>44</sup> Arrests can be made without a warrant where probable cause exists or when exigent circumstances exist, such as the probability of evidence being destroyed or danger to the officer. See *Segura v. United States*, 468 U.S. 796 (1984); *United States v. Watson*, 423 U.S. 411 (1976); *Vale v. Louisiana*, 399 U.S. 30 (1970); *Chimel v. California*, 395 U.S. 752 (1969).

<sup>45</sup> See *Camara v. Municipal Court*, 387 U.S. 523 (1967); see also *See v. City of Seattle*, 387 U.S. 541 (1967). The Court has applied this test often to analyze Fourth Amendment issues. *E.g.* *New Jersey v. T.L.O.*, 469 U.S. 325, 340-341 (1985) (stating when a warrant needed to be obtained); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041-1050 (1984) (stating when the exclusionary rule should apply); *Hudson v. Palmer*, 468 U.S. 517, 525-36 (1984) (defining the scope of the Fourth Amendment); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976) (defining the necessary amount of suspicion for searches and seizures).

<sup>46</sup> Hall, *supra* note 2, at 1012. See also *Camara*, 387 U.S. at 534-35.

<sup>47</sup> *Terry v. Ohio*, 392 U.S. 1 (1968). See also Hall, *supra* note 2, at 1012.

<sup>48</sup> See *infra* note 58; see also Hall, *supra* note 2, at 1012.

<sup>49</sup> *Terry*, 392 U.S. 1.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 21.

<sup>52</sup> See *id.* at 22. (noting that the governmental interests in "effective crime prevention and detection" were furthered by allowing an officer to approach people for the purposes of investigation without probable cause for arrest).

<sup>53</sup> See *id.* at 27.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 20. The Court emphasized that when making this assessment, it is crucial that the facts the officer bases his conclusions on are objective in nature. (stating "would 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?"). Stops have also been restricted by the Court by requiring the stop to be less than a formal arrest. *Dunaway v. New York*, 442 U.S. 200 (1979).

considered reasonable under the Fourth Amendment.<sup>56</sup> The second part of the *Terry* test placed limitations on the "frisk" resulting from the "stop."<sup>57</sup> The Court stated that the frisk should be limited to situations where it was necessary<sup>58</sup> and should be bound by the same factors that traditionally limit all searches.<sup>59</sup> Application of these balancing test restrictions demonstrates that the government's interests in *Terry* outweighed the intrusiveness of the procedure, and therefore the procedure was reasonable under the Fourth Amendment.<sup>60</sup> Similar analysis is used by the Supreme Court for drug courier profile cases.

### V. COURTS' APPROACHES

Courts differ in their approaches to the question of whether drug courier profiles prove the requisite reasonable suspicion that is necessary for a *Terry* stop,<sup>61</sup> as well as determining when a seizure has occurred to trigger the protections of the Fourth Amendment.<sup>62</sup> If a court determines that a seizure occurred at the time when an officer stops an individual, then the suspect's later comments and behavior should be irrelevant in determining whether there was any adequate reasonable suspicion for the investigative detention.<sup>63</sup> However, the suspicion of a suspect is significantly lessened when a suspect's match to a number of drug courier profile factors do not coincide with other more suspicious aspects of the profile.<sup>64</sup>

### VI. OTHER TYPES OF PROFILES

Courts have previously approved the use of other types of profiles. Some examples include: airline

"hijacker" profiles,<sup>65</sup> battering parent profiles,<sup>66</sup> gang member profiles,<sup>67</sup> auto theft profiles,<sup>68</sup> trucker profiles,<sup>69</sup> drug package profiles,<sup>70</sup> marijuana grower profiles,<sup>71</sup> alien smuggler profiles,<sup>72</sup> and alimentary

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<sup>65</sup> *United States v. Bell*, 464 F.2d 667, 675 (8th Cir. 1989).

<sup>66</sup> *Hoosier v. State*, 612 So.2d 1352 (Al. Crim. App. 1992).

<sup>67</sup> *United States v. Ayarza*, 874 F.2d 647 (9th Cir. 1989).

