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Totality of the Suspicious Circumstances: Airport Drug Courier Profile Use in Massachusetts since Commonwealth v. Torres

Mark W. Dunderdale
Suffolk University Law School

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TOTALITY OF THE SUSPICIOUS CIRCUMSTANCES: AIRPORT DRUG COURIER PROFILE USE IN MASSACHUSETTS SINCE *COMMONWEALTH v. TORRES*¹

I. INTRODUCTION

A drug courier profile can best be described as an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs.² Law enforcement agents often use profiles to identify potential airline drug traffickers.³ The officer typically identifies a suspect who matches one or more profile characteristics in order to ask them a few questions.⁴ If the person consents, the officer will usually ask to see their airline ticket.⁵ The ticket contains a great deal of information.⁶ This information, in combination with the suspect's reaction to the inquiry, can provide a basis for further inquiry or termination of encounter.⁷

The Fourth Amendment protects against unreasonable searches and seizures.⁸ Courts determine the reasonableness of a seizure by bal-

¹ 424 Mass. 153, 674 N.E.2d 314, 316 (1985).

² See *United States v. Mendenhall*, 446 U.S. 544, 547 (1980) (airport drug courier stopped and questioned by DEA agents leads to characteristic profile arrest).

³ See *id.* (providing example of common profile factors).

⁴ See *id.* (describing actual encounter characteristic of many such stops).

⁵ See *id.* (noting officer asked for ticket as readily available source of identification).

⁶ See Brief for the Petitioner at 7, *Mendenhall* (No. 78-1821) (1979) (describing identifying information taken off plane ticket of *Mendenhall*).

⁷ See *id.* (stating how ticket information can provide valuable data); Charles L. Becton, *The Drug Courier Profile: All Seems Infected That th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye*, 65 N.C. L. REV. 417, 428 (1987) (informing that officers will ask questions designed to reveal travel discrepancies or suspicious information).

⁸ U.S. CONST. amend. IV. The Fourth Amendment provides, in pertinent part:

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

U.S. Const. amend. IV.

ancing any superior government interest against invasion of the individual's privacy.⁹ To justify a seizure, one must have the foundation of probable cause, and for a lesser pat-frisk type search, reasonable suspicion is a minimum.¹⁰ Federal law states that such a seizure, even under reasonable suspicion, must be based on a totality of the circumstances at the time of the encounter.¹¹ Federal courts have further held, even if drug courier profiles contain factors that are circumstantial and individually innocent, the reasonableness analysis does not change, and such factors may be used as part of a totality of the circumstances argument leading to a proper search or seizure.¹²

The Massachusetts Supreme Judicial Court interprets Massachusetts' Article 14 of the Declaration of Rights as providing greater protection to its citizens than does the Fourth Amendment.¹³ The case of

⁹ See *Michigan v. Summers*, 452 U.S. 692, 700 (1981) (declaring warrantless searches and seizures unreasonable and subject to rebuttable presumption); *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)) (supporting balancing test between individual privacy and effective law enforcement when determining probable cause). Justice Brennan in *Dunaway* paraphrased *Brinegar* and set out the balance as: "The 'long-prevailing standards' of probable cause embodied 'the best compromise that has been found for accommodating [the] often opposing interests' in '[safeguarding] citizens from rash and unreasonable interference with privacy' and in '[seeking] to give fair leeway for enforcing the law in the community's protection.'" *Id.*

¹⁰ See *Carroll v. United States*, 267 U.S. 132, 162 (1925) (stating most common definition of probable cause). As defined by the *Carroll* court: Probable cause exists where "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that "an offense has been or is being committed." *Id.* See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (defining special category of less intrusive Fourth Amendment seizures that require only reasonable suspicion).

¹¹ See *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (affirming long held position that Fourth Amendment's touchstone is reasonableness). The *Robinette* Court further measured reasonableness in objective terms by examining the totality of the circumstances. *Id.* See *United States v. Cortez*, 449 U.S. 411, 417 (1981) (calling for requirement to use totality of circumstances test). The *Cortez* Court ruled that in evaluating the propriety of a stop, it must consider the totality of the circumstances - the whole picture. *Id.*

¹² See *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (also describing other federal decisions).

¹³ See *Commonwealth v. Ortiz*, 376 Mass. 349, 358, 380 N.E.2d 669, 674 (1978) (recognizing Massachusetts Constitution affords greater protections than Fourth Amendment). Judge Liacos specifically footnoted to Article 14 in the Massachusetts Constitution when distinguishing the two documents. *Id.* at 358 n.9. See *District Attorney for the Plymouth Dist. v. New England Tel. & Tel. Co.*, 379 Mass. 586, 589, 399 N.E.2d 866, 867 (1980) (acknowledging court's ability to adopt more restrictive guidelines under Article 14 than Fourth Amendment).

*Commonwealth v. Torres*¹⁴ provides that an officer may not add up innocent factors to reach reasonable suspicion to conduct a pat frisk.¹⁵ This holding places Massachusetts squarely against federal law.¹⁶ Drug courier profile observations are almost exclusively innocent if analyzed separately.¹⁷ Requiring an individual analysis of each factor ignores the reality that their potency stems from viewing the whole picture.¹⁸ Opponents have offered proposals to reduce drug courier profiles to a rigid set of criteria, but drug couriers would adapt their behavior to avoid detection.¹⁹ In Massachusetts, allowing experienced police officers to draw common sense conclusions amounting to reasonable suspicion, even from apparently innocent behaviors, does not offend logic because a whole is often more than the sum of its parts.²⁰

¹⁴ 424 Mass. 153, 164, 674 N.E.2d 638, 646 (1997).

¹⁵ *Id.*

¹⁶ Compare *Torres*, 424 Mass. at 161, 674 N.E.2d at 643-44 (holding innocent factors may not be added up to reach reasonable suspicion), with *Sokolow*, 490 U.S. at 11 (allowing for innocent factors to make up analysis leading to reasonable suspicion).

¹⁷ See *Commonwealth v. Fraser*, 410 Mass 541, 545, 573 N.E.2d 979, 982 (1991) (stating factors in determining reasonable suspicion are each innocent themselves); *Sokolow*, 490 U.S. at 5-6 (describing seemingly innocent factors that give rise to permissible suspicion depending on context). The factors include, but are not limited to, cash payment for tickets, unchecked baggage, use of an alias, type of dress, length of stay, destination city, origin city, nervous appearance, and type of movement through airport. *Id.*

¹⁸ See *United States v. Caicedo*, 85 F.3d 1184, 1189 (6th Cir. 1996) (stating no single factor is common to all drug interdiction encounters at airports). Other courts have recognized that one factor in isolation does not meet the requirement of reasonable articulable suspicion. *Id.* at 1189 (quoting *United States v. Knox*, 839 F.2d 285, 290 (6th Cir. 1988)). See *United States v. Cortez*, 449 U.S. 411, 417 (1981) (deciding that in evaluating stops, like drug profile stops, court must consider totality of circumstances).

¹⁹ See *United States v. Lopez*, 328 F. Supp. 1077, 1086, 1101 (E.D.N.Y. 1971) (announcing validity of anti-hijacker profile based on rigid scientific testing). This profile has been limited to exact matches, and the change of just one factor calls for a rejection of the conclusion drawn by the person applying the profile to a suspect. *Id.* See also *Karnes v. Skrutski*, 62 F.3d 485, 489-90 (3d Cir. 1995) (recognizing profile as dynamic and changing which adapt when drug couriers change their behaviors); Stephen E. Hall, *A Balancing Approach to the Constitutionality of Drug Courier Profiles*, 1993 U. ILL. L. REV. 1007, 1010 (1993) (calling for objectively codified drug courier profile).

²⁰ See generally *Sokolow*, 490 U.S. 1. The Court specifically rejected any bright line test of a profile. *Id.* The Court further equated a police officer's ability to deduce suspicion based on common sense factors to that of a jury's role in reaching factual conclusions based on common sense human behaviors. *Id.* It is entirely permissible for an officer to reach a conclusion amounting to reasonable suspicion based solely on innocent factors. *Id.* at 8-10.

