

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner V. ANDREW SOKOLOV
CASE NO: 87-1295
PLACE: WASHINGTON, D.C.
DATE: January 10, 1989
PAGES: 1 thru 45

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2
3
4
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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, ;
Petitioner ;
V. ; No. 87-1295
ANDREW SOKOLOW ;
-----x

Washington, D.C.
Tuesday, January 10, 1989

The above entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:04 a.m.

APPEARANCES:

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the Petitioner.
ROBERT P. GOLDBERG, ESQ., Honolulu, Hawaii; on behalf of
the Respondent.

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24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
PAUL J. LARKIN, JR., ESQ.	
On behalf of the Petitioner	3
ROBERT P. GOLDBERG, ESQ.	
On behalf of the Respondent	25
<u>REBUTIAL ARGUMENT OF</u>	
PAUL J. LARKIN, JR., ESQ.	43

1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 87-1295, United States
5 against Andrew Sokolow.

6 Mr. Larkin, you may proceed whenever you are
7 ready.

8 ORAL ARGUMENT OF PAUL J. LARKIN, JR.

9 ON BEHALF OF THE PETITIONER

10 MR. LARKIN: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 This case stems from the detention of
13 Respondent outside the Honolulu airport on the ground
14 that he was suspected of narcotics trafficking. The
15 question presented by this case involves the type of
16 evidence on which a law enforcement officer may rely in
17 making that type of judgment.

18 It's our submission that the reasonable
19 suspicion inquiry in this context should be answered in
20 the same way that that question is answered in any other
21 context, by looking to the totality of the
22 circumstances, viewing the facts in a common sense
23 manner, and giving weight to the reasonable inferences
24 that a trained and experienced law enforcement officer
25 can draw.

1 Respondent was detained just as he was about
2 to board a cab outside the Honolulu airport. At that
3 time the agents knew the following: They knew that
4 Respondent had purchased two round trip open return
5 tickets from Honolulu to Miami for \$2,100 by handing the
6 airline ticket agent a \$4,000 roll of \$20 bills.

7 The agents knew that Respondent had just spent
8 20 hours flying 12,000 miles to spend only two days at
9 his destination, which happens to be the nation's
10 principal source city for cocaine.

11 The agents had reason --

12 QUESTION: I didn't understand that. I, I
13 thought it was an open ticket coming back?

14 MR. LARKIN: Yes. At the time they stopped
15 him, they knew he had only spent two days in Miami.

16 QUESTION: And when they stopped him in Los
17 Angeles you mean?

18 MR. LARKIN: Well, they stopped him in Los
19 Angeles on the same day that they stopped him in
20 Honolulu.

21 QUESTION: How did they know -- how did the
22 police in Los Angeles know this man was coming back on
23 this flight?

24 MR. LARKIN: It's not clear from the record
25 who first told them. It's clear that they told the

1 people in Honolulu that Respondent was seen in the
2 waiting area waiting for a connecting flight from L.A.
3 to Honolulu, but it's clear who exactly --

4 QUESTION: The record doesn't --

5 MR. LARKIN: -- told them that Respondent may
6 have been coming back on that day.

7 They knew; that is, the agents in Honolulu
8 knew on July 24th that Respondent had booked a flight to
9 return on July 25th, the following day. It's possible,
10 then, that the agents in Honolulu may have told the
11 agents in L.A. to be on the lookout.

12 QUESTION: Well, I suppose -- how did they
13 know -- when did they find out that he was going to make
14 the return flight -- that he booked the flight on the
15 24th and came back on the 25th?

16 MR. LARKIN: Let me explain it this way. He
17 left on the 22nd of July.

18 QUESTION: Right. At that time with an open
19 ticket.

20 MR. LARKIN: Open ticket. On the 24th, they
21 learned that he had booked a return for the following
22 day, the 25th.

23 QUESTION: And how did they learn that?

24 MR. LARKIN: That's not clear from the record.

25 QUESTION: That's what I was trying to trace.

1 Okay.

2 MR. LARKIN: At the time the Respondent was
3 stopped, the agents also had reason to suspect that he
4 was traveling under an alias because there was a
5 discrepancy between the name that he gave to the airline
6 and the name listed for the telephone number at which
7 Respondent's voice was on an answering machine.

8 The agents also knew the Respondent appeared
9 nervous when he first purchased his tickets in Honolulu,
10 and that he appeared nervous and was looking all around
11 the waiting area in the L.A. airport awaiting a
12 connecting flight back.

13 The agents also knew the Respondent had
14 purchased his tickets shortly before his departure from
15 Honolulu and that he and his companion had checked none
16 of their four bags for either leg of their journey.

17 From all of those facts, a trained and
18 experienced law enforcement officer could draw the
19 following four inferences.

20 QUESTION: Can I ask you another question? Do
21 you have to be a trained and experienced law enforcement
22 officer to draw those inferences?

23 MR. LARKIN: I think it certainly helps
24 because it cuts down on the time necessary for someone
25 to go through the process.

1 We, for example, in our brief have explained
2 in detail why each of these factors is relevant. A law
3 enforcement officer with the type of experience that
4 these people had doesn't need to write that out or go
5 through the detail that we did. You can easily, if you
6 have the experience that these people have, make that
7 judgment.

8 Now, if you were a new law enforcement officer
9 and had been trained by other people who are experienced
10 to look for these certain factors, then a new law
11 enforcement officer making a common sense judgment in a
12 case like this where the evidence is this strong, I
13 think, could easily reach the same conclusion. So, the
14 difference is really, I guess, just a matter of time.
15 It's intuitive for someone with the type of experience
16 that these law enforcement officers had. But for
17 someone who may be new, I think he would certainly come
18 to the same conclusion, but he may just have to think
19 about it a little.