<sup>68</sup> *State v. Ochoa*, 544 P.2d 1097 (Ariz. 1976).

<sup>69</sup> *Dee Wampler & Joseph Passanise, The Increasing Use of Profiles and Prescribed Tactics in Drug Prosecutions*, 51 J. Mo. B. 288 (1995) (stating that cases are being litigated as to the use of this profile being used by state highway patrol agencies and weight inspectors due to the increased use of 18 wheelers to transport large quantities of drugs across the nation. Some elements of this profile include: improper bills of lading, previously unheard of trucking company, trucks not fully or properly licensed, unusual load being hauled on a long trip, supposedly pulling trailer with a sealed load but the lock has been tampered with, nervousness of driver, and unable to verify cargo or purpose of trip with the "home office" of the company.).

<sup>70</sup> *Id.* (stating that the U.S. Postal service and DEA have developed this profile to stop drug trafficking through the mail. Elements of this profile include: size and shape of package, package heavily taped to close and seal all openings, handwritten labels, unusual return names and addresses, unusual odors coming from the package, fictitious return addresses, destination of parcel, multiple packages sent to same address but to different persons, return address does not exist, numerous packages mailed to arrive for delivery on a repeated basis). The courts have determined that a reasonable expectation of privacy in our personal effects must give way to society's interest in law enforcement to win the war on drugs. See *United States v. Terpak*, 666 F. Supp. 1424 (D.C. Haw. 1987).

<sup>71</sup> See *Wampler & Passanise, supra* note 72 (stating that Missouri has been a leading state in the adoption of this profile to support issuance of a search warrant. The profile includes the following: occupants of house subscribe to HIGH TIMES magazine, indoor gardening equipment from companies that advertise in HIGH TIMES, outbuildings have electrical lines connected to the house, utility company records reveal unusually high wattage in past months compared to neighbors, surveillance does not indicate any large machinery that might use an increased amount of electricity, whether suspects failed to complain to utility company about previous excessive bills, suspects have a criminal record, suspects have large dogs, may be receiving shipments of hydroponic growing equipment and purchasing other marijuana growing equipment, receive mail, especially boxes under a fictitious name, known to be unemployed, officers hear humming sounds consistent with use of a ballast used to power halide lights, excessive roof top air conditioners or vents used to ventilate, blanket covered windows, infrared sensing devices measure surface waste heat emanating from the house, suspicious people visiting at all times during the day and night, people visit for only a few minutes duration.) See, e.g., *State v. Miller*, 815 S.W.2d 28 (E.D. Mo. 1991); *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993).

<sup>72</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (involving a random roving border patrol stop). See also *United States v. Cortez*, 449 U.S. 411 (1981) (stating that the border control officer had a "particularized suspicion" based upon the totality of the circumstances that satisfied the Fourth Amendment reasonableness standard).

<sup>56</sup> See *Beck v. Ohio*, 379 U.S. 89 (1964); see also *LAFAYETTE, supra* note 45, at § 9.3(b).

<sup>57</sup> *Id.*

<sup>58</sup> *Terry*, 392 U.S. at 26. The Court specifically stated that the frisk should be limited to situations where the frisk was necessary to protect the officer and others close by. The Court has not allowed the frisk to be used to investigate crime or to prevent the disappearance or destruction of evidence. See also *Preston v. United States*, 376 U.S. 364 (1964).

<sup>59</sup> The traditional factors are purpose, character and extent. See *Terry*, 392 U.S. at 25.

<sup>60</sup> This procedure is now known as a "Terry Stop" and has been ratified by the Supreme Court. See *LAFAYETTE, supra* note 45, at § 9.2.

<sup>61</sup> *Winbush* article, *supra* note 12, at 8.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* For examples of the different approaches, see *Ornelas v. United States*, 116 S. Ct. 1657 (1996); *Royer*, 460 U.S. 491.

canal smuggler profiles.<sup>73</sup> The *Terry* analysis of reasonable suspicion, based on articulable and specific facts, underlies courts' reasoning in all profile cases.<sup>74</sup> These decisions are not necessarily indicative of courts' acceptance of profiles, but do demonstrate a willingness to cumulate the specific facts, which alone are sufficient to meet the reasonable suspicion requirement.

