U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Assistance

Profile Factors After *Sokolow*

10th in a series

POLICE EXECUTIVE RESEARCH FORUM

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Profile Factors After *Sokolow*: Police-Citizen Encounters, Investigatory Stops and Consent Searches

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U.S. Department of Justice
Office of Justice Programs
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Dear Colleague:

Illicit drug traffic continues to flourish in every part of the country. The cash received by the traffickers is often converted to assets that can be used by drug dealers in ways that suit their individual tastes. Since 1981, federal authorities have increased their attack on these assets through both criminal and civil forfeiture proceedings with remarkable success. The recent passage and use of state asset forfeiture laws offers an excellent means for state and local jurisdictions to emulate the federal success.

The Bureau of Justice Assistance (BJA), in the Office of Justice Programs, has funded a nationally focused technical assistance and training program to help state and local jurisdictions facilitate broader use of such laws. BJA selected the Police Executive Research Forum to develop and administer this program because of its history of involvement in practical, problem-oriented research to improve police operations and the Forum's central role in developing training materials for use by police agencies and chief executives.

As part of this project, the Forum has contracted with experts in the area of asset forfeiture and financial investigations to prepare a series of short manuals dealing with different concerns in the area of asset forfeiture. We hope these manuals help meet the rapidly unfolding needs of the law enforcement community as more and more agencies apply their own forfeiture laws and strive to learn from the successes and problems of their peers.

I welcome hearing your comments about this program. We have structured this project so that most requests for information or assistance can be handled through the Forum staff in Washington, D.C., by calling 202/466-7820.

Sincerely yours,

Charles P. Smith, Director
Bureau of Justice Assistance

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Police Executive Research Forum

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Profile Factors as Law Enforcement Resources

Editor's Note: *This paper is about consent searches and profile stops and their proper use in police operations. In addition to contraband, these techniques often result in the seizure of assets that both facilitate crimes and represent the proceeds of crimes. Increasingly, the seizures include financial instruments and records that can lead investigators to additional assets. We hope this paper will encourage readers to use these techniques as part of an enhanced asset forfeiture initiative.*

What action may law enforcement officers take when they encounter an individual who matches a profile of a certain type of criminal? May the individual be stopped for questioning or investigation, subjected to a patdown or a more thorough search, detained, or even arrested? To justify such action, what facts, if any, must the officers establish in addition to the profile match? Is a profile match sufficient to establish probable cause, or at least reasonable suspicion? What is reasonable suspicion?

After a brief background discussion, this paper addresses these questions. It explores the implications of several court cases for law enforcement officers who may wish to use a profile to justify the following:

1. Approach an individual and ask one or two questions, but not display force or show of authority or otherwise imply that the individual is not free to end the encounter and depart.
2. Stop an individual and his or her property for investigation on the grounds of "reasonable suspicion that criminal activity is afoot."
3. Take action amounting to a seizure of the person or property on the basis of probable cause.

Development and Purpose of Profile Factors

Profiles represent the collective wisdom of law enforcement personnel, whose experience tells them that individuals who

commit certain kinds of offenses tend to look, act, and react in particular ways. Early in the 1970s, for example, the U.S. Drug Enforcement Administration (DEA) developed a drug courier profile. The profile was designed to make better use of limited law enforcement personnel by identifying individuals whose characteristics or traits are similar to those of known drug couriers.

A 1975 federal case[1] illustrates the use of a drug courier profile to detect narcotics couriers and make arrests. DEA agents were assigned to the Detroit airport to observe passengers arriving on flights from cities believed to be sources of drugs reaching Detroit. The agents informed key airline employees of the drug profile characteristics, as well as their own observations. When an airline employee spotted an individual exhibiting the characteristics, he or she would notify the agents.

Once an individual had been identified as a likely drug courier, agents would approach the individual, identify themselves, and request identification and an airline ticket. If the agents then discovered additional facts arousing suspicion (such as the use of an alias), they would ask the suspect to accompany them to an office for further questioning. There the suspect would be advised of his rights and told that he was suspected of carrying drugs. The agents would request permission to search his luggage[2]. In some cases, if the suspect withheld consent, he would be arrested and a search made incidental to the arrest[3].

Early experience with drug courier profiles at domestic airports led to more complex profile factors, including the following:

1. Traveling with little or no luggage.
2. Purchasing tickets with small-denomination currency.
3. Traveling to or from a major drug import center.
4. Traveling under an alias.
5. Scheduling rapid turnaround time for a lengthy airplane trip.
6. Carrying unusually large amounts of currency.
7. Displaying nervousness beyond that ordinarily exhibited by travelers.
8. Using public transportation (especially taxicabs) almost exclusively after arriving on a flight.

9. Making a phone call almost immediately after deplaning.
10. Leaving a fictitious callback telephone number with the airline.
11. Traveling frequently to or from identified drug distribution cities.[4]

Although separately these actions do not necessarily suggest criminal activity—and although collectively they are not illegal—some of them, when taken together, are sufficient for an experienced officer to reasonably suspect that criminal activity is afoot.

Use of Profile Factors To Justify a Brief Police/Citizen Encounter

Law enforcement officers who approach travelers solely or primarily because they exhibit profile factors will not run afoul of constitutional restraints, such as the Fourth Amendment's search and seizure provisions. A brief encounter entails minimal intrusion into an individual's person, property, and privacy. It usually occurs in a public place, such as an airport terminal. The individual is asked a question or two by an officer, who neither displays force nor otherwise implies that the individual is not free to terminate the encounter and walk away. Such an encounter is so minimally intrusive that no level of suspicion (in the legal sense) is required.

What begins as a brief encounter may develop into something more significant. The individual may answer the questions in a way that generates reasonable suspicion (discussed in the next section) in the officer's mind. Or, during the encounter, the officer may notice something in "plain view" that justifies a more significant intrusion[5].