20 QUESTION: Well, along the same lines, how
21 many of these items do you need?

22 MR. LARKIN: Only three.

23 QUESTION: What three?

24 MR. LARKIN: The cash purchase of airline
25 tickets, the 12,000 mile trip and the 20 hours in the

1 air for only a two day stay at the destination, and the
2 fact that the destination was Miami. In our view, those
3 three facts alone amount to reasonable suspicion because
4 they make it unlikely that someone traveled for a
5 business reason. They make it unlikely that someone
6 traveled for a vacation.

7 QUESTION: He was on business, all right.

8 (Laughter.)

9 MR. LARKIN: He was, but let me say legitimate
10 business reason, then.

11 QUESTION: You don't use nervousness any more,
12 do you?

13 MR. LARKIN: No. It is a factor among others.

14 QUESTION: I mean, since these crashes every
15 other day, I don't think you use nervousness any more,
16 do you?

17 MR. LARKIN: Well -- it depends. It's a
18 factor that has to be looked at in context. There are
19 numerous air travelers who are nervous, and we're not
20 arguing that nervousness by itself in an airport is
21 indicative of criminal conduct.

22 QUESTION: You're really arguing with gut
23 reaction, aren't you?

24 MR. LARKIN: I'm sorry, Your Honor?

25 QUESTION: You know what a gut reaction is?

1 MR. LARKIN: Yes.

2 QUESTION: Isn't that really what you're
3 arguing?

4 MR. LARKIN: That's, that's another way of
5 describing intuition, and intuition is something that is
6 built on experience and training.

7 QUESTION: Can't find intuition anyplace in
8 the Constitution, can you?

9 MR. LARKIN: Well, it's part of the type of
10 judgment that this court in Terry said, a reasonable
11 officer is entitled to take into account.

12 QUESTION: All right. Terry was no
13 intuition. Terry was -- the man was standing there,
14 locking, casing the joint.

15 MR. LARKIN: Well, here you have a different
16 type of facts because you have a different type of
17 crime. Smuggling is a crime of stealth. It's not like
18 a bank robbery or a package store robbery. All that's
19 necessary to complete the crime of smuggling is
20 concealment and escape.

21 Someone who is experienced, therefore, has to
22 be able to draw on a variety of different subtle clues.
23 That's the type of clues that this -- these officers
24 drew on, and they drew, as I started to say, the
25 following four inferences. First, Respondent did not --

1 QUESTION: May I ask one other question.
2 Don't you need a inference -- fourth factor in order to
3 make your, your trio hold up, and that is the absence of
4 any apparent justification? For example, if on Super
5 Bowl weekend someone flew from Honolulu to Miami and
6 back, and they, they had a pretty obvious explanation
7 for a three-day trip, I suppose.

8 MR. LARKIN: Yes, if, if there was --

9 QUESTION: So, don't you need that, at least,
10 also?

11 MR. LARKIN: Yes. There, there, there was in
12 this case no sort of obvious, apparent explanation.

13 QUESTION: Might he not argue a motion in an
14 important case, or something like that?

15 MR. LARKIN: Well, the cash purchase of
16 airline tickets might, I think, be a reasonable
17 explanation for why there was no business trip.

18 QUESTION: But you said you needed -- you
19 wouldn't say every cash purchase is enough?

20 MR. LARKIN: No. No, no.

21 QUESTION: You had the three things: You had
22 the cash purchase, the short period of time for a long
23 trip, and Miami.

24 MR. LARKIN: Well, for example, a lot of
25 people use cash to purchase a ticket on a shuttle going

1 from New York to Washington, so we're not saying that
2 the simple fact that someone has paid for a ticket in
3 cash is necessarily indicative of criminal conduct.

4 But this was a \$2,100 purchase out of a \$4,000
5 roll of \$20 bills.

6 QUESTION: Are you sure that that alone
7 wouldn't be enough? I mean, that's rather
8 extraordinarily, isn't it, just handing over to somebody
9 a \$4,000 roll of \$20 bills?

10 MR. LARKIN: It is rather extraordinary, and
11 one of the striking features about this case is that's
12 the sort of conclusion the Court of Appeals said in its
13 first opinion.

14 In its first opinion in this case, it said
15 that the cash purchase of airline tickets by itself was
16 cause for reasonable suspicion.

17 One of the most striking features of the two
18 opinions the Court of Appeals issued in this case, was
19 by the time the court got to its second opinion, that
20 fact had dropped out entirely; and the court gave it no
21 weight at all.

22 QUESTION: Well, I wouldn't even put it the
23 cash purchase alone. I, I suppose if for some reason if
24 he had two \$1,000 bills and a \$100 bill, it wouldn't
25 trouble me so much. It's just a \$4,000 roll of 20s.

1 (Laughter.)

2 MR. LARKIN: I can't disagree with you on
3 that, Your Honor.

4 (Laughter.)

5 MR. LARKIN: The four inferences that are
6 reasonable to draw in this case are: The Respondent
7 didn't travel on business for precisely the reason you
8 gave. Business travelers normally use a credit card or
9 a travel agency to make their trips. They don't
10 normally pay with a \$4,000 roll of \$20 bills.

11 The second inference that is unlikely,
12 Respondent went for a vacation. Few people who live in
13 Honolulu are going to take a summer vacation in Miami,
14 but fewer still are going to travel 12,000 miles and 20
15 hours just to spend two days there.

16 QUESTION: Are we going to hear the argument
17 that even if the curbside stop was legitimate, the
18 subsequent detention and removal of the Petitioner to
19 the customs area was not?

20 MR. LARKIN: I'm not going to address that --
21 the arguments -- the issues that arose after the initial
22 detention because we did not present those to this Court
23 in our certiorari petition.

24 The dissent below, Judge Wiggins addressed
25 those issues, but the majority did not. If this court

1 were to reverse the judgment of the Court of Appeals,
2 those sorts of issues would be open for reconsideration
3 on remand. But we do believe --

4 QUESTION: So, all we have before us is the
5 curbside stop and that if you prevail on that, we then
6 remand?

7 MR. LARKIN: Correct. If the detention was
8 valid under Terry, then the remaining issues would have
9 to be addressed below, and there is nothing in the Court
10 of Appeals majority opinion that addresses them.