This Note addresses the drug courier profile and the dichotomy between federal and Massachusetts search and seizure protections.²¹ Part II of the Note outlines the history of the drug courier profile.²² This section also describes the elements of federal and Massachusetts search and seizure protection.²³ Part III of the Note analyzes the two levels of search and seizure protection.²⁴ Part IV of the Note examines proposals made to improve the use of drug courier profiles.²⁵ The Note concludes by recognizing the importance of the drug courier profile and suggesting the Massachusetts level of protection may be too high.²⁶

II. HISTORY

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures.²⁷ With limited exceptions, a reasonable seizure must have the support of a warrant based on a showing of probable cause.²⁸ A stop made pursuant to a drug courier profile is not necessarily a seizure.²⁹ The Supreme Court held

²¹ See *supra* notes 1-20 and accompanying text.

²² See *infra* notes 27-83 and accompanying text.

²³ See *infra* notes 84-131 and accompanying text.

²⁴ See *infra* notes 132-146 and accompanying text.

²⁵ See *infra* notes 147-168 and accompanying text.

²⁶ See *infra* note 168 and accompanying text.

²⁷ See *supra* note 8 (citing applicable text of Constitution).

²⁸ See *Michigan v. Summers*, 452 U.S. 692, 700 (1981) (declaring warrantless searches unreasonable subject to rebuttable presumption).

²⁹ See *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *Florida v. Bostik*, 501 U.S. 429, 431 (1991); *Florida v. Royer*, 460 U.S. 491, 506 (1983). Not every encounter is necessarily a seizure. *Reid*, 448 U.S. at 440. There are encounters where the individual does not respond or answer questions and this does not rise to a Fourth Amendment seizure. *Id.* In *Reid*, police observed two men deplane in the early morning when police activity is low. *Id.* They both were carrying identical shoulder bags. *Id.* at 400. They glanced at each other as they walked to the building exit. *Id.* Agents outside approached and began to question the men. *Id.* They provided their airline tickets after the officers identified themselves as narcotics officers. *Id.* One of the men ran away, abandoning his shoulder bag, which contained drugs. *Id.* See *Mendenhall*, 446 U.S. at 554 (acknowledging need for police questioning as valid investigatory tool for prosecution of crimes). This practice has been expanded to allow for police to randomly approach persons in airports to ask them questions as long as a reasonable person would not feel that they were forced to cooperate. *Bostik*, 501 U.S. at 431. See also *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (Powell J., concurring) (recognizing that police are not prevented from approaching and questioning people on streets).

that stopping an individual under circumstances where a reasonable person would not feel free to leave constitutes a seizure.³⁰ Courts remedy unreasonable seizures by the judicially created exclusionary rule.³¹ The exclusionary rule is a judicial order barring the admission of evidence obtained as a result of the personal privacy infraction.³² This is not a constitutionally mandated remedy, but a practical measure aimed at deterrence to future unlawful searches and seizures.³³ When a government interest outweighs the intrusiveness of the seizure, the seizure is constitutional, and the fruits of the search are admissible as evidence of guilt.³⁴

The constitutional landscape dramatically changed in 1968 with the landmark Supreme Court case of *Terry v. Ohio*.³⁵ The Court permit-

³⁰ *Bostik*, 501 U.S. 429 (holding no seizure occurred). In *Bostik*, two officers displaying their badges boarded a bus without suspicion and asked a passenger's consent to inspect his luggage. *Id.* at 431. The passenger consented, and the police found cocaine. *Id.* The Court declared the required Fourth Amendment analysis centered on whether a reasonable person would have felt free to decline the officers' requests and walk away. *Id.* For Fourth Amendment purposes, the Court declared the government had not seized *Bostik* when he consented to a search. *Id.* at 438. This case redefined the parameters of a stop to include a situation where an individual did not feel free to walk away or otherwise end the encounter as a seizure. *Id.* at 438. See *Reid*, 448 U.S. at 440 (declaring seizure by police). See *Florida v. Royer*, 460 U.S. 491, 506 (1983) (holding seizure occurred when policed moved defendant over 40 feet from encounter spot). In *Royer*, two detectives stopped a suspect who fit a drug courier profile. *Id.* at 494. He produced an airline ticket and driver's license without his oral consent. *Id.* Without returning his property, the officers asked him to accompany them 40 feet away to a small room. *Id.* The Court determined this was a seizure for Fourth Amendment purposes. *Id.* at 508. An arrest of an individual, by placing in physical control or custody of an officer, is considered a seizure as well. *Id.*

³¹ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (declaring exclusionary rule deterrent necessary to give Fourth Amendment practical effect).

³² See *id.* (outlining seminal case defining exclusionary rule).

³³ See *id.* (creating theoretical future deterrent to unlawful police conduct by eliminating present evidence).

³⁴ See *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967) (recognizing government interest in cases of municipal building inspections that needed support of probable cause). Without probable cause, the search would be unreasonable and prohibited. *Id.* See also *Terry v. Ohio*, 392 U.S. 1, 28 (expanding policy into police encounters where superior governmental interest is police officer's safety).

³⁵ 392 U.S. 1 (1968). In *Terry*, a police officer observed two males casing a business store. *Id.* at 4. The officer approached the males and asked them questions. *Id.* at 4. Fearing for his safety, the officer patted down the outside of their clothing and unmistakably felt a gun, which he seized. *Id.* at 4. The Supreme Court declared the action a search without probable cause, but allowed it because it was much less intrusive than a full-scale search of a person and justified based on the officer's articulable suspicions of the two men and his fear for his personal safety. *Id.* at 30.

ted a lesser pat-frisk search, now commonly referred to as a *Terry* stop.³⁶ Police safety, the superior government interest in *Terry*, provides the foundation for the Court's analysis of individual elements in drug courier profile cases.

Similar to the federal government approach, Massachusetts law enforcement agents also use drug courier profiles.³⁷ The concept of drug courier profiles came out of a necessity to fight an emerging war on drugs.³⁸ The United States and Massachusetts remain in a war against drugs.³⁹ This war in the United States has escalated, leading to the appointment of a military commander as Federal Drug Czar along with the establishment of specialty drug courts.⁴⁰

The collective police knowledge now includes methods of drug trafficking because of intelligence gathered from known and convicted couriers.⁴¹ Police also know that drugs continue to make their way

³⁶ See WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT*, at 348 (2d ed. 1987) (recognizing acceptance of colloquial use of *Terry* stop).

³⁷ See generally *Commonwealth v. Torres*, 424 Mass. 153, 674 N.E.2d 638 (1997); *Commonwealth v. Bartlett*, 41 Mass. App. Ct. 468, 671 N.E.2d 515 (1996); *Commonwealth v. Rivera*, 33 Mass. App. Ct. 311, 599 N.E.2d 245 (1992); *Commonwealth v. Gutierrez*, 26 Mass. App. Ct. 42, 43, 522 N.E.2d 1002, 1003 (1988) (detailing typical drug courier profile case in Massachusetts).

³⁸ See *United States v. Ehlebracht*, 693 F.2d 333, 335 n.3 (former 5th Cir. 1982) (detailing massive amount of drug cases in courts). Drug Enforcement Agent Paul Markonni (sic) is largely credited with providing the work behind the term as early as 1974. *United States v. McClain*, 452 F. Supp. 195, 199 (E.D. Mich. 1977). In 1977, he testified that the DEA was having difficulty in the identification of suspects because of a vast lack of information. *Id.* He had years of experience and began recognizing patterns he saw in couriers. *Id.* See Brian A. Wilson, *The War on Drugs: Evening the Odds Through Use of the Airport Drug Courier Profile*, 6 B.U. PUB. INT. L.J. 203, 203 n.1 (1996) (recognizing drug epidemic leading up to and including 1978).

