Supplementary Material

Chapter 10: The Reagan Era—Criminal Justice/Search and Seizure

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

Richard Kempshall, a federal drug enforcement agent, stopped Andrew Sokolow outside of the Honolulu airport and began a search of his luggage on the ground that Sokolow's behavior fit the profile of a drug courier. In particular, Sokolow paid $2,100 in cash for a two round trip tickets from Honolulu to Miami, gave a phone number that did not match his name, stayed in Miami—a center for drug smuggling—only two days, seemed nervous, and did not check any of his luggage. The search revealed that Sokolow was traveling with more than 1,000 grams of cocaine. After being indicted for possession with intent to distribute, Sokolow moved that the evidence discovered during the search be suppressed because the search was unreasonable under the Fourth Amendment. The local district court rejected that claim, but the Court of Appeals for the Ninth Circuit ruled that Office Kempshall, who relied entirely on personal characteristics of drug couriers and had no evidence on ongoing criminal activities, did not have a constitutionally reasonable basis for searching Sokolow. The United States appealed to the Supreme Court of the United States.

The Supreme Court by a 7–2 vote declared the evidence was constitutionally obtained. Chief Justice Rehnquist's majority opinion ruled that Office Kempshall had a reasonable suspicion that Sokolow was a drug courier. Both Chief Justice Rehnquist and Justice Marshall agreed on the basic facts, but they disputed the significance of those facts. Why did the chief justice believe reasonable suspicion existed in this case? Why did Justice Marshall disagree? Who was correct? Under what conditions may government use profiles of drug couriers (or bank robbers) as the basis for searching a person? Could an agent stop a person whom they suspected of violating securities laws on the basis of a profile that said persons engaged in securities fraud tend to wear expensive suits, listen to classical music, talk on cell phones constantly, and have chauffeurs?

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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. . . In *Terry v. Ohio* (1968), we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause. The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found" and the level of suspicion required for a *Terry v. Ohio* stop is obviously less demanding than that for probable cause.

The concept of reasonable suspicion, like probable cause, is not "readily, or even usefully, reduced to a neat set of legal rules." . . . In evaluating the validity of a stop such as this, we must consider "the totality of the circumstances—the whole picture."

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[T]he factors in this case that the Court of Appeals treated as merely "probabilistic" also have probative significance. Paying $2,100 in cash for two airplane tickets is out of the ordinary, and it is even more out of the ordinary to pay that sum from a roll of $20 bills containing nearly twice that amount of

cash. Most business travelers, we feel confident, purchase airline tickets by credit card or check so as to have a record for tax or business purposes, and few vacationers carry with them thousands of dollars in $20 bills. We also think the agents had a reasonable ground to believe that respondent was traveling under an alias; the evidence was by no means conclusive, but it was sufficient to warrant consideration. While a trip from Honolulu to Miami, standing alone, is not a cause for any sort of suspicion, here there was more: surely few residents of Honolulu travel from that city for 20 hours to spend 48 hours in Miami during the month of July.

Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion. . . . "[I]nnocent behavior will frequently provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." That principle applies equally well to the reasonable suspicion inquiry.

We do not agree with respondent that our analysis is somehow changed by the agents' belief that his behavior was consistent with one of the DEA's "drug courier profiles." 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.

. . . The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decisions—here, respondent was about to get into a taxicab—and it would require courts to "indulge in 'unrealistic second-guessing.'"

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JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

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The Fourth Amendment cabins government's authority to intrude on personal privacy and security by requiring that searches and seizures usually be supported by a showing of probable cause. The reasonable-suspicion standard is a derivation of the probable-cause command, applicable only to those brief detentions which fall short of being full-scale searches and seizures and which are necessitated by law enforcement exigencies such as the need to stop ongoing crimes, to prevent imminent crimes, and to protect law enforcement officers in highly charged situations. By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to "overbearing or harassing" police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race.

To deter such egregious police behavior, we have held that a suspicion is not reasonable unless officers have based it on "specific and articulable facts." . . . [B]efore detaining an individual, law enforcement officers must reasonably suspect that he is engaged in, or poised to commit, a criminal act *at that moment.* The rationale for permitting brief, warrantless seizures is, after all, that it is impractical to demand strict compliance with the Fourth Amendment's ordinary probable-cause requirement in the face of ongoing or imminent criminal activity demanding "swift action predicated upon the on-the-spot observations of the officer on the beat." Observations raising suspicions of past criminality demand no such immediate action, but instead should appropriately trigger routine police investigation, which may ultimately generate sufficient information to blossom into probable cause.

Evaluated against this standard, the facts about Andrew Sokolow known to the DEA agents at the time they stopped him fall short of reasonably indicating that he was engaged at the time in criminal activity. It is highly significant that the DEA agents stopped Sokolow because he matched one of the DEA's "profiles" of a paradigmatic drug courier. 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. Reflexive reliance on a profile of drug courier

characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's "chameleon-like way of adapting to any particular set of observations." In asserting that it is not "somehow" relevant that the agents who stopped Sokolow did so in reliance on a prefabricated profile of criminal characteristics, the majority thus ducks serious issues relating to a questionable law enforcement practice, to address the validity of which we granted certiorari in this case.

The facts known to the DEA agents at the time they detained the traveler in this case are scarcely suggestive of ongoing criminal activity. . . . Sokolow gave no indications of evasive activity. On the contrary, the sole behavioral detail about Sokolow noted by the DEA agents was that he was nervous. With news accounts proliferating of plane crashes, near collisions, and air terrorism, there are manifold and good reasons for being agitated while awaiting a flight, reasons that have nothing to do with one's involvement in a criminal endeavor.

The remaining circumstantial facts known about Sokolow, considered either singly or together, are scarcely indicative of criminal activity. [T]hat Sokolow took a brief trip to a resort city for which he brought only carry-on luggage also "describe[s] a very large category of presumably innocent travelers." That Sokolow embarked from Miami, "a source city for illicit drugs," is no more suggestive of illegality; thousands of innocent persons travel from "source cities" every day and, judging from the DEA's testimony in past cases, nearly every major city in the country may be characterized as a source or distribution city. That Sokolow had his phone listed in another person's name also does not support the majority's assertion that the DEA agents reasonably believed Sokolow was using an alias; it is commonplace to have one's phone registered in the name of a roommate, which, it later turned out, was precisely what Sokolow had done.

Finally, that Sokolow paid for his tickets in cash indicates no imminent or ongoing criminal activity. The majority "feel[s] confident" that "[m]ost business travelers . . . purchase airline tickets by credit card or check." Why the majority confines its focus only to "business travelers" I do not know, but I would not so lightly infer ongoing crime from the use of legal tender. Making major cash purchases, while surely less common today, may simply reflect the traveler's aversion to, or inability to obtain, plastic money. Conceivably, a person who spends large amounts of cash may be trying to launder his proceeds from *past* criminal enterprises by converting them into goods and services. But, as I have noted, investigating completed episodes of crime goes beyond the appropriately limited purview of the brief, *Terry*-style seizure. Moreover, it is unreasonable to suggest that, had Sokolow left the airport, he would have been gone forever and thus immune from subsequent investigation. Sokolow, after all, had given the airline his phone number, and the DEA, having ascertained that it was indeed Sokolow's voice on the answering machine at that number, could have learned from that information where Sokolow resided.

. . . [N]othing about the characteristics shown by airport traveler Sokolow reasonably suggests that criminal activity is afoot. The majority's hasty conclusion to the contrary serves only to indicate its willingness, when drug crimes or antidrug policies are at issue, to give short shrift to constitutional rights.