

THE DRUG COURIER PROFILE: IN PLANES, TRAINS, AND AUTOMOBILES; AND NOW IN THE JURY BOX

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INTRODUCTION

Police officers rely on drug courier profiles¹ to justify stopping and questioning citizens about whether they are carrying illegal drugs. A nationally recognized profile does not exist; federal, state, local, and even individual law enforcement officials may have their own "profile."² Citizens easily may match one of these profiles, because the profiles list general and often contradictory characteristics: traveling by plane, train, automobile, or bus; traveling alone, with friends, or with your children; being young, middle-aged, or "older"; having short or long hair; traveling to or from Fort Lauderdale, Miami, New York, Los Angeles, San Diego, Atlanta, Chicago, Detroit, Austin, Birmingham, Chattanooga, Charlotte, Dayton, Indianapolis, Kansas City, Newark, Tulsa, Dallas-Fort Worth, or any foreign country; traveling in a business suit, casual clothes, or disheveled clothing; paying cash for your ticket; traveling without checking your luggage, carrying only a garment bag, or checking several large suitcases; traveling and returning home in twenty-four to forty-eight hours; being nervous or anxious when traveling; glancing around the airport, bus, or train terminal; looking over your shoulder; making telephone calls immediately after arriving at your destination; and taking public

1. The "drug courier profile" has been defined as an investigative tool used by Drug Enforcement Agency ("DEA") agents to identify and to apprehend drug couriers. It generally is attributed to Paul Markonni, a DEA agent who created the profile when he was assigned to a drug interception unit at the Detroit Airport. It consists of a list of identifying characteristics or behaviors that law enforcement officials associate with drug couriers. See Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. Rev. 843, 847 (1985) (describing development and origin of drug courier profile). No single, nationally recognized "profile" exists. The first drug courier profile case, *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), listed the following characteristics to be used to identify a drug courier: (1) the use of small denominations of currency for ticket purchases; (2) travel to and from major drug import centers, especially for short periods of time; and (3) the absence of luggage or use of empty suitcases on trips that normally require extra clothing; and (4) travel under an alias. See *id.* at 538. It is apparent from examining case law, however, that the drug courier profile characteristics have expanded well beyond this already expansive list. See, e.g., *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (approving profile-based questioning of bus passengers); *Karnes v. Skrutski*, 62 F.3d 485, 489 (3d Cir. 1995) (articulating profile characteristics for automobiles); *United States v. Castaneda-Sandoval*, No. 93-10349, 1994 U.S. App. LEXIS 6442, at *4 (9th Cir. Mar. 31, 1994) (excluding as "highly prejudicial" evidence that defendant met drug courier profile by being calm and by traveling with children); *State v. Williams*, 525 N.W.2d 538, 548 (Minn. 1994) (describing profile characteristics for Amtrak passengers); see also 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, 439-44 (1987) (describing profile factors relating to: nervousness; source, use, transshipment, hub, and cross-road cities; travel companions; race; age; attire; luggage; and miscellaneous possessions and behaviors).

2. See Becton, *supra* note 1, at 433 (stating that individual officers may have multiple profiles of their own).

transportation to your destination.³ If any of these characteristics match you and your travel habits, you may well fit a version of the drug courier profile. Of course, matching a profile does not mean that you are a drug courier.⁴

Imagine the following scenario: You are traveling and are stopped by police because you match a profile. They request permission to search your bags, or the interior or trunk of your car or truck. Knowing you have nothing to hide, you give consent. To your surprise, you are arrested for carrying illegal drugs. Incredible? Not really!⁵ What is incredible is what may happen next. After being

3. See *id.* at 430-31 (discussing drug courier profile characteristics).

4. The DEA does not keep statistics that include the number of people whom police stopped and questioned but who were not drug couriers. See *id.* at 418. In fact, the DEA does not keep any uniform statistics that would clarify how many people are stopped and are found to possess drugs. See *id.*

The author of this Article knows from experience how inaccurate profile use can be. Several years ago, I was stopped by DEA agents at the Ontario Airport in California. I was taking a flight from Atlanta to San Diego, with a 20-minute layover at the small Ontario Airport that is 20 air minutes from San Diego. I was on my way to an interview at a university in San Diego. I was wearing shorts, a t-shirt, and loafers. My hair was medium length, and I had a day's growth of beard.

During the layover, I left the plane without any luggage and immediately went to a pay phone to call my fiancée in Atlanta. When I tried to reboard the plane, I was confronted by three undercover DEA agents who said they suspected me of transporting narcotics. They requested to see my ticket and my identification. A cold chill ran down my spine as my imagination quickly flirited with many thoughts. I gave them my ticket and my identification and asked why they suspected me. I was told that they could not reveal such information. I then explained that I was a lawyer who was very familiar with the drug courier profile, and in fact, had litigated a case in which Paul Markonni (the originator of the profile) was involved. At that point, the agents admitted they were curious, because I carried no luggage when I left the plane. I explained that it was a short layover and that I was continuing on to San Diego. They eventually were satisfied and allowed me to reboard the plane. No search took place. The incident lasted approximately 10 minutes and I almost missed the flight.

A notorious example of a drug courier profile applied to an automobile stop was the basis for a civil rights action against Eagle County, Colorado, that settled out of court last year for \$800,000. On May 3, 1989, Jhenita Whitfield and her sister Janet were traveling to Denver from San Diego with four children under age 2. They were stopped and left to stand with their children while cars whizzed past at 65 miles per hour along I-70 as their cars were searched. Eagle sheriff's deputies found nothing. See Chet Whye, *Eagle County Drug Busts Don't Offset Collateral Damage to Rights*, DENV. POST, Nov. 16, 1995, at B13.

5. There is ample reason to ponder whether all people caught possessing drugs are indeed drug couriers or dealers. See Alan Dershowitz, *Edwin Meese Encourages Police Perjury*, BUFF. NEWS, Aug. 30, 1995, at B3. Professor Dershowitz explains: "The public is finally learning the extent of police perjury and evidence tampering around the country. In Philadelphia, several police officers have admitted planting drugs in the homes of innocent citizens. In New York City, more than a dozen policemen have admitted to committing perjury while testifying against defendants." *Id.*; see also Stephen Braun, *Confessions of Corrupt Cops Triggers Unrest in Philly*, DET. NEWS, Oct. 29, 1995, at A6 ("Indicted last February by a federal grand jury for violating the civil rights of more than 40 Philadelphia residents and stealing more than \$100,000 in cash and property, 6 officers have pleaded guilty and will be sentenced soon.")

A Scottish newspaper reports:

Last week an unsuspecting American university professor, en route from Helsinki to Orlando via Amsterdam's Schipol Airport, discovered, when he got to Florida, that the Dutch military police had planted explosives in his suitcase to test security procedures.

arrested, you begin to have hope; surely when you appear in court the situation will be resolved favorably. You did not put drugs in your luggage, you had no idea you were carrying them, and you certainly had no intent to distribute them. However, the fact that you matched a "drug courier profile" may be admitted as evidence to prove that you must have known about the drugs, and, consequently, that you did intend to distribute them.

Unfortunately security officers failed to find the bombs and the police forgot to take them out, sending the hapless passenger on his way with explosives in his luggage. The military police have now admitted that this is not the first time they have used unwitting passengers at Schipol as guinea pigs.

Robin Pascoe, *Potatoes Rocket, Bicycles Vanish and Democracy Rumbles On*, THE SCOTSMAN, Aug. 27, 1995, at 11; see also Michelle Stevens, *Utah Drug-Seizure Law Goes Too Far*, CHI. SUN-TIMES, May 15, 1995, at 25 ("In Helper, Utah . . . [u]nder a law in effect since Jan. 1 [1995], officers involved in any drug seizure get to keep 12 percent of the proceeds. Critics says [sic] it gives cops a license to steal. If nothing else, the law gives them an incentive to plant drugs on innocent motorists.").

A Miami newspaper reports:

US District Judge Federico Moreno awards \$155,000 each to six passengers and crew members of Belize Air International flight unwittingly involved in botched 1991 US drug sting operation; five of six were jailed and tortured in Honduras as a result of Drug Enforcement Administration planting cocaine on their jet; sixth jailed but not beaten.

David Lyons, *U.S. Must Pay for Botched Sting, Judge Rules*, MIAMI HERALD, Mar. 10, 1995, at B5.

In yet another example of an airport search,

British customs have been accused of planting drugs in the luggage of an innocent Qantas passenger to test search procedures at London's Heathrow Airport. . . . When he discovered the drugs, the [passenger] thought he was being set-up and telephoned New Scotland Yard, which retrieved the cocaine and returned it to the embarrassed customs officials.

Bill Perry, *British Customs Accused in Drug Bungle*, UPI, Nov. 11, 1994, available in LEXIS, News Library, UPI File; see *Cocaine Training Mix-Up*, MIAMI HERALD, Aug. 19, 1994, at B2 ("U.S. Navy stops secretly planting cocaine on private vehicles to train drug-sniffing dogs; action comes after civilian aircraft electrician Paul Fifer unwittingly drove off with cocaine stashed on underside of his truck at Pensacola Naval Air Station."); see also *United States v. Botero-Ospina*, No. 94-4006, 1995 U.S. App. LEXIS 36677, at *6 (10th Cir. Dec. 27, 1995) (excluding proffered testimony that drug dealers use unknowing travelers for cross-country drug transportation); *United States v. Osmani*, 20 F.3d 266, 270 (7th Cir. 1994) (noting that DEA agent admitted on cross-examination that drug dealers sometimes use unknowing couriers); *United States v. Navarro-Varelas*, 541 F.2d 1331, 1333 (9th Cir. 1976) (excluding expert testimony of DEA agent that planting narcotics in compartments in suitcases of unwary traveler was common scheme by smugglers to get drugs into United States).

Sometimes, other people may have an incentive to plant drugs. Although not a profile case, Debbie McCrary's story illustrates. Police arrived at McCrary's hotel room explaining they had received a tip that she possessed guns and drugs. She allowed them to search the room. They found nothing. Three days later, McCrary was stopped by police as she drove her van. They explained they had received a tip that a van fitting the description of her van would be transporting drugs. Again, knowing she had nothing to hide, McCrary consented to a search. Police found one half-pound of marijuana and a bag of prescription pills under the driver's seat. McCrary was arrested. After being jailed for 14 days, the government dropped the charges because there was insufficient proof that McCrary knew the drugs were there. Evidence indicated that a jealous ex-boyfriend planted them in the van. See Jill Taylor, *Tip Fizzles; Van Driver Goes Free*, PALM BEACH POST, Aug. 23, 1994, at B1.

This Article addresses serious issues raised by admitting drug courier profile evidence at trial. It begins by briefly discussing the drug courier profile in the Fourth Amendment context as a backdrop for an examination and analysis of the use of such evidence at trial. The profile has been challenged repeatedly in Fourth Amendment jurisprudence.⁶ Scholars have examined extensively several Supreme Court decisions that arguably failed to establish adequate guidelines for the government's use of profiles to justify investigative detentions.⁷ Although profile use still is being challenged in the Fourth Amendment arena, the recent use of profiles in trials of drug cases is more disturbing. Prosecutors routinely attempt to elicit drug courier profile testimony⁸ from purported "expert" law enforcement witnesses to bolster circumstantially substantive proof of guilt at trial.⁹

This Article analyzes both the majority view that drug courier profile evidence is too prejudicial to be used to prove guilt,¹⁰ as well

6. See, e.g., *infra* notes 17-62 and accompanying text.

7. See, e.g., Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49, 66-70 (1994) (concluding that Supreme Court has done little to protect motorists stopped because they fit drug courier profile); Becton, *supra* note 1, at 454 (stating that Supreme Court's decisions in drug courier profile cases has caused confusion in lower courts); Cloud, *supra* note 1, at 845 (criticizing Supreme Court for contradictory findings in construing use of drug courier profiles); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 *passim* (1990) (arguing that Supreme Court's interpretation of the Fourth Amendment restricts right of locomotion); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 240 (criticizing Supreme Court for failing to uphold Fourth Amendment rights in drug-related cases); Stephen E. Hall, Note, *A Balancing Approach to the Constitutionality of Drug Courier Profiles*, 1993 U. ILL. L. REV. 1007, 1008 (contending that Supreme Court has failed to address adequately Fourth Amendment concerns raised by use of drug courier profiles).

8. See, e.g., *United States v. Jackson*, 51 F.3d 646, 650 n.2 (7th Cir. 1995) (overruling objection to expert law enforcement testimony regarding drug courier profile) The court quoted the district court's statement regarding the admission of the expert testimony: "It's a pretty generic run-of-the-mill sort of testimony from the agent It is expert testimony in terms of what a lay jury would know, but in terms of the standard prosecution of drug cases, it is not unusual evidence or testimony"

9. Profile evidence usually provides circumstantial evidence of the elements of intent or knowledge. See, e.g., *United States v. Castaneda-Sandoval*, No. 93-10349, 1994 U.S. App. LEXIS 6442, at *1 (9th Cir. Mar. 31, 1994) (ruling that government used drug courier profile evidence impermissibly to prove Castaneda-Sandoval must have known about drugs found in her car); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) (holding that trial court erred in admitting expert testimony as substantive evidence to show that because defendant fit profile, he must have intended to distribute cocaine in his possession).

10. See, e.g., *United States v. Small*, 74 F.3d 1276, 1283 (D.C. Cir.) (noting that several courts have held profile evidence inadmissible as substantive proof of guilt), *cert. denied*, 116 S. Ct. 1867 (1996); *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992) (finding that prejudicial nature of profile evidence outweighs its probative value); *Jones*, 913 F.2d at 177 (holding that profile evidence should not have been admitted as substantive evidence); *United States v. Quigley*, 890 F.2d 1019, 1024 (8th Cir. 1989) (disapproving admission of profile testimony to prove guilt); *United States v. Beltran-Rios*, 878 F.2d 1208, 1210 (9th Cir. 1989) (criticizing use of criminal profiles as evidence of guilt in criminal trials); *United States v. Hernandez-Cuarteras*, 717 F.2d 552, 555 (11th Cir. 1983) (denouncing use of drug courier profiles as substantive evidence of guilt). The Tenth Circuit has avoided reviewing the issue on three separate

as the substantial exceptions that have been created to justify admission of this admittedly prejudicial evidence for background evidence, rebuttal evidence, and explanation of *modus operandi*.¹¹ It next examines the Seventh Circuit's contradictory view, which directly admits profile evidence to prove guilt.¹² The Article compares these conflicting views and shows that all circuits, in reality, permit prejudicial profile evidence to reach the jury and to influence the verdict.

Most importantly, this Article rejects the admission of drug courier profile evidence at trial, except as rebuttal evidence.¹³ It demonstrates that the admission of such evidence violates federal and state character evidence rules¹⁴ in a manner that jeopardizes the fundamental fairness of the trial itself.¹⁵

occasions. See *United States v. Robinson*, 978 F.2d 1554, 1563 (10th Cir. 1992) (refusing to classify evidence of gang affiliation as profile evidence); *United States v. Jefferson*, 925 F.2d 1242, 1253 (10th Cir. 1991) (finding detective's testimony that drug dealers often use pagers too limited to constitute profile evidence); *United States v. McDonald*, 933 F.2d 1519, 1523 (10th Cir. 1991) (reserving judgment as to admissibility of drug courier profile evidence as substantive proof of crime).

11. The exceptions for admission are analyzed in *United States v. Lui*, 941 F.2d 844, 847-48 (9th Cir. 1991). The exceptions include: impeachment or rebuttal evidence once the defendant opens the door by using the profile to establish innocence based upon his or her distinctions from the profile; explanation of *modus operandi* of complex drug-smuggling conspiracies; and background evidence to explain the expertise of the testifying officer or to explain why a stop was made. See *id.*; see also *United States v. Gomez-Norena*, 908 F.2d 497, 501 (9th Cir. 1990) (allowing use of profile testimony as background evidence); *United States v. White*, 890 F.2d 1012, 1014 (8th Cir. 1989) (allowing expert testimony by officer of drug dealer's *modus operandi*); *Beltran-Rios*, 878 F.2d at 1212-13 (permitting profile evidence in rebuttal).

