The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?

Joseph P. D’Ambrosio∗
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Abstract

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KEYWORDS: drug, stops, airport
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I. Introduction

In October of 1982, President Reagan declared “war on drugs.” The resulting escalation in law enforcement efforts to combat the flow of illegal drugs created an increased interest in drug detection techniques at federal, state and local levels.

One such technique currently in wide use is the “drug courier profile,” a compilation of characteristics thought common of persons transporting drugs. Despite being labeled a “particularly invidious practice” and compared to the forecasts of Orwell and Huxley by some courts, the profile is gaining increased use in a variety of law enforcement efforts.

2. See S. Wisotsky, BREAKING THE IMPELSE IN THE WAR ON DRUGS 91 (1986).
3. Id.
4. The drug courier profile is sometimes referred to informally as the “Markonni drug courier profile” after DEA agent Paul J. Markonni who is often credited with creating the profile. See, e.g., United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977), and Comment, Mendenhall and Reid: The Drug Courier Profile and Investigative Stops, 42 U. Pitt. L. Rev. 835, 837 n.15 (1981)(“Agent Markonni apparently played a significant part in developing the profile, it now, at least informally, bears his name.”).
7. See Note, Drug Courier Profile Stops and the Fourth Amendment: Is the
enforcement areas. A substantial amount of litigation continues to question the constitutionality of the profile. Further obscuring the legal ramifications of the profile are two United States Supreme Court decisions decided within weeks of each other — one upholding use of the profile; the other rejecting it.11

There are two constitutional issues implicated in a drug courier profile stop. First, at what point in time does a person stopped become “seized” within the meaning of the fourth amendment? Second, after a seizure occurs, do the profile characteristics provide a reasonable suspicion of criminal activity consistent with Terry v. Ohio,12 the United States Supreme Court’s landmark decision concerning the constitutionality of police seizures?

This note will detail the specific profile characteristics used in detaining suspected drug traffickers and discuss the inherent strengths and weaknesses of each characteristic as a basis for reasonable suspicion. Its primary focus will be on the use of the profile in airport stops. The related issue of when a seizure occurs is also discussed. The author examines the current status of the law in light of the Supreme Court’s decisions on the drug courier profile and discusses whether it conforms to the Terry doctrine. Finally, the author points out problems involved in the application of the profile and proposes solutions.18

Supreme Court’s Case of Confusion In Its Terminal Stage?, 15 Suffolk U.L. Rev. 217, 220-21 n.20 (1981) (citing the brief for the United States at 2, United States v. Mendenhall, 446 U.S. 544 (1980)(drug courier profile used at over twenty five airports)).

8. See, e.g., Id. at 220 n.19 (citing use of drug vessel profile by the United States Coast Guard and stolen motor vehicle profile by Arizona police). See also Comment, supra note 4, at 836 n.5 (“Profiles have been used to detect those transporting marijuana on trains” and a “smuggler’s profile” is used by customs officials); The Drug Enforcement Administration, 1986 Annual Report (1986 & photo, reprint 1987)(Operation Pipeline employs use of drug courier profile by state police to intercept cocaine shipments over the interstate highway system).


13. Beyond the scope of this note are the related issues of when custodial detention requiring probable cause occurs; when custodial detention begins for purposes of Miranda warnings; and the fourth amendment’s limitations on searches and seizures of luggage based on the drug courier profile.


16. Mendenhall, 446 U.S. at 562; Note, supra note 7, at 220 n.19.

17. See supra note 8.

18. Comment, supra note 4, at 836.


20. See, e.g., United States v. Hanson, 801 F.2d 757, 759 (5th Cir. 1986).


23. A “source city” is a location believed to be frequented by drug traffickers to obtain drugs for importation to another city. Originally there were only four designated source cities; Los Angeles, San Diego, Miami and New York. Mendenhall, 446 U.S. at 562. The reported cases however, indicate considerable expansion in the list. See, Reid v. Georgia, 448 U.S. 438, 441 (1980)(Ft. Lauderdale); United States v. Claridy, 819
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Another common practice is to supply airline personnel with certain characteristics who then contact an agent in the airport upon sighting a person who possesses those characteristics. See, e.g., United States v. Sokolow, 808 F.2d 1366, 1367 (8th Cir. 1987); United States v. Moris, 665 F.2d 765, 766 (5th Cir. 1982). For the ramifications of airline personnel observations becoming part of a law enforcement official’s basis for reasonable suspicion to detain a suspect, see infra text accompanying notes 154 to 161. Cf. United States v. Williams, 726 F.2d 661, 662 (10th Cir. 1984)(airline ticket agent contacts airport police based on passenger matching an American Airlines security profile).

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tored closest. When an agent observes a passenger displaying one or more of the profile characteristics, he follows the suspect through the airport concourse watching for other displays fitting the profile. This observation continues until the passenger is about to leave the airport or board a plane. At this point, if the agent decides to make a stop, he will approach the passenger and identify himself as a law enforcement officer. The passenger is asked to produce identification, usually a driver’s license and airline tickets, which the agent inspects for other profile characteristics, such as use of an alias. Further questioning concerning the passenger’s itinerary follows which may also reveal more profile “matches.” The passenger may then be told that he is suspected of carrying illicit drugs and asked to consent to a search of his luggage or of himself. He is sometimes relocated to an office within the airport for this search. If drugs are found, the passenger is then arrested.

The DEA does not keep statistical data on the success rate of the drug courier profile program. However, limited statistical data does exist from which the prevalence and effectiveness of the profile can be estimated. In United States v. Van Lewis, testimony was given by Detroit DEA agents that in a twelve month span they had initiated ninety-six profile based stops, seventy-seven of which yielded illegal drugs. In Chicago, agents making six to twelve stops per day had the following results: 30% of the stops involved searches in which drugs were found; 30% involved searches resulting in no drugs being found or in which contraband other than drugs was found; 30% percent of the stops ended without a search but after questioning; and 10% of the people approached refused to stop. Also, a DEA agent has estimated that an experienced agent will find drugs in 60 to 70% of profile stops. These unofficial figures demonstrate that a substantial number of non-traffickers are stopped and searched or at least questioned because they match drug courier characteristics listed on profiles.