## VII. GOVERNMENTAL INTERESTS VS. FOURTH AMENDMENT PROTECTIONS

The government has two important interests when it comes to stops based on less than probable cause: effectively detecting and preventing crime and ensuring public safety.<sup>75</sup>

### A. Crime Control

The two main objectives of using drug courier profiles for controlling crime are the interception of drugs at their point of entry,<sup>76</sup> and the disruption of the transportation networks of major drug trafficking organizations.<sup>77</sup> The interception of drugs at their point of entry, thus keeping them out of the hands of the users and off the streets, is the primary goal of the government's "war on drugs."<sup>78</sup> By stopping the drugs before they are distributed, the government saves itself time and money by affecting one seizure rather than stopping many individuals for smaller amounts of drugs.<sup>79</sup>

Although drug courier profiles are helpful in the

prevention of drug smuggling, the interest of the government in using drug courier profiles to disrupt the transportation networks of major drug trafficking organizations is ill founded because the profiles have no major effect on disrupting drug networks.<sup>80</sup> The drug courier profiles are generally used to stop the transporters of the drugs who are usually expendable, "low-ranking members" of the drug organizations.<sup>81</sup>

### B. Public Safety

Both the *Terry* line and profile cases state that the heart of the governmental interest lies elsewhere and must include the safety of the public and law enforcement officials.<sup>82</sup> However, effective law enforcement and protection of the public alone is not enough to support searches and seizures where there is no probable cause.<sup>83</sup> Even though drug courier profiles are helpful in preventing many of the dangers that drugs pose to society at large, they do not necessarily prevent any violence at airports or on our highways.<sup>84</sup> The dangers presented to society by drug couriers are not being alleviated through the use of profiles.<sup>85</sup> Unless profiles are determined to be less intrusive than governmental interests, drug courier profiles cannot be upheld by the Fourth Amendment's reasonableness clause.

### C. Intrusiveness

Stops and searches based on less than probable cause have been found to be very intrusive.<sup>86</sup> Because of the "chameleon-like" way that profiles conform to a variety of innocent behavior, profile use provides law enforcement officers the subjective right to stop and detain hurried travelers simply for

<sup>73</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (stating that "under this standard officials at the border must have a particularized and objective basis for suspecting the particular person of alimentary canal smuggling").

<sup>74</sup> Alec Farmer, Note, *Criminal Procedure—"Drug Courier" Characteristics are Sufficient to Establish Reasonable Suspicion of Criminal Conduct*, 12 U. ARK. LITTLE ROCK L.J. 407, 413 (1990).

<sup>75</sup> *Brignoni-Ponce*, 422 U.S. 873 (recognizing the governmental interest in effectively patrolling the U.S./Mexican border); *Terry*, 392 U.S. at 22 (1967) (stating that "stop and frisk" is justified as promoting "effective crime prevention and detection"); *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973) (stating that it suffices to say that there is a judicially-recognized necessity to insure that the potential harms of air piracy are foiled").

<sup>76</sup> See Alexandra Coulter, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers*, 43 VAND. L. REV. 1311, 1313 n.8 (1990).

<sup>77</sup> See Bob Sablatura, *The Border War: Major Traffickers Evade High-Tech Drug War*, HOUS. CHRON., Aug. 17, 1992, at A1. (stating that "the end result of successful drug interception operation is often the discovery of a load of marijuana taken out of the smuggling pipeline before it reaches the street.") See also Hall, *supra* note 2, at 1026-27.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* See also *Terry*, 392 U.S. at 23; *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971) (stating that "where the risks of hijacking to passengers and crew and to the viability of the entire industry are so great we cannot say on balance that the use of the FAA system is imprudent."); *Michigan v. Summers*, 452 U.S. 692, 702 (1981) (noting that a government interest in the safety of officer's executing a search warrant is of high importance).