³⁹ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 413 (1995) (summarizing astonishing amount of money funded to fight drug trade). In 1995, the U.S. spent over \$13 billion combating the drug trade representing a \$10 billion increase from 1985. *Id.*

⁴⁰ See Editorial, BOSTON GLOBE, *Strategic Thinking About Drugs*, March 11, 1996, at 10 (announcing appointment of Barry McCaffrey as national drug czar); White House Press Office, U.S. NEWswire, *White House Fact Sheet on Initiatives to break Cycle of Crime and Drugs*, January 5, 1999 (outlining President Clinton's intent to increase number of local drug courts). The number of drug courts has increased from 12 in 1994 to over 400 in 1999. *Id.*

⁴¹ See *Florida v. Royer*, 460 U.S. 491, 525 (1983) (Rehnquist, J., dissenting) (recognizing police training relies on collective experience of law enforcement officers).

through airports because it remains a successful conduit.⁴² Far more drugs make it through the governmental screening process than are detected.⁴³ Through training and intelligence gathering, officers become skilled in recognizing patterns and behaviors of drug couriers.⁴⁴ Law enforcement agencies informally collect and disseminate behaviors, physical attributes and methods of drug traffickers with each other.⁴⁵ Agencies develop profiles, which they use to enable officers to increase the probability of detection and to distinguish drug couriers from ordinary passengers.⁴⁶

The airport is a significant entry point of illegal narcotics into the commerce.⁴⁷ Therefore, the most innovative and effective methods of drug interdiction are brought to bear on the front lines: the airports.⁴⁸ Law enforcement officers developed the drug courier profile to help sift through the myriad of innocent travelers to identify suspected criminals.⁴⁹

A. Federal Law

After the Supreme Court settled the question of what constitutes a seizure pursuant to a drug courier profile and set the guidelines for reasonableness, another question surfaced.⁵⁰ In applying the reasonable

⁴² See *id.* at 508 (Justice Powell concurring that air transportation is preferred method of drug trafficking).

⁴³ See *United States v. Mendenhall*, 446 U.S. 544, 561-62 (1980) (acknowledging highly sophisticated methods used by drug traffickers and ease of drug concealment).

⁴⁴ See *Wilson*, *supra* note 38 at 241 (citing *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979)) (noting police officers may become highly skilled in drug courier activity).

⁴⁵ See *id.* at 205 (recognizing practice of sharing police intelligence information).

⁴⁶ See generally *Royer*, 460 U.S. at 492-93 (commenting on use of drug courier profiles as law enforcement method to stop illegal drug activity).

⁴⁷ See *id.* at 508 (Powell, J. concurring) (recognizing extent to which air transportation is used in drug trafficking).

⁴⁸ See *id.* at 508-09 (recognizing airports as major commerce stream of illegal narcotics). Justice Powell noted that since 1974 the DEA has adopted the practice of assigning highly skilled agents to the major airports as part of a nationwide program to intercept drug couriers. *Id.*

⁴⁹ See *United States v. Ehlebracht*, 693 F.2d 333, 335 n.3 (former 5th Cir. 1982) (referring to foundations and creation of drug courier profile).

⁵⁰ See *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (setting parameters for seizures in drug courier cases). This opinion focused mainly on probable cause and the objective

suspicion requirement developed in *Terry*, the Supreme Court in *Reid v. Georgia*,⁵¹ determined that a DEA agent could not have reasonably suspected a defendant of drug courier activity based on his profile.⁵² While limiting its holding to the specific profile and facts of the case, the Court nonetheless condemned the use of profiles to match suspicious behaviors and observations as no more than a hunch.⁵³ Therefore the question remains: Could a drug courier profile ever justify a conclusion of reasonable suspicion?⁵⁴

Three years later, the Supreme Court seemed to deal the profile practice another blow.⁵⁵ In *Florida v. Royer*,⁵⁶ the lower court held that the *Royer* stop amounted to more than a *Terry* type detainment and overturned the conviction.⁵⁷ In determining that his behavior remained consistent with the drug courier profile, the Court found the *initial Royer* stop probably would have been reasonable.⁵⁸ The *Royer* court recognized that law enforcement officers are free to push the limits of the

standard that a seizure occurs when a person would not feel free to leave or otherwise terminate the encounter. *Id.*

⁵¹ 448 U.S. 438 (1980).

⁵² See generally *Terry v. Ohio*, 392 U.S. 1, 8 (1968) (creating "reasonable suspicion" standard to frisk); *Reid*, 448 U.S. at 438, 441 (citing that *Reid*'s behavior was too common to be criminally suspicious). As *Reid* and his companion passed through the airport, he sporadically looked behind him and when his partner met up with him the two spoke briefly before attempting to leave the airport. *Id.* Upon questioning by DEA agents, *Reid* attempted to flee, but the agents apprehended him and found cocaine. *Id.*

⁵³ See *Reid*, 448 U.S. at 440 (citing specific observations as no more than police hunches). The majority felt that a seizure had occurred without probable cause. *Id.* The court chastised the police officer's belief that *Reid* and his companion were trying to avoid detection and conceal that they were travelling together based on their actions was "too slender a reed to support the seizure." *Id.*

⁵⁴ See generally *id.* (holding drug courier profile failed to amount to reasonable suspicion here without additional clarification).

⁵⁵ See *Florida v. Royer*, 460 U.S. 491, 506 (1983) (noting conviction overturned). Officers held *Royer* too long and his seizure was held an arrest without supporting probable cause. *Id.*

⁵⁶ 460 U.S. 491 (1983).

⁵⁷ See *id.* Compare *Royer*, 460 U.S. at 499 (noting defendants were moved to another location) with *Terry*, 392 U.S. at 10 (noting defendants were frisked in place).

⁵⁸ See *Royer* 460 U.S. at 502 (announcing that asking defendant to move some 40 feet away as too invasive). The officers changed the circumstances of the initial stop by asking *Royer* to come with them to a closed room some 40 feet away while holding onto his license and airline ticket. *Id.* at 502. This created a situation, in the Court's opinion, that a reasonable person would not have felt free to leave. *Id.* Therefore, the police were required to have probable cause to justify the seizure of *Royer*, which was lacking at that point in the encounter. *Id.*

Constitution and the Fourth Amendment so long as they do not exceed the bounds.⁵⁹ After acknowledging the initial stop valid, the Court further ruled that observations amounting to a drug courier profile contain too many different possibilities to attempt to reduce them to a finite formula.⁶⁰ Without requiring profiles to meet a rigid formula, the Supreme Court signaled its preference of reasonableness over rigid guidelines.⁶¹

In the most recent case on point, the Court established clear guidance on the acceptable use of drug courier profiles.⁶² In *United States v. Sokolow*,⁶³ the Court held that drug courier profile cases must be decided using a totality of the circumstances approach to the facts known to the officers at the time of the stop.⁶⁴ The Court's decision overturned the Ninth Circuit Court of Appeal's ruling of the same case that called for a two-part analysis.⁶⁵ The court of appeals stated that reasonable suspicion should be based upon evidence of ongoing criminal behavior on one hand, and on probabilistic evidence on the other.⁶⁶ The Court, noting one

⁵⁹ See *Royer*, 460 U.S. at 519 (Blackman, J., dissenting) (recognizing clear need for flexibility in methods of finding illicit drug couriers).

⁶⁰ See *id.* at 506-07. The Court stated:

We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

Id.

⁶¹ See *id.* at 509 (limiting holding of case to present facts only).

⁶² See *United States v. Sokolow*, 490 U.S. 1, 3-5 (1989) (defining parameters of permissive drug courier profile use). Drug Enforcement Administration agents in the Honolulu International Airport stopped Andrew Sokolow. *Id.* at 4. In his luggage police discovered 1,063 grams of cocaine. *Id.* The agents knew at the time he was stopped that: (1) he paid for two tickets (over \$2000) in \$20 bills, (2) he was travelling under a different name, (3) he was coming from Miami, (4) he had left Hawaii went to Miami and stayed 48 hours before returning to Hawaii, (5) he was nervous, and (6) he did not check any of his luggage. *Id.* The Court's concern centered on whether the agents had reasonable suspicion that Sokolow's behaviors indicated ongoing criminal behavior. *Id.* at 7.

⁶³ 490 U.S. 1 (1989).

⁶⁴ See *id.* at 13-14 (returning analysis to totality test).

⁶⁵ See *id.* at 7 (citing Ninth Circuit's ruling).