The United States Supreme Court currently divides all police-citizen contact into three categories: mere communication between police and citizens involving no coercion or detention and therefore impinging upon no fourth amendment protections; brief investigatory “seizures” that must be supported by reasonable suspicion; and full-scale arrests requiring probable cause. To facilitate an understanding of where profile encounters fit into these categories, consideration must be given to the development of the applicable fourth amendment standards.
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29. Note, supra note 9, at 1488 n.11.
30. DEA agent Markonni, who is often credited with developing the drug courier profile, supra note 4, asserts that 80% of the people stopped are searched. United States v. Berry, 670 F.2d 583, 608 n.3 (5th Cir. Unit B 1982).
31. In accordance with this is United States v. Price, 599 F.2d 494 (2d Cir. 1979) in which a DEA agent estimates that of all the profile stops he initiated, 60% were carrying drugs. Cf., United States v. McCranie, 703 F.2d 1213, 1219 (10th Cir. 1983)(McKay, J., dissenting)("The periodic intrusions on the rest of us — when, from time to time, our conduct fits the [drug courier profile] tend to be lost or ignored . . . intrusions on innocent people are widespread."). See also supra note 28.
32. Florida v. Royer, 460 U.S. 491, 497-98 (1983); Berry, 670 F.2d at 601.
III. The Supreme Court Cases

A. The Seizure Issue

The fourth amendment prohibits unreasonable searches and seizures. At the foundation of the fourth amendment's application to police-citizen encounters, what has become known as the law of stop and frisk, is the Supreme Court's decision in Terry v. Ohio. There, a police officer observed the defendants hovering about a street corner for an extended period, pacing back and forth in turn, staring into a jewelry store window twenty four times. Suspicious of this conduct, the officer approached the two a short distance from the store, identified himself as a police officer and asked for their names. When only a mumbled response was given, the officer spun one of the defendants around and conducted a pat-down of his outer clothing which revealed a pistol. Examining the constitutional limits of such stop and frisk encounters, the Court excepted the officer's conduct from the traditional requirement of probable cause. Instead, the Court held that where objective facts available to the officer at the time of the encounter would warrant a man of reasonable caution in the belief that criminal activity is afoot, that this "reasonable suspicion" satisfied the fourth amendment reasonableness requirement. To justify his reasonable suspicion, however, the officer must be able to point to "specific and articulable facts, which taken together with rational inferences from these facts" warrant the intrusion on the individual. Central to this rationale is the concern for police safety due to the nature of most street encounters. The Terry doctrine is a "sliding-scale" approach to the fourth amendment in that it allows police flexibility of response providing that "increasing degrees of intrusiveness require increasing degrees of justification and increasingly stringent procedures for the establishment of that justification."

Although the holding in Terry laid the cornerstone for the reasonable suspicion doctrine, it expressly avoided the question of what grounds are necessary to initiate a seizure in the first place. In the context of a drug courier profile stop the question becomes: is the initial approach of a passenger who matches some of the profile characteristics a "seizure" requiring reasonable suspicion? The distinction of when a seizure occurs is crucial to profile use because it signals the point at which reasonable suspicion must exist. It is from that point in time that any and all profile characteristics displayed are scrutinized in light of the fourth amendment.

In Brown v. Texas, the Supreme Court held that when officers detained a person for the purpose of requiring him to identify himself, they performed a seizure of that person subject to the requirements of the fourth amendment. The relevant facts in Brown were that officers had seen the defendant walking away from another man in an alley located in a high crime area. Because the situation looked suspicious, they stopped the defendant and requested identification. The defendant angrily refused and was arrested. The Court held that the facts relied on to make the stop did not meet the specific and articulable suspicion standard. Thus, the stop of the defendant failed to meet the fourth amendment's reasonableness requirement.

A year later, the issue of when a police-citizen encounter becomes a seizure faced the Court again, this time in the context of a drug courier profile stop. In United States v. Mendenhall, DEA agents observed the defendant display four profile characteristics upon deplaning

33. The fourth amendment provides that "the right of all people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV.
35. 392 U.S. 1 (1968).
36. Id. at 6.
37. Id. at 6-7.
38. Id. at 21-25.
39. Id. at 21-22.
40. Id. The Court inferred that the rational inferences from the specific and articulable facts, taken from the officer's experience.
42. 3 W. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3, at 423.
43. Justice Harlan in his concurring opinion does touch upon the initial encounter issue. Terry, 392 U.S. at 30, 33.
44. 443 U.S. 47 (1979).
45. Id. at 50.
46. The high crime area can be analogized with the "source city" characteristic used in the drug courier profile. See supra note 22.
47. Brown, 443 U.S. at 49. Brown was arrested for violating Tex. Penal Code Ann. tit. 8, § 38.02(a) (1974), refusing to give a name and address to an officer who had made a lawful stop.
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The Court was divided on whether the initial approach of Mendenhall constituted a seizure. Justices Stewart and Rehnquist determined that no seizure had occurred and therefore no fourth amendment protection had been triggered. A seizure within the fourth amendment, they stated, occurs only when, in view of all the surrounding circumstances, a reasonable person would have believed she was not free to leave. Under the circumstances, nothing objectively suggested to Mendenhall that she was not free to reject the agents' questions and proceed on her way. The decision in Brown was distinguished by retrospectively applying this standard to Brown's circumstances. Therefore, Brown had not been seized during the officers' repeated questioning, only after he was frisked and arrested.

Justices Powell, Burger and Blackmun declined to rule on the

50. Id. at 547 n.1. The characteristics displayed were arriving from a "source city"; deplaning last; proceeding past the baggage area without claiming any luggage and changing airlines for her flight out of Detroit. For an in-depth survey of profile characteristics, see infra text accompanying notes 116 to 150.
51. Id. at 548.
52. Id. at 548-49. The voluntariness of Mendenhall's consent to be relocated and consent to be searched were further issues addressed by the Court which are beyond the scope of this note.
53. Id. at 554. The Justices squared this with the Terry rationale by noting that in Terry it was stated that not all personal intercourse between policemen and citizens involve seizures implicating the fourth amendment and that only when an officer, by means of physical force or show of authority, has restrained the liberty of a citizen has a seizure occurred. Terry v. Ohio, 392 U.S. 1, 19 n.16.
54. The Court noted that, "The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket." Mendenhall, 446 U.S. at 555.
55. Id. at 556.

seizure issue. Instead, they assumed a seizure had occurred and found that it was supported by reasonable suspicion. Their opinion, however, suggested that they would approve of a reasonable person seizure standard had the question been properly raised.

Justice White authored a dissenting opinion joined in by Justices Brennan, Marshall and Stevens. The dissent also felt the seizure issue was improperly raised but if a seizure was to be assumed, it clearly was not supported by reasonable suspicion on the facts presented. The fractured conclusions in Mendenhall on the seizure issue provided little guidance for lower courts facing challenges to profile stops. Eventually most have acceded to Justice Powell's concurring suggestion and adopted the Mendenhall test.