11 QUESTION: And the whole case on the
12 invalidity of the stop?

13 MR. LARKIN: Correct.

14 The third inference that an officer could draw
15 is that Respondent didn't travel for another innocent
16 personal reason, like going to the Super Bowl. Most
17 people who go to the Super Bowl or to a wedding or a
18 funeral are not likely to use an alias, and the agents
19 had reasonable reason to suspect the Respondent was
20 doing so.

21 QUESTION: Well, they also go in January and
22 not July.

23 (Laughter.)

24 MR. LARKIN: That's right.

25 The only reasonable inference, the fourth one

1 I'd like to mention, is that Respondent was smuggling
2 cocaine back into Hawaii. That, in fact, is the only
3 inference that accounts for all of the facts that were
4 known to the officers in this case.

5 Now, Respondent has argued that that inference
6 is unreasonable basically for two reasons. One is that
7 it could have been wrong and another is that each of the
8 facts on which the agents relied could have an innocent
9 explanation.

10 Both of those arguments, in our view, are
11 foreclosed by well settled case law in this court. It's
12 well settled in cases such as Cortez and Gates that all
13 the facts must be considered. And that is, in fact,
14 what the DEA agent, Agent Kempshall, did in this case,
15 as he testified at pages 59 to 61 of the suppression
16 hearing transcript.

17 He considered all of the facts because he said
18 there may be an innocent explanation for each fact when
19 each fact on a trip is considered.

20 It's also settled law that an agent need not
21 conclusively prove that a person is in possession of
22 narcotics. Terry only requires that a rational,
23 objectively based inference be used to support an
24 intention.

25 Now, the Court of Appeals disagreed with us

1 both as to the bottom line and as to the reasoning.
2 According to the Court of Appeals, the central flaw in
3 our position was that the government had, and I'm
4 quoting, "unwittingly equated evidence of behavior that
5 a criminal may engage in with behavior indicating an
6 ongoing crime."

7 To remedy that type of error the Court of
8 Appeals created a new reasonable suspicion test. It
9 consists of two categories. The first category of
10 evidence consists of evidence of what the Court of
11 Appeals believes was an ongoing crime, such as the use
12 of an alias.

13 The second category which the Court of Appeals
14 termed probabilistic evidence consists of conduct that a
15 drug courier may engage in, such as the cash purchase of
16 airline tickets.

17 The Court of Appeals then set up a mechanism
18 for analyzing the evidence once it's fit into one of
19 these two categories. To establish reasonable
20 suspicion, the government must prove at least one factor
21 from the first category.

22 Factors from the second category only serve to
23 confirm or refute the presence of reasonable suspicion
24 based on evidence from the first category. But even to
25 serve that limited confirmatory function, the government

1 must first show that the factors on which it relies have
2 statistical or empirical validity in that they describe
3 only someone who is presently engaged in criminal
4 activity and not someone who is merely a criminal or who
5 is innocent of any crime.

6 Otherwise, all the factors that fit into
7 category two, such as the ones I mentioned before, are
8 in the Court of Appeals' terms irrelevant to the
9 suspicion analysis.

10 The Ninth Circuit applied that test in this
11 case in a very mechanical way. It said that there was
12 no evidence that Respondent was using an alias. It then
13 went on to say there was no evidence that Respondent's
14 nervousness was due to fear of apprehension rather than
15 fear of a mid-air collision.

16 At that point it stopped its analysis
17 entirely. It didn't consider any of the remaining
18 evidence even though in its first opinion it said the
19 cash purchase alone was close to establishing reasonable
20 suspicion.

21 Now, no decision by this Court remotely
22 suggests that the facts should be pigeonholed into two
23 categories in this manner. The Cortez case and the
24 Gates case to us seem to make clear that all of the
25 facts must be considered.

1 QUESTION: Well, Gates suggests quite the
2 opposite, doesn't it, that the Court does not favor
3 hairsplitting when you're talking about reasonableness
4 of Fourth Amendment, that you don't divide it into a
5 whole bunch of legal categories.

6 MR. LARKIN: Precisely. The Gates case made
7 that point in the context of the probable cause
8 determination, and the same point applies even more
9 forcefully in the reasonable suspicion context.

10 QUESTION: Mr. Larkin, what worries me is why
11 a man of just ordinary intelligence, knowing about these
12 profiles, and any courier certainly must know about
13 them, why they would lay themselves open to it?

14 MR. LARKIN: Well, Your Honor, it's difficult
15 to answer that.

16 QUESTION: I mean the \$2,400 -- \$4,000 in \$20
17 bills. He should have known about that.

18 MR. LARKIN: It certainly wasn't very smart
19 for him to go about paying for the tickets that way.

20 QUESTION: You know, it reminds me of the
21 cases where the thugs always have their TV set they've
22 stolen sitting right in the window so the police can see
23 it.

24 MR. LARKIN: Well, to the extent what you're
25 concerned about is that these -- the facts that we have

1 here may not be the facts that occurred in the real
2 world. That's a question for the District Court to
3 handle because those sorts of matters are questions of
4 historical fact.

5 The defendant has the opportunity to testify.
6 He has the opportunity to cross-examine the officers.

7 QUESTION: Right.

8 MR. LARKIN: And the District -- and he has
9 the opportunity to persuade the District Court that the
10 officers' story is an after-the-fact fabrication. The
11 Defendant had that opportunity in this case, and the
12 District Court found against him.

13 QUESTION: I guess we're getting stupid drug
14 couriers off the street.

15 (Laughter.)

16 MR. LARKIN: The Court of Appeals test is
17 arbitrary because there is no material difference
18 between the types of facts that fit into category one
19 and category two. There's no difference in a material
20 sense between a fact like the use of an alias and the
21 fact like a cash purchase of airline tickets, although
22 the Court of Appeals described the second type of fact
23 as only a probabilistic fact. All evidence is
24 probabilistic.