⁶⁶ See *id.* at 6 (detailing improper two-part test of lower court).

reason for overturning the Ninth Circuit, specifically rejected splitting the evidence into two categories.⁶⁷

More consequential to the issue of drug courier profiles, the Court codified the current federal analysis in *Sokolow* by declaring that the use of drug courier profiles does not change the process to reach reasonable suspicion.⁶⁸ In a common sense approach to the question, the Court sifted out the weight of catchphrases such as "drug courier profile" and "collection of factors" finding them irrelevant.⁶⁹ The Court's concern was with the reasonableness of the stop itself, not the nickname.⁷⁰ The Court held that even if circumstantial evidence leads to reasonable suspicion the stops are still permissible.⁷¹ Recognizing the human element of these types of encounters, the Court further stated that common sense conclusions about human behavior are permissible.⁷² The Court quoted its holding in *Gates* and stated that, "[i]nnocent behavior will frequently provide the basis for a showing of probable cause . . . [i]n making determinations of probable cause the relevant inquiry is not whether the particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts."⁷³ This ruling allows a wide range of permissible activity for profile use.⁷⁴

⁶⁷ See *id.* at 7-8 (correcting Ninth Circuit's restrictive analysis).

⁶⁸ See *Sokolow*, 490 U.S. at 19 (deciding drug courier profiles are permissive when used as part of normal reasonable suspicion analysis). The opinion specifically states, "We do not agree that our (reasonable suspicion) analysis is somehow changed by the agents' belief that his (Sokolow's) behavior was consistent with . . . 'drug courier profiles.'" *Id.*

⁶⁹ See *id.* (minimizing impact of word profile to focus attention to analysis itself).

⁷⁰ See *id.* (downplaying word choice in favor of actual analysis).

⁷¹ See *id.* at 7-8 n.6. (approving DEA had routinely trained its agents to identify drug smugglers through circumstantial evidence). The Court noted that there might be occasions that wholly lawful conduct could give rise to reasonable suspicion. *Id.* at 17. The Court also noted it possible to have a series of acts that are each innocent, but when taken together warrant further investigation. *Id.*

⁷² See *id.* at 8 (recognizing human element of police decisions). The Court reiterated that the process of determining probable cause deals in probabilities and allows for common-sense conclusions about human behavior. *Id.*

⁷³ *Sokolow*, 490 U.S. at 18 (quoting *Illinois v. Gates*, 462 U.S. 213, 243-44 (1983)).

⁷⁴ See Hall, *supra* note 19 at 1008 (noting *Sokolow* allows for subjective judgement of reasonable suspicion of suspect by officer). The determination permits a wide variety of permissible uses. It allows for a subjective conclusion based on an individual's commonsense. Similarly, jurors bring their own personal backgrounds and experience into the courtroom to determine facts and draw conclusions. *Id.*

The *Sokolow* decision has its limitations.⁷⁵ The *Sokolow* standard places a great deal of importance on the specifics of an officer's testimony and conduct.⁷⁶ An officer must be able to articulate the factors leading to his conclusion of reasonable suspicion, and not simply state that the suspect fit the profile.⁷⁷ Prosecutors meet this burden by proper direct examination of the officer.⁷⁸ A solid examination directs officers to point to the specific aspects of the defendant's behavior, manner and dress that led to the reasonable suspicion conclusion.⁷⁹ Conversely, a defense attorney's opportunity lies in the cross-examination.⁸⁰ Exploitation of the observations in minute detail, and the subjective conclusions drawn from them could paint a picture of a faltering decision.⁸¹ By attempting to draw the officer into stating that he made broad generalizations or a hasty decision, a skilled cross-examiner can impeach the credibility of both the officer and the profile.⁸² These trial tactics are both permissible and probable.⁸³

⁷⁵ See *Sokolow*, 490 U.S. at 7 (1989) (granting certiorari solely to refocus attention to Fourth Amendment's requirement for reasonableness).

⁷⁶ See *id.* (calling for specific articulable facts by officer).

⁷⁷ See *id.* (noting use of the word profile does not itself provide sufficient case specific facts).

⁷⁸ See Hall, *supra* note 19 at 1010 (pointing to examples of testimony where officer must articulate).

⁷⁹ See *id.* (recognizing officer's judgment is relied upon heavily by court given his/her experience).

⁸⁰ See *id.* (inferring government weakness lies in making general observations indicative of no particular criminal). Hall warns of the danger in allowing the same person who made the stop to assist in the contemplation of the reasonableness of the stop as well. *Id.* There is an inherent question raised of a risk of police abuse, and a skillful defense attorney will exploit this weakness if presented. *Id.*

⁸¹ See *id.* (recognizing profile effectiveness stems from officer's personal experiences as well as observable factors). Hall infers that a hunch is easily created by personalizing every observation made to an officer's inferior and subjective views of human behavior. *Id.*

⁸² See *id.* at 1023 (recognizing short time in which officers must make decisions). There is a stark difference between the analysis of the officer's decision made in the airport and the analysis made in the courtroom. *Id.*

⁸³ See *United States v. Taylor*, 917 F.2d. 1402, 1408-09 (6th Cir. 1990) (exemplifying case of hasty generalizations by officer). The defense attorney in *Taylor* provides a solid example of discrediting a police officer on drug courier profiles:

Q: Have you ever had any formal training in what constitutes a drug (courier) profile. . . If so, tell me when and who taught you?

A: Well, I - naw, I tell you, when you get into the word profile, I think we're starting to learn that there's no really (sic) criteria that you can actually say, yeah, hey, that is a druggy . . .

B. Massachusetts State Law

Historically, Massachusetts has conflicted with the Supreme Court concerning constitutional interpretation.⁸⁴ The philosophical differences surrounding this issue are sheltered in the affirmation that the Massachusetts Declaration of Rights is more restrictive than the Fourth Amendment of the United States Constitution.⁸⁵ The Massachusetts Su-

Q: All right. Now go ahead now, how did the defendant appear on this occasion?

A: He appeared [in] kind of a grunchny (sic) type work clothes. He had a dirty black baseball cap with something wrote (sic) across the front of it, and little squirrelly, kind of like captains wear, the little gold squirrels across the bill. . .

Q: In the military – called scrambled eggs?

A: There you go – scrambled eggs. And he had on, I think it was, a blue shirt with "PACE" written across the pocket. A pair of blue trousers, white tennis shoes.

Q: And why do you say he – why did he stick out?

A: Well, the rest of the passengers that usually come from Miami flights is (sic) either business people or resort type people, people getting off in real casual nice looking clothes. Like I say, it was just different seeing somebody getting off there looking like Mr. [Taylor] looked that night.

Id. See *Louisiana v. Garcia*, 519 So. 2d 788, 793 (La. App. 1987) (discussing officers drug courier testimony and failure of defense counsel to impeach officers' testimony); *See United States v. Quigley*, 890 F.2d 1019, 1022 (8th Cir. 1989) (commenting on officer's expert testimony regarding profiles). The court negatively commented on using an officer's expert drug courier profile testimony as evidence of guilt. *Id.* The defense counsel cross examined the officer on drug courier profiles and attempted to point out that the defendant did not display the typical accoutrements of wealth associated with some profiles. *Id.* The court then allowed the government to introduce other types of profile testimony to rebut the defense counsel's attack. *Id.*

⁸⁴ See e.g. *Commonwealth v. Upton*, 390 Mass. 562, 458 N.E.2d 717 (1983) (rejecting Supreme Court ruling in favor of Massachusetts state constitutional interpretation); *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985) (rejecting again Supreme Court ruling in favor of its own interpretation).