Two subsequent cases, Florida v. Royer & Florida v. Rodriguez, again brought profile stops before the Court but the facts in both poorly presented the seizure issue. The defendant in Royer, after matching five profile traits, was approached and almost immediately transferred to a DEA office forty feet away where his luggage had been retrieved without his consent. Due to this, the Court's plurality opinion focused more on Royer's consent to be relocated and whether an arrest supported by probable cause had been effected rather than on when any seizure had occurred. Justice White's opinion for the plurality did assert the principle first enunciated in Terry that the scope of a search must be strictly tied to the circumstances justifying its initiation, and that this was equally applicable to investigatory seizures based on less than probable cause. “An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should

56. Id. at 560 (Powell, J., concurring in the judgment). The Justices considered the issue as improperly before the Court as neither of the lower courts considered this question.
57. Id. at 560 n.1.
58. Mendenhall, 446 U.S. at 569, 571-72.
59. One month later the Court decided reasonable suspicion did not exist to "seize" another passenger also displaying four profile traits. Reid v. Georgia, 448 U.S. 438 (1980)(per curiam). The only trait Reid shared with Mendenhall was arrival from a source city.
60. See United States v. Black, 675 F.2d 129, 134-35 (7th Cir. 1982); United States v. Tolbert, 692 F.2d 1041, 1046 (6th Cir. 1982).
63. Royer, 460 U.S. at 493-94.
64. Id. at 500.
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be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. 66 Although signaling a direction more consistent with Terry, this principle for practical purposes is a dead-letter since in most airport stop situations, when the Mendenhall test is applied to the stop, no seizure occurs. This results in a longer period of detention and an increasingly intrusive investigation.

In Rodriguez, the seizure issue was avoided due to the strength of the facts giving rise to reasonable suspicion.66 The conduct of the defendant was so suspicious that the Court held, without deciding, that even if a seizure had occurred it was justified by "articulable" suspicion.66 The importance of determining the point of seizure in connection with profile stops is that at that point, police must have "specific and articulable facts" on which to intrude on an individual or not make the intrusion at all until such suspicious conduct is displayed. The practical effect of the Mendenhall test is to suspend that point in time while the intrusion is performed. It allows an officer using the profile to approach an individual who hasn't initially displayed any profile traits and prolong questioning until he incriminates himself. Thus the initial determination of who to stop can be made wholly arbitrarily — the subjective "hunch" rejected in Terry.

The decision in United States v. Poitier67 illustrates this point. The defendant in Poitier was suspected by DEA agent Paul Markonni of trying to conceal the fact that she was traveling with someone else, a profile trait. Further investigation revealed two more profile matches. Markonni telephoned this information to agents at Poitier's destination who approached her from both sides and displayed DEA badges.68 She agreed to answer a few questions and the agent indicated that they should move to another gate for this purpose.69 The agent then requested her identification and asked Poitier a series of questions. In response, she gave answers inconsistent with those of her suspected companion whom agents were also questioning.70 The agent told Poitier

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72. Id.
73. It is interesting to note that during a debriefing session prior to the flight's arrival the DEA agents were instructed to let Poitier go on her way if she did not want to answer questions, indicating that they suspected reasonable suspicion was not present. Id. at 680.
74. Id.
75. Id. at 683. In reversing, the court cited the dicta in Mendenhall that a seizure occurs only when a person's freedom of movement is restrained by physical force or a show of authority. Id. This misconstrues physical restraint as the dispositive factor under the Mendenhall test.
76. Id.
77. An interesting question is whether this scheme comports with the Supreme Court's decision in Rhode Island v. Innis, 446 U.S. 291 (1980), which provides that interrogation for Miranda purposes begins when a practice used by police is reasonably likely to evoke an incriminating response.
78. See, e.g., United States v. Pelen, 793 F.2d 853 (7th Cir. 1986)(seizure occurs only after agents inform suspect that he is suspected of carrying drugs); United States v. Hanson, 801 F.2d 757 (5th Cir. 1986)(seizure occurs only after police took defendant aside and informed him that he was suspected of carrying drugs).
be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Although signaling a direction more consistent with Terry, this principle for practical purposes is a dead-letter since in most airport stop situations, when the Mendenhall test is applied to the stop, no seizure occurs. This results in a longer period of detention and an increasingly intrusive investigation.

In Rodriguez, the seizure issue was avoided due to the strength of the facts giving rise to reasonable suspicion. The conduct of the defendant was so suspicious that the Court held, without deciding, that even if a seizure had occurred it was justified by "articulable" suspicion.

The importance of determining the point of seizure in connection with profile stops is that at that point, police must have "specific and articulable facts" on which to intrude on an individual or not make the intrusion at all until such suspicious conduct is displayed. The practical effect of the Mendenhall test is to suspend that point in time while the intrusion is performed. It allows an officer using the profile to approach an individual who hasn't initially displayed any profile traits and prolong questioning until he incriminates himself. Thus the initial determination of who to stop can be made wholly arbitrarily — the subjective "hunch" rejected in Terry.

The decision in United States v. Poitier illustrates this point. The defendant in Poitier was suspected by DEA agent Paul Markonni of trying to conceal the fact that she was traveling with someone else, a profile trait. Further investigation revealed two more profile matches. Markonni telephoned this information to agents at Poitier's destination who approached her from both sides and displayed DEA badges. She agreed to answer a few questions and the agent indicated that they should move to another gate for this purpose. The agent then requested her identification and asked Poitier a series of questions. In response, she gave answers inconsistent with those of her suspected companion whom agents were also questioning. The agent told Poitier he suspected she was carrying drugs. He then read her Miranda warnings and asked her if she was carrying drugs, to which Poitier responded that she was carrying cocaine.

The district court, in granting a motion to suppress the cocaine, held that a reasonable person would not have felt free to leave when the agent relocated Poitier to another gate. At that point in time, the agents had an insufficient basis for reasonable suspicion. The Eighth Circuit Court of Appeals reversed. The court redefined the seizure as occurring only after agents stated they suspected Poitier of carrying drugs and gave her the Miranda warning. By pushing back the seizure until that point, Poitier's inconsistent responses could be weighed along with her profile traits as components of reasonable suspicion. The court then held that these factors together constituted reasonable suspicion. Thus, implicit in the court's decision is that law enforcement officers may continue questioning of a profile suspect until the suspect gives an answer the officer considers suspicious or happens to display another trait listed on the profile, as long as he withholds Miranda warnings.

The Poitier court's application of the Mendenhall test allows police to initiate a stop and then "fish" for profile traits. Similar outcomes have been reached in other circuits. The result is inconsistent with the Terry sliding-scale balance of interests as the increasing police intrusion.