25 The appropriate question, as the court made

1 clear in the Gates case, is not whether conduct is
2 innocent or guilty, but is the degree of suspicion that
3 attaches to certain types of conduct.

4 The Court of Appeals test is erroneous for
5 another reason as well. It leaves no room for the
6 judgment of experienced officers, and the officers in
7 this case had considerable experience. Two of them
8 alone, Officer McCarthy, the Honolulu police officer who
9 was first approached by the United Airlines ticket
10 agent, and the DEA agent who made the detention, Agent
11 Kempshall --

12 QUESTION: Mr. Larkin, the thing that bothers
13 me about your relying on the expertise of the officer,
14 doesn't he have to have reasonable -- even the expert
15 officer has to have reasons he can articulate and that
16 you can review. It would not be enough to say I've been
17 in this business 50 years, and I think I can spot -- I
18 can smell a drug courier? That wouldn't be enough,
19 would it?

20 MR. LARKIN: No. That would be what the
21 court --

22 QUESTION: Doesn't he have to have reasons
23 that he can state and a judge can listen to and decide
24 whether they constitute reasonable suspicion?

25 MR. LARKIN: Well, he has to be able to point

1 to the facts that he believes were suspicious.

2 QUESTION: And if those facts aren't enough,
3 would the fact that he'd been in the business for 50
4 years make a difference?

5 MR. LARKIN: No.

6 QUESTION: Then I really don't see how you can
7 rely on this expertise argument at all. He's an expert
8 in spotting things. He can tell us what they are. But
9 if what he tells us doesn't persuade us, the fact that
10 he's an expert, I don't see adds, adds anything to your
11 case.

12 MR. LARKIN: Well, it's in the last step and
13 whether what he says is persuasive.

14 QUESTION: That's right.

15 MR. LARKIN: He can -- he can explain and make
16 judgments based on his experience as to why a particular
17 fact is significant.

18 QUESTION: And then the court later has a duty
19 to decide whether that judgment based on those facts
20 amounts to reasonable suspicion. I don't think it
21 becomes more reasonable because he's been in the
22 business 50 years.

23 MR. LARKIN: Well, the judge has the
24 independent duty to decide whether these facts are
25 reasonable or not.

1 QUESTION: But it seems to me if they're
2 reasonable, they're reasonable if he's a brand new
3 officer.

4 MR. LARKIN: Well, it can in certain, certain
5 cases where the facts are this obvious amount to that.
6 But where the facts may be more subtle, where -- where
7 the officer relies on a fact that maybe the District
8 Court would not on its own have thought suspicious, the
9 officer could explain that.

10 QUESTION: But he has to be able to explain
11 it, doesn't he?

12 MR. LARKIN: That's right.

13 QUESTION: He can't just say I, I can -- I can
14 smell drug couriers.

15 MR. LARKIN: No. That's absolutely right.
16 That would be the type of unarticulated hunch that is
17 insufficient under Terry.

18 My, my point about experience is that if --

19 QUESTION: Even a man who's been in the
20 business for 30 years can't get away with pure hunches.

21 MR. LARKIN: Absolutely.

22 QUESTION: All right.

23 MR. LARKIN: Now, the only explanation for the
24 Court of Appeals' very mechanical test is that it
25 believed the DEA agents were also relying on a very

1 mechanical test.

2 The Court of Appeals believed that the agents
3 were relying on a drug courier profile that contained a
4 variety of different characteristics that the agents
5 just mechanically used in selecting people at an
6 airport. That's not true in this case, and it's not
7 true in general.

8 In this case, Agent Kempshall testified, and
9 his testimony is reprinted at page 59 of the Joint
10 Appendix, that he relied on the totality of the
11 circumstances, and he did so, as he explained on pages
12 60 to 61, because individual factors may have an
13 innocent explanation.

14 DEA agents in general are taught to approach
15 the problem that way. They're not taught just to engage
16 in a checklist sort of analysis of the facts. Now, when
17 they are taught what to look for, some of the factors
18 that they are taught to look for are factors that have
19 proven reliable to other agents. But that is the same
20 way police officers operate in any other type of context.

21 It would be irrational to denigrate an
22 officer's judgment on the ground that what he saw in a
23 particular case and what he believed to be suspicious
24 had also been seen in other cases and had been found by
25 other agents equally suspicious.

1 In fact, what's ironic about the Ninth
2 Circuit's test is that if the Ninth Circuit was
3 responding to what it believed was a drug courier
4 profile, then the Ninth Circuit's opinion created its
5 own drug courier profile in an attempt to respond.

6 The Court of Appeals created two categories of
7 evidence. It required that all the evidence be put into
8 one category or the other, and then it adopted a very
9 mechanical means of analyzing all the facts.

10 For all the reasons we have given, that type
11 of approach is worse than anything the Court of Appeals
12 feared that the agents engaged in. In fact --

13 QUESTION: Mr. Larkin, I, I -- we've had a lot
14 of these cases like this around here. Does the
15 government view this, this airport stop -- is it really
16 an important tool in the -- in trying to stop the drug
17 traffic?

18 MR. LARKIN: Yes, it is, Your Honor. Airports
19 are used to traffic in drugs because they're the
20 quickest way to travel from point A to point B.

21 QUESTION: But I just wonder how often it --
22 how often it really -- how often using this profile
23 comes up with anything.

24 MR. LARKIN: Well, the agents normally are
25 taught to use the factors to help distinguish --

1 QUESTION: Well, I know, but how often does it
2 bear fruit?

3 MR. LARKIN: We don't -- the DEA does not have
4 statistics on the general number nationwide of stops
5 that are engaged in for the time.

6 QUESTION: But I suppose if they, if they --
7 it really was a -- produced something very rarely, they
8 wouldn't put all this manpower into it.