⁸⁵ See MASS. CONST. ANN. PT. 1, ART. 14 (1998). Article 14 of the Massachusetts Constitution states:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Id. See *Commonwealth v. Ortiz*, 376 Mass. 349, 356, 380 N.E.2d 669, 674 (1978) (distinguishing Article 14 of Massachusetts State Constitution from Fourth Amendment). *Ortiz* specifically holds that the SJC interprets Article 14 to provide greater protections

preme Judicial Court (SJC) has affirmed that Massachusetts provides more protections to individual freedoms than provided by the U.S. Constitution.⁸⁶ In particular, Article Fourteen of the Massachusetts Declaration of Rights grants stronger individual rights against unreasonable search and seizures than the Fourth Amendment.⁸⁷ Sound legal analysis requires this judicial position if the intent is to independently distance Massachusetts law from federal law.⁸⁸ Otherwise, the Fourteenth Amendment provides substantive Due Process implications to the states and requires states to provide citizens the protections guaranteed under the United States Constitution.⁸⁹

The SJC and the Supreme Court strictly prohibit the use of drug courier profiles as substantive evidence of guilt.⁹⁰ *Commonwealth v. Day*⁹¹ recognizes this precept for both jurisdictions.⁹² The foundations of Massachusetts law in threshold inquiries and seizures are strikingly similar to federal law given the disparate outcome in drug courier cases.⁹³ For a permissive threshold inquiry, the SJC in *Commonwealth v.*

than the Fourth Amendment. *Id.* See District Attorney for the Plymouth District v. New England Tel. & Tel. Co., 379 Mass. 586, 589 (1980) (agreeing court may grant additional rights under Article 14 not present in Fourth Amendment).

⁸⁶ See *Ortiz*, 376 Mass. at 356, 380 N.E.2d at 674 (specifically recognizing differences and greater limitations of Massachusetts law); MASS. CONST. ANN. PT. 1, ART. 14 (textually different than Fourth Amendment); Jenkins v. Chief Justice of the District Court Dep't, 416 Mass. 221, 229 n.16, 619 N.E.2d 324, 330 (1993). The court stated, "it is by now firmly established that, in some circumstances, Art.14 affords greater protection against arbitrary government action than do the cognate provisions of the Fourth Amendment." *Id.*

⁸⁷ See MASS. CONST. ANN. PT. 1, ART. 14 (preceding and textually different than the Fourth Amendment).

⁸⁸ See *Upton*, 394 Mass. at 364, 476 N.E.2d at 549 (declaring Massachusetts Declaration of Rights is stricter on government intrusions than Fourth Amendment). Indicating a preference over federal law, the SJC later stated in the same opinion: "The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States." *Id.* at 372, 476 N.E.2d at 555-56.

⁸⁹ See *Ex Parte Virginia*, 100 U.S. 339, 346-47 (1879) (noting 14th Amendment means States shall not deny federal or equal protections of laws). The Constitution gives power to Congress to enforce its provisions to the states by appropriate legislation. *Id.*

⁹⁰ See *Commonwealth v. Day*, 409 Mass. 719, 723, 569 N.E.2d 397, 399 (1991) (citing *U.S. v. Simpson* 910 F.2d 154, 158 (4th Cir. 1990)).

⁹¹ 409 Mass. 719, 569 N.E.2d 397 (1991).

⁹² See *id.* (recognizing federal prohibition as evidence of guilt and duplicating rule for Massachusetts).

⁹³ See e.g. *Commonwealth v. Silva*, 366 Mass. 402, 406, 318 N.E.2d 895, 898 (1974) (relying on *Terry v. Ohio*, 392 U.S. 1(1968) to explain Massachusetts position on threshold inquiries); *Commonwealth v. Stoute*, 422 Mass. 782, 785, 665 N.E.2d 93, 95

Silva,⁹⁴ held that, "[T]he police officer's action [must] be based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer's experience."⁹⁵ Once the threshold inquiry test is satisfied, and if the encounter continues, the next test is one for seizure.⁹⁶ Massachusetts adheres to the seizure test adopted in *United States v. Mendenhall*.⁹⁷ The *Mendenhall* test serves to distinguish a seizure from a consensual encounter by, "[v]iewing all the circumstances surrounding the incident, [to determine if] a reasonable person would have believed that he was not free to leave."⁹⁸ In *Commonwealth v. Borges*,⁹⁹ Massachusetts adopted the same test.¹⁰⁰

It is the recent case of *Commonwealth v. Torres*, that the SJC departed in its interpretation of observations that may lead to reasonable suspicion.¹⁰¹ In *Torres*, a state trooper stopped a vehicle, in which Torres was a passenger, for a moving violation.¹⁰² The trooper approached the vehicle on the passenger side and waited several seconds for Torres to notice he was standing outside his window.¹⁰³ Torres attempted to exit

(1996) (citing foundation *United States v. Mendenhall*, 466 U.S. 544 (1980), as test Massachusetts will use to determine seizure).

⁹⁴ 366 Mass. 402, 318 N.E.2d 895 (1974).

⁹⁵ See *Silva*, 366 Mass. at 406, 318 N.E.2d at 898 (recognizing officer's experience plays role in observing potential criminal situations). By clarifying that an officer's experience plays a factor in his ability to assess observations, one may infer from the case that an officer with a great deal of experience with particular types of observations may draw inferences that inexperienced persons could not. *Id.*

⁹⁶ See *Commonwealth v. Stoute*, 422 Mass. 782, 786, 665 N.E.2d 93, 95 (1996) (defining seizure test in Massachusetts). The court declared for purposes of Article 14, a person seized when the police have significantly restrained their personal liberty. *Id.*

⁹⁷ See *United States v. Mendenhall*, 446 U.S. 544, 550 (1980) (defining federal "free to leave" standard test for seizures); *Commonwealth v. Thinh Van Cao*, 419 Mass. 383, 387, 644 N.E.2d 1294, 1297 (1995) (declaring *Mendenhall* as the standard in Massachusetts). The court recognized that, "Massachusetts courts have adhered to the test set forth in the *Mendenhall* (case). . . as the proper analysis whether a seizure has occurred under article 14 to the Massachusetts Constitution." *Id.*

⁹⁸ *Mendenhall*, 466 U.S. at 554.

⁹⁹ 393 Mass. 788, 482, N.E.2d 314 (1985).

¹⁰⁰ See *id.* at 791, 482 N.E.2d at 316 (quoting *Mendenhall*, 446 U.S. at 554). Officers asked a suspect to remove his shoes during an investigatory stop. *Id.* This act raised the stop to a seizure because the court found a reasonable person would not have felt free to leave without his shoes. *Id.*

¹⁰¹ See *Commonwealth v. Torres*, 424 Mass. 153, 160, 674 N.E.2d 638, 640 (1997) (holding each observed factor must independently indicate something suspicious).

¹⁰² See *id.* at 155, 674 N.E.2d at 641 (citing speed as reason for car stop).

¹⁰³ *Id.*

the vehicle, and, fearing for his safety, the trooper directed Torres to wait at the rear of the vehicle.¹⁰⁴ The trooper then began to question the driver outside the vehicle and away from Torres.¹⁰⁵ Once the driver answered the trooper's questions satisfactorily, the trooper began to question Torres.¹⁰⁶ Because Torres repeatedly stated that he did not speak English, the trooper motioned to Torres' rear pant's pocket to his wallet and made an open and close motion with his hands.¹⁰⁷ Torres gave his wallet to the trooper who, upon inspection, found papers he recognized as money wire receipts from Lowell, Massachusetts to Medellin, Colombia.¹⁰⁸ Based on his experience and training, the trooper knew Medellin to be a source city for cocaine distribution.¹⁰⁹ He requested to search the vehicle and received permission.¹¹⁰ The court convicted both the driver and Torres with trafficking in cocaine, and conspiracy to traffic in cocaine, of which the convictions were later set aside.¹¹¹

With respect to Torres, the court found the stop impermissible because it felt the officer reached reasonable suspicion based on a hunch.¹¹² Holding that a passenger in a car has a higher expectation of privacy than the driver, the court reasoned that upon receiving a set of satisfactory answers by the driver, the trooper should have presented the driver with a traffic violation and sent him on his way absent an independent suspicion of Torres.¹¹³ The court felt that up to this point the trooper had been

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Commonwealth v. Torres*, 424 Mass. 153, 156, 674 N.E.2d 638, 641 (1997).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Commonwealth v. Torres*, 424 Mass. 153, 156, 674 N.E.2d 638, 641 (1997).