72. Id.
73. It is interesting to note that during a debriefing session prior to the flight's arrival the DEA agents were instructed to let Poitier go on her way if she did not want to answer questions, indicating that they suspected reasonable suspicion was not present. Id. at 680.
74. Id.
75. Id. at 683. In reversing, the court cited the dicta in Mendenhall that a seizure occurs only when a person's freedom of movement is restrained by physical force or a show of authority. Id. This misconstrues physical restraint as the dispositive factor under the Mendenhall test.
76. Id.
77. An interesting question is whether this scheme comports with the Supreme Court's decision in Rhode Island v. Innis, 446 U.S. 291 (1980), which provides that interrogation for Miranda purposes begins when a practice used by police is reasonably likely to evoke an incriminating response.
78. See, e.g., United States v. Palen, 793 F.2d 853 (7th Cir. 1986)(seizure occurs only after agents inform suspect that he is suspected of carrying drugs); United States v. Hanson, 801 F.2d 757 (5th Cir. 1986)(seizure occurs only after police took defendant aside and informed him that he was suspected of carrying drugs).
sions are not countered by an increasing degree of justification.**

The Mendenhall test is further flawed in that it asks the courts to perform an artificial calculation.** A judge is not asked what a reasonable man might do under the circumstances but what a reasonable man might think.** It forces a highly psychological inquiry easily swayed by countless details.** This produces inconsistent results as courts differ on what combination of details comprise the mental impression that any given individual was not free to leave. For example, the court in United States v. Berry** felt that retaining a person’s plane ticket for more than a minimal amount of time constitutes a seizure.** Conversely, the court in United States v. Notoriani** did not even consider this a factor in finding no seizure occurred when there, the defendant’s ticket was never returned to him.

Taking their cue from the plurality’s finding of no seizure under the facts presented in Mendenhall, the lower courts, although recognizing the artificiality of the test, defer to that application** thereby transforming the Mendenhall reasonable person standard into a “legal construct.”** Thus, an individual approached by DEA agents who request his driver’s license and plane ticket, retain these while informing him that they are conducting a narcotics investigation and that he is suspected of carrying drugs, and then seek consent to search his luggage,

87. For a discussion of the Terry doctrine, see supra text accompanying notes 35 to 43.
80. Note, supra note 9, at 1498.
81. Id.
82. Cf. Kadish, Brozman & Kadish, Drug Courier Characteristics: A Defense Profile, 15 Trial 47, 50 (Nov. 5, 1979) (expert testimony by psychologist is used to prove defendant did not feel free to leave). But see, United States v. Notoriani, 729 F.2d 520, 522 (7th Cir. 1984) (“It might appear that a test based on the perceived freedom of movement of the accosted individual would invite all sorts of tricky psychological inquiries. But this . . . legal indeterminacy has been closed off by [recognizing that the Mendenhall test is an objective one].”).
83. 670 F.2d 583 (5th Cir. Unit B 1982).
84. Id. at 597.
85. 729 F.2d 520 (7th Cir. 1984).
86. Id. at 522 (“We know from . . . other airport-surveillance cases that merely accosting a person in an airport, identifying yourself as a federal agent, and asking the person whether he is willing to answer questions do [sic] not create a setting in which the average person does not feel free to thumb his nose at the agent. (Maybe this is a wrong guess about what the average person feels in this situation but it is the law of this circuit.
87. United States v. Cordell, 723 F.2d 1283, 1286 (7th Cir. 1983) (Swygert, C.J., concurring).

should have felt free to ignore the agents and walk away.**

The courts should recognize the artificiality of the Mendenhall test and that it invites arbitrary police conduct when used in conjunction with the drug courier profile. It should be rejected in favor of a finding of a seizure when a suspect under profile surveillance is initially approached. This would constrain police to utilize only the sounder profile characteristics as components of reasonable suspicion. This would not unduly hamper police efforts and better comports with the balance of interests Terry sought to strike as the possibility of danger to police or public is absent in the airport stop situation.**

B. The Drug Courier Profile as Reasonable Suspicion

Once the seizure has or hasn’t taken place the issue at the core of the Terry doctrine emerges — what drug courier profile characteristics or combination of them equal reasonable suspicion? Three Supreme Court cases have addressed this issue.**

The decision in Mendenhall was the first time the drug courier profile characteristics were before the Court as elements of reasonable suspicion.** The court of appeals had reversed an order suppressing the cocaine found on the defendant finding that the profile traits relied on for the stop did not constitute reasonable suspicion.** The plurality opinion authored by Justice Stewart ignored consideration of the profile traits finding instead that no seizure had taken place.** The only attempt at harmonizing the opinion with Terry was in relation to the seizure issue which is misplaced because as stated earlier Terry did not decide the seizure issue.**

Justice Powell’s concurrence in the judgment found reasonable suspicion existed in Mendenhall’s display of four profile characteristics:

88. Id. at 1285.
89. For an alternative solution cf., A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(5) (1975), which proposes that an officer warn a suspect before engaging in any sustained questioning that such person is not obliged to say anything; that within twenty minutes he will be released unless he is arrested; and that he will not be questioned unless he wishes (emphasis added).
91. For the facts of Mendenhall, see supra text accompanying notes 49 to 52.
94. See supra text accompanying note 42.
sions are not countered by an increasing degree of justification.79

The Mendenhall test is further flawed in that it asks the courts to
perform an artificial calculation.80 A judge is not asked what a rea-
sonable man might do under the circumstances but what a reasonable
man might think.81 It forces a highly psychological inquiry easily sway
by countless details.82 This produces inconsistent results as courts differ
on what combination of details comprise the mental impression that any
given individual was not free to leave. For example, the court in United
States v. Berry83 felt that retaining a person’s plane ticket for more
than a minimal amount of time constitutes a seizure.84 Conversely, the
court in United States v. Notorianni85 did not even consider this a fac-
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arrival from a source city, deplaning last, passing the baggage area without claiming any luggage, and changing airlines for her connecting flight. Implicitly recognizing the dubious quality of the characteristics, the opinion justifies them in Terry terms by emphasizing the significant government interest in combatting drug trafficking and the "considerable expertise that law enforcement officials have gained from their special training and experience."  

This reasoning fails for three reasons. First, there is nothing to ensure that every "law enforcement official" has gained expertise in using the profile. In many instances the person applying the profile is not even a law enforcement officer. Second, it ignores the Terry doctrine's demand for objective specificity of fact, instead deferring to agency expertise. Justice White's dissent points this out noting that Mendenhall's conduct is typical of numerous airplane passengers. Third, the significant government interest of police safety justifying the Terry exception is absent in the airport stop situation. Although drug trafficking is currently a national concern, it does not rise to the level of the interest involved in Terry which concerned the very definition of acceptable police conduct.