<sup>83</sup> Hall, *supra* note 2, at 1027.

<sup>84</sup> *Id.* at 1028 (noting that the Supreme Court has relied upon this concern in other cases, upholding government-mandated drug testing schemes that did not require individualized reasonable suspicion, thus allowing for less intrusive means for increasing airport security).

<sup>85</sup> See *id.*

<sup>86</sup> *Id.* at 1029. See also *Skipwith*, 482 F.2d at 1275 (noting that being subjected to the FAA hijacking program is "inconvenient and annoying, in some cases it may be embarrassing, and at times it can be incriminating").

displaying innocent behavior.<sup>87</sup> Although law enforcement officers are well trained and have extensive experience, they do not have the discretion to select neutral human behavior as the justification for the formation of probable cause.<sup>88</sup> Profiles allow officers to infringe upon a citizen's Fourth Amendment rights to be free from an unreasonable search and seizure in situations where officers observe nothing that would remotely indicate an involvement in the transportation of illegal drugs.<sup>89</sup> These are situations in which an officer sees neutral human behavior--behavior which an educated or experienced officer may testify would give rise to a reasonable and permissible inference that criminal activity was afoot.<sup>90</sup>

The common theme in federal and state cases discussing intrusions into personal liberties is that the decisions seek to preserve those liberties unless there is a demonstrated public interest concern that must override the protections guaranteed by the Constitution of the United States, particularly the Bill of Rights. Increasing pressure on the courts and public officials to provide the tools necessary in waging an effective battle on the "war against drugs" is resulting in incoherent jurisprudence of Fourth Amendment principles at a time when both law enforcement and citizens need clearly defined substantive guidelines. The only effective way to do this is to lay out uniform standards of an objective nature--in essence, taking the power out of the police's hands and giving the courts something to review. At present, it is the officer and his own experiences that determine what characteristics are common in drug couriers, and which characteristics warrant a stop when there is less than probable cause. To rectify this, courts need to apply the *Terry* balancing test and delineate an objective test that officers can easily apply in the field, while still maintaining individual rights.

#### D. Prejudice

Race and gender are two of the most "innocent"

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<sup>87</sup> United States v. Hooper, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J. dissenting). See also United States v. Cordell, 723 F.2d 1283, 1287-88 (7th Cir.), cert. denied, 465 U.S. 1209 (1983) (citing a 1983 O'Hare Airport statistic where 70% of all stops that were made pursuant to a drug courier profile did not reveal drug trafficking, subjecting between 4 to 9 innocent people per day to unnecessary police scrutiny).

<sup>88</sup> LAFAVE, *supra* note 45, at §3.6 (f) (2d ed. 1987); see also People v. Reynolds, 445 N.E.2d 766 (Ill. 1983); Donaldson v. State, 46 Md. App. 520, 420 A.2d 281 (1980).

<sup>89</sup> See Whitehead v. State, 116 Md. App. 497, 504-05, 698 A.2d 1115 (1997).

<sup>90</sup> See *id.*

characteristics that are included in some drug courier profiles.<sup>91</sup> The use of these characteristics however, only increases the intrusiveness of the profiles. Although profiles are not committed to writing, most clearly contain a racial component.<sup>92</sup> Whether conscious or unconscious, the decision to stop a suspect based on race will rarely ever be admitted to. The state of the profiles as they exist now allows officers to stop suspects based on the "totality of the circumstances" as well as the officer's own experiences.<sup>93</sup> If, in the officer's experience, drug couriers are of a certain ethnicity or racial background, that would be a sufficient component for the stop, yet this is strictly prohibited by the Equal Protection Clause.

In allowing the use of race in investigatory stops and in failing to discourage or condemn this practice, many courts have accepted such racially based doctrines, also known as the "out of place doctrine" or "random" investigatory stops, as important predictive devices.<sup>94</sup> So much latitude and acceptance of subjective judgments of officers makes it easy for officers to deny the use of race and easily point to other factors that may have contributed to their suspicions.