¹¹² *See id.* at 158, 674 N.E.2d at 642 (narrowing discussion to areas of reasonable suspicion to question Torres). The court held that the issue surrounding Torres was whether there was independent reasonable suspicion to question him while at the back of the vehicle. *Id.* at 163, 674 N.E.2d at 645. The facts present a similar circumstance to many airport drug courier profile observations such as dress, speech, nervousness, and other circumstances enumerated in the opinion.

¹¹³ *See id.* at 158, 674 N.E.2d at 642 (separating passenger and driver's expectation of privacy). The court stated, "It is well settled that a police inquiry must end on the production of a valid license and registration unless the police have grounds for inferring that either the operator or his passengers were involved in the commission of a crime or engaged in other suspicious conduct." The court signaled that the driver and Torres should have been sent upon their way with whatever citation could have been issued. *Id.*

collecting merely innocent observations indicative of nothing criminal.¹¹⁴ The SJC specifically drew the analogy of adding up of zeros not equating to a sum of reasonable suspicion.¹¹⁵ In reaching its decision, the SJC relied, in part, and devoted considerable space in the opinion to, *Commonwealth v. Bartlett*,¹¹⁶ in which it reinforces *Bartlett*'s rejection of another trooper's use of eight factors akin to a profile, as not enough to approach the reasonable stimulus for investigation.¹¹⁷ The *Torres* court declared the order of events as the specific reason for the improper search and seizure, not the questioning itself.¹¹⁸ Specifically, given the facts presented above, if the trooper had asked for Torres' identification first, the stop would have been permissible.¹¹⁹ By stating the trooper's deductions were only out of order, it may be inferred that the SJC does not say they were improper and therefore, in a similar situation, an offi-

¹¹⁴ See *id.* at 161, 674 N.E.2d at 643-44 (reversing lower court's position that Torres' actions amounted to suspicion). The lower court ruled that Torres' exiting the passenger side was itself unusual and justified the trooper's suspicion of Torres to ascertain his identity. *Id.*

¹¹⁵ See *id.* at 161-62, 674 N.E.2d at 643-44. (quoting *Commonwealth v. Bartlett*, 41 Mass. App. Ct. 468, 469-70, 671 N.E.2d 515, 516 (1996)). The *Bartlett* court identified eight observations made by a police officer and declared, "Adding up eight zeros-- does not produce a sum of suspicion . . ." to justify a *Terry* stop based on reasonable suspicion. *Bartlett*, 41 Mass. App. Ct. at 469-70, 671 N.E.2d at 516. The eight observations were: (1) the car was rented, (2) the car was rented at Logan Airport, (3) the car was not rented to either the driver or the passenger, (4) the driver was a resident of Cambridge, and it was odd that he would rent a car for a local trip, (5) the driver was driving from Boston to Lowell and back at 10:00 AM to pick up a carpenter, (6) there were no construction tools in the car (they had claimed to be construction workers), (7) the occupants of the vehicle wore beepers, and (8) the officer had made drug seizures himself in the area they were travelling in. *Id.*

¹¹⁶ 41 Mass. App. Ct. 468, 671 N.E.2d 515 (1996)

¹¹⁷ *Torres*, 424 Mass. at 159, 674 N.E.2d at 643-44. In reaching the conclusion that Torres' actions did not justify further suspicion, the court supports the conclusion through reliance on *Bartlett*. *Bartlett*, 41 Mass. App. Ct. at 469-70, 671 N.E.2d. at 517. *Bartlett* declares that the some of the factors are individually unlikely as to suggest guilt, while others are individually explained away with opposite innocent explanations and proposals by the court. *Id.* See also *Commonwealth v. Day*, 409 Mass. 719, 723, 569 N.E.2d 397, 399 (declaring drug courier profiles can not be used as evidence of guilt). The *Bartlett* court did not address whether it concluded that the officer was assessing the factors to reach reasonable suspicion or determining guilt. *Bartlett*, 41 Mass. App. Ct. at 468, 671 N.E.2d. at 517.

¹¹⁸ See *Torres*, 424 Mass. at 163, 674 N.E.2d at 645 (finding questions too invasive). The court agreed with the Appeals Court that, "the order of events is what renders this search and seizure improper." *Id.*

¹¹⁹ See *id.* (inferring order of questioning led to improper reasonable suspicion).

cer could permissibly find reasonable suspicion under a totality of the circumstances argument.¹²⁰

In *Torres*, the court relies on another Massachusetts Appeals Court opinion, *Commonwealth v. Rivera*.¹²¹ The *Torres* opinion seems to stretch language in *Rivera* that bears heavily on its conclusion.¹²² Specifically, the court quotes *Rivera* as, "while alert police officers may add up suggestive factors . . . to support a search, they may not add up non-suggestive factors [emphasis added]." ¹²³ The *Rivera* opinion provides, "while one factor by itself may appear innocent . . . taken in combination with other factors, there may be requisite reasonable apprehension."¹²⁴ Notably absent is the word "suggestive."¹²⁵ The addition of "suggestive" by the SJC in *Torres* changes the foundation of the argument.¹²⁶ The foundation of the argument is that police may add up suggestive but not innocuous factors in matching observations to a profile used to support reasonable suspicion.¹²⁷ A direct interpretation of *Rivera* favors the line of reasoning in *Sokolow*.¹²⁸ The argument would go as follows: Innocent factors taken in combination with other factors, including possibly

¹²⁰ See *id.* (pointing to improper order of questioning). Trooper Cummings' questioning of *Torres* was not per se violative. *Id.* The trooper's observations were recognized as valid for a continuing suspicion, but not in the order they presented themselves in these series of facts. *Id.* The act of observing others legitimately allows a practitioner to surmise that police observations of innocuous circumstances, fitting a profile, could lead to further questioning. *Id.*

¹²¹ *Torres*, 424 Mass. at 161, 674 N.E.2d at 643; *Commonwealth v. Rivera*, 33 Mass. App. Ct. 311, 314, 599 N.E.2d 245, 246 (1995).

¹²² See *Torres*, 424 Mass. At 161, 674 N.E.2d at 643 (quoting *Rivera* with language not found in original opinion); *Rivera*, 33 Mass. App. Ct. at 314, 599 N.E.2d at 245.

¹²³ *Torres*, 424 Mass. at 161, 674 N.E.2d at 643. This implies that non-suggestive, or innocent, factors may not be added up. *Id.*

¹²⁴ *Rivera*, 33 Mass. App. Ct. at 314, 599 N.E.2d at 245.

¹²⁵ See *id.* (discussing factors without use of "suggestive").

¹²⁶ See *Torres*, 424 Mass. at 161, 674 N.E.2d at 643 (quoting suggestive factors can be added up without actual reference to specific word). The foundation is that suggestive factors can be added up, and the inference is that only suggestive factors may be added. *Id.*

¹²⁷ See *id.* (providing intended analysis of reasonable suspicion).

¹²⁸ See *Rivera*, 33 Mass. App. Ct. at 314, 599 N.E.2d at 245 (textual reading supports use of non-suggestive factors to reach reasonable suspicion); *United States v. Sokolow*, 490 U.S. 1, 8 (1989) (allowing for totality of circumstances argument to support reasonable suspicion to seize pursuant to profile). In *Sokolow*, the Court recognized that innocent behavior will often be the foundation for further inquiry. *Id.* at 17.

other innocent ones, may reach requisite reasonable suspicion.¹²⁹ There is no explanation of the additional text in the opinion.¹³⁰ Unless the SJC clarifies the use of the language, it appears that *Torres* could serve as the basis to review an officer's ability to add up non-suggestive factors on a new set of facts.¹³¹

III. ANALYSIS

The SJC, in *Torres*, intended to furnish Massachusetts citizens with greater protection than provided for in the United States Constitution.¹³² The SJC rejected the totality of the circumstances argument in the *Upton & Upton II*¹³³ line of cases.¹³⁴ The SJC took great pains to enforce a two-prong test promulgated through *Aguilar v. Texas*¹³⁵ and *Spinnelli v. United States*.¹³⁶ By now making it more difficult for investigators, in state cases, to question suspected drug couriers in airports, the

¹²⁹ See generally *Sokolow*, 490 U.S. at 1 (allowing innocent factors to amount to reasonable suspicion to seize pursuant to drug courier profile).