One month later the drug courier profile was before the Court again, but in Reid v. Georgia  the Court found the displayed profile traits insufficient for reasonable suspicion. The profile traits displayed were: Reid arrived from a source city; he arrived in the early morning when law enforcement activity is low; he seemed to be trying to conceal that he was traveling with someone else; and he was carrying only a shoulderbag. A per curiam decision held that this behavior was an insufficient basis for reasonable suspicion as a matter of law.  The Court reasoned that except for the fact of trying to conceal a traveling companion, a large number of innocent travelers would be subject to random investigatory stops if these traits were found sufficient to justify a stop. Implicit in the decision was that matching some of the drug courier profile traits does not in and of itself justify a seizure. Something more is required.

The disparity of results reached in Mendenhall and Reid based on similar conduct created confusion in the lower courts, many of which chose to follow their own precedent. Although the decision in Reid did seem to compel closer scrutiny of the profile traits, when offset by Mendenhall the practical effect of the two decisions on profile use was to undermine only the traits displayed in Reid. This confused state was partially clarified in the later case of Florida v. Royer but not until after the Supreme Court handed down its decision in United States v. Cortez which delineated a more precise formulation for reasonable suspicion.

The Cortez Court established a totality of circumstances approach for determining whether reasonable suspicion exists. The approach entails a two-step process. First, consideration must be given to objective observations gleaned from various law enforcement data seen in the light of trained police experience. Falling under this heading is the drug courier profile. Second, consideration of the objective data in the first step must raise a suspicion of criminal activity "particularized" to that individual being stopped — that he is engaging in criminal activity. This is the "something more" to which the Reid court alluded.

When the drug courier profile was again before the Supreme Court, this second component of the Cortez test was ignored. In Florida v. Royer, the profile traits displayed by the defendant were: he was between 25 and 35; he was casually dressed; he was carrying heavy American Tourister luggage; he appeared nervous; and he wrote only his name on his luggage tags. Justice White's plurality opinion

95. Mendenhall, 446 U.S. at 566.
96. See, e.g., United States v. Williams, 726 F.2d 661 (10th Cir. 1984) (Airline ticket agent); Royer v. State, 389 So. 2d 1007 (Fla. 3d Dist. Ct. App. 1980) (Dade County Public Safety Department).
97. "Th[e] demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Terry v. Ohio, 392 U.S. 1, 21 n.18 (1968).
99. Id.
100. Id.
101. Id.
102. Note, supra note 7, at 229.
103. See, e.g., United States v. McCranie, 703 F.2d 1213, 1216 (10th Cir. 1983); United States v. Nemhard, 676 F.2d 193, 201 (6th Cir. 1982); United States v. Berry, 670 F.2d 583, 593 (5th Cir. 1982).
106. Id.
107. Id. at 418.
108. Id.
110. Id. at 493 n.2.
arrival from a source city, deplaning last, passing the baggage area without claiming any luggage, and changing airlines for her connecting flight. Implicitly recognizing the dubious quality of the characteristics, the opinion justifies them in Terry terms by emphasizing the significant government interest in combatting drug trafficking and the "considerable expertise that law enforcement officials have gained from their special training and experience." 98

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joined by three other justices approved these as a basis for reasonable suspicion in an after-the-fact fashion with minimal discussion. Justice Powell’s concurrence also disregarded the *Cortez* test, instead focusing on the importance of the public interest the profile serves and the “highly skilled agents” employing it. Justice Blackmun, although dissenting on the consent issue, stated that the DEA agents had reasonable suspicion when they began their encounter. Thus, although the Court divided on other issues presented in the case, there was now a majority which approved of the use of drug courier profile traits to support the reasonable suspicion needed for an investigatory detention. The effect of this on lower courts was to legitimize the profile’s use.

Because the fourth amendment demands that police action be based on specific information, and because any profile is only as sound as the characteristics which comprise it, it is necessary to take a detailed look at the drug courier profile traits found in the reported cases.

IV. The Drug Courier Profile Characteristics

Essential to a complete understanding of the drug courier profile characteristics is the fact that there is no “national profile.” Profiles change from city to city, airport to airport and also depending upon the particular use to which the law enforcement agency puts them. The variation in characteristics coupled with the fact that some characteris-

111. *Id.* at 502.
112. *Id.* at 508.
113. *Id.* at 518. Justice Rehnquist, joined by Justice O’Connor and Chief Justice Burger, reiterated his position in *Mendenhall* that the initial stop and questioning of Royer did not constitute a seizure. *Id.* at 523-25.
115. See supra text accompanying note 97.
116. Note, supra note 7, at 221.
117. See United States v. Rico, 594 F.2d 320, 326 (2d Cir. 1979) (court noted use of two profiles with differing characteristics in the same circuit); Comment, supra note 4, at 837 (“The actual characteristics which make up the profile have varied over the years and have also depended on the city in which the DEA agents are stationed.”). Note, supra note 41, at 130 n.96. (DEA agent states that elements of the profile vary with the situation at hand). *Cf.* THE DRUG ENFORCEMENT ADMINISTRATION, 1986 ANNUAL REPORT (1986 & photo. reprint 1987) (DEA changes and updates its intru-
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breakdown of profile characteristics listed in the reported decisions into

28. MASKING TAPE
29. HEMP ROPE
30. SCALES
31. BOTTLES OF CHEMICALS, TEST TUBES, BREAKERS, MIXERS, OVENS
32. NERVOUS
33. NO DRIVER'S LICENSE WITH COLOMBIANS
34. COLOMBIANS — NO PROOF OF CITIZENSHIP
35. INCORRECT LICENSE TAGS
36. MARIJUANA RESIDUE ON BACK BUMPER OR UNDERSIDE OF VEHICLE
37. PASSPORTS SHOWING TRAVEL TO SOUTH AMERICA OR TO THE ISLANDS
38. ROAD MAPS MARKED TO NORTHERN CITIES
39. LARGE SUMS OF CASH
40. FIREARMS

DEVIAN'T CHARACTERISTICS OF NARCOTICS COURIERS

I. Deviant characteristics which are indicative of narcotic couriers operating on the interstate system, Turnpike and major highways throughout the State of Florida.