12. See *United States v. Foster*, 939 F.2d 445, 451 (7th Cir. 1991) (holding that profile evidence can be admissible if it is relevant to element of crime at issue); *United States v. Solis*, 923 F.2d 548, 550-51 (7th Cir. 1991) (ruling profile evidence admissible as proof of intent to distribute drugs); *United States v. Teslim*, 869 F.2d 316, 324 (7th Cir. 1989) (finding drug courier profile evidence admissible if it is relevant to issue of defendant's guilt or innocence).

13. Criminal profile testimony may be used to rebut a defendant's attempt to prove innocence by comparing the defendant to the typical profile and by highlighting the differences. See, e.g., *Beltran-Rios*, 878 F.2d at 1212 (noting that Ninth Circuit previously had allowed government to introduce otherwise excludable testimony on rebuttal when defendant opened door by introducing testimony that could mislead jury).

14. This Article focuses primarily on federal case law. Many state court opinions, however, also will be considered. Thirty-four states have adopted the Federal Rules of Evidence, including: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Washington, and Wyoming. See 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 3 n.2 (2d ed. 1993).

15. See *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994) (finding use of drug courier profile evidence analogous to character evidence and holding that admission of this improper profile evidence, in conjunction with two other evidentiary errors, denied defendant fair trial).

I. DRUG COURIER PROFILE AND THE FOURTH AMENDMENT

In an apparent attempt to examine the expansion of police investigative practices,¹⁶ the United States Supreme Court granted certiorari in a series of drug courier profile cases beginning in 1980.¹⁷ These decisions acknowledged the drug courier profile as a legitimate, if somewhat imprecise, police investigatory device.¹⁸ Further, during the following decade, the Court determined that a profile match is insufficient to create probable cause for an arrest.¹⁹ The Court, however, never has decided whether the profile is sufficient by itself to establish reasonable suspicion—a standard less rigorous than probable cause—to detain a citizen under the Fourth Amendment.²⁰ In practice, police do stop and question citizens when they match the drug courier profile.²¹ Officers generally assert

16. See generally MODEL CODE OF PRE-ARREST PROCEDURE § 120.1 (1975) (recognizing that investigative questioning of suspicious persons in public places is standard police operating procedure); WAYNE R. LAFAVE, SEARCH AND SEIZURE (3d ed. 1996) (describing scope of police investigative practices).

17. The cases began with *United States v. Mendenhall*, 446 U.S. 544 (1980), and continued through *Florida v. Bostick*, 501 U.S. 429 (1991). Although not all of the cases have considered directly the drug courier profile, they have had some impact on this area of law.

18. Compare *United States v. Sokolow*, 490 U.S. 1, 10 (1989) ("A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but 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."), with *id.* at 13 (Marshall, J., dissenting) ("In my view, a law enforcement officer's mechanistic application of a formula of personal and behavioral traits in deciding whom to detain can only dull the officer's ability and determination to make sensitive and fact-specific inferences 'in light of his experience,' particularly in ambiguous or borderline cases.") (citations omitted).

19. See *Investigation Stops Using Drug Courier Profiles*, in INT'L ASS'N OF CHIEFS OF POLICE, TRAINING KEY NO. 394, at 53, 55 (1988) ("This principle has been made crystal clear by the courts; any attempt to arrest a drug courier based solely upon the use of a drug courier profile will almost certainly result in all evidence being suppressed and the criminal charge being dismissed.").

20. See *Ornelas-Ledesma v. United States*, 116 S. Ct. 1657, 1661 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."). The Maryland Court of Appeals predicted such indecision in *Grant v. State*, 461 A.2d 524 (Md. Ct. App. 1983), stating:

[The] "drug courier profile" . . . is a convenient descriptive term without a great deal of significance. Some lament the fact that the Supreme Court has not yet told us whether meeting the so-called 'drug courier profile' is an adequate predicate to establish either reasonable suspicion for a stop or probable cause for an arrest or search. Of course, the Supreme Court has not told us that and they never will. Indeed, they cannot, for there is no such thing as a single drug courier profile; there are infinite drug courier profiles. The very notion is protean, not monolithic.

Id. at 526.

21. See, e.g., *United States v. Sokolow*, 490 U.S. 1 (1989); *Florida v. Royer*, 460 U.S. 491 (1983); *Reid v. Georgia*, 48 U.S. 438 (1980); *United States v. Mendenhall*, 446 U.S. 544 (1980). In these leading drug courier profile cases, like most of the cases discussed in this Article, citizen detentions were justified by police because the citizen fit a profile.

that a match establishes reasonable suspicion to believe that criminal activity is afoot.²²

The first Supreme Court drug courier profile case, *United States v. Mendenhall*,²³ established the test for determining whether a limited investigatory encounter by police rises to the level of a seizure under the Fourth Amendment. Justice Stewart, writing for a plurality,²⁴ stated: "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."²⁵ A "seizure" occurs only when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."²⁶ Applying this test, Justice Stewart concluded that Mendenhall had not been seized within the meaning of the Fourth Amendment.²⁷

Although the plurality opinion, by establishing the "free to leave" test,²⁸ did not address the drug courier profile, the concurring and dissenting opinions explored the Fourth Amendment implications surrounding the profile. Justice Powell, concurring, relied heavily upon the experience of the police in detecting drug couriers through use of the profile.²⁹ He concluded that, assuming a Fourth Amendment detention had occurred, the police had reasonable suspicion to

22. See, e.g., *United States v. Coggins*, 986 F.2d 651, 654-55 (3d Cir. 1993) (noting that police had testified at trial about defendant's match with profile to establish reasonable suspicion); *United States v. Weaver*, 966 F.2d 391, 396 (8th Cir. 1992) (finding that drug courier profile can be used to establish reasonable suspicion for search and seizure).

23. 446 U.S. 544 (1980).

24. Justice Stewart wrote the plurality opinion, in which only one Justice joined completely. Justice Powell wrote for three Justices who concurred in part and concurred in the judgment; four Justices dissented.

25. *Mendenhall*, 446 U.S. at 552 (plurality opinion) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

26. *Id.* at 554 (plurality opinion).

27. See *id.* at 547-49 (plurality opinion). Mendenhall was approached by two DEA agents at the Detroit Metropolitan Airport who had observed that her conduct appeared "characteristic of persons unlawfully carrying narcotics." *Id.* (plurality opinion). The agents approached her as she was walking through the concourse and after identifying themselves as federal agents, asked to see her identification and her airline ticket. There was a discrepancy between the name on her driver's license and the name on the ticket. The agents returned her ticket and driver's license, and one agent asked Mendenhall if she would accompany him to the airport DEA office for further questioning. She agreed and consented to a search of her person and her handbag. The body search revealed two packages containing heroin. See *id.* (plurality opinion).

28. See *id.* at 554 (plurality opinion). For analysis suggesting that a reasonable person who would feel free to walk away from police is a legal fiction, see Shawn V. Lewis, Note, *Fourth Amendment Protection Against Reasonable Seizures of the Person: The Intrusiveness of Dragnet Styled Drug Sweeps*, 82 J. CRIM. L. & CRIMINOLOGY 797, 818-21 (1992).

29. See *Mendenhall*, 446 U.S. at 563-64 (plurality opinion).

stop and question Mendenhall.³⁰ Although his opinion seemed to endorse the use of "drug courier profiles," Justice Powell stopped short of complete validation. He stated that "reliance upon the 'drug courier profile' [would not] necessarily demonstrate reasonable suspicion."³¹ But Justice Powell stressed that the element of "reasonableness" in reasonable suspicion "need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience,"³² thus indicating approval of the profile.

Four Justices dissented, expressing distrust of the drug courier profile.³³ It was, no doubt, the diversity of opinion in *Mendenhall* that led the Supreme Court to grant certiorari to a similar case only a few months later.

In *Reid v. Georgia*,³⁴ the Court directly addressed whether a "drug courier profile" match provided police with reasonable articulable suspicion to stop and question Reid.³⁵ The Court

30. See *id.* (plurality opinion) (noting that "trained law enforcement agent" may have knowledge of methods used in recent criminal activity, characteristics of area, and behavior of suspect apparently evading police contact and that they may see meaning in conduct or circumstances that would seem innocent to untrained observer).

The factors that supported the reasonable suspicion in *Mendenhall* were: (1) Mendenhall arrived in Detroit on an early morning flight from Los Angeles, a city believed to be a drug source city; (2) she was the last person leaving the plane; (3) she appeared to be very nervous and looked around the terminal area; (4) she did not claim any luggage at the baggage claim area; and (5) she changed airlines for the flight out of Detroit. See *id.* at 547 n.1 (plurality opinion).

31. *Id.* at 565 n.6 (plurality opinion).

32. *Id.* at 566 (plurality opinion).

33. See *id.* at 573 n.11 (White, J., dissenting). Justice White contended that "Justice Powell's conclusion that there were reasonable grounds for suspecting Ms. Mendenhall of criminal activity relie[d] heavily on the assertion that the DEA agents 'acted pursuant to a well-planned, and effective, federal law enforcement program.'" *Id.* (White, J., dissenting) (quoting plurality opinion at 565). Justice White charged that there was no evidence that the claimed successes of the drug courier program were achieved through reliance on "nearly random" stops. He pointed out that the statistics to which Justice Powell cited to show the Detroit Airport program's success "refer[red] to results of searches following stops 'based upon information acquired from the airline ticket agents, from [the agent's] independent police work,' and occasional tips, as well as observations of behavior at the airport." *Id.* (White, J., dissenting). Justice White concluded that in this case, the DEA agents' suspicion of Ms. Mendenhall was based solely on their observations of her conduct in the airport terminal. See *id.* (White, J., dissenting).

The statistics referred to in the dissent and upon which Justice Powell relied, were as follows: "During the first 18 months of the program, agents watching the Detroit Airport searched 141 persons in 96 encounters. They found controlled substances in 77 of the encounters and arrested 122 persons." *Id.* at 562 (plurality opinion).

34. 448 U.S. 438 (1980) (per curiam).

35. See *Reid v. Georgia*, 448 U.S. 438, 440-41 (1980) (per curiam). Police observed Reid exit an early morning plane arriving at Atlanta from Fort Lauderdale. Reid was carrying a shoulder bag and was walking a short distance in front of a man carrying an identical shoulder bag. Reid looked over his shoulder numerous times in the direction of the other man. The second man caught up with Reid near the baggage claim area. They spoke and left the airport together without claiming any luggage. As Reid and his companion left the airport terminal, DEA agents stopped them and asked for their identification and their airline tickets. The agents learned that the two men had stayed in Fort Lauderdale only one day. Both men became

found,³⁶ as a matter of law, that the facts provided no reasonable articulable suspicion to support the investigative stop:

The agent's belief that [Reid] and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and unparticularized suspicion or hunch" than a fair inference in the light of [the agent's] experience, is simply too slender a reed to support the seizure in this case.³⁷

The Court's opinion in *Reid*, although not explicitly rejecting the use of a profile to establish articulable suspicion, retreated from the implicit endorsement of its use in *Mendenhall*.

Following *Reid*, the use of the profile and challenges to it proliferated, and the Court continued to revisit the issue. In *Florida v. Royer*,³⁸ the Supreme Court vacillated again. The Court's decision turned on whether Royer was detained illegally when DEA agents confiscated Royer's airplane ticket and identification, and took him with his luggage to a small room at the airport for further questioning.³⁹ The Court held that the detention of Royer exceeded a consensual encounter or investigatory stop.⁴⁰ It determined that the agents'

nervous during the encounter. The agents then requested permission to search their bags. Both men agreed but as they began to re-enter the terminal to go to a private room, Reid dropped his bag and ran. The bag later was found to have cocaine in it. The agents justified the stop by arguing that Reid fit the "drug courier profile." See *id.* at 439-41.

36. *Reid* was a per curiam decision, with three Justices concurring. The concurrence rested on the fact that the lower courts assumed that a detention had occurred. The only issue, therefore, was whether that assumed detention was supported by articulable suspicion. See *id.* at 442-43.

37. *Id.* at 441 (citations omitted).

38. 460 U.S. 491 (1983) (plurality opinion).

39. See *Florida v. Royer*, 460 U.S. 491, 501 (1983) (plurality opinion). Royer purchased an airline ticket from Miami to New York with cash. His ticket was purchased using an alias and he checked two suitcases with luggage tags having the same alias. As Royer proceeded to the boarding gate, DEA agents stopped him because his characteristics appeared to match the drug courier profile. The agents asked to see Royer's ticket and identification. It was not until this encounter that the agents learned that Royer was using an alias. After checking Royer's ticket and identification, the agents asked Royer to accompany them to a small room. The room was described by one detective as "a large storage closet located in the stewardesses lounge" that contained a desk and two chairs. Royer's ticket and his identification were not returned to him. Furthermore, without Royer's consent, one agent retrieved Royer's luggage and brought it to the room. Royer surrendered the keys to his luggage when the agents asked for consent to search. Marijuana was found in Royer's luggage. See *id.* at 493-95 (plurality opinion).

Royer's profile characteristics were as follows: (1) he was carrying heavy American Tourister luggage; (2) he appeared to be between 25 and 35 years of age; (3) he was dressed casually; (4) he appeared "pale and nervous, looking around at other people;" (5) he paid for his ticket with a large number of bills; and (6) he wrote only a name and a destination on the airline baggage identification tag, which had space for a name, address, and telephone number. See *id.* at 493 n.2 (plurality opinion). Royer challenged the search under the Fourth Amendment. See *id.* at 495 (plurality opinion).

40. Justice White wrote the plurality opinion in which three Justices joined completely. See *id.* at 491 (plurality opinion). Two Justices concurred, writing separate opinions. See *id.* at 508 (Powell, J., concurring); *id.* at 509 (Brennan, J., concurring). There were two separate dissents. See *id.* at 513 (Blackmun, J., dissenting); *id.* at 519 (Rehnquist, J., dissenting).

conduct constituted a de facto arrest, which required probable cause.⁴¹ Thus, the decision did not *require* analysis of whether use of the profile justified an investigatory stop. However, addressing the government's argument that the stop did not exceed an investigatory detention supported by reasonable suspicion,⁴² the Court agreed that reasonable suspicion existed,⁴³ but determined that the stop exceeded investigatory detention.⁴⁴ The only suspicion of the DEA agents that was noted by the Court was Royer's conduct allegedly fitting the drug courier profile.⁴⁵

After the decision in *Royer*, some scholars strongly criticized the use of the drug courier profile because of its lack of empirical validity.⁴⁶ As a result, some lower courts became more vigilant in reviewing whether the drug courier profile permitted an investigatory stop.⁴⁷

Nonetheless, when the Supreme Court revisited the issue in 1989, the profile again survived scrutiny.⁴⁸ In *United States v. Sokolow*,⁴⁹ DEA agents justified a stop based on a profile match.⁵⁰ The factors prompting DEA agents to stop Sokolow were:

- (1) he paid \$2,100.00 for two airplane tickets from a roll of \$20 bills;
- (2) he traveled under a name that did not match the name

41. See *id.* at 502-03 (plurality opinion) (concluding that Royer's detention was serious enough to constitute arrest).

42. See *id.* (plurality opinion) (noting government's argument that reasonable, articulable suspicion existed, and thus investigatory stop was justified).

43. See *id.* (plurality opinion) (finding that reasonable investigative detention was justified when officers discovered petitioner was traveling under assumed name, paid cash for one-way ticket, and exhibited suspicious behavior).

44. See *id.* (plurality opinion).

45. See *id.* at 493 (plurality opinion).

46. See Becton, *supra* note 1, at 470 (arguing that use of profile encourages "selective enforcement and retroactive application" of evidence produced by search to reasonable suspicion analysis); Cloud, *supra* note 1, at 920 (concluding that use of profiles permits searches of individuals on basis of innocent facts, violating "central teaching" of Fourth Amendment that individualized facts should be determinative).

47. See, e.g., *Karnes v. Skrutski*, 62 F.3d 485, 490 n.2 (3d Cir. 1995) (citing Cloud, *supra* note 1, at 853-54); *United States v. Coggins*, 986 F.2d 651, 655 n.1 (3d Cir. 1993) (citing Cloud, *supra* note 1); *State v. Williams*, 525 N.W.2d 538, 545 (Minn. 1994) (quoting Cloud, *supra* note 1, at 848-49); *Taylor v. Commonwealth*, 369 S.E.2d 423, 425 (Va. Ct. App. 1988) (citing Becton, *supra* note 1, at 471).