¹³⁰ See *Torres*, 424 Mass. 153, 674 N.E.2d 638 (noting word "suggestive" attributed to *Rivera* not found in opinion nor discussed text).

¹³¹ See *id.* (calling for use of suggestive factors in reasonable suspicion).

¹³² See *Torres*, 424 Mass. 153, 674 N.E.2d 638 (limiting totality analysis to include at least some suspicious factors). The court stated that it was basing its opinion in express reliance on art. 14. *Id.* at 154, 67 N.E.2d at 640. See *supra* note 7 (outlining text of Article 14).

¹³³ 394 Mass. 363, 476 N.E.2d 548 (1985)

¹³⁴ See *Commonwealth v. Upton*, 390 Mass. 562, 458 N.E.2d 717. (1983) (discussing initial *Upton* case); *Commonwealth v. Upton*, 394 Mass. at 363, 476 N.E.2d at 548 (rejecting Supreme Court ruling in same case and defining new state constitutional grounds). In *Upton*, the Court remanded a case for further ruling because the SJC had not followed the federal guidelines in determining probable cause in the use of anonymous informants. In *Upton II*, the SJC upheld its previous interpretation on independent state grounds thus, establishing a different rule under state law. See *supra* notes 84-100 and accompanying text (discussing SJC distinguishable interpretation).

¹³⁵ 378 U.S. 108 (1964).

¹³⁶ See generally *id.* at 108 (declaring importance of veracity and basis of knowledge factors); *Spinelli v. United States*, 393 U.S. 410, 411 (1969) (allowing for independent police corroboration of factors). For an arrest to comport with Article 14, information known to the arresting officers must satisfy a two-pronged test: first, a basis of knowledge of the information provider - the particular means by which he came by the information - must be shown; and second, facts establishing either the general veracity of the informant or the specific reliability of his statement in the particular case. *Upton*, 394 Mass. at 363, 476 N.E.2d at 548.

intent has had the opposite effect.¹³⁷ Like many other big cities to which this criminal law theory applies, when state law has limited permissive action, the state's law enforcement agencies look for alternative methods.¹³⁸ It becomes obvious to law enforcement agencies that federal law emerges as the least restrictive method, providing a wide scope of subjective interpretation.¹³⁹

Massachusetts prosecutors and other law enforcement agencies have not rushed to fight the *Torres* implications in airport drug courier profile situations.¹⁴⁰ This is somewhat due to the fact that the other major area of drug courier profile screening is on highways where the rules of search and seizure have been historically broader.¹⁴¹ As the Supreme Court sits to determine if it will place additional limits on motor vehicle stops, Massachusetts prosecutors will watch carefully for any effect on searches and seizures.¹⁴² If the Supreme Court places severe restrictions on motor vehicle stops, it is likely that *Torres* will come under new scrutiny.¹⁴³ If the Supreme Court decides that searches following a motor vehicle stop are no longer as heavily protected due to an inherent exigency argument of motor vehicles, then these searches will become more

¹³⁷ See *Torres*, 424 Mass. 153, 674 N.E.2d 638 (calling for minimal independently suspicious factors when grouping to reach reasonable suspicion). *Torres* requires each observation to have suspicious characteristics whereas *Sokolow* allows all observations to be bundled under a totality of the circumstances theory. *Id.*

¹³⁸ See *Burnett*, 33 DUQ. L. REV. 283, 283 (1995) (describing authorized police program of completely random approaches to airport travelers).

¹³⁹ See *generally Sokolow*, 490 U.S. at 1 (allowing for compiling of otherwise innocent behaviors as factors in computing requisite reasonable suspicion).

¹⁴⁰ See *Torres*, 424 Mass. 153, 674 N.E.2d 638 (absence of other cases referring to opinion). Research of Massachusetts cases since *Torres* indicates that there have been few citations or references to *Torres*, and of those cases there are no negative references. *Id.* The cases citing to *Torres* focus on the greater protections, provided by article 14, of a passenger in a vehicle. *Id.* There are no references to the government's ability, or inability, to draw inferences from non-suggestive factors. *Id.* There are no cases cited dealing with airport drug courier profiles. *Id.*

¹⁴¹ See *generally Commonwealth v. King*, 389 Mass. 233, 237, 449 N.E.2d 1217, 1220 (1983) (recognizing several unique circumstances pertaining to Fourth Amendment rights and automobile searches). See *generally Commonwealth v. Ortiz*, 376 Mass. 349, 355, 380 N.E.2d 669, 673 (1978) (recognizing broad searches of automobiles arising under exigent circumstance not requiring warrant).

¹⁴² See ASSOCIATED PRESS, *Justices Question Searches By Police; An Iowa Case Involves Authority After Citation*, BOSTON GLOBE, November 4, 1998 at A3 (discussing permissive scope, to searches incident to traffic citation currently under review by Supreme Court).

¹⁴³ See *id.* (warning of potential change to permissive scope of automobile stops).

difficult to justify.¹⁴⁴ Prosecutors will justifiably seek to supplement an officer's reasonable suspicion with additional factors like those found in a drug courier profile.¹⁴⁵ It is ironic that the SJC's intent to protect its citizens from the broad interpretations of federal law under the Fourth Amendment could signal a return to federal prosecutions of Massachusetts' citizens, as a way of avoiding Massachusetts law.¹⁴⁶

IV. PROPOSALS

There have been many commentaries against drug courier profile use by academics and civil libertarians.¹⁴⁷ Some of these articles have made recommendations and proposals on how to fix profile use.¹⁴⁸ For example, opponents commonly offer to solidify the profile to a rigid set of criteria.¹⁴⁹ Such a proposal ignores the realities of drug dealing.¹⁵⁰ If

¹⁴⁴ See *id.* (predicting Supreme Court will likely restrict historically broad authority to search); see also *Carroll v. United States*, 267 U.S. 132, 147 (1925) (defining automobile exception to search warrant requirement).

¹⁴⁵ See *United States v. Cortez*, 449 U.S. 411 (1981) (recognizing sliding scale of reasonable suspicion in light of officer's experience). A sharp prosecutor would ensure that a very experienced officer were involved in as many airport drug courier profile cases as possible. *Id.* In these circumstances, the more experienced the officer, the fewer facts are necessary to justify a finding of reasonable suspicion. *Id.*

¹⁴⁶ Compare *Torres*, 424 Mass. 153, 674 N.E.2d 638 (rejecting officer's ability to add-up non-suggestive factors) with *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (approving addition of non suggestive factors). The reasonable suspicion standard is lower under a federal interpretation than in Massachusetts State courts. *Id.*

¹⁴⁷ See Mark J. Kadish, *The Drug Courier Profile: in Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U.L. REV. 747, 751 n.9 (criticizing profile use by prosecutors who attempt to collaterally enter such observations as evidence). See *supra* note 17 (proposing adherence to profile alone should be violative of Fourth Amendment). See generally Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. REV. 843 (1985) (calling for greater objective and detached review of Fourth Amendment searches).

¹⁴⁸ See *supra* note 34 (calling for *Camara* balancing test). See Cloud, *supra* note 130, at 850 (calling for independent judicial scrutiny of drug courier profiles).

¹⁴⁹ See Cloud, *supra* note 147, at 850 (calling for codified factors to allow for judicial review of compliance on each case). The author suggests the government should be required to define all the elements of a drug courier profile before judicial acceptance as the premise to an argument. *Id.*

¹⁵⁰ See Wilson, *supra* note 38, at 203 n.1 (noting that profile must be flexible to be useful). A rigid and well-publicized profile would disappear quickly from the drug cou-

a profile were set in stone, it would not take long for drug dealers to become aware of the characteristics and modify their activities.¹⁵¹

Other proposals have suggested studies to corroborate officer's suspicions with hard and clearly definable data.¹⁵² In other words, their proposals call for the identification of singular factors that make a profile accurate and ask for a requirement to place a number on the percentage of correct guesses officers tend to make.¹⁵³ Therefore, the profile would have an objective reliability factor and courts would have a number on which to give weight to its effectiveness.¹⁵⁴ Government agencies have done similar studies on airline hijackers in the 1960s and have successfully used such profiling to detect potential terrorists.¹⁵⁵ Even though helpful in those circumstances, there are significant differences between the two types of activity.¹⁵⁶ Reliable and quick bomb detection equipment is still emerging as a technical capability available at airport passenger concourses in the United States.¹⁵⁷ The new type of equipment is more portable but expensive and currently only found in select locations in a few national airports.¹⁵⁸

rier's modus operandi. *Id.* But see *Karnes v. Skrutski*, 62 F.3d 485, 489-90 (3d Cir. 1995) (recognizing profile changes as courier habits change).