A prime example of race playing a factor in motorist stops is the case of *Wilkins v. Maryland State Police*.<sup>95</sup> Mr. Wilkins was a graduate of Harvard Law School and was a staff attorney at the Public Defender Service for the District of Columbia.<sup>96</sup> He was a 33 year old black male, married, and drove a 1989 Nissan Sentra.<sup>97</sup> Mr. Wilkins dressed conservatively, wore horn rimmed glasses, and was "very articulate."<sup>98</sup>

Mr. Wilkins quite clearly does not fit the typical drug courier profile. However, on May 8, 1992, while driving a rented Cadillac from Chicago to Washington, D.C. with his aunt, uncle and cousin after his grandfather's funeral, the car was stopped by

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<sup>91</sup> See United States v. Rosales, 60 F.3d 835 (9th Cir. 1994) (unpublished opinion); United States v. Weaver, 966 F.2d 391, 392-93 (8th Cir. 1992).

<sup>92</sup> See Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 234 (1983).

<sup>93</sup> See *id.*

<sup>94</sup> See Erika L. Johnson, *A Menace to Society: The Use of Criminal Profiles and its Effects on Black Males*, 30 HOW. L.J. 629 (1995).

<sup>95</sup> The Wilkins case was settled with approval from the U.S. District Court of Maryland on January 5, 1995.

<sup>96</sup> See Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 438 (1997).

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 438-39.

Maryland State Police Trooper V.W. Hughes on I-68 in Cumberland, Maryland.<sup>99</sup> Mr. Wilkins's cousin was driving when the officer pulled them over at 5:55 a.m. for speeding.<sup>100</sup> Trooper Hughes stated that the car had been traveling 60 m.p.h. in a 40 m.p.h. zone and immediately produced a request for consent to search the vehicle, even before issuing a citation or warning.<sup>101</sup> At the time the car was pulled over, it was raining outside, and Mr. Wilkins's uncle refused to consent to a search of the vehicle.<sup>102</sup> Mr. Wilkins inquired as to why the officer desired to search the car, and Trooper Hughes refused to give a reason, merely repeating his request to search the car, saying something about "problems with rental cars coming up and down the highway with drugs."<sup>103</sup> Mr. Wilkins explained that they were returning from his grandfather's funeral, and offered to show the officer the obituary, which the officer refused.<sup>104</sup> Trooper Hughes informed the family that if they did not consent to a search of the car, they would have to wait while a drug sniffing dog was brought out to inspect the car.<sup>105</sup> Mr. Wilkins, being a criminal defense attorney, informed the officer of the law preventing him from detaining the family without a reasonable, articulable suspicion that they were carrying drugs.<sup>106</sup> The officer, somewhat irritated, informed the family that they would have to wait, and at approximately 6:25 a.m. Sergeant Brown arrived with a narcotics dog and ordered the family out of the car.<sup>107</sup> The family requested to remain in the car during the dog's inspection of the car to avoid having to stand in the rain, the officers refused, and the dog slowly and thoroughly sniffed the car, detecting nothing.<sup>108</sup> A speeding ticket was issued at approximately 6:35 a.m., and the Wilkins family continued their trip home.<sup>109</sup>

As any person would be, Mr. Wilkins and his family were humiliated and upset.<sup>110</sup> Mr. Wilkins decided to pursue a legal course of action, and wrote to the American Civil Liberties Union (ACLU), who

chose to represent Mr. Wilkins after an initial meeting.<sup>111</sup> Attorneys from the firm of Hogan & Hartson agreed to join the ACLU as counsel for Mr. Wilkins, and a lawsuit was filed against the Maryland State Police.<sup>112</sup> Mr. Wilkins and the ACLU alleged that the Wilkins family had been falsely imprisoned, and were intentionally treated differently on account of their race, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1983, and Maryland Common Law.<sup>113</sup> The Plaintiffs also claimed a deprivation of "their right to equal protection of the laws as enjoyed by similarly situated Caucasian citizens of the United States secured to them by the Fourteenth Amendment."<sup>114</sup>