48. See *United States v. Sokolow*, 490 U.S. 1 (1989).

49. 490 U.S. 1 (1989).

50. See *id.* at 10 n.6. DEA agents were notified by an airline ticket agent of the cash purchase of two tickets from Honolulu to Miami. This notification prompted the DEA to check the call-back number provided by the purchaser. Neither the call-back number nor any other number were listed under the name of Andrew Kray, Sokolow's alias. Sokolow and his companion, unaware of the investigation, flew to Miami. Later, the DEA was notified that return reservations were made for three days later. The return flight had two scheduled stopovers, one of which was in Los Angeles. Police in Los Angeles were notified, and they monitored Sokolow's conduct. DEA agents in Los Angeles informed Honolulu DEA agents that Sokolow appeared to be very nervous and was looking around the waiting area during the stopover in Los Angeles. See *id.* at 4-5.

under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.⁵¹

The Court concluded⁵² that the conduct exhibited by Sokolow provided reasonable suspicion to warrant an investigatory stop.⁵³ "A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but 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."⁵⁴ Thus, *Sokolow* seemingly mandates that a person's conduct be objectively suspicious in nature to justify an investigatory detention; behavior that merely matches a profile list, with nothing more, is not necessarily sufficient.⁵⁵ Use of the profile, however, was not condemned.

In *Florida v. Bostick*,⁵⁶ the Supreme Court revisited and extended *Mendenhall*. In its simplest terms, the opinion in *Bostick* reiterates the rule that police may question people and may request to search their belongings without any articulable suspicion and without violating the Fourth Amendment.⁵⁷ The facts of *Bostick*, however, seem to stretch the *Mendenhall* rule to new and questionable limits.⁵⁸

51. *Id.* at 3.

52. *Sokolow* was a 7-2 decision with Chief Justice Rehnquist writing for the majority and Justices Marshall and Brennan dissenting.

53. See *Sokolow*, 490 U.S. at 11 (holding that agents had reasonable basis for suspecting that respondent was carrying illegal drugs).

54. *Id.* at 10.

55. See INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 19, at 55. One commentator explains:

In applying the Supreme Court's decision in *U.S. v. Sokolow*, it is important to note that the court did not state that the drug courier profile itself provided a sufficient basis for the investigative stop of Sokolow in the Honolulu Airport. The Court held only that the factors which were known to the DEA agents, and which led them to believe that Sokolow fit the profile which they happened to be using, were in themselves sufficient to constitute "reasonable suspicion" and to justify the temporary detention of Sokolow for further investigation. The majority of the Court seemed to regard the fact that the agents were using a profile as irrelevant; to the justices who voted to uphold the conviction, it was apparently the circumstances themselves, not the existence or use of a prepared profile, which constituted "reasonable suspicion." Presumably the result in the case would have been the same even if a profile had not been involved.

Id.

56. 501 U.S. 429 (1991).

57. See *Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to 'disregard the police and go about his business . . .'" (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991))).

58. In *Bostick*, police officers entered a bus that was stopped temporarily at a bus terminal as part of a drug interdiction program. Police requested to see Bostick's identification and ticket, admittedly with no articulable suspicion that he was involved in criminal activity.

Reconsidering *Mendenhall* in the "bus context,"⁵⁹ the Court implied that Bostick, although perhaps not "free to leave" the bus,⁶⁰ was free to ignore the officer's request.⁶¹ The Court, however, refused to hold that no seizure had occurred and remanded the case for that determination.⁶²

Now, after the decade of decisions set forth above, the basic question surrounding the drug courier profile still remains: Is it merely an investigative device alerting police officers to question certain individuals, or is it a justification for forcible stops of citizens that is constitutional only if officers have reasonable suspicion of criminal activity?

Commentators agree that this area of Fourth Amendment jurisprudence is confusing.⁶³ Given the ambiguity of Supreme Court precedent, challenges to the use of profiles undoubtedly will continue.⁶⁴ Although analysis of the validity of the drug courier profile in

Although the identification and ticket provided no additional reason for suspecting criminal activity, the officers requested permission to search Bostick's luggage. Bostick denied that he was advised he could withhold consent to the search, but the Court relied upon the trial court's determination that consent had, indeed, been given. The officers searched the luggage and found cocaine. See *id.* at 431-33.

59. *Bostick* was the first Supreme Court drug courier case that was not an "airport" case. It was a 6-3 decision with Justices Marshall, Blackmun, and Stevens dissenting.

60. See *Bostick*, 501 U.S. at 435 (articulating Bostick's argument that there was nowhere to go on bus to avoid police questioning, and that reasonable bus passenger would not have felt free to disembark because he might have been stranded without his luggage).

61. See *id.* at 436 (finding that issue was whether "reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter"). For analysis suggesting that the "reasonable person" in this Fourth Amendment context is a myth, see Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799, 834-40 (1991).

62. See *Bostick*, 501 U.S. at 437 (noting that officers did not point gun or otherwise threaten Bostick, yet declining to decide whether seizure occurred).

63. See generally Thomas E. Baker, "The Right of the People to Be Secure . . .": Toward a Metatheory of the Fourth Amendment, 30 WM. & MARY L. REV. 881 (1989). For a provocative effort to create such a metatheory and for criticism of that effort, compare Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994), with Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

64. For examples of continuing conflict in this area of law, see *United States v. Jennings*, No. 91-5942, 1993 U.S. App. LEXIS 926, at *13-14 (6th Cir. Jan. 13, 1993) (noting officer's admission that half of his airport stops are of either African-American or Hispanic individuals, although they "comprise far less than fifty percent of the airline passengers," giving appearance that officer's "reasons for stopping these individuals '[are] less likely to be inarticulate than unspeakable'") (quoting *Bostick*, 501 U.S. at 42 n.1 (Marshall, J., dissenting)); *United States v. Weaver*, 966 F.2d 391, 395-96 (8th Cir. 1992) (reviewing numerous inconsistent cases analyzing drug courier profile as basis for reasonable suspicion); *United States v. Taylor*, 956 F.2d 572, 578 (6th Cir. 1992) (finding no need to consider questions of whether surveillance of petitioner was motivated by race or whether racial component to courier profile would violate individual's due process or equal protection rights); and Gregory L. Young, *The Role of Stereotyping in the Development and Implementation of the D.E.A. Drug Courier Profiles*, 15 LAW & PSYCHOL. REV. 331, 335-49 (1991) (suggesting codification of specific profile characteristics to be used and standards by which to implement them). Courier profile characteristics are of questionable usefulness as an investigative tool. Most objectionable, however, is the use of such characteristics as race,

Fourth Amendment jurisprudence remains unresolved, prosecutors now have stepped beyond Fourth Amendment challenges and are presenting profile evidence to the jury. This Article examines this emerging practice.

II. BEYOND THE FOURTH AMENDMENT: DRUG COURIER PROFILE EVIDENCE IN THE COURTROOM

The conflicting opinions about the drug courier profile in Fourth Amendment jurisprudence raise serious questions about whether profile evidence ever should be used at trial.⁶⁵ The Supreme Court has not yet addressed this issue, although conflict exists among the circuits.⁶⁶ The majority rule is that drug courier profile evidence may not be admitted as "substantive" evidence of guilt at trial.⁶⁷ These same circuits, however, allow profile evidence to reach the jury by way of liberal exceptions that virtually have subsumed the purported rule.⁶⁸ These broad exceptions include admission of drug courier profile evidence: (1) as background material to explain police

ethnicity, and appearance, which may be based on stereotypes. See *id.* at 338-39. Profiles also are criticized as overly vague; the lack of set limits as to which characteristics may be used engenders "a seemingly endless and everchanging set of criteria, which appear capable of change to fit the traits of the suspects involved in each case." *Id.*

65. See Becton, *supra* note 1, at 454-59, 471 (analyzing inconsistency in drug courier profile cases and concluding that courts should consider courier profiles only as administrative tools of police); Cloud, *supra* note 1, at 861-73 (pointing out that Supreme Court has failed to articulate consistent policy and has left central questions unanswered). Compare *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (stating that most circuits view critically the use of courier profiles), and *United States v. Berry*, 670 F.2d 583, 600 (5th Cir. 1982) (en banc) (concluding that courier profile is merely administrative police tool, and that presence or absence of any particular trait on profile is legally irrelevant to determination of reasonable suspicion), with *United States v. Caicedo*, No. 95-3242, 1996 U.S. App. LEXIS 13393, at *11-12 (6th Cir. June 6, 1996) (explaining Supreme Court's mandate to consider even innocent facts in determination of reasonable suspicion).

66. The Supreme Court, however, has had numerous opportunities to address the issue. Certiorari has been denied in several cases. See, e.g., *United States v. Lim*, 984 F.2d 331 (9th Cir.), *cert. denied*, 508 U.S. 965 (1993); *United States v. Wilson*, 930 F.2d 616 (8th Cir. 1990), *cert. denied*, 502 U.S. 872 (1991); *United States v. Gomez-Norena*, 908 F.2d 497 (9th Cir.), *cert. denied*, 498 U.S. 947 (1990); *United States v. White*, 890 F.2d 1012 (8th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990); *United States v. Quigley*, 890 F.2d 1019 (8th Cir. 1989), *cert. denied*, 493 U.S. 1091 (1990).

67. See *supra* note 10 and accompanying text.

68. When drug courier profile evidence is admitted under a limited purpose exception over objection, courts generally give limiting instructions to alleviate the acknowledged prejudicial impact of such testimony. It is, of course, questionable whether such limiting instructions achieve the goal of reducing prejudicial impact. For empirical studies of the efficacy of limiting instructions, see Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUMAN BEHAV. 407 (1995); and Roselles L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985). Both authors conclude that the instructions are largely ineffective, particularly when the evidence goes to character.

conduct in arresting the accused;⁶⁹ (2) as foundation for police expert opinions;⁷⁰ (3) as background material to explain the modus operandi of the drug trade;⁷¹ and (4) as rebuttal evidence against the accused.⁷² The Seventh Circuit, taking a minority position, admits profile evidence to prove guilt directly.⁷³

The following sections explore the weakening general rule with its burgeoning exceptions and the Seventh Circuit minority position. In addressing the courts' justifications for the admissibility of profile evidence, this Article reveals that these decisions predispose jurors to a conclusion of guilt by permitting flagrant violations of evidence rules, thereby jeopardizing the reliability of the verdict, and, consequently, the fundamental fairness of the trial.

A. The Majority: Profile Evidence Is Inadmissible as Substantive Evidence of Guilt

Drug courier profile evidence sweeps so broadly as to include innocent people as well as the guilty.⁷⁴ In fact, most of the characteristics included in such profiles are common to all travelers.⁷⁵ Thus, presentation of the profile prejudicially influences the jury by identifying the defendant with an alleged drug dealer profile based on characteristics that necessarily may not be indicative of criminal

69. See *infra* notes 104-31 and accompanying text; see also *Gomez-Norena*, 908 F.2d at 501; *Hernandez-Cuartas*, 717 F.2d at 555.

70. See *infra* notes 133-43 and accompanying text; see also *United States v. Ramirez-Garcia*, No. 93-50310, 1994 U.S. App. LEXIS 12406, at *4 (9th Cir. May 25, 1994).

71. See *infra* notes 144-90 and accompanying text; see also *Lim*, 984 F.2d at 335; *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991).

72. See *infra* notes 81-101 and accompanying text; see also *United States v. Carillo-De Molino*, No. 92-10025, 1994 U.S. App. LEXIS 14856, at *10 (9th Cir. June 6, 1994); *United States v. Castaneda-Sandoval*, No. 93-10349, 1994 U.S. App. LEXIS 6442, at *6 (9th Cir. Mar. 31, 1994); *Lim*, 984 F.2d at 335; *United States v. Beltran-Rios*, 878 F.2d 1208, 1212 (9th Cir. 1989).

73. See *United States v. Foster*, 939 F.2d 445, 451 (7th Cir. 1991); *United States v. Solis*, 923 F.2d 548, 551 (7th Cir. 1991); *United States v. Teslim*, 869 F.2d 316, 324 (7th Cir. 1989).

74. See *Hernandez-Cuartas*, 717 F.2d at 555 (finding that drug courier profiles are inherently prejudicial due to potential for including innocent citizens). The Eleventh Circuit has held that "[e]very defendant has the right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers in investigating criminal activity." *Id.*

75. See *supra* text accompanying note 3 (listing conflicting characteristics).

activity.⁷⁶ Consequently, the majority rule is that drug courier profile evidence is inadmissible as substantive evidence of guilt.⁷⁷

Substantive evidence of guilt generally is any evidence, either direct or circumstantial, that helps prove an element of the crime charged.⁷⁸ A survey of federal circuit cases shows that the prevailing interpretation of "substantive evidence" in the profile context is more narrow; it is a direct comparison of generalized profile data with the actual behavioral characteristics of the accused observed by police.⁷⁹ This interpretation has made it easy for the courts to admit profile evidence through liberal exceptions, so long as no direct comparison is made. Consequently, profile evidence routinely reaches the jury.

B. Exceptions for Admissibility of Drug Courier Profile Evidence

The exceptions carved out for admission of drug profile evidence have begun to overshadow the majority rule.⁸⁰ The following

76. See *Hernandez-Cuarter*, 717 F.2d at 555; see also *State v. Walker*, 891 P.2d 942, 948 (Ariz. Ct. App. 1995) (holding that use of drug courier profile evidence as evidence of guilt risks conviction for others' criminal activity); *People v. Martinez*, 12 Cal. Rptr. 2d 838, 841 (Ct. App. 1992) (rejecting car thief profile and holding that such profiles may be permissible investigatory technique but are "inappropriate for consideration on the issue of guilt or innocence for the very reason given in drug courier profile cases: the potential of including innocent people as well as the guilty"); *People v. Hubbard*, 530 N.W.2d 130, 133 (Mich. Ct. App. 1995) (holding that defendants have right to be tried by evidence against them, not by investigative techniques of law enforcement officers); cf. *United States v. Banks*, 36 M.J. 150, 162 & n.11 (C.M.A. 1992) (analogizing sex offender profile to drug courier profile and explaining that "[t]he government tactic was to use a simple syllogism (major premise, minor premise, and conclusion) to persuade [jury] members that appellant was a child abuser" (citing Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1 (1988))). Through expert testimony in *Banks*,

the government presented the major premise—families with the "profile" of the three identified risk factors present an increased risk of child sexual abuse. Through lay or expert testimony, the prosecution established the minor premise—appellant and his family fit the profile This led to the conclusion that appellant was a child abuser—a conclusion argued by trial counsel based on the major and minor premises.

Id. at 162.

77. See *supra* note 10 and accompanying text.

78. "Substantive evidence" is defined as "that adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness, or of corroborating his testimony." BLACK'S LAW DICTIONARY 1429 (6th ed. 1990).

79. See, e.g., *United States v. Ramirez-Garcia*, No. 93-50310, 1994 U.S. App. LEXIS 12406, at *4 (11th Cir. May 25, 1994) (finding that officer's testimony describing similarities between defendant and profile constitutes use of profile as substantive evidence of guilt); *United States v. Lui*, 941 F.2d 844, 847 (9th Cir. 1991) ("[The agent] tied Lui's actions to a drug courier profile for the purpose of proving Lui's guilt."); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) (finding that use of expert testimony to show defendant's similarity to profile was used to prove guilt); *United States v. Quigley*, 890 F.2d 1019, 1023-24 (8th Cir. 1989) (finding point-by-point comparisons of defendant with profile to constitute use of profile as substantive evidence of guilt).

80. See *supra* notes 68-72 and accompanying text (describing existing exceptions and explaining potential for juror misuse of profile evidence). Although courts have identified three separate exceptions for admission of drug courier profile evidence, upon examination, it becomes apparent that there is virtually no distinction in *how* the information is presented under

sections examine how profile evidence is used under the exceptions. This Article questions its admissibility, except when used as rebuttal evidence.