9 MR. LARKIN: No. It has been very effective.
10 For example, it --

11 QUESTION: Well, how do you know? You say
12 there isn't any statistics.

13 MR. LARKIN: Well, they have some general
14 impressionistic judgments based, for example, in the
15 L.A. airport, on the amount of money that they have
16 obtained over the past several years. They've obtained
17 several million dollars in cases like this because the
18 money is -- if it's associated with narcotics
19 trafficking is later forfeited.

20 So, they don't have any precise statistics,
21 and certainly not the type of statistics the Ninth
22 Circuit demanded in this case. But it is the judgment
23 of the people at the Drug Enforcement Administration it
24 has been a very valuable program because it has allowed
25 them to intercept narcotics trafficking at a point above

1 the more traditional undercover operation, but below
2 that of the massive type of importations that can occur
3 by ship.

4 My final point is this. At the end of the
5 day, the Ninth Circuit's analysis is precisely the type
6 of analysis that this Court rejected in the Gates case.
7 For all the reasons we have given in our brief and the
8 reasons I have tried to summarize here today, that
9 analysis adopted by the Ninth Circuit is not only
10 inconsistent with this Court's precedents and
11 principles, it's inconsistent with any common sense
12 approach to this problem.

13 Unless the Court has any further questions, I
14 have nothing further to add.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Larkin.

17 Mr. Goldberg, we'll hear now from you.

18 ORAL ARGUMENT OF ROBERT P. GOLDBERG

19 ON BEHALF OF THE RESPONDENT

20 MR. GOLDBERG: Mr. Chief Justice, may it
21 please the Court:

22 My first address -- the issue of the totality
23 of the circumstances. The Solicitor General has
24 suggested that Ninth Circuit did not use the Gates test
25 or the totality of the circumstances in looking at the

1 whole picture. In fact, in looking at the Ninth Circuit
2 opinion, it did state specifically just as Officer
3 Kempshall did at the Honolulu International Airport, he
4 considered the total picture. He considered the
5 totality of the circumstances.

6 In coming to that -- in looking at the
7 totality of the circumstances, he looked at each
8 element. And in looking at each element, gave it
9 whatever weight or value he thought was appropriate,
10 just like what the Ninth Circuit did.

11 The Ninth Circuit went one more step further
12 in looking at these elements is that they looked at
13 elements that were -- that covered almost any innocent
14 traveler and then they looked at those few elements that
15 possibly showed criminal activity being afoot. And they
16 found that in the cases -- in prior cases before this
17 Court such criminal activity was use of an alias or
18 possibly walking through an airport in such a manner as
19 to try to hide their identity.

20 QUESTION: Of course, that could conceivably
21 be innocent. You know, maybe you're trying to avoid
22 your wife.

23 MR. GOLDBERG: Absolutely, Your Honor.

24 QUESTION: So, it really isn't any big
25 difference in kind between the Ninth Circuit's two

1 factors. There really is just differences in degree,
2 isn't it?

3 MR. GOLDBERG: That is correct, Your Honor. I
4 feel that Ninth -- how can we not look at the total
5 picture without looking at each of the elements that
6 make this picture be put together?

7 I find -- and let me go one step in, in just
8 responding to the questions put to Solicitor General.
9 Not everyone in this country are lucky enough to be able
10 to have a credit card, and other of us maybe are afraid
11 to have a credit card because maybe we don't know how to
12 control ourselves.

13 There's no gambling in Honolulu, in Hawaii.
14 My mother lives in Florida. On the flight over I was
15 with another attorney whose mother was in Florida and he
16 was going to visit her. They have racetracks in
17 Florida. If you don't have a credit card, and if I was
18 flying to -- whenever I fly to Florida to visit my
19 family, you know how -- it would be difficult to cash a
20 check. I do take a lot of cash. And hundred dollar
21 bills are often difficult to spend. Most places do not
22 take them. You have to go into a bank and get change
23 for them.

24 In the hindsight, which is exactly what the
25 government used in looking at these factors, we can come

1 up with numerous purposes and reasons why an individual
2 may carry a relatively small amount of cash, \$4,000,
3 when you consider the tickets were \$2,100, especially if
4 they intend to gamble, and people in Hawaii do enjoy
5 gambling.

6 QUESTION: Well, Mr. Goldberg, didn't the
7 Court recognized in the Terry case that a collection of
8 possibly innocent actions when viewed in their totality
9 can, can amount to reasonable suspicion to justify a
10 detention, I don't think the Court has ever said that
11 any of the factors couldn't be innocent acts.

12 MR. GOLDBERG: I -- I do not disagree with
13 Your Honor. I would only suggest that I think in the
14 Royer matter the factors were almost exactly similar to
15 the Sokolow case except for a few -- except it was even
16 more damaging to Royer than it was to Sokolow. And in
17 that case, I believe, Justice Rehnquist and yourself
18 indicated that without knowing that there was an alias,
19 that the reasonable suspicion would not have been --
20 that it would not have reached a basis of reasonable
21 suspicion in order to justify a seizure.

22 In, in this case we have -- I believe the
23 government itself is saying that we're looking at the
24 \$2,100 -- \$4,000.

25 The alias in this case is extremely

1 interesting. Rents in Hawaii are expensive. Agent
2 McCarthy testified below at the district court level
3 that it's not unusual for individuals to share
4 apartments. It's almost a necessity.

5 He also testified when that occurred the
6 telephone number was always in one of the two roommates'
7 name. Mr. Sokolow, if he's trying to hide his identity
8 or trying to hide himself by -- in any manner, why does
9 he give his correct telephone number? He gives his
10 correct telephone number, which immediately the agents
11 know exactly where Mr. Sokolow lives. They call up that
12 telephone number and his voice is on the answering
13 machine. They know where he lives, they know his
14 telephone number, they know where he's going, they know
15 when he's returning.