An individual subjected to a brief stop may consent to a search of his or her person or belongings. For a consent search to be constitutionally valid, the individual must voluntarily waive his right not to be searched. The "voluntariness is a question of fact to be determined from all of the circumstances"[6]. A factor considered by the court is whether the individual understood that he had the right to refuse consent[7]. Cases in which "consent" searches were held to be coercive, and therefore not voluntary, involved, for example, situations in which the officers did not identify themselves as

such or deceived the suspect about the true purpose of their investigation[8], falsely claimed to have a search warrant[9], or made a show of force or displayed weapons[10], and situations in which the suspect was mentally impaired[11]. Of course, a consent search is limited to the scope of actual consent[12].

Use of Profile Factors To Justify Brief Detention for Investigation

If the brief encounter (no reasonable suspicion required) is at the one end of the spectrum of governmental intrusion, arrest and property seizure (probable cause required) are at the other. In between are various forms of police/citizen contacts in which an individual and his or her property may be briefly detained for investigation depending on the circumstances. Those contacts—let us call them investigatory stops—require that the officer have grounds for reasonable suspicion, a lesser standard than probable cause.

"Probable cause" is defined as knowledge of facts and circumstances, gained through trustworthy information, sufficient to suggest to a reasonable person that a crime has been or is being committed. Probable cause has also been held to mean "a fair probability that contraband or evidence of a crime will be found." "Reasonable suspicion" sufficient to warrant stopping and detaining an individual for investigative purposes may be said to be established when specific and articulable facts, along with rational inferences from those facts, reasonably lead a police officer to conclude that criminal activity "may be afoot," even if the officer lacks probable cause.

Although it is not entirely clear what constitutes reasonable suspicion, most courts have made it fairly clear that conformity with profile factors *alone* cannot establish reasonable suspicion. However, the Supreme Court, in *United States* v. *Sokolow*, and many lower federal courts have recognized the validity of using profile factors, *combined with* an officer's personal observations in light of his experience, to arrive at reasonable suspicion. In short, matching the characteristics of an individual to those in a profile is probably insufficient to establish reasonable suspicion and, therefore, to justify an investigatory stop.

However, the matching of profile factors supplemented by an officer's observations and experience may establish reasonable suspicion.

As may occur during a consensual encounter, a properly conducted investigatory stop motivated by an officer's reasonable suspicion may lead to action even more intrusive. For example, the individual under investigation may consent to a more thorough search, or information may be developed that constitutes probable cause for an arrest or seizure.

The next section includes court cases that examine investigatory stops initiated wholly or partly because of profile factors, cases in which the court ruled on whether those stops were justified by reasonable suspicion, and cases that explored the nature of reasonable suspicion.

The Origin of Reasonable Suspicion

In the 1968 case of *Terry* v. *Ohio*[13], the U.S. Supreme Court allowed a police stop and weapons patdown even though probable cause had not been established. A plainclothes officer with 30 years of experience had observed three men "casing out" a store in broad daylight. The men paced back and forth in front of the store and peered through the windows. The officer concluded that the men were about to commit an armed robbery, approached them, and asked for their names. When he received a "mumbled" reply, the officer conducted a brief "patdown," which revealed a gun concealed in the defendant's coat. The man was charged with unlawful possession of a concealed weapon.

At trial, the defense moved to suppress the evidence as the product of an illegal search and seizure. The defense argued that the officer lacked probable cause to believe the men had committed, or were about to commit, a felony. However, through his own observations and experience, the officer was able to describe a specific pattern of behavior that distinguished the suspects from all others on the street. The Supreme Court formulated the concept of a "stop and frisk," which was less intrusive than a full arrest and, therefore,

required less justification than probable cause. The standard for such a detention was "reasonable suspicion."

The Court did not define "reasonable suspicion," but stated that due weight must be given to specific reasonable inferences an officer is entitled to draw from the facts in light of his experience. In permitting a "stop and frisk" based on reasonable suspicion under the Fourth Amendment, the Court took note of the demands of street police work and the need for increased protection of the public from violent crime.

In determining the reasonableness of the "stop and frisk," the *Terry* Court employed a balancing test. The nature and extent of the government's interest in the intrusion was weighed against the corresponding interest of the private citizen in being free from unreasonable searches and seizures. In *Terry,* the Court found that a police officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of outer clothing. . . ." Therefore, the brief patdown was held reasonable.

The *Terry* doctrine was expanded in 1972 by the U.S. Supreme Court[14]. In that case, an officer relied on an unverified informant's tip that a suspect sitting in a nearby car was carrying a concealed weapon. The officer approached the car and asked the driver to open the door. Instead, the suspect lowered the window. The officer reached into the car and found a loaded handgun (which had not been visible from the outside) in the suspect's waistband, just where the informant had said it would be. The suspect was arrested for unlawful possession of the handgun. A search incident to the arrest revealed heroin and other contraband. The Supreme Court ruled that an officer making a reasonable investigatory stop may conduct a limited protective search for concealed weapons when there is reason to believe the suspect is armed and dangerous. The officer's information need not be verified.

Investigatory Stops Based Solely on Profile Factors

In a 1975 U.S. Supreme Court case[15], a roving border patrol stopped a vehicle in an area known for illegal crossings

because the occupants "appeared to be of Mexican descent." The Court ruled that the single factor of Mexican descent did not amount to reasonable suspicion sufficient to justify an investigatory stop.