1. *Rebuttal evidence*

All circuits allow the profile to be used as rebuttal evidence.⁸¹ This use of the profile, similar to the right to rebut introduction of good character traits,⁸² is relevant when the defendant "opens the door" by injecting the profile into the trial.⁸³ When a defendant presents evidence of his dissimilarity to the "typical drug courier" to create the inference that he is innocent, therefore, the prosecutor subsequently is permitted to introduce characteristics in the profile that the defendant does match.⁸⁴

The case cited most often for use of this exception is *United States v. Beltran-Rios*.⁸⁵ The defendant was stopped by U.S. Customs agents at a port of entry in California.⁸⁶ Beltran-Rios was transporting heroin in his shoes.⁸⁷ Beltran-Rios' defense was duress; he claimed he transported the drugs against his will to protect his family.⁸⁸ In

the background and the modus operandi exceptions. The differing judicial classifications for this testimony apparently were derived from the justification for its admission by the prosecution.

81. Although some courts refer to rebuttal as impeachment evidence, this is a misnomer. Profile evidence is offered almost exclusively under this exception after the defense cross-examines the law enforcement officer and highlights dissimilarities between the defendant and the profile. In rebuttal, the prosecution is permitted to re-direct the officer on profile characteristics that the defendant did match. *See, e.g., United States v. Castaneda-Sandoval*, No. 93-10349, 1994 U.S. App. LEXIS 6442, at *6 (9th Cir. Mar. 31, 1994) (finding error in prosecution's attempt to "impeach" defendant by offering profile evidence before defendant "opened door" to it); *United States v. Lim*, 984 F.2d 331, 335 (9th Cir. 1993) (rejecting government's argument that defendant's testimony that he was innocent "opened door" to admission of drug courier profile as rebuttal evidence, because profile evidence was introduced in government's case-in-chief before defense introduced any evidence of defendant's behavior); *see also infra* note 83 and accompanying text (describing when use of profile evidence is not appropriate by the government).

82. *See* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 191 (John Williams Strong ed., 4th ed. 1992) (stating that once defendant introduces particular character traits to prove his innocence, prosecution may use same traits, but only those traits, as rebuttal evidence in cross-examination or direct testimony); *infra* notes 223-41 and accompanying text (providing analysis that concludes profile evidence is character evidence).

83. *See, e.g., Castaneda-Sandoval*, 1994 U.S. App. LEXIS 6442, at *5-6 (finding that government's use of profile evidence exceeded scope of defense's testimony and, therefore, fell outside exception); *Lim*, 984 F.2d at 335 (ruling that admission of profile evidence was error, because it was introduced before defendant had opportunity to "open door"); *United States v. Beltran-Rios*, 878 F.2d 1208, 1210-11 (9th Cir. 1989) (allowing profile testimony to rebut defendant's characterization of himself as "poor simple farmer").

84. *See supra* note 81 (discussing ability of prosecutor to elicit characteristics defendant matched after defense introduced profile evidence).

85. 878 F.2d 1208 (9th Cir. 1989).

86. *See id.* at 1209.

87. *See id.*

88. *See id.* at 1209-10.

an effort to "raise an inference that Beltran-Rios was not a drug courier because his lifestyle was inconsistent with that line of business,"⁸⁹ defense counsel portrayed Beltran-Rios as a poor farmer who displayed no trappings of wealth associated with the drug trade.⁹⁰ In rebuttal, the prosecutor elicited testimony from law enforcement agents that "mules"⁹¹ were generally poor, sympathetic-looking individuals, who went into the drug courier trade because it is the only way for such individuals to make money quickly.⁹² Although recognizing the general rule that profile evidence is too prejudicial to be used as substantive evidence of guilt,⁹³ the court held that it may be offered in rebuttal when the defendant "opens the door by introducing potentially misleading testimony."⁹⁴ The court emphasized that this exception is a narrow one: "The government may introduce profile testimony of this sort only to rebut specific attempts by the defense to suggest innocence based on the particular characteristics described in the profile."⁹⁵

Rebuttal use of profile evidence is appropriate and firmly grounded in our concept of a fair trial.⁹⁶ Beltran-Rios' evidence could have given the jury the false impression that only persons who appear wealthy intend to import and distribute drugs. When offered by the defense, such misleading evidence can influence unfairly the jury just as much as when it is offered by the prosecution.⁹⁷ The rebuttal exception, thus, is necessary to ensure confidence in the integrity of the verdict.⁹⁸ Furthermore, although profile evidence is inherently

89. *Id.* at 1211.

90. *See id.* at 1211-12.

91. A "mule" is a slang term used to refer to individuals who transport illegal narcotics. *See United States v. Botero-Ospina*, No. 94-4006, 1995 U.S. App. LEXIS 36677, at *6-7 (10th Cir. Dec. 27, 1995). A "blind mule" is a slang term for an "unwitting" individual who has been duped into transporting drugs unknowingly. *See id.*

92. *See Beltran-Rios*, 878 F.2d at 1210. The court, however, refused to allow the agent to testify that mules are typically "older" because Beltran, who apparently was "older," did not insinuate that he was too old to be a courier. *See id.* at 1210 n.1.

93. *See id.* at 1210-11.

94. *Id.* at 1212.

95. *Id.* at 1212 n.2; *see also United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986) (ruling that expert testimony regarding drug practices of Pakistani heroin traffickers was relevant to rebut defendant's attempt to prove his innocence by suggesting that he displayed no trappings of wealth that large scale distributor might be expected to display).

96. "Our adversary system permits 'fighting fire with fire' to ensure a fair trial." *United States v. Banks*, 36 M.J. 150, 164 n.15 (C.M.A. 1992) (citing *MCCORMICK*, *supra* note 82, § 57).

97. *Cf. State v. Parkinson*, 909 P.2d 647, 650-51 (Idaho Ct. App. 1996) (holding that trial court properly excluded defense's use of expert testimony on sex offender profiles to prove innocence based on dissimilarities to profile, because such evidence "invades the province of the jury and unfairly prejudices the prosecution").

98. *See generally In re Winship*, 397 U.S. 358 (1970) (explaining that requirement of reasonable doubt further protects strong societal interest in reliability of verdicts).

prejudicial,⁹⁹ when the defendant invites erroneous use of the testimony, he has no basis to claim unfair prejudice.¹⁰⁰ Even this appropriate theory of admission, however, can be applied inappropriately.¹⁰¹

2. *Background evidence*

Profile evidence is used in two ways as background evidence by prosecutors at trial: (1) as background of the case; and (2) as training

99. See *United States v. Carter*, 901 F.2d 683, 684 (8th Cir. 1990) (holding that profile admissions are "inherently prejudicial and can easily influence jury into thinking that defendant is guilty"); *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (holding that profiles are "inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers").

100. See *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992) ("The doctrine of invited error prevents a defendant from complaining of an error that was his own fault."); *United States v. Segal*, 852 F.2d 1152, 1155 (9th Cir. 1988) ("The 'invited error' doctrine entitles the government to pursue inquiry into matter, if evidence thereon was first introduced by defendant.").

101. See *United States v. Wilson*, 930 F.2d 616, 616 (8th Cir. 1991). In *Wilson*, the defendant was indicted for possession of methamphetamine with intent to distribute when he picked up a package containing the drugs at Minneapolis/St. Paul International Airport. See *id.* at 617. His defense was ignorance: He picked up the package for his boss and did not know what was in it. See *id.* at 618. The prosecution offered evidence in its case-in-chief to show that Wilson often traveled by plane between St. Paul and Phoenix, the source city of the package. The prosecutor also made reference to the drug trafficker profile during his closing argument. See *id.* The court permitted testimony "regarding the significance of flight duration, source cities, and the like," and about the number of previous flights Wilson had taken. See Brief for Appellant at 7, *United States v. Wilson*, 930 F.2d 616 (8th Cir. 1990) (No. 90-5176 MN) (citing transcript). On appeal, the defendant argued:

The prosecutor relied upon [the profile evidence], and exaggerated its evidentiary effect in closing argument. [He] discuss[ed] the defendant's frequent travel to Arizona, the shortness of the trips, payment by cash, and last minute purchase of tickets [and] concluded all of these fit the profile that [the officer] of the Airport Narcotics Unit testified as consistent with people involved in narcotics trafficking.

Id. at 13. The Eighth Circuit concluded that the profile evidence was used properly to rebut Wilson's ignorance defense. See *Wilson*, 930 F.2d at 618.

There is no indication in this case that Wilson ever attempted to prove his innocence by showing his dissimilarity to the profile characteristics. He merely denied knowledge of the package's content and explained the innocent reasons for his frequent travel to Arizona. See *id.* Such testimony should not open the door to profile evidence. In this decision, the court condoned the use of drug courier profile evidence not to rebut *evidence* but to rebut a *not guilty plea*. The court's reasoning is particularly faulty because it admitted the testimony during the government's case-in-chief. Thus, even this theoretically well-reasoned exception to the majority rule can be abused.

background of a testifying expert law enforcement agent.¹⁰² Each will be addressed separately because they present different challenges.

a. Background of the case

Many courts that admit the profile as background evidence conclude that the evidence merely places the arrest in context and provides an explanation for the law enforcement officer's conduct.¹⁰³ Thus, in the view of these courts, profile evidence, in this context, is not unduly prejudicial and does not amount to substantive proof of guilt or innocence.¹⁰⁴ *United States v. Hernandez-Cuartas*¹⁰⁵ is the leading opinion cited for this exception; however, this Eleventh Circuit view is somewhat misleading.

In *Hernandez-Cuartas*, the defendant entered the United States from Columbia through the Miami airport carrying several containers of

102. There is very little difference in how these types of background evidence are presented. In both situations, law enforcement officers testify about the training they have received in the use of drug courier profiles and list the characteristics they have been taught to look for. When presenting the background of the case, profile evidence is presented as an introduction to the facts surrounding the arrest of the defendant. An officer presenting this testimony need not be qualified as an expert under Federal Rule of Evidence 702. In the expert opinion cases, the officer is qualified as an expert under Rule 702 so that he can give opinions on the significance of the defendant's behavior or about physical evidence in the case. His expertise is based partially on his training in the use of drug courier profiles. Although quite similar, the two types of background evidence are addressed separately because unique issues must be resolved when profile evidence is used as the basis of an expert opinion.

103. See *United States v. Gomez-Norena*, 908 F.2d 497, 501 (9th Cir. 1990) (noting that trial record reflected that district court judge warned jury to utilize testimony only for background material concerning events that occurred on day defendant was arrested); *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (clarifying that testimony concerning "drug profile was used for purely background material").

104. See *United States v. Small*, 74 F.3d 1276, 1284 (D.C. Cir.) (refusing to find plain error for use of drug courier profile because evidence "was not central to the prosecution's proof of guilt"), *cert. denied*, 116 S. Ct. 1967 (1996); *United States v. Ramirez-Garcia*, No. 93-50310, 1994 U.S. App. LEXIS 12406, at *3-4 (9th Cir. May 25, 1994) (holding that allowing government's use of profile evidence as background information, to which defense did not object, was not plain error); *United States v. Brown*, 7 F.3d 648, 652 (7th Cir. 1993) (intimating that testimony concerning "typical behavior[ial] patterns characterizing both users and distributors" is permissible as long as it provides background data); *United States v. McDonald*, 933 F.2d 1579, 1522 (10th Cir. 1991) (validating use of drug courier profile to aid jury in relating relevance of evidence); *Gomez-Norena*, 908 F.2d at 501-02 (holding profile admissible because it provided jury with "full and accurate portrayal of events as they unfolded . . . and actually limited potential for unfair prejudice"). But see *United States v. Williams*, 957 F.2d 1238, 1241 (5th Cir. 1992) (finding plain error when profile used not as background information, but as substantive proof of guilt).

105. 717 F.2d 552, 555 (11th Cir. 1983). The Fourth Circuit, however, apparently credits *United States v. Sokolow*, 490 U.S. 1 (1989), for this proposition. See *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) (deciding that admission of profile evidence was abuse of trial court's discretion because profile was not introduced as background information as in *Sokolow*, but as substantive evidence); see also *United States v. Bryant*, No. 89-5754, 1990 U.S. App. LEXIS 20036, at *5 (4th Cir. Nov. 14, 1990) ("When the propriety of a stop or an arrest is not at issue, such evidence may nevertheless be admitted as background information providing an agent's basis of a stop or arrest.").

coffee.¹⁰⁶ At the first check-point, a customs agent noted that the defendant had made four trips from Columbia in four months and signaled for a second agent to examine closely her belongings.¹⁰⁷ At the second check-point, the second agent discovered cocaine in six of the ten coffee containers.¹⁰⁸ At trial, both customs agents testified about their training in using the drug courier profile and listed characteristics they were taught drug couriers purportedly exhibit.¹⁰⁹ Defense counsel failed to object to this line of questioning until the agents began to compare the defendant's behavior to the profile.¹¹⁰ Although the objection was overruled by the trial court, the prosecutor rephrased the question in a manner that did not elicit a direct comparison.¹¹¹ The defendant was convicted.¹¹²

On appeal, Hernandez-Cuartas claimed that the general profile testimony denied her a fair trial,¹¹³ and the court reviewed the record for plain error.¹¹⁴ Finding it improper to use profile evidence as substantive evidence of guilt,¹¹⁵ the court noted that the challenged testimony "was used purely for background material on how and why Ms. Hernandez-Cuartas was stopped and searched by the customs officers."¹¹⁶ The conviction was affirmed.¹¹⁷ The court's ruling was a narrow one: Use of profile evidence to explain police conduct in arresting a defendant does not amount to plain error.¹¹⁸ The court did not endorse the use of profile evidence in every circumstance, however, explaining that the use of profile evidence in this circumstance was permissible because "[t]he prejudicial effect of the admission of this testimony was slight as was the probative value

106. See *Hernandez-Cuartas*, 717 F.2d at 553-54.

107. See *id.* at 553-54.

108. See *id.* at 554.

109. See *id.* at 554 & n.1.

110. See *id.* It is apparent that defense counsel often fails to object to profile testimony. See *United States v. Ramirez-Garcia*, No. 93-50310, 1994 U.S. App. LEXIS 12406, at *4 (9th Cir. May 25, 1994) (reviewing admission of profile evidence for plain error when defense did not raise specific objection during jury trial); *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994) (finding, *sua sponte*, plain error in admission of profile despite failure of defense counsel to make proper objections); see also *infra* notes 265-69 and accompanying text (discussing *Williams*).

111. See *Hernandez-Cuartas*, 717 F.2d at 554 n.1.

112. See *id.* at 553.

113. See *id.* at 554.

114. See *id.* at 555.

115. See *id.* (noting that drug courier profiles are inherently prejudicial because they are likely to describe innocent people as drug couriers).

116. *Id.* The court asserted that the officer's testimony made it clear that a drug courier profile was only a "preliminary consideration" in the decision to subject the defendant to a full customs inspection. See *id.*

117. See *id.* at 556.

118. See *id.* at 555-56.

because this evidence was not necessary or relevant to the charges against the appellant."¹¹⁹

Relevant evidence, under the Federal Rules of Evidence, is defined as "evidence having any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence."¹²⁰ It is undisputed that irrelevant evidence should not be admitted at trial.¹²¹ A closer analysis of the court's assessment of profile background evidence in *Hernandez-Cuartas* shows (1) that profile evidence cannot be admitted "purely" as background evidence; and (2) that the profile has no place in a jury trial due to its irrelevance and its substantial prejudicial impact.¹²²

When the drug courier profile is admitted as background evidence, the testimony goes far beyond merely placing the arrest in context. It raises two inferences: (1) that the defendant matched the profile—and, therefore, the police were justified in stopping him; and (2) that because the defendant matched the profile, he must have known he was carrying drugs.

The first inference may be relevant to whether the officer's suspicion of the defendant was sufficient to warrant an investigative stop and, therefore, would be significant to a Fourth Amendment challenge to the stop. But, as noted in *Hernandez-Cuartas*, it is not relevant "to the charges against a defendant."¹²³ The allegation

119. *Id.* at 555.

120. FED. R. EVID. 401 (emphasis added).

121. See FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."); see also Advisory Committee's Notes, 56 F.R.D. 183, 216 (1973) ("The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are 'a presupposition involved in the very conception of a rational system of evidence.'" (quoting JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264-65 (1898))); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 6.01 (1996) ("The concept of relevancy is basic to the law of evidence; it is the cornerstone on which any rational system of evidence rests. Without regard to any other rules or considerations, an item of evidence cannot be admitted unless it meets the test of relevancy."). Only a part of the author's treatment of profile issues related to "inferences" and "relevancy" are presented here. For the Article's final analysis of these subjects, see *infra* notes 281-83 and accompanying text.