A. Upon making a traffic stop where an arrest, a written warning, a correction card, or a disabled vehicle warning card, the following characteristics may be observed by an alert Trooper:
1. Unusual nervousness (hand shaking, voice, nervous actions)
2. Very limited luggage (shaving kit, 1 shirt or pair of pants in the rear seat or the lack of a shaving kit)
3. Use of an alias (gives a different name than what is on the driver license or the rental vehicle papers. Rental papers will not have a driver license or driver's name on it)
4. Possession of unusually large amount of money
   (a) Money usually in brown paper bags, bank bags, usually has rubber bands wrapped around 1000 or 5000 dollar stacks.
   (b) Large sums of money in front pockets, notice for bulky in pockets, also money belts or money located in chest within the interior or the car.
5. Unusual itinerary
   (a) Map on the seat or in the vehicle showing different cities marked in different States.
   (b) A person may say that they have arrived in Miami one afternoon and had left early the next morning.
6. Rental Vehicles
   (a) Z tags or M tags on old model vehicles with large trunks.
   (b) In many cases, vehicle will be rented in one name and

The Drug Courier Profile

categories to aid in analyzing each characteristic's overall use and effect as a component of reasonable suspicion.

First, there are the profile characteristics displayed by an overt act on the part of the passenger in a deliberate attempt to mislead others concerning their identity, residence, property or their circumstances. Reported characteristics include traveling under an alias: using an alias on luggage tags, or incomplete or absence of tags on luggage; leaving a false telephone number with the airline; trying to conceal someone else will be driving it, usually known as a mile [sic] paid to deliver the drugs.

7. Coming from or going to a known source city. For example, Miami, New Orleans, New York, Houston and Los Angeles.
8. New Luggage — Subjects will buy new luggage to transport cocaine, heroin or illegal pills.
   (a) This type luggage is usually of the shoulder type and carried by the person at all times.
9. Rental vehicles or vehicles from known source cities.
   (a) Such vehicles stopped in rest areas, subjects will not leave drugs to sleep in motels and do not want to take the chance to unload it into a motel room.
   (b) A paid courier will not usually want to spend the money on a motel room.
10. Evidence of personal use of drugs in the vehicle.
    (a) Raw smell of marijuana coming from the vehicle.
    (b) Joints in the ashtray.
    (c) Baggies of marijuana in plain view. For example, on the floor of the vehicle or in the glove compartment when they open it to get ownership papers.
11. Look for bulge of baggies of marijuana on the person of the traffic violator.
    (a) Observe for smell of smoked marijuana in the hair or on the clothing of the person being detained.

121. Profile characteristics are sometimes listed as primary and secondary characteristics, see, e.g., United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), implying that characteristics listed as primary are more dispositive of drug activity than secondary characteristics, but in practice this classification is of little value as courts rarely state they are aware of this distinction or that it in any way formed a basis for their decision.

122. United States v. Hanson, 801 F.2d 757, 761 (5th Cir. 1986); United States v. Palen, 793 F.2d 853, 857 (7th Cir. 1986); United States v. Williams, 726 F.2d 661, 662-63 (10th Cir. 1984).

123. Florida v. Royer, 460 U.S. 491, 493 n.2 (1983)(wrote only name on luggage tags; name was an alias); United States v. Rico, 594 F.2d 320, 325 (2d Cir. 1979)(no tags on luggage).

124. United States v. Clardy, 819 F.2d 670, 673 (6th Cir. 1987); Elmore, 595
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that the passenger is traveling with someone else, and making false statements to law enforcement officers when questioned.

A second grouping of listed courier characteristics is manifest in the passenger’s behavior prior to boarding. Among these are paying cash for airline tickets, paying cash in small denominations, purchasing a one-way ticket, purchasing a round trip ticket to and from a source city with a short stay between flights, purchasing a first class ticket, and purchasing two return flight tickets.

A third category of profile characteristics focuses on the passenger’s luggage. Reported here are traveling with little or no luggage, or with only a shoulderbag, traveling with empty suitcases, and traveling with heavy American Tourister luggage.

A fourth category appearing in the reported cases concerns

F.2d at 1039 n.3; United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978); 125; Reid v. Georgia, 448 U.S. 438, 440-41 (1980); United States v. Oakes, 786 F.2d 832, 834 (8th Cir. 1986); United States v. Berry, 670 F.2d 563, 603 (5th Cir. Unit B 1982).


127. Roper, 460 U.S. at 493 n.2; United States v. Alper, 816 F.2d 958, 959 (4th Cir. 1987); United States v. Rothert, 692 F.2d 1041, 1047 (6th Cir. 1982).

128. Ballard, 573 F.2d at 915; United States v. Crenshaw, 555 F.2d 984, 99 (5th Cir. 1977); United States v. McCaleb, 552 F.2d 717, 719 (6th Cir. 1977).

129. Crenshaw, 555 F.2d at 795.

130. Alper, 816 F.2d at 961; Palen, 793 F.2d at 857; Williams, 726 F.2d 663.

131. United States v. Ervin, 803 F.2d 1505, 1511 (9th Cir. 1986); Crenshaw, 552 F.2d at 720.

132. Palen, 793 F.2d at 857.

133. Tolbert, 692 F.2d at 1047 (20 minutes); United States v. Moore, 605 F.2d 765, 766 (5th Cir. 1982)(7 minutes).

134. Ervin, 803 F.2d at 1511; Moore, 665 F.2d at 768 n.9.

135. Reid, 448 U.S. at 441 (no luggage other than shoulder bag); United States v. Sokolow, 808 F.2d 1366, 1370 (9th Cir. 1987)(no luggage); Tolbert, 692 F.2d at 1047 (no piece of checked luggage).

136. Crenshaw, 555 F.2d at 955; McCaleb, 552 F.2d at 719-20.

137. Roper, 460 U.S. at 493 n.2. The opinion is not clear as to whether the fact that the luggage was of the American Tourister brand, or that it was heavy, or the combination of both of these make up the specific profile characteristic looked for by agents. But see Roper v. State, 389 So. 2d 1007, 1016 (Fla. 3d Dist. Ct. App. 1980)(officer stated that American Tourister luggage "seemed to be [the suspect] attempting to conceal something").
that the passenger is traveling with someone else;\textsuperscript{128} and making false statements to law enforcement officers when questioned.\textsuperscript{128}

A second grouping of listed courier characteristics is manifested in the passenger’s behavior prior to boarding. Among these are paying cash for airline tickets;\textsuperscript{127} paying cash in small denominations;\textsuperscript{128} paying cash in large denominations;\textsuperscript{128} purchasing a one-way ticket;\textsuperscript{128} purchasing a round trip ticket to and from a source city with a short stay between flights;\textsuperscript{128} purchasing a first class ticket;\textsuperscript{128} purchasing a ticket very close to departure;\textsuperscript{128} and purchasing two return flight tickets.\textsuperscript{128}