The parties entered into a settlement agreement on January 5, 1995 which involved monetary damages and injunctive relief.<sup>115</sup> The Maryland State Police denied using race in motorist stops, but agreed to explicitly prohibit such discrimination in the future, conduct officer training, and maintain computer records tracking motorist detentions and searches to enable the agency, the court and the Plaintiffs to monitor compliance.<sup>116</sup> The computer records were to document the date, time, and location of the consent; search and/or dog sniff; the grounds for the search and/or dog sniff; the name of the officer; the race of the person(s) stopped, detained or searched; and the year, make, and model of the car.<sup>117</sup> The agreement also included a clause that allowed the Plaintiffs to require the Defendants to provide additional identifying information in the computer records if the Plaintiffs could make a reasonable showing that a pattern and practice of race-based stops existed.<sup>118</sup>

Data covering the first twenty-one months of the monitoring period (January 1995 - September 1996) was filed with the court and supplied to the

<sup>99</sup> See *id.* at 439.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> See *id.* See also *United States v. Sharpe*, 470 U.S. 675, 683, 689 (1985).

<sup>107</sup> See *id.*

<sup>108</sup> See *id.* at 439 - 440.

<sup>109</sup> See *id.* at 440.

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* See also *Wilkins v. Maryland State Police*, Complaint filed in U.S. District Court for the District of Maryland, p. 12.

<sup>115</sup> See *id.* See also Settlement Agreement, United States District Court for the District of Maryland, Civil Action No. MJG-93-468.

<sup>116</sup> See *Davis*, *supra* note 99, at 440. See also Settlement Agreement, at p. 3-5; Memorandum in Support of Plaintiffs' Motion for Enforcement of Settlement Agreement and for Further Relief, Civil Action No. CCB-93-468, p. 1-2.

<sup>117</sup> See *id.* at 440-41. See also Settlement Agreement, *supra* note 116, at 5.

<sup>118</sup> See *id.* at 441.



Plaintiffs.<sup>119</sup> The data showed a disturbing pattern of continuing racial discrepancies, which was a violation of the non-discrimination policy and the settlement agreement.<sup>120</sup> The Plaintiffs appealed to the court which found the Maryland State Police in contempt and imposed an additional civil contempt monetary penalty, payable to the court.<sup>121</sup> In addition, the Plaintiffs requested that: (1) the Maryland State Police provide the Plaintiffs with names, addressees, and telephone numbers for all motorists searched along the I-95 corridor since January 1995; (2) Maryland State Police record-keeping obligations be extended by one year, until December 1998, and be expanded to include motorist stops in addition to motorist searches and detentions; and (3) Maryland State Police produce all investigative and disciplinary records reflecting any actions taken by the agency to enforce the policy of non-discrimination established under the settlement.<sup>122</sup>

The data submitted by the Maryland State Police was collected, organized and analyzed by Mr. Wilkins and the ACLU.<sup>123</sup> This data showed that more than one-third of all Maryland State Police drug interdiction activities involving motorists occurred along I-95, north of Baltimore.<sup>124</sup> The Maryland State Police drug interdiction team, the "Special Traffic Interdiction Force" (STIF), is a specialized team of troopers trained and solely focused on drug interdiction activity along I-95.<sup>125</sup> The data for this area of the Maryland State Police records was glaring,<sup>126</sup> so Plaintiffs focused their monitoring on this I-95 corridor.<sup>127</sup>

The data was measured by two separate methods, one being a benchmark of percentages of African-American and other minority motorists traveling and violating traffic laws along the I-95

corridor, the other being a racial breakdown for Maryland State Police searches conducted on I-95 as compared with those for searches conducted by the Maryland State Police on roadways other than I-95.<sup>128</sup> Both measures resulted in evidence that the racial disparities were extraordinary, showing a racially-based pattern and practice.<sup>129</sup>

Statistical analysis was also performed on the data. The analysis showed that only about one in every six I-95 motorists and three out of every four motorists searched by state police were African-American.<sup>130</sup> The Maryland State Police contended that this was a mere coincidence.<sup>131</sup> However, the statistical analysis shows that the odds that three-quarters of Maryland State Police detainees would be African-American by mere coincidence are about one in a quintillion.<sup>132</sup>