122. It is questionable whether recitation of drug courier profile characteristics adds any information to place the arrest into context. The profile is not part of the facts of the case; it is an investigatory tool that was developed over time prior to the arrest. An officer quite easily could place the arrest in context without the profile testimony simply by recounting his observations of the defendant prior to the arrest.

123. *Hernandez-Cuartas*, 717 F.2d at 555. In questioning the relevance of drug courier profile testimony as background information, it is highly likely that when a defendant matches a profile it might lead a jury to think that the defendant knew that he possessed drugs. See *People v. Derello*, 259 Cal. Rptr. 265, 273 (Ct. App. 1989) (maintaining that profile evidence "has

against most drug couriers is possession of narcotics with intent to distribute.¹²⁴ The elements of this offense are: (1) the defendant possessed illegal narcotics; (2) the defendant knew he possessed those narcotics; and (3) the defendant intended to distribute them.¹²⁵ The fact that police stop a defendant and find drugs is indeed "a fact that is of consequence, and therefore is relevant evidence," but the fact that the stop was premised upon the drug courier profile is not.¹²⁶

A jury is not called upon to determine reasonable suspicion or probable cause.¹²⁷ By the time of the trial, these issues already have been decided adversely to the defendant. Thus, the first inference created by profile testimony—that because the defendant matched the

absolutely no relevance to the elements of the crime and might be perceived by the jury to be evidence of the character of defendants as drug couriers"). Once this inference is raised, however, the evidence no longer is being offered as "background" evidence, but rather as substantive evidence of guilt, which gives rise to the "substantive" inference that the majority of courts have concluded is unduly prejudicial and inadmissible. See *supra* Part II.B.2 (questioning relevance of profile testimony when prosecution seeks to admit it for background material at trial).

It should be noted, however, that after *United States v. Sokolow*, 490 U.S. 1 (1989), it is questionable whether profile testimony is relevant even to justify police conduct when they suspect and stop a defendant. See INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 19, at 56 ("The majority of the court [in *Sokolow*] seemed to regard the fact that the agents were using a profile as irrelevant; to the justices who voted to uphold the conviction, it was apparently the circumstances themselves, not the existence of a prepared profile, which constituted reasonable suspicion.").

124. See 21 U.S.C. § 841(a)(1) (1994) (prohibiting possession of controlled substance with intent to distribute). Other charges frequently found in drug courier profile cases are for the violation of 21 U.S.C. § 846, which prohibits the attempt and conspiracy to commit a controlled substance violation, and of the Controlled Substance Import and Export Act, 21 U.S.C. § 951-95, which prohibits the import or export of controlled substances.

125. See *id.* § 841(a). This section provides:

Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Id.; see also *United States v. Crowder*, 87 F.3d 1405, 1409 (D.C. Cir. 1996) ("Intent and knowledge are two of the three elements—the third is possession—of a 'possession with intent to distribute' charge under 21 U.S.C. 841(a)(1).").

126. FED. R. EVID. 401 (defining what constitutes relevant evidence); see also *supra* note 120 and accompanying text (same).

127. See *Jones v. United States*, 362 U.S. 257, 264 (1960) (emphasizing that motions to suppress are "designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt"); *United States v. Small*, 74 F.3d 1276, 1283 (D.C. Cir.) (concluding that presentation of profile testimony and references to profile in opening and closing argument was error because it "was relevant only to the officers' probable cause and not to Small's guilt"), *cert. denied*, 116 S. Ct. 1967 (1996); *United States v. Garcia*, 848 F.2d 58, 59-61 (4th Cir. 1988) (demonstrating that drug courier profile testimony usually is relevant to issues relating to propriety of stop or arrest); *Valcarcel v. State*, 765 S.W.2d 412, 417-19 (Tex. Crim. App. 1989) (clarifying that profile evidence as it relates to officer's probable cause should not be admitted unless defendant raises issue of probable cause for jury's consideration).

profile, the police stop was justified—should be challenged as having no place at trial.¹²⁸

The second inference is relevant only to prove the defendant's guilt; the defendant matched the profile, therefore, he knew he possessed drugs.¹²⁹ The majority rule, based on the determination that profile evidence is unduly prejudicial, was created to prohibit this inference.¹³⁰ Consequently, background testimony about the drug courier profile, having no relevance except to the prohibited guilt inference, has no legitimate use at trial.¹³¹ But the profile is reaching the jury, often unchallenged, and, inherently, becomes strong circumstantial evidence of guilt.

b. Background as foundation for expert opinion

The second background use of the profile is in qualifying a law enforcement officer as an expert.¹³² Law enforcement officers often explain the training they have received in drug courier profiling as a foundation for their expert testimony.¹³³ This use of the profile presents the danger that a jury simply will accept the officer's expert conclusions without weighing its probative value.¹³⁴

When a law enforcement officer is qualified as an expert, the officer gains a certain "aura of reliability."¹³⁵ Consequently, when

128. See *Derello*, 259 Cal. Rptr. at 272 (affirming that "[e]vidence of a nondisputed issue or of an issue not before the jury is inadmissible"). The fact remains that the court does not have the discretion to admit irrelevant evidence. See *id.*

Section 350 California Evidence Code provides that only relevant evidence is admissible, and Section 210 Evidence Code provides that relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." *Derello*, 259 Cal. Rptr. at 425.

129. See *supra* note 79 and accompanying text (reviewing cases in which defendant's characteristics were matched with drug courier profile).

130. See *supra* note 10 and accompanying text (reviewing cases holding that use of drug profile evidence was unduly prejudicial).

131. See *supra* note 77 and accompanying text (discussing rule against using profile as substantive evidence of guilt).

132. See FED. R. EVID. 102 (stating that witnesses may be qualified as experts due to their knowledge, skill, experience, training, or education).

133. See, e.g., *United States v. Ramirez-Garcia*, No. 93-50310, 1994 U.S. App. LEXIS 12406, at *1, *4 (9th Cir. May 25, 1994) (stating that agent's trial testimony on her passenger profile training that included evaluation of behavioral characteristics such as nervousness or shaking as indications of drug smuggling provided background material for explanation for stop of defendant).

134. See generally Phylis Sklout Bamberger, *The Dangerous Expert Witness*, 52 BROOK. L. REV. 855 (1986) (stating that greater safeguards against potential prejudice are needed when law enforcement officer testifies both as expert and as factual witness); Deon J. Nossel, Note, *The Admissibility Of Ultimate Issue Expert Testimony By Law Enforcement Officers In Criminal Trials*, 93 COLUM. L. REV. 231 (1993) (arguing that law enforcement officers' testimony as to guilt or innocence or intent should be given little or no weight in assessment of sufficiency of evidence).

135. See Nossel, *supra* note 134, at 246 (explaining that law officer's expert opinion may appear more reliable to jury because of officer's experience in evaluating criminal behavior);

an officer's expertise is based in part on drug courier profile training, the profile becomes cloaked with the same aura.¹³⁶ Under Federal Rule of Evidence 703, the basis of the officer's expert opinion need not itself be admissible so long as it is a basis reasonably relied upon by experts in the field to form an opinion or inference.¹³⁷ Profile evidence, however, is admitted at trial as an element of the officer's expertise and as a basis for his opinion, although the drug courier profile never has been proven reliable.¹³⁸

Although the Supreme Court tacitly has accepted the profile as an investigative tool in the Fourth Amendment realm,¹³⁹ such recognition cannot be imputed to the trial arena, because "an officer's

see also United States v. Young, 745 F.2d 733, 765-66 (2d Cir. 1984) (Newman, J., concurring) (declaring that risk is created when narcotics expert is allowed to testify as to her personal opinion concerning defendant's role in drug operation because "aura of reliability and trustworthiness" surrounding expert testimony may be overly persuasive to jury); *People v. Hubbard*, 530 N.W.2d 130, 133 (Mich. Ct. 135App. 1995), *appeal denied*, 548 N.W.2d 634 (Mich. 1996) (finding that law enforcement testimony as expert witness may be prejudicial due to disproportionate weight jury may give such evidence).

136. *Cf.* Flanagan v. State, 625 So. 2d 827, 829-30 (Fla. 1993) (examining risk of prejudice of psychologist's testimony on sex offender profile). The court explained, "Profile testimony . . . by its nature necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony. The jury naturally will assume that the scientific principles underlying the expert's conclusion are valid." *Id.* at 828.

137. Federal Rule of Evidence 703 governs the bases of opinion testimony by experts. It establishes:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

The second sentence of Rule 703 was written primarily in recognition that many experts rely on data that may not be admissible because it does not pass the hearsay rule. *See* WEINSTEIN & BERGER, *supra* note 121, § 13.03(01). The rule, consequently, enables experts to give opinions based on hearsay so long as the hearsay is of the type that is "reasonably" relied upon in the field. *See id.* § 13.03(02)(c). Drug courier profile testimony, as the foundation for an expert opinion, presents certain hearsay concerns addressed by Rule 703. Law enforcement officers testify about their training in the use of the drug courier profile by stating what they have been instructed by other narcotics agents to look for in a suspected drug courier. Reliance on this basis for an expert opinion is not appropriate at trial. The challenge to profile evidence discussed in this section is in the context of Rule 703. This discussion, however, is but a part of the more important analysis the profile receives in this Article.

138. *See, e.g.,* Becton, *supra* note 1, at 470 (asserting that drug courier profiles should be used to investigate but should not be used to justify stop); Cloud, *supra* note 1, at 884-920 (providing thorough analysis demonstrating profile's unreliability as investigative tool); *see also* Hubbard, 530 N.W.2d at 134 n.2 (declaring that prosecution did not provide evidence on reliability of drug profile and that "junk science" was not acceptable to court); State v. Williams, 525 N.W.2d 538, 547 (Minn. 1994) (noting that police may use profiles as factor in stopping suspected drug couriers but that such profiles are not scientific and should not be relied upon mechanically by officers and stating that courts should not defer mechanically to police testimony on profile evidence).

139. *See supra* notes 17-64 and accompanying text (reviewing Supreme Court's treatment of drug courier profile).

expertise lies in determining when a search or arrest is justified, not in determining when a defendant should be convicted."¹⁴⁰ No statistical records or empirical studies exist that prove validity of the profile.¹⁴¹ In fact, there is no nationally recognized profile upon which all law enforcement agents rely.¹⁴² Thus, without a judicial determination that the drug courier profile is in fact a technique that "reasonably" can be relied upon by law enforcement agents, it is not an appropriate basis for an expert opinion on the issue of guilt.¹⁴³ Therefore, expert background information also should not be admitted in a jury trial.

3. *Modus operandi* evidence

Profile data, in the form of *modus operandi*¹⁴⁴ testimony, can be offered in two ways: (1) as general information about the typical behavior of drug traffickers; or (2) as specific details about the defendant's conduct with an explanation of why this conduct should be construed as drug-related activity. Both methods inherently compare the profile with the defendant's conduct, thus constituting substantive evidence of guilt.

a. *Generalized use*

Profile evidence for the limited purpose of showing *modus operandi* is testimony by an officer explaining the techniques

140. *Hubbard*, 530 N.W.2d at 134.

141. To date, the DEA does not maintain statistical data on the accuracy of the drug courier profile. Telephone Interview with Paul Markonni, DEA Agent, Savannah, Ga. (Aug. 6, 1996).

142. See Becton, *supra* note 1, at 433-34 (stating that not only is there no national profile but that individual agents, law enforcement agencies, and courts each have their own profile characteristics, including variations for different types of suspects); see also *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (characterizing drug courier profile as "chameleon-like way of adapting to any particular set of observations" (citing *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987))).

143. See Nossel, *supra* note 134, at 247 (arguing that it may be prejudicial if jury accepts law enforcement officer's testimony based on hunch or if evidence does not indicate guilt beyond reasonable doubt that defendant's behavior was criminal).

144. Two different types of *modus operandi* evidence arise in drug courier profile cases. The first type arises when generalized profile characteristics are given to explain the typical behavior and techniques used by drug traffickers. The second type arises when an expert law enforcement officer recounts the specific conduct of the defendant, and then gives an opinion that the conduct is the *modus operandi* of drug traffickers. Although, in theory, there may be a distinction between the two, in practice, they have become indistinguishable. Although this Article focuses on the dangers of generalized profile evidence, both types of *modus operandi* evidence will be addressed separately because, in practice, both types allow profile evidence to reach the jury and raise the inference that the defendant knew he possessed drugs and intended to distribute them. See *infra* notes 145-90 and accompanying text (discussing *modus operandi* evidence usage generally and specifically).

employed by people who operate within the drug trade.¹⁴⁵ Law enforcement agents routinely are allowed to testify about the typical behavior exhibited by drug couriers.¹⁴⁶ Many courts have admitted generalized drug courier profile evidence under this exception.¹⁴⁷ The justification for admission typically is that the average juror does not understand the activities and practices of drug dealers.¹⁴⁸ Because of this lack of understanding, jurors are unable to draw inferences necessary to decide the case without *modus operandi* information about the drug business.¹⁴⁹

Thus, courts originally allowed the *modus operandi* exception to enable the government to present limited testimony in complex and confusing cases, particularly in those involving drug conspiracies.¹⁵⁰ What originated as a very narrow exception, however, has been broadened and now is used commonly to justify admission of profile testimony even in uncomplicated, simple possession cases.¹⁵¹ Admitting generalized profile testimony to explain *modus operandi* presents the same inferences as when it is used as "background."¹⁵²

145. See *United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987) (stating that qualified law enforcement officers may testify about methods and techniques associated with criminal activity).

146. See *United States v. White*, 890 F.2d 1012, 1014 (8th Cir. 1989) (referring to well-established principle that federal court has discretion to allow law enforcement officers to testify as experts as to *modus operandi* of criminals in instances in which jury may not be familiar with such activities). But see *United States v. Lui*, 941 F.2d 844, 847-48 (9th Cir. 1991) (explaining that admissibility of drug profile evidence to establish *modus operandi* is questionable because purpose of such testimony, to advise jury about possible link between seemingly unconnected and innocent events and criminal behavior, is exactly why such testimony is dangerous).

147. See Christopher Bello, Annotation, *Admissibility of Expert Testimony as to Modus Operandi of Crime-Modern Cases*, 31 A.L.R.4TH 798 (1984 & Supp. 1995) (analyzing federal and state opinions since 1960 that address issue of admissibility of expert testimony on *modus operandi* of particular crime, including drug profile cases).

148. See *United States v. Gonzalez*, 933 F.2d 417, 428-29 (7th Cir. 1991) (allowing use of law enforcement officer's expert testimony on grounds that jury is not in position to understand *modus operandi* of drug operations).

149. See *id.*

150. See, e.g., *United States v. Carrillo-De Molina*, No. 92-10025, 1994 U.S. App. LEXIS 14856, at *10 (9th Cir. June 6, 1994) (restating that drug courier profile evidence to establish *modus operandi* is admissible only in complex cases); *Lui*, 941 F.2d at 848 (conceding appropriateness of *modus operandi* exception in some instances, such as complex drug smuggling conspiracies); *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984) (recognizing that admission of *modus operandi* evidence is allowed to help jury understand complex criminal activity).

Although extensive background evidence may be necessary in conspiracy cases for the jury to understand the myriad of roles involved in such a case, it is questionable whether generalized "drug courier profile" evidence would be helpful even in these complex cases. The drug courier profile gives no information to explain the role of the courier in a conspiracy case, but merely describes characteristics purportedly displayed while playing that role, many of which are characteristics shared with innocent people.

151. See *Lui*, 941 F.2d at 848 (holding that admission of drug courier profile evidence to prove possession was erroneous).

152. See *supra* note 123 and accompanying text (discussing drug courier profile use in investigating stops and its use as background information at trial).

Testimony about general profile characteristics inherently raises the inference that the defendant matches the *modus operandi* of a drug courier; therefore, she must have known that she possessed drugs.¹⁵³ This inference is precisely what the majority rule supposedly forbids—comparison between the typical drug courier and the defendant in order to prove guilt.¹⁵⁴ Given the majority view's interpretation of "substantive evidence," profile testimony routinely is admitted so long as no direct comparison is made to the defendant's conduct.¹⁵⁵ Thus, courts pay lip-service to the majority rule, and then by legal fiction in the form of *modus operandi* testimony, admit profile evidence.¹⁵⁶

b. Specialized use: expert opinions on modus operandi

A second use of *modus operandi* evidence is even more disconcerting. Law enforcement agents use *modus operandi* evidence as an integral part of their expert opinions.¹⁵⁷ This category can be distinguished from generalized *modus operandi* evidence because only specific characteristics of the defendant are discussed.¹⁵⁸

Expert law enforcement officers routinely are allowed to give direct opinions regarding the significance of the defendant's specific conduct.¹⁵⁹ Opinions explaining the significance of specific conduct fitting *modus operandi* of drug traffickers inherently make direct comparisons between the defendant and elements of the profile.¹⁶⁰

153. See *supra* note 71 and accompanying text (discussing cases that used drug courier profile evidence as background to explain *modus operandi*).