In another federal case (1977)[16], two men and a woman arrived at the Detroit airport on a direct flight from Los Angeles. The three exhibited characteristics included in the drug courier profile: they arrived from a drug source city, appeared nervous, and carried only one suitcase among them. DEA agents followed them, stopped them in the parking lot, and asked for identification. Their airline tickets did not match their identification. They were escorted to an office in the airport and consented to a search, which revealed heroin. On appeal, the sixth circuit court held that the investigatory stop was invalid, because

> The "Drug Courier Profile," by itself, provides no reasonable cause to arrest an individual. In addition, while a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion, the circumstances of this case do not provide specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed] the intrusion of an investigatory stop.

In effect, the court held that the suspects' activities were merely consistent with innocent behavior. It noted that when the arrests were made, the profile was not written, nor, apparently, had the agents been clearly instructed on how many, or what combination, of the characteristics were necessary to justify a stop.

Another federal case decided in 1977[17] addressed the issue of whether a profile match alone establishes reasonable suspicion. The suspects arrived in New York City on a flight that had originated in Chicago and stopped in Cincinnati. As they were deplaning, a DEA agent observed them glancing furtively about the airport. During the three- to four-minute walk to the front of the terminal, they remained in single file. Once outside, they began to converse. At that point, agents approached the suspects, identified themselves, and asked to see their airline tickets and identification. A consent search of an overnight bag revealed a quantity of heroin. Although the agents testi-

fied that the suspects had exhibited several profile characteristics, the court refused to find grounds for reasonable suspicion:

> [T]he "Drug Courier Profile" . . . is not a "talisman": its use does not obviate the need for a traditional analysis. . . . First, no evidence was offered in support of the accuracy of the profile. Secondly, the profile has a chameleon-like quality; it seems to change itself to fit the facts of each case. One agent candidly admitted that "the profile in a particular case consists of anything that arouses his suspicions."

The court went on to list additional profile factors mentioned in other cases[18] and concluded:

> [E]ither the "Drug Courier Profile" is too amorphous and unreliable to be of any help, or . . . there is a tremendous lack of communication within the Drug Enforcement Administration as to the factors in the profile.[19]

In addition, the court had difficulty with the factors the agents presented. It refused to rely on the agent's subjective perception of the suspects' nervousness, which the court did not consider a "specific and articulable" fact. The court also found that luggage carried by the defendants (an overnight bag and a garment bag) was consistent with an overnight flight to New York[20].

A 1979 Louisiana case[21] illustrates the need to differentiate between possibly suspicious behavior and nervous but innocent behavior. As the suspect arrived from Los Angeles (a drug source city), two federal agents observed him looking around nervously. Moving through the airport, he continued to look around. After making a phone call, the suspect was stopped. The factors relied on to justify the stop were arrival from a source city, nervousness, continual looking around and over his shoulder, and making a phone call immediately upon deplaning. The Louisiana Supreme Court held that even when all these characteristics were considered together, at most they indicated conduct of a passenger who could not find the person he expected to meet at the airport. The conviction was reversed.

In a case decided by the U.S. Supreme Court in 1980[22], the defendant arrived at the Atlanta airport on a flight from Ft. Lauderdale. A DEA agent observed that the defendant and another man, who stayed a distance from him, were carrying

identical bags. As they walked through the airport, the defendant occasionally looked behind him in the direction of the other man. They proceeded separately past the baggage area. In the terminal lobby, they spoke briefly, then exited the terminal together. The agent approached them, identified himself, and asked to see the suspects' airline tickets and identification. Both suspects appeared nervous. The airline tickets (purchased with the defendant's credit card) indicated that they had been in Florida for one day. At the agent's request, they agreed to return to the terminal for a consent search of their persons and bags. As they reentered the terminal, the defendant fled, dropping his shoulder bag. It was searched, and a quantity of cocaine was found inside.

The Supreme Court held that the agent had insufficient grounds for reasonable suspicion when he stopped the defendant. It did not consider whether or not he had been "seized" at the time of the initial encounter. Describing the profile as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics," the Court recited the factors considered by the agent: arrival from a drug source city (Ft. Lauderdale) in the early morning hours (when law enforcement activity is at a minimum), attempts to conceal that the two suspects were traveling together, and absence of luggage other than shoulder bags. The Court ruled that these factors amounted to "too slender a reed to support the seizure in this case." In effect, the Court reaffirmed previous federal court decisions recognizing that drug courier profiles are useful investigatory tools but stating that they do not automatically amount to reasonable suspicion to justify an investigative stop[23].

The recent U.S. Supreme Court decision in *United States* v. *Sokolow* (87-1295) clarified the issue of proper use of factors in a drug courier profile to stop travelers in airports. In an earlier case, *Reid* v. *Georgia*, 448 U.S. 438 (1980), the Court had declared that an individual's match to such profile factors does not provide a basis for reasonable suspicion. It now appears, judging from its decision, in *Sokolow* to accept the use of such factors even though the factors are set forth in a profile. Following *Sokolow*, the emphasis of the courts will shift away from

use of profile factors and toward the experience and knowledge of police.

In *Sokolow*, the appellant had just returned to Honolulu after a 20-hour round trip to Miami, a well-known source city for drugs. He had stayed in Miami only 48 hours. He had paid $2,100 for two airline tickets with cash from a large wad of $20 bills that appeared to contain around $4,000. Neither Sokolow nor his traveling companion had checked any luggage. During his layover in Los Angeles, Sokolow "appeared to be very nervous and was looking all around the waiting area." He was dressed in a black jumpsuit and wore a lot of gold jewelry. Finally, his voice was on an answering machine at a phone subscribed to by "Karl Herman," but he was ticketed under the name "Andrew Kray." Based on these facts, Sokolow was stopped upon returning to Honolulu by DEA agents, who grabbed him by the arm outside the airline terminal.

The government's position was that Sokolow's behavior, together with the facts known to the agents when Sokolow was seized, indicated ongoing criminal activity. However, the U.S. Court of Appeals for the Ninth Circuit, on reviewing de novo the question of whether a seizure had occurred before or after reasonable suspicion existed, held that Sokolow was seized at the point of initial contact with the agents, and before any questioning occurred. *United States* v. *Sokolow*, 831 F.2d 1413, 1416 (9th Cir. 1987).