16 There is no evidence indicative of an -- of an
17 attempt to use an alias here. They did not know there
18 was an alias until they grabbed him by the arm outside
19 and pulled him up onto the sidewalk and sat him down and
20 grabbed his girlfriend and told them they were going to
21 take his bags in the back and search them. There was no
22 notice of an alias to that time.

23 QUESTION: Excuse me. I thought they -- they
24 had the phone number and they checked with the telephone
25 company whose name that phone number was listed under.

1 MR. GOLDBERG: It was in the name of Mr.
2 Herman, Karl Herman.

3 QUESTION: Didn't it appear to them at that
4 time that he was using an alias?

5 MR. GOLDBERG: When they called the telephone
6 number, they recognized the voice --

7 QUESTION: That's right.

8 MR. GOLDBERG: -- of the traveler.

9 QUESTION: And that voice is coming from a
10 phone number that is listed in the name -- in a name
11 different from the name that he gave to the travel agent.

12 MR. GOLDBERG: That is correct.

13 QUESTION: Now, they may have been wrong about
14 whether he was using an alias, but it certainly seemed
15 that he was using an alias, wouldn't you say?

16 MR. GOLDBERG: I would -- knowing Hawaii and
17 Honolulu, I would suggest no. I would suggest that it
18 was indicative that there was possible a roommate or
19 that possibly -- one of the possibilities of the number
20 of possibilities is he was using an alias.

21 QUESTION: Sure, there are a lot of
22 possibilities and for all of these things. You can see
23 a man walking into a bank with a gun in his hand, and he
24 could -- he could have a friend in there who's a
25 gunsmith to clean it, but it's not likely. And you put

1 all of them together, and that's what builds the case.

2 MR. GOLDBERG: I understand that, but I would
3 suggest that in this case, as Agent McCarthy testified,
4 it's not unusual for a telephone to be in one of a
5 number of roommates' names.

6 Further, I believe what the government, the
7 DEA or the -- attempt to use these elements for is as an
8 investigative tool, why can't they investigate? Why
9 wouldn't they go up to Mr. -- Mr. Sokolow while he was
10 in Los Angeles or while he was walking down the
11 corridor? Excuse me, sir, may I ask you a few
12 questions? Why couldn't they determine whether this was
13 a one-bedroom or two bedroom residence?

14 They didn't do any investigation whatsoever.

15 QUESTION: Because if -- if they had done
16 that, they would have only gotten the rest of the \$4,000
17 that he had in his pocket which it's not illegal to
18 carry. They were obviously going to follow him and wait
19 until he came back from Miami with -- you know, with
20 what he came back with. I think that was pretty smart,
21 don't you?

22 MR. GOLDBERG: Well --

23 QUESTION: Why should -- why should they
24 arrest him before he's committed the crime that they
25 suspect him of, of, of engaging in?

1 MR. GOLDBERG: I, I believe if they -- what
2 remained of the \$4,000 was approximately \$1,900, which
3 is not a very large amount of money to buy narcotics.
4 And if that was the circumstances, it would be more than
5 likely that Hawaii, being a source city for marijuana,
6 that he was carrying marijuana to Florida. But they
7 didn't stop him or arrest him at the airport in Miami.

8 QUESTION: He wasn't necessarily buying it.
9 He was just carrying it for somebody else who already
10 owned it at both points.

11 MR. GOLDBERG: In, in hindsight, it is
12 possible to come up with -- to verify the hunch or
13 suspicion or whatever it was that made this -- made
14 these individuals choose to stop Mr. Sokolow.

15 I believe one of the serious problems in this
16 type of investigative tool is every one of us have inert
17 prejudices. Maybe someone reminds you of your ex-wife.
18 Maybe somebody reminds you of some kid that you had
19 problems with once. And something happens. You go --
20 something makes you draw their attention and you start
21 looking around. You go well, he is young, well he is
22 about this age. His hair is kind of long. Well, he is
23 paying cash for his ticket. He only has carry-on
24 baggage, which is indicative of a short trip anyway.

25 But the result of that is we are no longer --

1 it's not just that we're not free to walk around anymore
2 without being stopped. It's now when I go into an
3 airport -- and my hair is short now -- when I went to
4 San Francisco, I paid cash for my ticket because I did
5 not have a credit card, and I was afraid maybe there
6 would be problems with my check and my hair was kind of
7 long, I wore blue jeans and I carried a carry-on with my
8 suit on it for the Ninth Circuit case.

9 And McCarthy and Kempshall testified that San
10 Francisco is a source city. And when I was at the
11 airport I got nervous and I got nervous because I was
12 afraid that I was hitting the profile and I was afraid
13 that a DEA agent was going to approach me and give me a
14 hard time.

15 I don't want to have to walk around with that
16 fear. I want to be able to walk around feeling I can be
17 free from being messed with unless there's a really good
18 reason for it.

19 QUESTION: Fear of what? In fear that, that a
20 policeman will come up and ask if a dog can sniff your,
21 your trunk? I mean, isn't this all a matter of how much
22 of a constraint upon all of our liberties we're willing
23 to put up with in, in order to enable crime to be
24 stopped. And you, you think that is an excessive price
25 to pay?

1 MR. GOLDBERG: I think the fear or the
2 paranoia that goes around -- I don't think we have to --
3 I don't think we should have to walk around thinking of
4 the government intruding on our lives.

5 QUESTION: I don't mind a dog smelling my
6 luggage at, at all if I'm not carrying drugs in it. It
7 really doesn't -- it doesn't fill me with paranoia at
8 all.

9 MR. GOLDBERG: I believe if -- if Your Honor,
10 I'm sure if Your Honor was stopped in an airport that it
11 would upset you. I would assume that.

12 And the other question that's never really
13 been asked is for giving up all these freedoms and
14 rights, how much -- and again for over ten years they've
15 been using the so-called profile and they still don't
16 have any percentages on right and wrong -- how much have
17 they actually, for us giving up these rights to walk
18 around free -- what have they actually taken off the
19 streets in relationship to the tons of junk that's come
20 into this country? How much can you carry on your
21 person in relationship to how much stuff is all over the
22 place? I'd like to know that, too. I want to know what
23 price I'm paying for giving up those rights.