154. See *supra* note 10 and accompanying text (reviewing cases that found use of drug profile evidence was unduly prejudicial).

155. See *supra* note 79 and accompanying text (reviewing cases that used drug courier profile evidence as substantive evidence of guilt).

156. See *supra* note 71 and accompanying text (discussing instances in which drug courier profile evidence was admitted as *modus operandi* evidence).

157. See *United States v. Ramirez-Gomez*, No. 93-50310, 1994 U.S. App. LEXIS 12406, at *4-5 (9th Cir. May 25, 1994) (distinguishing between profile evidence used as background evidence and profile evidence used as substantive evidence of guilt).

The difference between expert opinions on *modus operandi* and generalized *modus operandi* testimony is simple: There is no inferential step required when an expert explains the significance of the defendant's conduct; direct comparisons are made between the profile and the defendant. The expert typically recounts the conduct of the defendant, then explains that in his experience most drug dealers exhibit that conduct, and therefore, in his opinion, the defendant was exhibiting the *modus operandi* of a drug trafficker.

158. See *id.*

159. See generally Bamberger, *supra* note 134, at 856-57 (analyzing use of law enforcement officers' testimony as both expert and factual witness); Nossel, *supra* note 134, at 250-55 (discussing admissibility of expert testimony of law enforcement agents); Bello, *supra* note 147, at 802-04 (reviewing use of *modus operandi* testimony by law enforcement officials in state and federal cases).

160. See *supra* note 157 and accompanying text (explaining that *modus operandi* evidence is used to compare defendant's conduct with officer's previous experience with other drug

These opinions are tantamount to substantive evidence of guilt, but rarely are questioned by the courts.¹⁶¹

The trial court has wide discretion in choosing to accept expert testimony that is outside the common knowledge of jurors and that will assist the trier of fact.¹⁶² Thus, the threshold question is whether the testimony will help the jury.¹⁶³ The majority of courts have concluded that expert testimony on the "drug courier profile" does not meet this threshold analysis when offered as substantive evidence of guilt,¹⁶⁴ because it sweeps so broadly as to include innocent as well as suspicious acts.¹⁶⁵ In determining whether to admit expert opinions, however, courts purport to distinguish between "innocent" characteristics and characteristics that implicate criminal activity.¹⁶⁶ Expert opinions, therefore, readily are admitted to explain the significance of profile characteristics that implicate criminal *modus operandi*.¹⁶⁷ Significantly, experts are permitted to testify about the use of beepers,¹⁶⁸ counter-surveillance techniques,¹⁶⁹ and weapons

dealers).

161. See *United States v. Gomez-Norena*, 908 F.2d 497, 502 (9th Cir. 1990) (testimony that quantity of drugs indicates intent to distribute); *United States v. DeSoto*, 885 F.2d 354, 360 (7th Cir. 1989) (testimony that defendant's behavior constitutes counter-surveillance); *United States v. Brown*, 776 F.2d 897, 900 (2d Cir. 1986) (testimony that defendant's behavior indicates being member of drug trade); see also Nossel, *supra* note 134, at 261-63 (noting that many courts fail to subject ultimate issue expert testimony to standard of applicable rules of evidence).

162. See FED. R. EVID. 702 (allowing expert testimony to assist jury in understanding evidence); FED. R. EVID. 703 (stating that expert may testify as to facts or data upon which he relied); FED. R. EVID. 704 (disallowing ultimate issue opinion by expert); FED. R. EVID. 705 (allowing expert testimony not accompanied by facts underlying opinion).

163. See *State v. Odom*, 560 A.2d 1198, 1201 (N.J. 1989) (providing that admissibility of expert testimony is based not on whether subject matter is common knowledge but on whether expert witness has particular knowledge or experience that is not common and that aids factfinder).

164. See *supra* note 10 and accompanying text (examining majority courts' interpretation of drug courier profile testimony as substantive evidence of guilt).

165. See, e.g., *United States v. Hernandez-Cuarteras*, 717 F.2d 552, 555 (11th Cir. 1983) (condemning use of drug courier profiles as substantive evidence of guilt).

166. See *People v. Derello*, 259 Cal. Rptr. 265, 270 (Ct. App. 1989) (stating that only drug profile characteristics that indicate ongoing criminal activity are admissible).

167. See, e.g., *United States v. Taren-Palma*, 997 F.2d 525, 534-35 (9th Cir. 1993) (holding that ban against profile evidence does not preclude officer from testifying to significance of defendant's incriminating behavior or from linking this behavior to drug trade).

168. See, e.g., *United States v. Rogers*, 918 F.2d 207, 212-13 (D.C. Cir. 1990) (concluding that trial judge did not abuse discretion by allowing proof of defendant's possession of beeper and expert testimony that drug dealers use beepers). Oddly, courts continue to treat possession of a beeper as indicative of criminal activity even though they have become commonplace in our society. See *id.* (citing *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989); *United States v. Rollins*, 862 F.2d 1282, 1286 n.1 (7th Cir. 1988); *United States v. Zapata-Tamallo*, 833 F.2d 25, 28 (2d Cir. 1987)).

169. See, e.g., *United States v. Daniels*, 723 F.2d 31, 33 (8th Cir. 1983) (allowing testimony on drug dealers' method of registering property in another person's name to conceal criminal activity because jury may not be familiar with such methods).

in the drug trade,¹⁷⁰ because, unlike most profile characteristics, these activities are not deemed to be innocuous.¹⁷¹

Challenges to these expert opinions generally have been framed as violations of Federal Rule of Evidence 704, as improper "ultimate opinions" on either state of mind or guilt.¹⁷² The argument is that officers implicitly testify on state of mind or guilt when they give an opinion that the defendant's conduct conformed to *modus operandi* of drug activity: he acted like a drug courier, therefore, he is a drug courier.

In criminal cases, under Federal Rule of Evidence 704(b), an expert is forbidden explicitly from stating an opinion or an inference on whether the defendant did or did not have the mental state or condition constituting an element of the crime charged.¹⁷³ Most courts have been reluctant to find a violation of 704(b) in profile cases.¹⁷⁴ In fact, many have questioned whether 704(b) applies to expert law enforcement officers' opinions.¹⁷⁵ The legislative history of 704(b) supports some skepticism as to its application and suggests that Congress intended to limit the scope of expert testimony by psychiatric and mental health experts.¹⁷⁶ The Advisory Committee

170. See *United States v. Escamilla*, No. 93-50094, 1993 U.S. App. LEXIS 28732, at *3 (9th Cir. Oct. 27, 1993) (determining that expert opinion testimony that connected weapon to drug deal was admissible as *modus operandi* evidence and that this evidence was different from drug courier profile evidence because carrying weapon is not innocuous conduct).

171. See *id.* But see *United States v. DeSoto*, 885 F.2d 354, 360-61 (7th Cir. 1989) (acknowledging fact that behavior is common does not prohibit automatic admission of expert testimony that attributes behavior to criminal actions and cautioning courts to ensure that such testimony is not prejudicial and does not take over function of jury).

172. Federal Rule of Evidence 704 provides:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto.

FED. R. EVID. 704.

173. See FED. R. EVID. 704(b).

174. See, e.g., *United States v. Lipscomb*, 14 F.3d 1236, 1239-42 (7th Cir. 1994) (reviewing case law and determining that Rule 704(b) does not limit law enforcement officers' testimony that includes opinion on criminal nature of defendant's activities); *United States v. Richard*, 969 F.2d 849, 854-55 (10th Cir. 1992) (distinguishing law enforcement officer's expert opinion that implies that defendant was engaging in criminal activity from opinion that directly draws conclusion for jury).

175. See *Lipscomb*, 14 F.3d at 1239-42.

176. The legislative history provides:

With respect to limitations on the scope of expert testimony by psychiatrists and other mental health experts, section 406 of title IV of the bill amends Rule 704 of the Federal Rules of Evidence to [add section (b)]. . . . The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier

notes, however, provide language to indicate that the rule applies to all experts.¹⁷⁷ Thus, no federal court has refused to apply the rule to police experts, they simply have refused to find violations of the rule.¹⁷⁸

An expert law enforcement officer may testify that the defendant's conduct conformed to criminal activity so long as the officer refrains from saying that the defendant "intended" to commit the crime charged.¹⁷⁹ Consequently, in drug cases, expert law enforcement officers can "describe in general terms the common practices of those who clearly do possess the requisite intent, leaving unstated the inference that the defendant, having been caught engaging in more or less the same practices, also possessed the requisite intent"¹⁸⁰ without running afoul of 704(b).¹⁸¹

of fact. Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnosis, such as whether the defendant had a severe mental disease or defect and what the characteristics of such disease or defect, if any, may have been.

S. REP. NO. 98-225, at 230 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3412.

177. The Senate Judiciary Committee notes state:

Moreover, the rationale for precluding ultimate opinion psychiatric testimony extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven. The Committee has fashioned its Rule 704 provision to reach all such "ultimate" issues, e.g., premeditation in a homicide case, or lack of predisposition in entrapment.

Id. at 231, *reprinted in* 1984 U.S.C.C.A.N. at 3413.

178. See, e.g., *Richard*, 969 F.2d at 855 n.6 ("The legislative history suggests that Congress only intended to limit 'the scope of expert testimony by psychiatrists and other mental health experts.' However, no federal circuit court has so held.") (citation omitted). Much of the controversy over the application of 704(b) may stem from the language "mental state." This legal term of art often is used interchangeably for mens rea or state of mind. "State of mind" is defined as "a person's reasons and motives for acting as he did . . . used in connection with evidence." BLACK'S LAW DICTIONARY 1409 (6th ed. 1990).

"Mens rea" is defined as "an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent." *Id.* at 985. "Mental state" is defined as "capacity or condition of one's mind in terms of ability to do or not to do a certain act." *Id.* at 986.

179. See *United States v. Barber*, 80 F.3d 964, 970 (4th Cir. 1996) ("In interpreting [704(b)], courts have distinguished between expert opinion testimony that describes the significance of a defendant's actions to an illegal enterprise from opinion testimony that a defendant had an actual thought or intent."); *Lipscomb*, 14 F.3d at 1239 (stating that validity of expert testimony of law enforcement officers under Rule 704(b) depends on whether expert speculates as to actual intent of defendant or merely describes common practices of drug couriers, allowing jury to infer whether defendant had requisite intent from how completely defendant meets profile); *United States v. Rendon*, No. 93-6033, 1993 U.S. App. LEXIS 32619, at *6-7 (10th Cir. Dec. 8, 1993) ("Rule 704(b) only prevents experts from expressly stating the final conclusion or inference as to a defendant's actual mental state. The rule does not prevent the expert from testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state.") (citation omitted). Analysis in these cases seems to ignore completely the fact that Federal Rule of Evidence 704(b) states that an expert may not make a statement or inference about the defendant's state of mind.

180. *Lipscomb*, 14 F.3d at 1239.

181. See *id.*; see also *Richard*, 969 F.2d at 855 (finding that police officer's opinion testimony concerning roles performed by defendant was not prohibited ultimate issue testimony); cf. *United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir. 1995) (admitting testimony that "drug

"Ultimate issue" challenges¹⁸² are indistinguishable from 704(b) challenges. The concern, again, is that an expert law enforcement officer gives an opinion about the significance of physical evidence or the defendant's particular behavior, and then proceeds to draw a conclusion that infers guilt.¹⁸³ Although expert opinions on ultimate issues no longer are forbidden,¹⁸⁴ most courts still refuse to allow expert opinions on the ultimate question of guilt.¹⁸⁵ Such an opinion is not helpful to the trier of fact; it merely tells the jury what to do.¹⁸⁶ In fact, the Second Circuit gives little weight to expert ultimate issue opinions in a "sufficiency of the evidence review."¹⁸⁷ Inexplicably, without reasoned analysis or findings on the validity of the profile, courts admit opinions going to the ultimate issue.¹⁸⁸ It

traffickers often employ counter-surveillance driving techniques, register cars in others' names, make narcotics and cash deliveries in public parking lots, and frequently use pagers and public telephones").

182. See *supra* note 172 (stating ultimate issue rule).

183. See *United States v. Boissoneault*, 926 F.2d 230, 233 (2d Cir. 1991) ("We have repeatedly expressed our discomfort with expert testimony in narcotics cases that not only describes the significance of certain conduct or physical evidence in general, but also draws conclusions as to the significance of that conduct or evidence in the particular case.").

184. See *supra* note 172 (distinguishing testimony in form of opinion not objectionable though it addresses ultimate issue from expert witness testimony stating opinion whether defendant had requisite state of mind to satisfy mens rea element of crime). See generally Anne Lawson Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620 (1987) (analyzing effect of 704(b) on ultimate issue rule).

185. See, e.g., *United States v. Huerta-Macias*, No. 93-50230, 1994 U.S. App. LEXIS 12397, at *1 (9th Cir. May 25, 1994) ("Drug courier profile testimony is not admissible as substantive evidence of guilt, and an expert cannot opine about a defendant's guilt.") (citations omitted); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) ("The use of expert testimony as substantive evidence showing that the defendant 'fits the profile and, therefore, must have intended to distribute the cocaine in his possession' is error." (quoting *United States v. Quigley*, 820 F.2d 1019, 1023-24 (8th Cir. 1989))); *United v. Carter*, 901 F.2d 683, 684 (8th Cir. 1991) ("Drug courier profiles are investigative tools, not evidence of guilt."). See generally 11 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 702 (2d ed. 1960 & Supp. 1996) (evaluating state of law on issue of admissibility of expert opinions on ultimate issue of guilt).

186. See Kathy Jo Cook, *An Opinion: Federal Judges Misconstrue Rule 704*. (Or Is That an Impermissible Legal Conclusion?), 43 CLEV. ST. L. REV. 45, 57 (1995) (contending that courts repeatedly admit expert testimony regarding "intent to distribute" in narcotics possession cases even though such testimony proffers conclusion on critical issue in case that jury ultimately must decide); see also *United States v. Arenal*, 768 F.2d 263, 269-70 (8th Cir. 1985) (reversing conviction when expert made inference that jury itself was capable of making).

187. See *Boisseneault*, 926 F.2d at 230 (declaring that expert testimony on "ultimate issues" in criminal cases should be given minimal probative value, especially in circumstances where government produces no evidence from which "requisite criminal intent" must be inferred); see also *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (setting forth standard for appellate review on issue of whether sufficient evidence was presented at trial to convince jury of defendant's guilt beyond reasonable doubt).

188. See, e.g., *United States v. Theodoropoulos*, 866 F.2d 587, 591 (3d Cir. 1989) (allowing opinion testimony on defendant's role in drug scheme); *United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985) (allowing opinion that defendant was a "steerer"). See generally *Boisseneault*, 926 F.2d at 232 (discussing numerous cases that have admitted police expert's conclusory opinions on defendant's role in drug enterprise).

is apparent in examining these exceptions to the majority rule that the distinction between admission under an exception and admissibility as substantive evidence of guilt most often is one without a difference.¹⁸⁹ It also is apparent that the profile, having never been adjudged to possess empirical validity, adds little probative value to a case.¹⁹⁰ Perhaps it is the majority's unreasoned admission of profile evidence under the guise of "exceptions" that prompted the Seventh Circuit to reject the majority "rule" and to admit directly the profile as evidence of guilt.