This racial distortion is unnecessary to successful drug interdiction; even Maryland State Police data demonstrated this.<sup>133</sup> Comparisons of the I-95 corridor stops with the stops on other roadways in Maryland revealed that troopers patrolling I-95 search black motorists at a rate that is more than double the rate of the troopers who patrol elsewhere in Maryland.<sup>134</sup> Yet the rates of motorists discovered with contraband by troopers are very similar on and off the I-95 corridor.<sup>135</sup> More significantly, Maryland State Police data showed that police find contraband on black and white motorists at equal rates statewide.<sup>136</sup>

As a result of this dramatic showing of race-based stops prevalent in Maryland, on April 11, 1997, Judge Catherine C. Blake ordered that the police continue to record identifying data of all people who have been stopped for traffic violations along I-95.<sup>137</sup>

## VIII. CONCLUSION

The governmental interests in interdicting drugs do not allow for delaying motorists in situations where no reasonable articulable suspicion of drug trafficking

<sup>119</sup> See Memorandum in Support of Plaintiffs' Motion for Enforcement of Settlement Agreement and For Further Relief, Civil Action No. CCB-93-468, p. 2.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See *id.* at 3.

<sup>124</sup> From January 1995 through September 1996, Maryland State Police troopers reported a total of 2,372 motorist detentions and searches through the state. Of these searches, 823 (34.7%) occurred north of Baltimore, in Harford, Cecil, and Baltimore Counties, along I-95, according to Maryland State Police records.

<sup>125</sup> See Memorandum in Support of Plaintiffs' Motion for Enforcement of Settlement Agreement and for Further Relief, Civil Action No. CCB-93-468, 3 n. 2.

<sup>126</sup> See *id.* at 4-8.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 5.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.* at 8.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 9.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See Catherine M. Brennan, *Court Calls for Closer Look at Police Records*, DAILY REC., Monday, April 14, 1997 p. 1.

exists. A traffic stop cannot become a convenient occasion for an officer to delay the travels of the ordinary motorist so that the officer may dispel a mere hunch that the motorist has committed a past or present crime.<sup>138</sup> Though the public has a compelling interest in detecting drug couriers and even though there are few problems that may cause citizens greater concern, the sweeping approach to law enforcement by officers makes it necessary that courts set constitutional, objective guidelines.

While we may expect and hope that law enforcement officers will exercise their powers with discretion and while we may encourage and applaud them in their extraordinary efforts to combat the increasing drug problems in this country, giving them free reign to do so leaves all of us at risk of being violated. Those law abiding members of society who have done no wrong should not be subject to searches and seizures by officers who, but for no other reason than a hunch based on a drug courier profile, suspected criminal activity.

Allowing profiles that include a racial component runs afoul of the law. Race-based drug courier profiles rely on a fallacy, particularly that drug

trafficking can be predicted by the race of a person, resulting in the stereotype that African-American people or people of other minority races are drug dealers. This is clearly a violation of the United States Constitution's Equal Protection Clause. Regardless of claims by law enforcement and other governmental agencies, that profiles do not rely on race, but rather "reasonable suspicion," the data is clear--the stops are not coincidental.

The use of drug courier profiles is not without benefit. However, without an objective way to guide police officers, the court is sure to lose its ability to rule on the stops and seizures of citizens where drug courier profiles are used. In order to be effective, drug courier profiles must be combined into one rationally based national profile. Rather than basing its decisions on the reasonableness standard, courts need to weigh the governmental interest in protecting the public in its "war on drugs" against the intrusiveness of these profiles for Fourth Amendment purposes. Once this has been effectively accomplished, drug courier profiles will become less subjective, and more likely to have a positive impact on the drug problem in the United States.

<sup>138</sup> See *United States v. Walker*, 941 F.2d 1086, 1088-90 (10th Cir. 1991), *reh'g denied, cert. denied*, 502 U.S. 1093, 112 S. Ct. 1168, 117 L. Ed. 414 (1992).

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