At that point, the court said, reasonable suspicion did not exist. In other words, the facts known to the agents when they made initial contact with Sokolow did not give the agents grounds for an investigatory stop. The Supreme Court accepted the finding of the court of appeals as to when the seizure occurred, but disagreed that the agents did not have reasonable suspicion to stop Sokolow.

One of the Supreme Court's main criticisms of the court of appeals' decision was the lower court's creation of a two-part "test" for reasonable suspicion, which needlessly complicated the concept. The Supreme Court decision did not draw lines around categories of evidence or assign a quantity of suspicion to a particular characteristic. Instead, it set up *United States* v. *Sokolow* as the drug-trafficking equivalent of *Terry* v. *Ohio*,

allowing police officers to investigate an individual whose behavior appears consistent with drug trafficking.

The key element in establishing this parallel is the Supreme Court's focus on the law enforcement officers' ability to reach common-sense conclusions about human behavior. Just as the officer in *Terry* could determine, on the basis of his 30 years of police experience, that the men he was observing were "casing" the store, so, too, could the DEA agents in *Sokolow* determine, from their experience and the presence of certain factors, that illegal drug trafficking was in progress. Moreover, in *Sokolow* the Court held that "the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."

The Supreme Court decision in *Sokolow* will direct the attention of courts away from the profile and onto the testimony of the investigating police officer. Therefore, the decision gives the police greater freedom to combat drug trafficking, and leaves the decision to act responsibly with the individual police officer.

Investigatory Stops Based on Profile Factors Followed by Consent To Search

The area of consent searches was not affected by the *Sokolow* decision. The *Mendenhall* test as to when a person has been "seized" is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (P.554) In 1980, the U.S. Supreme Court decided the *Mendenhall* case[24]. It addressed the issue of what impact the use of certain profile characteristics had during a police/citizen encounter at the Detroit airport. Although the Court ultimately held that the stop of the suspect was constitutional, the Justices disagreed over why it was constitutional: two thought the encounter did "not amount to an intrusion upon any constitutionally protected interest," while three thought the stop was properly based on "reasonable suspicion" under the *Terry* doctrine.

In February 1976, Sylvia Mendenhall arrived at the Detroit

airport on a flight from Los Angeles. Two DEA agents were monitoring the flight's arrival. They observed that Mendenhall was the last passenger to leave the plane, that she appeared "very nervous," and that she "completely scanned" the area where the agents were standing. She walked to the baggage area, then changed directions and went to an Eastern Airlines ticket counter. One agent stood behind her in the ticket line and watched her purchase an Eastern Airlines ticket for a Detroit-to-Pittsburgh flight (this despite the fact that she already had an American Airlines ticket for the same itinerary).

Mendenhall was then stopped by the agents, who identified themselves as "federal agents" and asked to see her identification and airline ticket. Her driver's license was in the name "Mendenhall," but her airline ticket was in the name "Annette Ford." Asked why the airline ticket had a different name, Mendenhall stated that she "just felt like using that name." The agents also determined that Mendenhall had been in Los Angeles only two days. One agent then further identified himself as a "federal narcotics agent," at which time Mendenhall "became quite shaken, extremely nervous." After returning her driver's license and airline ticket, the agents asked her if she would accompany them to a DEA office at the airport for further questioning. She did so, although the record does not indicate a verbal response to the request. After being advised by the agents that she had the right to decline, she gave her consent to be searched, first to the agents and subsequently to the police matron who searched her. The search revealed heroin in her undergarments.

Prior to trial, Mendenhall moved to suppress the heroin as evidence obtained during an unlawful search. The trial court found there had been a permissible investigative stop under *Terry* v. *Ohio*. Since Mendenhall had not been placed under arrest or otherwise detained when she accompanied the agents to their office "voluntarily and in a spirit of cooperation," the trial court concluded that she had not been arrested until the heroin was found and that she had voluntarily consented to the search. The court of appeals reversed this decision, holding that the stop was impermissible and that the request to accompany the agents to their private office amounted to an arrest

without probable cause. Since Mendenhall's consent was the "fruit of an unconstitutional detention," the court ruled the search involuntary.

In a concurring opinion joined by Justice Blackmun and Chief Justice Burger, Justice Powell considered it inappropriate to decide whether a seizure had occurred since neither the district nor circuit court had considered the issue. The seizure was held constitutional because the agents had reasonable suspicion that the defendant was engaged in criminal activity.

In discussing the drug courier profile, Justice Powell first cited statistics on the success of the profile program. He commented that the agents were carrying out a highly specialized law enforcement operation designed to combat narcotics distribution and that the agents' knowledge of drug dealers' methods may be relied on to give rise to reasonable suspicion. After discussing the agents' experience with narcotics traffic, Justice Powell evaluated the conduct observed by the agents. The opinion emphasized the agents' expertise in narcotics observations and indicated that conduct that may appear innocent to a layman could have an entirely different meaning to a trained law enforcement officer. Now, seven members of the Supreme Court have emphasized the significance of the agents' expertise in the 1989 *Sokolow* decision.

However, in discussing profile-program statistics, Justice Powell stated, "I do not believe that these statistics establish by themselves the reasonableness of the search. Nor would reliance on the 'Drug Courier Profile' necessarily demonstrate reasonable suspicion. Each case raising a Fourth Amendment issue must be judged on its own facts."