C. *The Seventh Circuit: Bucking or Leading the Trend?*

In three separate opinions, each addressing different aspects of profile use, the Seventh Circuit concluded that "drug courier profile" evidence is admissible to prove the guilt of an accused.¹⁹¹ The first case to establish the minority position was *United States v. Teslim*.¹⁹² Although the court addressed the issue as a drug courier profile problem,¹⁹³ the classification is misleading. Teslim claimed that the prosecutor elicited drug courier profile evidence that had no relevance to any issue at trial.¹⁹⁴ The Seventh Circuit concluded that "the drug courier profile testimony was relevant to the issue of proving the defendant's guilt or innocence."¹⁹⁵ The court explained that this testimony was relevant to prove the elements of possession and the chain of custody,¹⁹⁶ noting that the arresting officer's "observations" of Teslim exiting the plane with luggage—later found to contain cocaine—were the only means to prove these two elements.¹⁹⁷

In *Teslim*, the court did not suggest that a generalized list of profile characteristics be admitted.¹⁹⁸ Rather, the court repeatedly indicated that the evidence pertained to the actual observed behavior of the

189. See *infra* note 199 and accompanying text (admitting eye witness testimony to prove chain of custody under label of drug courier profile), note 201 and accompanying text (admitting expert officer testimony regarding use of beepers by drug traffickers), and notes 214-17 and accompanying text (admitting general profile characteristics to prove knowledge).

190. See *Boissoneault*, 926 F.2d at 234.

191. See *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991); *United States v. Solis*, 923 F.2d 548 (7th Cir. 1991); *United States v. Teslim*, 869 F.2d 316 (7th Cir. 1989).

192. 869 F.2d 316 (7th Cir. 1989).

193. See *Teslim*, 869 F.2d at 324.

194. See *id.*

195. *Id.*

196. See *id.* The defendant was charged with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841. See *Teslim*, 869 F.2d at 324.

197. See *id.*

198. See *id.* (indicating that such evidence was presented at hearing on motion to suppress). The Court consistently discussed "the observations of the police officers" when discussing trial testimony classified as "profile" evidence. See *id.*

defendant.¹⁹⁹ Testimony that focuses entirely upon the actions of the defendant, recounting the facts leading to the ultimate stop and apprehension, does not raise a profile issue; rather, it is basic eyewitness, fact evidence. Although, the court in *Teslim* mischaracterized fact evidence as a profile, its literal language often is cited as permitting profile evidence as proof of guilt.²⁰⁰

In *United States v. Solis*,²⁰¹ the Seventh Circuit examined whether expert officer testimony regarding the use of beepers by drug traffickers was appropriate and helpful to the jury.²⁰² This case was typical of those involving expert opinions on *modus operandi* of drug traffickers.²⁰³ At trial, the government attempted to elicit expert testimony from a narcotics agent about the use of beepers in drug trafficking in order to prove circumstantially Solis' intent to distribute cocaine.²⁰⁴ The defendant objected to this testimony as being irrelevant and highly prejudicial.²⁰⁵ The trial court, overruling the objection, concluded that expert testimony explaining the common use of beepers by drug traffickers would assist the jury.²⁰⁶

On appeal, the Seventh Circuit affirmed.²⁰⁷ The primary issue at trial was the defendant's intent to distribute cocaine.²⁰⁸ The court held that because the government's proof of intent was shown by circumstantial evidence, the defendant's possession of numerous beeper numbers was relevant.²⁰⁹ The expert testimony assisted the jury by explaining the significance of beepers in the drug trade,

199. *See id.*

200. *See, e.g.,* *United States v. Foster*, 939 F.2d 445, 451 (7th Cir. 1991); *United States v. Solis*, 923 F.2d 548, 551 (7th Cir. 1991).

201. 923 F.2d 548 (7th Cir. 1991)

202. *See Solis*, 923 F.2d at 551.

203. *See id.* at 549 (evoking prevalence of beeper use in drug trade). Acting on a tip, police stopped Solis at O'Hare Airport. They asked to see her identification and her ticket. They learned that her ticket had been paid for with cash. Solis consented to a search, and police found cocaine and a notebook containing several beeper numbers. *See id.* at 549-50; *see also* *United States v. Lipscomb*, 14 F.3d 1236, 1238 (7th Cir. 1994) (testimony regarding significance of packaging of drugs); *Foster*, 939 F.2d at 454 (testimony on methods used by drug traffickers); *United States v. Boissoneault*, 926 F.2d 230, 234 (2d Cir. 1991) (testimony regarding significance of amount of drugs, packaging, and money found on defendant); *United States v. Campino*, 890 F.2d 588, 593 (2d Cir. 1989) (testimony regarding notebooks and electronic equipment found and practices of drug traffickers); *United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986) (testimony on *modus operandi* of Pakistani drug trade).

204. *See Solis*, 923 F.2d at 549.

205. *See id.*

206. *See id.* ("[F]or a 68 year old person who is at poverty level of most definitions of income in the United States to have a large number of friends that own beepers might be a question that the jury could reasonably consider.").

207. *See id.*

208. *See id.* at 551.

209. *See id.* ("Evidence of Ms. Solis' actions and of the other articles in her possession was therefore relevant on the issue of whether she intended to distribute the contraband.").

thereby allowing the jury to find that the defendant, who possessed numerous beeper numbers, knowingly was part of that drug trade.²¹⁰ Here, as in most *modus operandi* cases, officers explained the significance of the defendant's conduct by comparing it to the profile conduct of drug couriers.²¹¹ Although arguably in direct conflict with the majority rule, *Solis* follows the pattern of case law admitting expert opinions on *modus operandi*.²¹² The Seventh Circuit accurately determined that expert opinions about profile factors constitute substantive proof of guilt, and went one step further to conclude that such use of the profile is admissible.²¹³

In the third Seventh Circuit case, *United States v. Foster*,²¹⁴ the court bypassed all the exceptions, contradictions, and fictitious distinctions in the case law, and admitted generalized evidence of the drug courier profile to prove knowledge of drug possession.²¹⁵ The only issue at trial was whether the defendant "knew" he was transporting cocaine.²¹⁶ Evidence was admitted to permit the inference that Foster matched general profile characteristics, and, therefore, must have had the requisite knowledge.²¹⁷ The court concluded that the drug profile evidence was relevant and therefore was admissible as circumstantial evidence of the defendant's knowledge.²¹⁸ The court declared that "activity that 'may appear, to the outside observer, to be perfectly normal and innocent' may take on an entirely new significance when placed in context by expert testimony."²¹⁹ Thus, the court unequivocally allowed a direct comparison between the defendant and the drug courier profile as substantive evidence of guilt.²²⁰

Given this trend in the law to admit profile evidence, it would be beneficial for all courts to re-examine the underlying purpose for the

210. See *id.* at 550-51.

211. See *id.* at 549. The prosecution submitted a memorandum concerning the admissibility of expert testimony on the practices of drug traffickers, including the use of beepers. The agent testified about the use of beepers in the drug trade, noting that it made drug traffickers more mobile and anonymous.

212. See *supra* note 151 and accompanying text.

213. See *Solis*, 923 F.2d at 550-51.

214. 939 F.2d 445 (7th Cir. 1991).

215. See *United States v. Foster*, 939 F.2d 445, 451-52 (7th Cir. 1991).

216. See *id.* at 449. Foster exited an Amtrak train pulling two very new looking hard-sided suitcases. He appeared nervous and looked repeatedly over his shoulder as if someone were following him. Police stopped him for questioning. One case fell over and emitted a puff of white powder assumed to be talcum powder. See *id.* at 448.

217. See *id.* at 449-51 (admitting police officer's testimony of 10 general characteristics typical of drug couriers, including source city information). Foster matched most of the profile factors.

218. See *id.* at 452.

219. *Id.* (quoting *United States v. De Soto*, 885 F.2d 354, 360 (7th Cir. 1989)).

220. See *id.*

much diluted majority rule. Such an analysis will explain why profile evidence never should be admitted at trial, except as rebuttal evidence.

III. A STRONG PROFILE: IT IS A MARK ON CHARACTER AND A BLIGHT ON JUSTICE

Courts espousing the majority rule prohibiting profile evidence as substantive evidence of guilt²²¹ have stated that "[t]he broad brush painted by . . . [drug courier] profiles inevitably will cover many innocent individuals"²²² and that "[e]very defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by the law enforcement officers in investigating criminal activity."²²³ Embodied in these decisions is the determination that profile evidence simply is too prejudicial to be admitted to prove guilt.²²⁴ Federal courts and most state courts, however, have failed to confront the profile in an intellectually honest and proper context: Profile testimony is "akin" to the introduction of bad character evidence²²⁵ and presents issues that jeopardize the fundamental fairness of the trial itself.²²⁶ Several state courts, in various types of profile cases, have begun to recognize the character implications of profile evidence, and to prohibit admission of it on that basis.²²⁷

221. See, e.g., *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992); *United States v. Beltran-Rios*, 878 F.2d 1208, 1210 (9th Cir. 1989); *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983); *People v. Hubbard*, 530 N.W.2d 130, 133 (Mich. Ct. App. 1995), *app. denied*, 548 N.W.2d 634 (Mich. 1996) (acknowledging wide condemnation of drug courier profiles as substantive evidence of defendant's guilt). Although this rule is recited continually by the majority of circuits, it has been so subsumed by exceptions that the rule has little if any remaining vitality.

222. *Hubbard*, 530 N.W.2d at 134 (acknowledging that trial court abused its discretion by admitting drug courier profile evidence used by prosecutor to establish defendant's substantive guilt, but ultimately deeming admission to be harmless error).

223. *Id.*

224. See *id.*

225. See 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5233 (1978 & Supp. 1996) (equating quality and effect of drug courier profile evidence with introduction of bad character evidence).

226. See *Hubbard*, 530 N.W.2d at 134.

227. See, e.g., *People v. Martinez*, 12 Cal. Rptr. 2d 838 (Ct. App. 1992) (car theft profile); *Flanagan v. State*, 586 So. 2d 1085 (Fla. Dist. Ct. App. 1991) (child sex abuse offender profile); *Commonwealth v. Day*, 569 N.E.2d 397 (Mass. 1991) (child batterer profile); *State v. Williams*, 525 N.W.2d 538 (Minn. 1994) (drug courier profile); *State v. McMillan*, 590 N.E.2d 23 (Ohio Ct. App. 1990) (sexual abuser profile); *State v. Haynes*, No. 4310, 1988 Ohio App. LEXIS 3811, at *1 (Sept. 21, 1988) (anger-retaliatory murder profile); *Wilson v. State*, 871 P.2d 46 (Okla. Crim. App. 1994) (drug dealer profile).

One particularly apt general assessment of profiles is that they constitute "group character evidence."²²⁸

A moment's reflection on these categories of evidence reveals that "group" character evidence is objectionable for the same reason as is traditional character evidence: probative value depends upon the jury drawing the forbidden inference that the defendant has a propensity to commit the crime with which he is charged.²²⁹

Such an inference is forbidden under all state and federal character evidence rules.²³⁰

Focusing on the "group character" theory, in the context of the child abuser profile, the Florida Court of Appeals explained the danger involved: "Evidence of the propensity of a particular group to commit a crime shifts the focus of the jury to the question of whether the accused is a member of the particular group."²³¹ Introduction of the "group" character traits "indirectly brings the [defendant's] character into issue."²³²

The jury may conclude that the defendant must be guilty because he appears to be a member of the group. Such a determination is based on the premise that the characteristics of the group are indicative of guilt. This is a premise that never has been validated.²³³

228. *McMillan*, 590 N.E.2d at 32 (emphasis added) ("'Group' character evidence . . . attempts to prove that because *other persons* have acted in certain ways in the past, a defendant who shares common characteristics with those persons is likely to have acted the same way with respect to the crime charged.").

229. *Id.*; see also 2 WEINSTEIN & BERGER, *supra* note 121, § 7.01(01) (stating that traditional exclusion of circumstantial character evidence on grounds of "lack of probative value" and "likelihood of prejudice or confusion" is justified by theory that jury will misuse evidence). "The rule rests on the theory that the risk that the jury will convict for crimes other than those charged, or because defendant deserves punishment for his prior bad acts, outweighs the probative value of the inference, 'he's done it before, he's done or will do it again.'" *Id.*

230. Federal Rule of Evidence 404(a) provides:

Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Evidence of the character of a witness, as provided in rules 607, 608, and 609.

FED. R. EVID. 404(a); see also 2 WEINSTEIN & BERGER, *supra* note 121, § 404(21) (noting that majority of states have adopted Federal Rule of Evidence 404 either verbatim or in some modified form).

231. *Flanagan*, 586 So. 2d at 1123 (Wolf, J., concurring).

232. *Id.* at 1124 (Wolf, J., concurring) (noting that group character profiles have "even less probative value than direct evidence of defendant's character").

233. See generally Becton, *supra* note 1; Cloud, *supra* note 1.

The danger is exacerbated when group character evidence is presented by an expert, because the jury may defer to the expert who is experienced in the field of profiles by concluding that if the expert found a profile match, the defendant is a member of the group, and therefore, is guilty.²³⁴

Classification of profile evidence as character evidence, however, raises yet another question: whether the profile is permissible evidence of other crimes, wrongs, or acts²³⁵ that legitimately may be admitted to prove intent and knowledge.²³⁶ The defendant's conduct that originally aroused suspicion of law enforcement officers may be offered to provide circumstantial evidence of knowledge or intent,²³⁷ but the fact that he matched a profile should not be offered.²³⁸ Such evidence does not reflect the defendant's motivation for behaving in a certain manner, but rather imposes on the defendant the motivation of third parties not connected to the charged crime.²³⁹

234. See *Flanagan*, 586 So. 2d at 1124 ("[I]t invites the jury to conclude that because an expert experienced in child abuse cases identifies an accused as someone fitting a particular profile, it is more likely than not that this individual committed the crime.") (citation omitted). See generally *State v. Williams*, 525 N.W.2d 538 (Minn. 1994) (convicting defendant because of defendant's resemblance to group profile); Bamberger, *supra* note 134 (examining dangers of expert testimony based on profiles).

235. Federal Rule of Evidence 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

236. See *id.* One commentator has pointed out the character implications of expert opinions on *modus operandi*:

An even less defensible ploy for evading the restrictions on character evidence is the use of 'expert testimony' about the practices of some criminal sub-culture. The expert testifies that cocaine dealers behave in a certain way, evidence is offered that the defendant behaved in the same way, then in argument the jury is told that since the defendant behaved like a cocaine dealer, he must be a cocaine dealer and hence must be guilty of the charged cocaine deal. This can escape Rule 404 only on the supposition that being a drug dealer is not an attribute of 'character'.

WRIGHT & GRAHAM, *supra* note 225, § 5233.

237. See *supra* note 195 and accompanying text (stating that drug courier profile in conjunction with police impressions may be relevant to proving defendant's guilt or intent).

238. See *Wilson v. State*, 871 P.2d 46, 48-49 (Okla. Crim. App. 1994) ("The particular facts which are used to define a 'profile' may be admissible for other purposes such as proof of motive, intent, absence of mistake or accident, identity or common scheme or plan However, while such facts may be admissible, evidence concerning the 'profile' itself should be excluded.") (emphasis added) (citations omitted).

239. See *Williams*, 525 N.W.2d at 547-48 ("Normally proof of character involves witnesses who generalize on the basis of past acts of the defendant and this generalization is used to support an inference as to the conduct in issue. The drug courier profile involves a generalization based

The group character analysis is a new concept. It presents a more reasoned and more intellectually honest approach to profiling. More importantly, because it is based on a very specific evidentiary concept, the courts must analyze the prejudicial impact of the testimony in the context of well established character evidence rules. The majority rule, on the other hand, is based on the more general concept that a "profile match" is too prejudicial to be admitted.²⁴⁰ But this rule has opened the door to several major exceptions,²⁴¹ and, all too often, any error created by departure from the rule is deemed to be harmless.²⁴²

Testimony about "profile matches," direct or indirect, is far from harmless. Such evidence presents the defendant with an impossible dilemma: "[E]vidence of crimes committed by a third person who is not on trial saddles a defendant with the burden of proving the innocence of another."²⁴³ This burden violates a defendant's fundamental due process right,²⁴⁴ thus requiring review for constitutional harmless error.²⁴⁵

In *People v. Martinez*,²⁴⁶ the California Court of Appeals addressed the futility of fighting profile evidence.²⁴⁷ The defendant, Martinez, was stopped en route to Central America,²⁴⁸ driving a Toyota truck he claimed was purchased several days prior to the stop.²⁴⁹ The vehicle actually had been stolen two days earlier.²⁵⁰ At trial, law enforcement agents presented testimony regarding the "typical auto theft ring."²⁵¹ The court found this

on the past acts of third persons." (citing 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE—EVIDENCE* § 5233 n.53.2 (Supp. 1994)).