24 Miami's a source city, San Francisco, Los
25 Angeles, San -- San Diego, Washington, we're all source

1 cities. I don't -- I want to be able to walk around
2 without worrying about the government intruding on my
3 life, especially if somebody's just prejudiced against
4 somebody who's young or who has long hair or maybe it's
5 the wrong color or there's maybe an attractive female
6 looks something like a female that turned you down for a
7 dance the other night, who knows?

8 What evidence was there of actual criminal
9 activity?

10 QUESTION: Did you try this case?

11 MR. GOLDBERG: Yes, I did, Your Honor. When I
12 tried the case I did --

13 QUESTION: Didn't you make all of these
14 arguments to the jury that you are now making?

15 MR. GOLDBERG: Your Honor, we made a
16 conditional plea at the end of the suppression motion.

17 QUESTION: Oh, that's right. Yeah. But you
18 made the same arguments then?

19 MR. GOLDBERG: Yes, I did, Your Honor.

20 We also argued that again, the facts in this
21 case were so similar to Royer, and I believe -- I
22 believe Justice Blackmun stated that in Royer that -- if
23 in Royer there was not consent, then it would be much
24 closer to Donna -- U.S. versus Donna, is that Donna --
25 if there is no consent, I believe as Justice Blackmun

1 stated --

2 QUESTION: Well, the case is here before us
3 just on the curbside stop, is it not?

4 MR. GOLDBERG: It's here only in the case --

5 QUESTION: So, we, we, we really don't get to
6 the subsequent questioning and, and, and search of the
7 luggage in the customs area.

8 MR. GOLDBERG: That is correct, Your Honor,
9 but similar to, I believe, the Royer case where -- I
10 think it was Royer -- where they did -- where this court
11 chose to determine that when he was held in a small room
12 -- In this case Sokolow was also taken to a small room.
13 If you hear the uncontroverted testimony in the
14 transcript --

15 QUESTION: But that's later. All we're doing
16 is talking about the curbside, as I understand it.

17 MR. GOLDBERG: That is correct, Your Honor.

18 QUESTION: And the facts for the -- supporting
19 the initial detention, which we are examining, are
20 virtually identical to Royer, aren't they?

21 MR. GOLDBERG: Virtually identical, but even --

22 QUESTION: So, why should -- why should the
23 Ninth Circuit reach a different result?

24 MR. GOLDBERG: I believe the Ninth Circuit did
25 reach the same result because in the -- you see, in this

1 case you had an absolute, definite seizure at curbside.

2 QUESTION: I thought the court found in Royer
3 that there was sufficient cause for the initial
4 detention. It was what happened later.

5 MR. GOLDBERG: The court was divided, Your
6 Honor, on that. I believe the -- I'm sorry -- my
7 understanding of Royer was that Royer was determined --
8 Royer was finally determined on the small room where, in
9 fact, it was an arrest, even though it was not --

10 QUESTION: That's right. And as Justice
11 O'Connor indicates, we stated quite clearly that cash,
12 traveling under an assumed name, etcetera, was grounds
13 for the initial stop and interrogation. The plurality
14 opinion so indicated.

15 QUESTION: And that's all we're dealing with
16 here.

17 MR. GOLDBERG: That is correct. But in that
18 case as Your Honor stated that -- the indication was
19 that if there was not the use of the alias -- and in
20 this case they did not know there was an alias until
21 after the seizure -- unless you --

22 QUESTION: Well, they certainly had reason to
23 believe he was using an alias at the time of the
24 detention, as you just explored with Justice Scalia.

25 MR. GOLDBERG: When he con -- when they called

1 and heard his name on the telephone machine.

2 Again, I would -- as Justice Scalia stated, it
3 would be a really stupid drug courier who gave out his
4 telephone number and his address but then hid his name
5 at the same time.

6 QUESTION: But, you see, the Ninth Circuit had
7 two categories, criminal characteristics that are
8 apparently general characteristics, and indications of
9 ongoing criminal activity. But our cases don't support
10 that, and it was very difficult for the Court of Appeals
11 to use that.

12 They gave as an example a criminal trait,
13 buying -- going to a source city, as opposed to conduct,
14 and so you can argue about that. And it -- and it seems
15 to me that going to a source city is conduct, considered
16 together with all of the other factors in the case.

17 MR. GOLDBERG: I believe that's what in my
18 viewing the Ninth Circuit's opinion, they did state that
19 things such as going to a source city, which in this
20 case was dated San Francisco, Los Angeles, San Diego,
21 Miami, et cetera, was something that a large group of
22 innocent travelers do on a daily basis. And that was
23 placed in one grouping.

24 They placed a second grouping on facts that
25 are -- normally indicate criminal activity is afoot, and

1 that is use of an alias. Why would -- although there's
2 -- in my brief I state there are a number of reasons why
3 someone would use an alias for travel, anywhere from
4 business to illicit affairs, none of which is, I
5 believe, unconstitutional.

6 The use of an alias is something you look at.
7 Why is this individual looking? Why is this person
8 using a different name. You don't think why is this
9 person going to Chicago or Cleveland or Honolulu or
10 Miami.

11 Miami happens to be a source city. Miami also
12 is a retirement city. It's also a vacation city. It
13 may be a city where people choose to invest. Any number
14 of reasons. Just because you go to Miami doesn't
15 indicate any criminal activity.

16 The Ninth Circuit just considered that in
17 coming and looking at the whole picture -- at the
18 totality. They just considered that. And after
19 considering the totality of the circumstances, they felt
20 there was no reasonable suspicion.

21 QUESTION: Mr. Goldberg, do you know why we
22 had two separate opinions in the Ninth Circuit by
23 different justices, not concurring but successively
24 different opinions?