Justice Powell noted that "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." He found that the intrusion was modest, that Mendenhall was stopped in a public area where others from whom she could have sought aid were nearby, that she was not physically restrained, that the agents displayed no weapons, and that the questioning was brief. Based on these factors, "the respondent could not reasonably have felt frightened or isolated from assistance." The opinion concluded:

> [T]he public interest in preventing drug traffic is great, and the intrusion upon respondent's privacy was minimal. The specially trained agents acted pursuant to a well planned, and effective federal law enforcement program. They observed respondent engaging in conduct that they reasonably associated with criminal activity.[25]

Justice White, joined by Justices Brennan, Marshall, and Stevens, dissented. After assuming that a seizure had taken place, they found that the agents lacked reasonable grounds to suspect that Mendenhall was transporting narcotics. Therefore, the investigatory stop and succeeding events were unlawful. Justice White stated, "What the agents observed Ms. Mendenhall do in the airport was not unusual conduct which would lead an experienced officer reasonably to conclude that criminal activity was afoot . . . but rather the kind of behavior that could reasonably be expected of anyone changing planes in an airport terminal.[26]"

Use of Profile Factors—The Royer Case

A 1983 U.S. Supreme Court case involved an investigative stop based on factors included in a profile and officers' observations and inferences based on training and experience[27]. Two Dade County (Florida) plainclothes detectives were on patrol at Miami International Airport and observed passengers boarding a flight to Los Angeles, a drug "target" city. They watched a man walk through the airport concourse carrying two apparently heavy suitcases. Appearing nervous, he went to the ticket counter and purchased tickets for a flight to New York using small-denomination bills. He wrote "Holt—LaGuardia" on the baggage tags and checked the luggage.

As the man left the ticket counter, the police approached him, identified themselves as "policemen working out of the sheriff's office," and asked if he had a moment to talk. At their request, he produced an airline ticket in the name "Holt" and a driver's license in the name "Mark Royer." The officers identified themselves as "narcotics investigators" and told Royer they had reason to suspect him of transporting narcotics.

The officers asked Royer to accompany them to an interroga-

tion room 40 feet away. They did not return his ticket or driver's license. Royer went with the officers as requested. His baggage was brought to the interrogation room, and he was asked to open it. He unlocked one suitcase with a key from his pocket. The other had a combination lock. Royer said he could not remember the combination but did not object to its being forced open. When marijuana was found in both suitcases, Royer was arrested.

The agents subsequently testified that a combination of profile characteristics had led them to focus on Royer: (1) he was carrying heavy suitcases of the type often used by drug couriers; (2) he was nervous; (3) he looked around as if watching for police; (4) he paid for his tickets in cash, with small-denomination bills (so that he would not have to produce identification, they surmised); and (5) he did not write a full name and address on the baggage tags. Moreover, he was youthful and casually dressed.

The issue was whether the police had exceeded the limited restraint permitted in *Terry* v. *Ohio*. The Court found that the officers did have reasonable suspicion that justified detaining Royer briefly for interrogation; reasonable suspicion was based on the five profile characteristics and the officers' observations and inferences based on their training and experience. On the other hand, the Court noted, the officers clearly did *not* have probable cause at that point. Once the officers retained Royer's identification and airline ticket, he no longer was free to leave and a seizure had occurred. The Court stated:

> [A]n 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 be the least intrusive means reasonably available to verify or dispel the officer's suspicions in a short period of time.[28]

In this case, the seizure based on reasonable suspicion was overly intrusive in duration and scope. When Royer produced the key to his suitcase, the detention to which he was subjected ceased to be a brief investigatory stop[29] and became a more intrusive restraint on his personal liberty than is permitted on mere suspicion[30]. The U.S. Supreme Court in *Sokolow* refused to extend the *Royer* notion of "least intrusive means."

It held that in *Royer*, "least intrusive means" was directed at the length of the investigative stop, not at whether the police had a less intrusive means to verify their suspicions before making the stop.

Although the Supreme Court's decision in the *Royer* case was not favorable to law enforcement, it is important to enforcement officers because it sets forth nine principles that apply to police activities in stopping a traveler. The Court indicated that if the principles (listed below) guide police actions, "there is no detention—no seizure within the meaning of the Fourth Amendment—[and] no constitutional rights have been infringed." In other words, a "brief stop" (discussed previously) is present. The nine principles, quoted beginning on page 498 of *Royer*, are:

1. "Approaching an individual in the street or in another public place."
2. "The officer identifying himself as a police officer."
3. "By asking him if he is willing to answer some questions."
4. "Asking for and examining Royer's ticket and his driver's license."
5. "By putting questions to him if the person is willing to listen."
6. "By offering in evidence in a criminal prosecution his voluntary answers to such questions."
7. "The person approached, however, need not answer any questions put to him; indeed he may decline to listen to the questions at all and may go on his way."
8. "He may not be detained even momentarily without reasonable, objective grounds for doing so."
9. "His refusal to listen or answer does not, without more, furnish those grounds."

Use of Profile Factors To Justify Seizure of Person or Property Based on Reasonable Suspicion

Seizure of a person or property for an extended period is restricted by the Fourth Amendment requirement that such an intrusion occur only after probable cause has been established. Although the use of profile factors may give a trained and experienced police officer "reasonable suspicion," if the officer can articulate the conduct that led to the investigation (*U.S.* v. *Sokolow*), the factors that allow an officer to conduct an investigative stop may not, by themselves, amount to probable cause.

The 1988 federal circuit court cases described in this section did not rely on profile factors alone, but tended to characterize the basis of reasonable suspicion as the "totality of the circumstances," the "whole picture," or the "common-sense analysis of a trained, experienced police officer," or else the reasonable suspicion issue was diverted to a consent search, plain view, or seizure issue. The cases were not confined to incidents at international airports, for over the years drug trafficking has spread to involve trains and train stations, private planes and municipal airports, automobiles and the interstate highway system, and bus stations.