A third category of profile characteristics focuses on the passenger’s luggage. Reported here are traveling with little or no luggage, or with only a shoulderbag;\textsuperscript{128} traveling with empty suitcases;\textsuperscript{128} and traveling with heavy American Tourister luggage.\textsuperscript{127}

A fourth category appearing in the reported cases concentrates on the passenger’s behavior upon arrival at his destination. These are arriving early in the morning when law enforcement activity is low;\textsuperscript{130} deplaning first;\textsuperscript{130} deplaning last;\textsuperscript{130} scanning the gate area upon deplaning;\textsuperscript{130} immediately making a phone call or what seems to be a simulated call;\textsuperscript{130} looking over your shoulders when walking through the airport;\textsuperscript{130} and leaving the airport on public transportation.\textsuperscript{130}

Lastly, a final category of immutable and seemingly innocuous traits emerges as drug courier characteristics. Among these are race,\textsuperscript{145} age,\textsuperscript{145} style of dress,\textsuperscript{145} nervousness;\textsuperscript{146} looking towards a law enforcement official several times or for a long time;\textsuperscript{146} and departure or arrival from a source city.\textsuperscript{130}

When taken in totality, what becomes startlingly evident about the drug courier profile is its expansive scope encompassing an extraordinary amount of innocent behavior. The average airline traveler would be hard pressed to not display one of these characteristics at some time during their trip. Its breadth illustrates the nearly limitless range a law

\textsuperscript{127} Reid, 448 U.S. at 440-41. This characteristic seems self-contradictory as if enough couriers arrive early in the morning to make this characteristic of them, it would seem that law enforcement activity would be intentionally prevalent at this time.

\textsuperscript{128} Alpert, 816 F.2d at 961.

\textsuperscript{129} United States v. Mendehall, 446 U.S. 544, 547 n.1 (1980); United States v. Clardy, 819 F.2d 670, 673 (6th Cir. 1987); United States v. Regan, 687 F.2d 531, 533 n.2 (1st Cir. 1982).

\textsuperscript{130} Mendehall, 446 U.S. at 547 n.1; Erwin, 803 F.2d at 1510.

\textsuperscript{131} United States v. Viegas, 639 F.2d 42, 43 (1st Cir. 1981); United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979).

\textsuperscript{132} Reid, 448 U.S. at 441; Erwin, 803 F.2d at 1506.

\textsuperscript{133} Elmore, 595 F.2d at 1039 n.3.

\textsuperscript{134} Supra note 120, profile characteristics 4-7 and 34. See also Comment, supra note 4, at 838 n.20 (Hispanic origin, especially Mexican, appeared as profile characteristic).

\textsuperscript{135} Roher, 460 U.S. at 493 n.2 (between 25-35). See also, supra note 120, characteristics 4 (Colombian males - 25-30 years), 5 (Black males - 25-30 years), and 6 (White males - 25-30 years).

\textsuperscript{136} Roher, 460 U.S. at 493 n.2 (casual dress); Sokolow, 808 F.2d at 1370 (dressed in a black jumpsuit); United States v. Pulvano, 629 F.2d 1151, 1153 (5th Cir. 1980)(appearance unkempt and unlike other passengers on the flight); United States v. Roco, 594 F.2d 320, 325 (2d Cir. 1979)(dressed differently than the pattern of dress usual in Chicago to New York flights).

\textsuperscript{137} Roher, 460 U.S. at 493 n.2; Mendehall, 446 U.S. at 547 n.1.

\textsuperscript{138} Mendehall, 446 U.S. at 547 n.1.

\textsuperscript{139} Reid, 448 U.S. at 440-41; Mendehall, 446 U.S. at 547 n.1.
enforcement officer has to find a drug courier match. This is a function of both its confidentiality and the fact that the DEA constantly updates the profile with additional characteristics.\(^1\) As new traits are added there are no controls to ensure that agents or local police using a profile list\(^2\) discontinue use of others. Consequently, the profile grows larger in breadth and the "specificity value" of the information as required by Terry and Cortez is weakened. Also, because of the profile's confidentiality, the courts are given no finite list of traits from which to determine each trait's relative worth as a component of reasonable suspicion.

Strangely, most courts seldom mention this as a factor in their opinions. This situation may be solved through use of in-camera proceedings. Under this procedure, the public and the defendant are excluded from the courtroom but defense counsel remains. The entire profile is then revealed to the court and cross-examination of the agents using it allowed. Defense counsel is then enjoined from revealing the profile. This approach preserves the confidentiality of the profile and allows full judicial scrutiny of its elements.\(^3\)

Additionally, the profile is subject to judicial expansion. Since courts have no access to the profile, an overzealous officer can artificially increase the level of reasonable suspicion to justify an investigatory stop by including a particular act of the defendant as a profile trait. For example, in United States v. Morin,\(^4\) a DEA agent observed the defendant appearing nervous and paying for his ticket in cash. Deciding to investigate, he called the hotel the defendant had stayed at the night before and learned that he had paid for his room with a one hundred dollar bill and left without retrieving his twenty-four dollar change. The court states that both of these acts are drug courier profile traits.\(^5\) Not only is it doubtful that this exact behavior has been researched by the DEA and found common to drug traffickers but it is also confusing.\(^6\) The result is that although the particular defendant in question may have been stopped without reasonable suspicion, later courts refer to that behavior as a profile trait when it reappears, thereby judicially originating additional profile traits.

Central to the Terry and Cortez rationales is that the elements of reasonable suspicion relied on for an investigatory stop should be seen in light of a policeman's expertise which may detect relevant information that a lay person would not. In the context of the drug courier profile this justification evaporates. Little is known or reported about the training an agent or local official receives in profile use.\(^7\) In some instances a profile list is merely distributed with no training involved.\(^8\) In these situations there is no foundation of personal expertise (as existed in Terry) to give credibility to a profile match. Further extenuating the chain of expertise is the practice of giving airline personnel a profile list and allowing them to look for matches.\(^9\) Also, at least one airline uses its own profile to pick out suspects and then contacts police.\(^10\) These are obviously not the law enforcement officials with "considerable expertise gained from special training" that Justice Powell deferred to in Mendenhall.\(^11\)

Defence to agency expertise plays a major role in the reported profile decisions.\(^12\) The result is that more weight is accorded to a particular trait displayed by an individual because that trait is a "drug courier" trait. In light of the fact that many inexperienced people are using profiles, courts should be cautious to closely scrutinize behavior purportedly listed on them. The danger in placing too much reliance on an agent's perception is that "[it] short-circuit[s] the requirement of 'specific and articulable facts and inferences' [needed] to support an investigatory stop."\(^13\) The proper approach is to accord the fact that a