240. See *People v. Martinez*, 12 Cal. Rptr. 2d 838, 840 (Ct. App. 1992) (noting federal circuit court's belief that drug courier profiles are prejudicial); *Williams*, 525 N.W.2d at 548 (rejecting profile evidence because it urged jury to infer guilt).

241. See *supra* note 80 and accompanying text (discussing court-created exceptions).

242. See, e.g., *United States v. Carrillo-De Molina*, No. 92-10025 1994 U.S. App. LEXIS 14856, at *11 (9th Cir. June 6, 1994); *United States v. Lim*, 984 F.2d 331, 335 (9th Cir. 1993); *United States v. Williams*, 957 F.2d 1238, 1243 (5th Cir. 1992); *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990); *United States v. Quigley*, 890 F.2d 1019, 1024 (8th Cir. 1989).

243. *Martinez*, 12 Cal. Rptr. 2d at 841 (quoting *People v. Jackson*, 62 Cal. Rptr. 208, 211 (Ct. App. 1967)).

244. See *id.* (stating that forcing defendant to prove another's innocence "violates the fundamental principles of due process of the law" (quoting *Jackson*, 62 Cal. Rptr. at 211)).

245. See *Chapman v. California*, 386 U.S. 18, 24 (1967) (reiterating doctrine that constitutional error is harmless only if harmless beyond a reasonable doubt).

246. 12 Cal. Rptr. 2d 838 (Ct. App. 1992).

247. See *id.* at 841-42 (commenting on strong presumption of guilt that profile evidence creates in juries).

248. See *id.* at 839.

249. See *id.*

250. See *id.*

251. *Id.* at 839-40.

"profile"²⁵² analogous to "similar transactions" evidence used to prove intent, comparing it to *People v. Jackson*, a burglary case in which evidence of similar crimes was offered at trial.²⁵³

In *Jackson*, the prosecution offered evidence of four similar crimes in which the defendant was not involved.²⁵⁴ Holding that admission of the evidence was error, the court in *Jackson* stated that evidence of crimes implicating no one never can be allowed into court.²⁵⁵ The court explained:

[A] defendant charged with robbing a service station [should not] be convicted by proof that four other service stations were robbed in the same city on the same night by persons unknown, simply because the modus operandi as to each of the other crimes was the same as that employed to commit the crime charged.²⁵⁶

Using the rationale of the court in *Jackson*, the court in *Martinez* criticized the use of profiles in order to prove that the defendant was lying about not knowing that he had purchased a stolen car.²⁵⁷ Specifically, the prosecutor tried to prove that the defendant was lying simply because other drivers driving similar vehicles under similar circumstances also claimed ignorance. The court criticized the prosecution's attempt to have the jury consider the defendant's claim of ignorance²⁵⁸ in order to substantiate the theory that the other drivers also were lying when they denied knowledge.²⁵⁹ From this, the prosecutor wanted the jury to conclude that the defendant knew the vehicle was stolen.²⁶⁰ The court wrote: "This sort of bootstrap reasoning is impermissible and the trial court erred in admitting the

252. See *id.* at 840 (noting that purpose of auto theft ring evidence was to show that defendant matched profile of typical participant). The court pointed to several factors used in creating the "profile":

(1) The similarity between defendant's car and other stolen automobiles taken to Central America; (2) the road taken by defendant was commonly used in transporting stolen vehicles to Central America; (3) defendant was traveling during a time that was popular with those transporting stolen automobiles; (4) the false documents possessed by defendant were normally found on individuals moving stolen cars; and (5) defendant's claim of ignorance and that he bought the truck on a street corner was a popular story among car smugglers.

Id. at 840-41.

253. See *id.* at 841 (discussing *People v. Jackson*, 62 Cal. Rptr. 208 (Ct. App. 1967)).

254. See *id.* (noting that although defendant's alleged accomplice was connected to first three crimes, neither defendant nor his alleged accomplice was tied to fourth crime).

255. See *id.*

256. *Id.*

257. See *id.* at 840-41.

258. See *id.* at 841.

259. See *id.*

260. See *id.* at 841-42.

evidence of other crimes without first requiring proof that defendant was connected with the other crimes."²⁶¹

In short, the court found no link between the profile and the defendant's veracity. More importantly, the court recognized that the error could not be considered harmless, finding at trial that intent was a close question and that the officer's testimony constituted a large part of the prosecution's case.²⁶² It takes little imagination to see how this analysis applies to drug courier cases.

In *State v. Williams*,²⁶³ the Minnesota Supreme Court found that the same type of "bootstrapping" occurred when the drug courier profile was used: "The jury is asked to infer from the fact that the defendant shares some of the characteristics of these third persons that he shares their guilt of drug smuggling."²⁶⁴ Using reasoning similar to that developed in *Martinez*, the court determined that admission of this profile evidence, in conjunction with other improper evidence,²⁶⁵ amounted to plain error that deprived the defendant of a fair trial.²⁶⁶ In making this critical due process determination,

261. *Id.* at 842. The court stated:

"Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle."

Id. at 841 (quoting *People v. Long*, 86 Cal. Rptr. 590, 592 (Ct. App. 1970)).

262. *See id.* at 842. Inexplicably, although the court cited approvingly the due process analysis of *People v. Jackson*, 62 Cal. Rptr. 208 (Ct. App. 1967), it appears that the court failed to apply the constitutional harmless error test to the case. *See supra* notes 244-45 and accompanying text (discussing application of harmless error review for due process violation of forcing defendant to prove another's innocence).

263. 525 N.W.2d 538 (Minn. 1994).

264. *State v. Williams*, 525 N.W.2d 538, 548 (Minn. 1994) (quoting 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE—EVIDENCE* § 5233 n.53.2 (Supp. 1994)). In *Williams*, officers testified to general characteristics of "Amtrak" drug couriers, including the facts that "they buy their tickets with cash, typically come from a so-called 'source' city, such as Detroit[, and] typically use the club car on the train." *Id.* By using this evidence, wrote the court, the jury was "impliedly urged" to conclude that defendant knowingly possessed the crack because she fit the profile. *See id.*

265. *See id.* at 549 (discussing errors at trial). The Minnesota Supreme Court indicated that it found fault with the sum total of prosecutorial misconduct. *See id.* The court specifically cited: (1) the use of inadmissible hearsay evidence related to the tip that led the detectives to stop the defendant; (2) the admission of the drug courier profile; and (3) language in the prosecutor's closing argument that had the affect of inviting the jury to question the motivation behind the defendant's argument that she did not know the drugs were in her suitcase. *See id.*

266. *See id.* at 544. Interestingly, in *United States v. Wilson*, 930 F.2d 616 (8th Cir. 1991), this precise issue was presented to the Eighth Circuit Court of Appeals. In *Wilson*, the defendant argued "that he was denied due process because the district court admitted drug trafficker profile evidence as substantive evidence of his guilt." *Id.* at 617. The court found no due process violation, holding that the profile evidence presented during the prosecution's case-in-chief was used properly to rebut the defense of ignorance. *See id.* at 618. These contradictory

the court considered the improper profile evidence "equally if not more troubling" than the other errors.²⁶⁷

The holdings in these state court cases highlight the harm in allowing profile evidence to be admitted at trial: it cannot be challenged effectively. The profile, introduced as the "stereotype" of a drug courier,²⁶⁸ sets the stage for comparison to the defendant's conduct.²⁶⁹ Once the comparison is made in the juror's minds, the defendant implicitly has become linked with the character of guilt. The link is, in a practical sense, irrebuttable.

When profile characteristics are introduced to a jury, a picture is drawn of the "typical" drug courier.²⁷⁰ These "typical" characteristics are drawn from countless prior cases, involving countless prior couriers.²⁷¹ Many varied characteristics have emerged over the years.²⁷² Because police officers are not required to apply any one particular set of characteristics, any conduct inevitably will fit some version of "the" profile.²⁷³ Consequently, when testimony eventually

opinions between the Minnesota Supreme Court and the federal appellate court sitting in that district exemplify the conflict in this area of law and the need for judicial review by the United States Supreme Court.

267. *Williams*, 525 N.W.2d at 545.

268. See *People v. Derello*, 259 Cal. Rptr. 265, 270 (Ct. App. 1989) ("By themselves these [profile] elements indicate no ongoing criminal activity but merely attempt to identify an individual as a type of person who may engage in a criminal enterprise based upon stereotype of drug courier appearance or behavior."); cf. *United States v. Weaver*, 966 F.2d 391, 397 (8th Cir. 1992) (Arnold, C.J., dissenting) ("Use of race as a factor simply reinforces the kind of stereotyping that lies behind drug-courier profiles. When public officials begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed.").

269. When profile characteristics are introduced, for whatever purpose, the stereotypical image of a drug courier is injected into the trial. When the defendant's conduct at the time of the arrest is introduced, it inevitably will match at least some portion of the "typical" conduct of a courier and a comparison is inherent. The fact that defendant's conduct will match some version of the drug courier profile is the result of a lengthy and often contradictory list of characteristics that courts have accepted as part of the drug courier profile. For example, some courts have held that arrival at the destination city late at night is indicative of drug courier activity, and others have felt similarly about arriving in the afternoon or early in the morning. See *Fluid Drug Courier Profiles See Everybody as Suspicious*, 5 CRIM. PRAC. MAN. (BNA) 233, 234-35 (July 10, 1991) (providing thorough listing of similarly inconsistent and contradictory characteristics).

270. See *supra* note 268 (citing cases acknowledging tendency of drug courier profiles to create stereotypes).

271. See *Florida v. Royer*, 460 U.S. 491, 525 n.6 (1983) (Rehnquist, J., dissenting) ("A 'profile' is, in effect, the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers."); *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980) (noting that drug courier profile is an "informally compiled abstract of characteristics thought to be typical of persons carrying illicit drugs").

272. See *Fluid Drug Courier Profiles See Everybody as Suspicious*, *supra* note 269, at 236.

273. See *id.* Given the numerous conflicting profiles noted in case law over the years, it is safe to infer that police have a tendency to mix and match profile characteristics at will. See Gregory L. Young, *The Role of Stereotyping in the Development and Implementation of the D.E.A. Drug Courier Profiles*, 15 LAW & PSYCHOL. REV. 331, 339 (1991). Professor Young explains:

is presented on the defendant's specific conduct, it also, inevitably, will fit the profile. When the jury is invited to compare the defendant with untold numbers of presumably guilty drug couriers, they likewise are invited to presume that the guilt of one proves the guilt of the other.

This profile match, whether direct or indirect, creates an irrebuttable inference that, because the defendant fit the profile of the "typical" drug courier, he must be guilty. Logic dictates: If only the guilty behave in a certain manner, and the defendant behaved in that manner, the defendant is guilty. Therefore, the defendant must disprove that only the guilty behave in that manner in order to prove that he is not guilty. Inherent in this profile matching is the government created compulsion on the defendant to defend not only himself but the third persons making up the group character profile evidence.²⁷⁴ This places the defendant in an impossible position²⁷⁵ because the "typical" courier is fiction. Forcing a defendant to face such an irrebuttable inference, based on information that has no proven validity, denies him the opportunity to mount a defense.²⁷⁶ This situation is not harmless, and the practice of using

[T]he profiles have been said to be objectionable for their vagueness, because there are no set limitations on the characteristics which may be used. Instead, the profiles include a seemingly endless and everchanging set of criteria, which appear capable of change to fit the traits of the suspects involved in each case.

Id.

274. See *supra* note 243 and accompanying text (discussing similar statement made by court in *People v. Martinez*, 12 Cal. Rptr. 2d 838 (Ct. App. 1992)).

275. This position is somewhat analogous to the "presumption" addressed in *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979), in which the Court found that a jury charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts" denied defendant due process of law because it alleviated the burden of the government to provide the element of intent beyond a reasonable doubt. Although use of profile evidence does not rise to the level of a presumption ordered by the court, it certainly places the defendant in a similar situation as far as rebutting the evidence. Like the *Sandstrom* presumption, the inference created by profile evidence goes to the element of intent and seemingly shifts the burden of proof to the defendant to rebut the inference. The inference, however, is virtually irrebuttable.

276. The only real rebuttal available to a defendant claiming lack of knowledge in a drug case would be to show that drug traffickers often use unknowing couriers to transport their drugs. Ironically, this defense has been rejected by the courts. For example, in *United States v. Pereda-Aleman*, No. 94-2197, 1995 U.S. App. LEXIS 15162 (10th Cir. June 20, 1995), the defendant subpoenaed a DEA agent to testify as an expert that "it is not at all unusual for the driver of a vehicle containing contraband to have no knowledge of such contraband," and that "it is common in smuggling operations to have a driver who is innocent." *Id.* at *3 (citation omitted). The court refused to allow the expert to testify, stating:

[The] proffered testimony would not have addressed 'specific facts' of [the defendant's] case, but would instead have been in the form of an 'expert' hypothetical. He simply would have testified that, as a general proposition, it is common for the driver of a vehicle not to know drugs are in the car. . . . Such an opinion would not have been helpful to a jury deciding whether [the defendant] personally had knowledge.

profile evidence, therefore, should be closely re-examined by the courts.

CONCLUSION

The "War on Drugs" has had a far-reaching effect on American society.²⁷⁷ In an attempt to stop the never-ending flow of illegal narcotics from entering this country, law enforcement officers have developed new techniques to aid them in their battle. The drug courier profile is one "tool" that prosecutors have misused. It was created as an investigative tool for detecting drug couriers. The debate regarding the efficacy of the profile as an investigatory tool no doubt will continue.²⁷⁸

Now a more disturbing use of this "tool" has emerged. The profile is being used at drug trials to prove guilt circumstantially. Presentation of the profile to the jury raises an irrebuttable inference that the defendant matched the profile; therefore, he must have known he possessed narcotics. Unfortunately, this is not necessarily true.²⁷⁹ Nonetheless, the inference reaches the jury.

Presentation of profile evidence adds little probative value to a case, and, arguably, violates numerous evidentiary rules. Most alarming, however, is the fact that it presents bad character evidence against the accused before he has placed his character in issue. Federal courts have failed to recognize the character implications of the profile, although several recent state court decisions have made the analysis and have concluded that the profile raises an impermissible bad character inference.²⁸⁰ If the defendant matches any factor of the profile and the profile describes a typical drug courier, then the

Id. at *4-6; see also *United States v. Botero-Ospina*, No. 94-4006, 1995 U.S. App. LEXIS 36677, at *9 (10th Cir. Dec. 27, 1995) (rejecting defendant's expert testimony that "blind mules" often are used to transport drugs unknowingly on basis that it did not shed light on mental state of "mule" but on practices of drug dealers and thus was useless to jury); *United States v. Navarro-Varelas*, 541 F.2d 1331, 1334 (9th Cir. 1976) (affirming district court's refusal to allow testimony about common ploy of drug smugglers to use unknowing couriers because it "added no probative evidentiary value tending to prove or disprove the guilt or innocence of the appellant").

277. See Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1452 (1993) (concluding that "our Bill of Rights and our political freedom will be ultimate casualties of our war on drugs"); Jason A. Gillmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 499 (1995) (arguing that true victims of war on drugs are racial minorities and U.S. Constitution).

278. See *United States v. Hooper*, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting) ("The 'drug courier profile' . . . is so fluid that it can be used to justify designating anyone a potential drug courier if the DEA agents so choose.").

279. See *supra* notes 4-5 and accompanying text (relating incidents of false stops for narcotics possession).

280. See *supra* notes 191-220 and accompanying text (examining Seventh Circuit case law).

defendant must be a courier.²⁸¹ This inference is irrebuttable and denies a defendant due process; the defendant is forced to prove the innocence of the "typical" courier in order to prove his own innocence. Such a situation is a vicious circle: The profile of a typical courier proves the defendant's guilt as the defendant attempts to prove typical couriers' innocence.²⁸²

In light of the recent state court opinions, and because of the conflict among the federal circuits, the Supreme Court should re-evaluate the impact of drug courier profile evidence and provide a definitive holding that will keep such evidence out of trials.

281. See *supra* note 227 and accompanying text (citing courts that have recognized this unavoidable result).

282. See *supra* note 4. This situation is an impossibility because no statistical records are kept of people fitting the profile who were found not to be drug couriers.