In *United States* v. *Thame,* 846 F.2d 200 (3rd Cir. 1988), although Thame was not subjected to an investigative stop because he exhibited characteristics in a "drug courier profile," the factors that aroused police suspicion could also apply to innocent travelers. An Amtrak investigator in Washington, D.C., noted the following facts about Thame: (1) his train reservation was made on the day of travel; (2) no telephone number was given; (3) a sleeping accommodation was reserved for the northbound trip but not for the return; (4) the ticket was paid for in cash; and (5) he appeared nervous, and repeatedly asked when the train would leave and whether he could keep his luggage with him. *Thame,* 846 F.2d at 201. On the basis of these facts, Thame was approached by a DEA agent, who identified himself and asked if he could speak with Thame. He consented and gave his name as "Albert Thame." The agent asked to see his train ticket and saw that the name on it was "B. Kelly." However, the identification he produced on request correctly identified him as Albert Thame. The first agent was joined by another, they identified themselves as part of the Narcotics Interdiction Unit, and asked Thame for his consent to search his luggage. He refused, but finally consented to a sniff test, and the police dog alerted to his bag.

On appeal, the U.S. Court of Appeals for the Third Circuit upheld the district court's conclusion that Thame consented to the sniff test while he was not under custodial restraint. "For this reason, there is no need to consider whether the officers had reasonable suspicion to subject Thame to a limited investigatory detention." *Id.* at 203. The facts indicate that Thame

was told he could refuse a search. After the sniff test, there was probable cause for a warrant to search his bag.

The pilot of a private plane and his passenger came under the scrutiny of the Drug Enforcement Administration because they matched the "DEA drug smuggler profiles." In *United States* v. *Zukas*, 843 F.2d 179 (5th Cir. 1988), reasonable suspicion justifying the investigative detention of the pilot and passenger was supported by the following facts: (1) the aircraft was a small craft with extended-range fuel tanks, tinted windows, and high-security locks; (2) the pilot and passenger paid cash for fuel and a hotel room; (3) the aircraft was flying from one drug traffic center to another; (4) the passenger was nervous, wore gold jewelry, and carried a large amount of cash; (5) the pilot had a prior drug smuggling arrest and was again under suspicion of drug smuggling; (6) the aircraft was owned by a company that often leased aircraft to drug smugglers; and (7) calls had been made from the motel to California. The court's observations concerning the use of these profile factors demonstrate the effect of a profile:

> Taken alone, no single factor would support a reasonable, particularized suspicion with regard to the activities of Zukas and his passenger. When these factors, however, are considered together with Zukas's prior record, the specific activities observed by the agent and informant, and the agent's level of experience and expertise, *their significance renders the whole greater than the sum of its parts.* When the officers began questioning Zukas and the passenger, therefore, the seizure was supported by reasonable suspicion and justified to the extent that it was not more than an investigatory stop. *Id.* at 183. [Emphasis added]

The court held that the level of intrusion prior to the consent search that gave probable cause was ". . . no more than was necessary to dispel the officers' legitimate suspicions." *Id.* Two points emphasized by the Fifth Circuit Court of Appeals are particularly significant to its view of searches based on profile factors. First, while no one factor in the profile can alone establish reasonable suspicion, "the whole," in the court's view, "can be greater than the sum of its parts." Second, an investigative stop (which is what the court found the stop of pilot Zukas and his passenger to be) can be justified by a match with profile factors. The court did not find that the means of

stopping the suspects—the officers parked their automobile in front of the airplane—created a *de facto* arrest at that point. Instead, it found that blocking with the car resulted in a *Terry* stop, which, as mentioned earlier, was justified by reasonable suspicion. *Id.* at 182. The reasonable suspicion sufficient to justify a *Terry* stop in the fifth circuit consists of specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion. This concept is similar to the "totality of the circumstances" test used to create "reasonable suspicion."

Another version of the "sum of the parts" test for reasonable suspicion was articulated when a case originating in the U.S. District Court for the Eastern District of Missouri was heard on appeal. In *United States* v. *Campbell*, 843 F.2d 1089 (8th Cir. 1988), the U.S. Court of Appeals for the Eighth Circuit found that reasonable suspicion existed to warrant the investigative stop of Campbell as he left the St. Louis airport terminal after arriving from Los Angeles.

The particularized, objective facts known to the DEA agent who stopped Campbell were as follows: (1) Campbell arrived on a flight from Los Angeles, a known source city for drugs; (2) he arrived on a flight that agents had been watching because it had left Los Angeles after DEA agents there went off duty; (3) he arrived in St. Louis at a time when the airport was uncrowded; (4) he walked very quickly and did not check the arrival or departure boards; (5) he looked behind him several times while walking; (6) he did not pick up any checked luggage and carried no luggage other than a carry-on bag; (7) he wore a winter coat in late July; (8) he used a one-way ticket paid for in cash; and (9) he was very nervous while talking with the agent, and remained nervous even after handing the DEA agent his ticket and identification, which revealed no apparent discrepancies. *Id.* at 1094. These observed facts are consistent with the general characteristics included in the drug courier profile.

The court was willing to include the total of the parts of the profile in a whole great enough to create reasonable suspicion. It stated its position as follows:

> The standard of articulable justification required by the fourth amendment for an investigative, *Terry*-type seizure is whether the police officers were aware of "particularized, objective facts which, taken together, warrant[ed] suspicion that a crime [was] being committed." *United States* v. *Martin*, 706 F.2d 263, 265 (8th Cir. 1983); see also *Terry*, 392 U.S. at 20-21, 88 S.Ct. at 1879-80. In assessing whether the requisite degree of suspicion exists, we must determine whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion. "[T]he totality of the circumstances—the whole picture—must be taken into account." *United States* v. *Cortez*, 449 U.S. 441, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). We may consider any added meaning certain conduct might suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operation modes of criminals. *See United States* v. *Wallraff*, 705 F.2d 980, 988 (8th Cir. 1983). It is not necessary that the behavior on which reasonable suspicion is grounded be susceptible only to an interpretation of guilt, *Id;* however, the officers must be acting on facts directly relating to the suspect's conduct and not just on a "hunch" or on circumstances which "describe a very broad category of predominantly innocent travelers." *Reid* v. *Georgia*, 448 U.S. at 440-41, 100 S.Ct. at 2754; *United States* v. *Sokolow*, 831 F.2d 1413 (9th Cir. 1987). *Quoted in Campbell*, 843 F.2d at 1094.