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152. A discontinued drug courier profile list is reprinted supra at note 120.
153. In camera proceedings were used to alleviate the same problem the courts faced with the hijacker profile -- the drug courier profile's predecessor. For an in depth discussion see United States v. Lopez, 328 F. Supp. 1077, 1086-92 (E.D.N.Y. 1971).
154. 665 F.2d 765 (5th Cir. 1982).
155. Id. at 767.
156. Does the trait apply only to hotel bills? To hundred dollar bills? How much does it cost the profile?
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Central to the Terry and Cortez rationales is that the elements of reasonable suspicion relied on for an investigatory stop should be seen in light of a policeman’s expertise which may detect relevant information that a lay person would not. In the context of the drug courier profile this justification evaporates. Little is known or reported about the training an agent or local official receives in profile use. In some instances a profile list is merely distributed with no training involved. In these situations there is no foundation of personal expertise (as existed in Terry) to give credibility to a profile match. Further extenuating the chain of expertise is the practice of giving airline personnel a profile list and allowing them to look for matches. Also, at least one airline uses its own profile to pick out suspects and then contacts police. These are obviously not the law enforcement officials with “considerable expertise gained from special training” that Justice Powell deferred to in Mendenhall.

Deference to agency expertise plays a major role in the reported profile decisions. The result is that more weight is accorded to a particular trait displayed by an individual because that trait is a “drug courier” trait. In light of the fact that many inexperienced people are using profiles, courts should be cautious to closely scrutinize behavior purportedly listed on them. The danger in placing too much reliance on an agent’s perception is that “[i]t short-circuit[s] the requirement of ‘specific and articulable facts and inferences’ [needed] to support an investigatory stop.”

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particular trait is a profile trait no legal significance.164

The profile is also susceptible to racial abuse. The fact that a person is black,165 Columbian,166 or Hispanic167 has appeared on profiles as a drug courier trait. In some instances, race is listed by the DEA itself as a positive attribute of drug traffickers.168 At other times it is injected unilaterally by an agent or an agency.169 This clearly exceeds the reasonableness requirement of the fourth amendment as well as implicating first amendment protections. In camera proceedings would aid in remedying this situation also, exposing to the court how much of a factor race played in initiating the profile stop.

As elements of reasonable suspicion, certain profile traits are plainly more reliable than others. Specifically, the deceptive efforts listed in the first category of traits170 carry more of an indicia of criminal activity than those listed in the final category.171 In the airport setting, nervousness loses all value as an indicator of wrong-doing because of the many legitimate reasons for being nervous in an airport.172 Also, many of the defendants stopped become nervous after agents initiate the stop by identifying themselves as DEA agents.173

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164. The Fifth Circuit adopted this approach in United States v. Berry, 670 F.2d 583 (5th Cir. Unit B 1982), but whether this is still the approach used has been put in doubt by the circuit’s post-Royer decisions. See, e.g., United States v. Hannon, 801 F.2d 757 (5th Cir. 1986).


166. See supra note 120.


168. See supra note 120.

169. Westerbaum-Martinez, 435 F. Supp. at 69 (agent states that being Hispanic, especially Mexican, is a profile trait when that trait had not previously appeared in other reported cases); United States v. Lopez, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971)(Pan American Airlines issues “update” to profile which includes race as a characteristic).

170. See text accompanying notes 122 to 126.

171. See supra text accompanying notes 145 to 150.

172. See Westerbam-Martinez, 435 F. Supp. at 69 (disembarking at a strange airport, fear of flying and an innate personality characteristic listed as legitimate reasons for nervousness in an airport situation). See also, United States v. McGrane, 702 F.2d 1213, 1219 (10th Cir. 1983)(McKay C.J., dissenting)(“I strongly doubt . . . that even a federal judge would not appear nervous [if approached by DEA agents in an airport].”)


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particular trait is a profile trait no legal significance.\textsuperscript{164} The profile is also susceptible to racial abuse. The fact that a person is black,\textsuperscript{166} Columbian,\textsuperscript{168} or Hispanic\textsuperscript{169} has appeared upon profiles as a drug courier trait. In some instances, race is listed by the DEA itself as a positive attribute of drug traffickers.\textsuperscript{170} At other times it is injected unilaterally by an agent or an agency.\textsuperscript{171} This clearly exceeds the reasonableness requirement of the fourth amendment as well as implicating first amendment protections. In camera proceedings would aid in remedying this situation also, exposing to the court how much of a factor race played in initiating the profile stop.

As elements of reasonable suspicion, certain profile traits are plainly more reliable than others. Specifically, the deceptive efforts listed in the first category of traits\textsuperscript{172} carry more of an indicia of criminal activity than those listed in the final category.\textsuperscript{173} In the airport setting, nervousness loses all value as an indicator of wrong-doing because of the many legitimate reasons for being nervous in an airport.\textsuperscript{174} Also, many of the defendants stopped become nervous after agents initiate the stop by identifying themselves as DEA agents.\textsuperscript{175}

The source city characteristic, while useful as a guide for where to conduct profile surveillance, should not be considered as an element of reasonable suspicion either. The Supreme Court has stated that “[m]ere proximity of a person to areas with a high incidence of drug activity . . . does not provide the necessary reasonable suspicion for an investigatory stop.”\textsuperscript{176} Travel from a particular city, especially the metropolitan areas usually listed as source cities, is too consistent with innocent behavior to be a serious consideration in a court’s reasonable suspicion calculation. Exclusively limiting the source city characteristic to a guide for where to focus profile surveillance is more consistent with the fourth amendment’s reasonableness standard.

IV. Conclusion

When used in connection with the drug courier profile, the Mend- enhall seizure standard invites arbitrary police conduct. It should be rejected in favor of a finding of a seizure when a suspect under profile surveillance is initially approached. The expansive breadth and the constant modification of the drug courier profile traits coupled with their confidentiality and the lack of training in their proper use do not provide the “specific and articulable facts” necessary to justify an investigatory detention consistent with the Terry rationale. The fact that a particular defendant’s behavior matches a profile trait should be accorded no legal significance by a court in determining whether reasonable suspicion for a stop existed. Additionally, the courts should adopt the use of in camera proceedings to scrutinize the profile traits where they are alleged as elements of reasonable suspicion. Although it has proved a useful tool in drug trafficking detection, “[t]he drug courier profile . . . is not a ‘talisman’ and its use does not obviate the need for traditional [fourth amendment] analysis.”\textsuperscript{177}