25 MR. GOLDBERG: This is -- regarding to Judge --

1 QUESTION: Well, the first one was by Judge
2 Norris, as I recall, and the second one was by Judge
3 Ferguson.

4 MR. GOLDBERG: I believe --

5 QUESTION: The second prompted by the
6 rehearing petition en banc which was not granted, but --

7 MR. GOLDBERG: If I -- if I had to state yes,
8 it was the initial opinion, Judge Norris was so upset at
9 the fact that -- and it was clear to him that the reason
10 Mr. Sokolow drew attention was because he chose to dress
11 in a certain manner. And that upset him so much that
12 people were no longer free to dress as they wished in
13 black with gold, blue jeans, whatever, that that's where
14 the initial opinion was written.

15 I think after the -- after we -- both sides
16 had filed additional briefs, they reconsidered the case
17 based on the totality of the circumstances. And in
18 looking at the totality of the circumstances they
19 determined that -- and even in this case the government
20 says quite -- in their brief they say the way a person
21 is dressed and his age -- of course, being under 35 is
22 half our population -- is not really something to be
23 considered very strongly. Considered, yes, but not very
24 strongly. All of which is indicative of innocent
25 behavior.

1 QUESTION: Well, maybe Justice Kennedy can
2 help me out.

3 MR. GOLDBERG: Possibly. Justice Kennedy, I
4 believe, was sitting at the time the Ninth Circuit made
5 their decision.

6 Again, I would suggest that the purpose of
7 these types of stops are to -- are to use this as an
8 investigative tool. And I would suggest in this case
9 there was no investigation.

10 And I believe, according to the DEA's own
11 profile, what they -- according to their own training,
12 what they're supposed to do is not even stand in front
13 of an individual to ask them some questions. Walk to
14 the side, may I ask you a few questions, not grab you by
15 the arm, pull you on the curb, drag you in a room, a
16 little room, search you, have a dog sniff one of four
17 bags, three of which the dog said had nothing in them.
18 Nothing turns out in the bag the dog does alert to, and
19 then hold the guy 13 more hours until they can get
20 another dog to sniff the three other bags.

21 QUESTION: I don't think that question is
22 before the court, Mr. Goldberg.

23 MR. GOLDBERG: Yes, Your Honor, Mr. Chief
24 Justice.

25 Justice Brandeis stated in Olmstead that the

1 very basis of being an American is the right to be left
2 alone, to be free to go wherever we want to go without
3 worrying about intrusions, and I would suggest that the
4 government -- we have after ten years of these types of
5 situations -- and, and Professor Cloud in his Boston Law
6 Review article states real clearly that after ten years,
7 there's no indication that all these officers work on is
8 some inert prejudice because every officer's program is
9 different than the other officers'. Some stop women.
10 Some stop Hispanics. Some stop blacks. Some stop
11 long-haired kids. Some stop, et cetera.

12 And what do we know we're getting for this?
13 We don't know how much is taken off the market. We
14 don't know how successful they are. If they were
15 extremely successful, I would assume we'd have some
16 really good statistics showing us how accurate the DEA
17 is.

18 Judge King in his decision in this case on the
19 District Court level said we hear about all their
20 successes, but we never hear about their failures.
21 After ten years we still don't have no statistics. I
22 would only beg the court to consider that I feel -- that
23 we are giving up a very basic, basic right for returns
24 we have no knowledge.

25 If there are no additional questions.

1 QUESTION: Mr. Larkin, you have seven minutes
2 remaining.

3 REBUTTAL ARGUMENT OF PAUL J. LARKIN, JR.

4 MR. LARKIN: Unless the members of the Court
5 have any further questions, I have nothing further.

6 QUESTION: I have just one that your opponent
7 prompted. He mentioned that San Francisco, San Diego,
8 Los Angeles, Honolulu are all source cities. Do we know
9 how many source cities there are that could be
10 substituted for Miami and produce the same result?

11 MR. LARKIN: It varies, Your Honor. Miami,
12 for example, is just one of the cities in this whole
13 south Florida area.

14 QUESTION: For example, I suppose you'd say
15 the same thing about Tampa, Fort Lauderdale, Key West
16 and all of those?

17 MR. LARKIN: Well, no, Fort Lauderdale and
18 West Palm Beach are close to Miami, and the DEA has
19 informed me, therefore, that people will fly into and
20 out of the different airports there.

21 QUESTION: So, they're also source cities?

22 MR. LARKIN: They would be considered that
23 simply because when we're talking about Miami, we're not
24 saying that it's just the geographic confines of the
25 city. It's that entire south Florida area, Miami having

1 the busiest airport.

2 When the agents talked about the West Coast,
3 what he said was that narcotics are transported from
4 Miami to the West Coast for transshipment then to
5 Hawaii, for example, or for use on the West Coast
6 itself. For a long time narcotics in L.A. came from
7 Miami. I'm told that recently and unfortunately there
8 is now narcotics coming in from Mexico as well.

9 So, when you say source city in this context,
10 it involves taking a look at some of the facts.

11 QUESTION: So, does that include San Diego,
12 perhaps Houston, then, if they're coming in from Mexico,
13 too. Most any city on the border of the country could
14 qualify.

15 MR. LARKIN: Any city is potentially eligible
16 because factors of geography and tradition may make it
17 an attractive port for smugglers. There may be
18 established distribution networks in that city so that
19 once cocaine is brought in, it's easier then to send it
20 out to the rest of the country.

21 But we're not saying that we can just pick at
22 random any city that we happen to find in Rand McNally's
23 and call it a source city.

24 QUESTION: Not Peoria, surely.

25 MR. LARKIN: No. That is not by any means a

1 source city. Miami has traditionally been a source city
2 because of its access, easy access from Colombia, for
3 example, to the southern Florida region.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Larkin. The case is submitted.

6 (Whereupon, at 10:52 a.m., the case in the
7 above-entitled matter was submitted.)

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NO. 87-1295 - UNITED STATES, Petitioner V. ANDREW SOKOLOW

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