The court recognized that the initial interview between Campbell and the DEA agent came about because Campbell exhibited characteristics included in the drug courier profile. *Campbell*, 843 F.2d at 1092. It recognized this encounter as a permissible meeting followed by a consensual conversation. *Id.* at 1093. The court also determined that the retention of Campbell's ticket and identification card was not as significant in determining whether a seizure had occurred as a similar retention was in *Florida* v. *Royer*, 460 U.S. 491 (1983). Campbell's ticket was a used, one-way ticket and his identification was a state-issued identification card, not a driver's license. Thus, the court found, Campbell could have left at any time; he did not really need these documents. *Campbell*, 843 F.2d at 1093. The court also made much of the fact that Campbell was wearing a winter coat in July in St. Louis and was nervous, even after handing the agent his ticket and identification. It considered these factors particularized evidence.

The Fourth Circuit Court of Appeals, in deciding the case of *United States* v. *Whitehead*, 849 F.2d 849 (4th Cir. 1988), followed the reasoning of the Eighth Circuit Court of Appeals in

Campbell. The fourth circuit court held that reasonable suspicion that an Amtrak train passenger was acting as a drug courier sufficed to allow law enforcement officers to bring trained drug detection dogs into his private sleeping compartment to sniff his luggage. The majority of the court reasoned that a train compartment is more like an automobile than a hotel room for purposes of the Fourth Amendment, and, hence, an individual has a reduced expectation of privacy.

Essentially, the Fourth Circuit Court of Appeals refused to analyze each profile characteristic to determine its consistency with innocence. Instead, it held that "It is the entire mosaic that counts, not single titles." *Whitehead*, 849 F.2d at 858. In *Whitehead*, the reasonable suspicion was created by certain objective facts observed by experienced officers. These facts included the arrestee's traveling from a drug source city (Miami), where he stayed at a hotel notorious for its patronage by drug traffickers, his purchase of a ticket with cash a few hours before the train departed, his arrival at the Amtrak station just before departure and "scanning" the place, his not having taken the train to Miami, his not supplying his full name when twice asked, his having no identification except military dog tags although he was dressed in a business suit, his nervousness when approached by police officers, and the fact that he seldom left his train compartment.

Summary

There are three levels of governmental intrusion into an individual's person, property, and privacy. The least intrusive type is usually characterized by a brief encounter in a public place, such as an airport terminal, to ask an individual a question or two without displaying force or a show of authority or otherwise implying that the individual is not free to terminate the encounter and walk away. Such an encounter is so minimally intrusive that no level of suspicion is required. Law enforcement officers who have such a brief encounter with individuals solely or primarily on the basis of profile characteristics will not violate the Fourth Amendment.

The most intrusive type of encounter amounts to seizure of

the person (an arrest) or of property. The Fourth Amendment requires that such intrusions occur only when probable cause exists.

Between these two extremes are police/citizen encounters in which an individual and his property may be detained for investigation in keeping with the circumstances. Such encounters require the existence of reasonable suspicion—a lesser standard than probable cause. Most courts that have considered the question have found that matching profile characteristics *alone* does not establish reasonable suspicion. On the other hand, the Supreme Court and many lower federal courts have recognized the significance of using profile characteristics, together with an officer's personal observations in light of his experience, to arrive at reasonable suspicion.

The use of profile factors is legally sound in terms of the fourth amendment. Profile factors are simply specific and articulable facts, drawn not from the limited experience of a single officer but from the collective experience of a law enforcement body. They provide a base line to which the individual officer can add his or her own observations and experience when articulating the basis on which reasonable suspicion of criminal activity was formed.[31]

Recommendation

In addition to using the nine principles from the *Royer* case to support a brief encounter, police officers should apply three principles to determine whether there is reasonable suspicion to justify stopping and detaining a traveler for further investigation. *First,* a police officer is not required to eliminate all innocent explanations for the traveler's activities, or to conclude that the traveler's activities are more likely to be guilty than innocent. *Second,* an officer's inquiry should be based on the totality of the circumstances—"the whole picture" as known to the officer. *Third,* an officer should view the circumstances and the traveler's conduct in light of the inferences and probabilities that can be drawn from them when reaching a common-sense conclusion about human behavior.

Notes

1. *United States* v. *Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976). Affirmed, 556 F.2d 383 (6th Cir. 1977).

2. In some cases the suspect would be informed that if he did not consent, a search warrant would be obtained.

3. Little information has been publicly available on the success of DEA stops made using the drug courier profile. Testimony in *United States* v. *Van Lewis*, *supra*, indicated that agents at the Detroit airport had searched 141 persons in 96 encounters. Of those, narcotics were found in 77 encounters and 122 persons were arrested. Of the 77 searches in which narcotics were found, 26 were consent searches and 43 were nonconsensual. Narcotics were found in all nonconsensual searches and in 10 of the 26 consent searches. In *United States* v. *Price*, 599 F.2d 494 (2d. Cir. 1979), a DEA agent estimated that of the 15 to 20 persons he had stopped during the preceding year, 60% were carrying narcotics. There are no statistics on the effectiveness of the drug courier profile nationwide.