¹⁵¹ See *Skrutski*, 62 F.3d at 489-90 (citing changing aspects of drug courier profile).

¹⁵² See Steven K. Bernstein, *Supreme Court Review: Fourth Amendment - Using the Drug Courier Profile to Fight the War on Drugs*, 80 J. CRIM. L. & CRIMINOLOGY 996, 1016 (1989) (criticizing *Sokolow* for failing to require clearly defined set of permissible factors).

¹⁵³ See *Wilson*, *supra* note 38, at 238 (announcing "common criticism" that law enforcement officials do not use statistical analysis in profiles).

¹⁵⁴ See generally *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (comparing common sense deductions of behavior with unjustified need for objective data). The Court granted certiorari to *Sokolow* specifically to reject the Ninth Circuit's two-part test in determining reasonable suspicion. *Id.* The Supreme Court solidified the ability to allow for common sense deductions. *Id.*

¹⁵⁵ See *id.* (citing FAA study of hijacking profiles).

¹⁵⁶ See *Hall*, *supra* note 19 at 1031 (noting FAA profile is easier to regulate than drug courier profile). Courts have provided a great deal of secrecy with the "skyjacker profile," and often have revealed its details only in "in camera" hearings. *Id.* at 1010 (quoting *United States v. Miller*, 414 U.S. 1041 (1973) (*cert. denied*)).

¹⁵⁷ See Marci Bailey, *Detecting a Trend Across the Globe; AS&E Detects Trend*; BOSTON GLOBE, March 29, 1998 at C4 (discussing emergence in 1998 of reliable hand held detection equipment). The currently available equipment is expensive, not hand held, more time consuming, and a greater invasion of privacy. *Id.*

¹⁵⁸ See *id.* (noting new CargoSearch system at over \$3 million each). Bailey further notes that these units are portable, but it appears that the operational focus of the machine centers on border crossings as opposed to airports. *Id.*

Many bombs apparently can be made with a low probability of setting off the walk-through metal detector.¹⁵⁹ The United States' culture remains largely ignorant to the potential for a plane bombing while our attention remains heightened to drug activity.¹⁶⁰ Additionally, there are many more instances of drug trafficking than terrorist bombings.¹⁶¹ For these reasons, it seems that the terrorist profile has remained largely fixed.¹⁶² Unfortunately, the same precepts do not apply to the drug courier.¹⁶³

Finally, a proposal to conduct an empirical study ignores the important role that flexibility plays in a profile's usefulness.¹⁶⁴ The lucrative business of drug dealing makes it easy to hire and create camouflaged methods of delivery.¹⁶⁵ For a profile to be useful, it must also be flexible and adaptable to climate, location and culture.¹⁶⁶ Airline terrorists or hijackers tend to come from more limited and identifiable backgrounds.¹⁶⁷ The two types of crimes have significant differences and to force the drug courier to a hijacker's type definition ignores the foundation of adaptability that drug couriers rely upon.¹⁶⁸

¹⁵⁹ See Jerry Ackerman, *Biopharmaceuticals: Therion Gets up to \$25M to Develop Cancer Vaccine*; BOSTON GLOBE, January 18, 1998 at c4 (noting sale of expensive detection equipment to airports worldwide). The article suggests there is an emerging need for new equipment with greater capabilities than widely available until now. *Id.*

¹⁶⁰ See Hall, *supra* note 19, at 1010 at note 27 (highlighting in 1969 there were less than 100 hijackings and attempts); Wilson, *supra* note 38, at 203 at note 1 (recognizing drug epidemic leading up to and including 1978); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 413 (summarizing billions of dollars spent as recently as 1995 fighting drugs). The war on drugs that existed in the late 1960's continues to present day. *Id.*

¹⁶¹ See *supra* note 160 and accompanying text (comparing volume of drug cases to vastly smaller hijacking attempts).

¹⁶² See Hall, *supra* note 19, at 1010 (noting succinct "skyjacker profile" with objective criteria).

¹⁶³ See Wilson, *supra* note 38, at 233-34 (recognizing changing behaviors of drug couriers and consequential flexible profile).

¹⁶⁴ See *id.* (stressing law enforcement's position courier behaviors adapt). The profile must adapt to the activity it seeks to detect. *Id.*

¹⁶⁵ See *Florida v. Royer*, 460 U.S. 491, 512 (1983) (declaring drug dealing so invasive that it amounts to pressing national concern).

¹⁶⁶ See Wilson, *supra* note 38, at 233-34 (discerning adaptive drug courier profile and corresponding need for law enforcement flexibility).

¹⁶⁷ See Hall, *supra* note 19, at 1010 (discussing skyjacker profile and its time tested criteria).

¹⁶⁸ See Wilson, *supra* note 38, at 234 (noting important question is whether each trait may distinguish courier from normal traveler).

V. CONCLUSION

Drug courier profiles are greatly misunderstood. Once coined, a phrase too often seems to take on monolithic proportions as to its meaning. Massachusetts seems to have fallen victim to this overstatement when concluding that officers are not experts in drug activity observation. The conclusions that police should not disturb the citizenry absent some objective manifestation of criminal suspicion is overbearing. By basing its restrictive holdings exclusively on the Massachusetts Declaration of Rights, the SJC seems to flatly reject that a whole can be greater than the sum of its parts, and appears to create a totality of the suspicious circumstances test.

It is not a leap of logic to say that people commonly judge a whole to be greater than the sum of its parts. Allowing trained police officers to add up apparently innocent behaviors and physical attributes to reach a reasonable suspicion of criminal activity does not constitute an overbearing intrusion on personal freedoms. The SJC has signaled otherwise, although it has permitted common sense judgments in making determinations about an individual's conduct. Calling a process of deducing common sense observations a drug courier profile taints the actual process with fears of casting too wide a net on innocent people.

When trained police officers use factors they have seen repeatedly in actual couriers, it should not be illegal to stop a person who displays these time-tested characteristics to ask a few simple questions. Citizens have a recognized right to refuse, and the innocent will be on their way in a matter of moments. If answers are inconsistent, then the legal stepping stones of reasonable suspicion and probable cause can be climbed in due course. Given the high priority placed on drug interdiction by society, this is the least intrusive means that still satisfies our need to achieve an ordered society.

In a culture plagued by drugs, it is sound public policy for police to use honest effective methods to deter illegal activity. The drug courier profile is a tool to help this process. When used as a tool, and not a crutch, it is an effective piece of drug prosecutions. By allowing a proven method of reducing the chances of even questioning an innocent person, Massachusetts will continue to protect the innocent. Both the prosecutor and defense attorney continue to have many opportunities to question and impeach individual officers as to their conclusions of an

individual's behavior and root out any hasty or ill-conceived foundations for seizures.

The narcotics officer of today is a well-trained professional. A fact that has resulted in thousands more criminals being prosecuted for drug courier activities. The additional data and collective experience gained by police have solidified the profile's foundation. Even without scientific testing, many profile characteristics have remained the same.

With an apparent misinterpretation of the *Rivera* opinion, the Massachusetts Supreme Judicial Court has, at least, left itself open for another opportunity to state its intent. If the United States Supreme Court forces another opportunity to bring an appeal to the SJC by modifying motor vehicle stops, we will likely see another chance for weighing the airport drug courier profile's permissibility in Massachusetts. It may, however, provide nothing more than a chance to close the *Torres* door even tighter.

Mark W. Dunderdale