4. Factors 1–4 are noted in *United States* v. *McClain*, 452 F. Supp. 195 (E.D. Mich. 1977). These four plus the remaining factors are listed in *United States* v. *Elmore*, 595 F.2d 1036 (5th Cir. 1979). Other cases have also identified drug profile characteristics, such as taking direct flights to and from specified cities, furnishing false identification to airline personnel, attempting to conceal the fact that someone is waiting for them, attempting to conceal the fact that two or more individuals are traveling together, using circuitous routes from known source cities (*United States* v. *Ballard*, 573 F.2d 913 (5th Cir. 1978)); purchasing one-way tickets, being of Hispanic origin (especially Mexican) (*United States* v. *Westerbann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977)); being youthful (*United States* v. *Smith*, 574 F.2d 882 (6th Cir. 1978)); carrying luggage without identification tags (*United States* v. *Price*, 599 F.2d 494 (2d. Cir. 1979) and *United States* v. *Vasquez*, 612 F.2d 1338 (2d. Cir. 1979)); arriving and purchasing tickets at the last minute (*United States* v. *Fry*, 622 F.2d 1218 (5th Cir. 1980)); early morning flights (*State* v. *Reid*, 149 Ga. App. 685, 255 S.E.2d 71 (1979), vacated and remanded *Reid* v. *Georgia*, 448 U.S. 438 (1980)); and deplaning last in order to avoid surveillance by other passengers (*United States* v. *Mendenhall*, 446 U.S. 544 (1980)).

5. The "plain view" doctrine applies equally to what is seen, heard, and smelled. Examples of plain view are physical appearance, an action in a plainly observable place, and conversation loud enough to be heard in a public place. *United States* v. *Jackson*, 588 F.2d 1046 (5th Cir. 1979); *United States* v. *Muckenthaler*, 584 F.2d 240 (8th Cir. 1978); Edson, *Legal Problems in Airport Interceptions of Domestic Drug Couriers* (Drug Enforcement Administration, 1980 draft).

6. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

7. See, for example, *State* v. *Johnson*, 346 A.2d 66 (N.J. 1975).

8. See LaFave, *Search and Seizure: A Treatise on the Fourth Amendement* (2nd ed.) (West Publishing Co., 1987), section 8.2.

9. *Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

10. See *Lowery* v. *State*, 499 S.W.2d 160 (Tex. Crim. 1973).

11. *United States* v. *Leland*, 376 F. Supp. 1193 (D. Del. 1974).

12. In *State* v. *Lash*, 204 S.E.2d 563 (N.C. App. 1974), the officers obtained consent to search the passenger compartment of a car. After finding fruits of the crime in the passenger compartment, they removed the rear seat and obtained access to the trunk. Although the search of the trunk was permissible on other grounds, the suspect's

consent did not extend to the trunk of the car.

13. *Terry* v. *Ohio*, 392 U.S. 1 (1968).

14. *Adams* v. *Williams*, 407 U.S. 143 (1972).

15. *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975).

16. *United States* v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977).

17. *United States* v. *Westerbann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977).

18. The court apparently did not recognize that some of the factors presented to justify an investigatory stop may not be part of the drug courier profile—they simply may be suspicious in and of themselves. For instance, in *United States* v. *Chamblis*, 425 F. Supp. 1330 (E.D. Mich. 1977), an agent had mistakenly testified that the profile included the fact that the defendant had exited at a level of the airport where there was no access to public transportation. This was not part of the profile; it was merely suspicious in itself.

19. 435 F. Supp. at 698.

20. *Westerbann-Martinez* and *Chamblis* illustrate one of the problems with the drug courier profile. Some agents are not clear on what the profile characteristics are and what characteristics are merely suspicious in themselves.

21. *State* v. *Washington*, 364 So.2d 958 (La. 1979.)

22. *Reid* v. *Georgia*, 448 U.S. 438 (1980).

23. Launer, "Airport Searches and Seizures for Narcotics," 12 *Search and Seizure Law Report* 173 (1985). See also *United States* v. *Allen*, 644 F.2d 749 (9th Cir. 1980); *United States* v. *Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States* v. *Smith*, 574 F.2d 882 (6th Cir. 1978).

24. *United States* v. *Mendenhall*, 446 U.S. 544 (1980).

25. 100 S.Ct. at 1882.

26. 100 S.Ct. at 1886.

27. *Florida* v. *Royer*, 460 U.S. 491 (1983).

28. 460 U.S. at 500.

29. "What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions. The officers had Royer's ticket, they had his identification and they had seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed he was being detained. . . . As a practical matter, Royer was under arrest." 460 U.S. at 502-503.

30. Recent post-*Royer* cases with analogous facts include *United States* v. *Moreno*, 742 F.2d 532 (9th Cir. 1984); *United States* v. *Verrusio*, 742 F.2d 1077 (7th Cir. 1984); *United States* v. *Ilazi*, 730 F.2d 1120 (8th Cir. 1984). See also, Launer, "Airport Searches and Seizures for Narcotics," 12 *Search and Seizure Law Report* 174, 176-177 (1985).

31. Latzer, "Royer, Profiles, and the Emerging Three-Tier Approach to the Fourth Amendment," 11 *Am. J. Crim. Law* 109, 113-114 (1983).

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Police Executive Research Forum

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- public debate of police and criminal justice issues;
- research and policy development; and
- the provision of vital management and leadership services to police agencies.

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- Research, experimentation, and exchange of ideas through public discussion and debate are paths for development of a professional body of knowledge about policing;
- Substantial and purposeful academic study is a prerequisite for acquiring, understanding, and adding to the body of knowledge of professional police management;
- Maintenance of the highest standards of ethics and integrity is imperative in the improvement of policing;
- The police must, within the limits of the law, be responsible and accountable to citizens as the ultimate source of police authority; and
- The principles embodied in the Constitution are the foundation of policing.

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