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SPECIAL BULLETIN

DRUG COURIER PROFILES AFTER SOKOLOW: LEGAL REVIEW AND ANALYSIS

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Summary and Policy Implications

The recent Supreme Court decision, U.S. v. Sokolow, clarifies the issue of proper use of a controversial narcotics investigative procedure known as "profiling." The technique involves singling out for investigation individuals with characteristics which police determine are consistent with certain criminal activities. Following Sokolow, the emphasis of the courts will be away from departmentally approved standard profiles to the experience and knowledge of police. Therefore, the police can consider the behavior of an individual in deciding whether or not to investigate the person for violation of drug laws. An investigating officer must be able to articulate or recall each act and characteristic of the suspect that prompted the investigation. Further, that officer must demonstrate that he or she possesses sufficient training and experience to have concluded that the observed behavior was consistent with possessing or distributing illegal drugs. The fact that each act and each characteristic of the suspect, when considered separately, is consistent with innocent behavior does not matter. The determining factor in validating a stop based on these circumstances is the ability of the officer: to **observe** the combination of characteristics; to **articulate** the individual ingredients of suspicious behavior; and to **demonstrate** the competence needed for reaching the conclusion that a violation of drug trafficking laws was in progress.

The Supreme Court's decision leaves untouched several search and seizure questions that form a troublesome gray area in criminal investigation. For example, the Court did not actually sanction the use of "drug courier profiles" by law enforcement agencies. Instead, the Court leaves it to the **individual police officer** to rely on his or her training and experience in making the decision to use a profile in initiating an investigation of a person. Furthermore, when a police officer stops an individual who exhibits characteristics and behavior that trigger the officer's suspicion, the officer can only perform an investigatory or "Terry-type" stop. A valid search can only be conducted: if the suspect consents, if a trained dog "alerts" to the suspect's person or baggage, or if the investigating officer notices an unusual bulge in the clothing or other indication that the suspect is harboring illegal drugs. The "plain view" doctrine still applies if police notice the odor of an illegal drug or observe the suspect to be under the influence of a controlled substance. Under these circumstances, the suspect may be detained until a search warrant is obtained.

On April 3, 1989, the United States Supreme Court ruled that law enforcement agents may stop and question airline passengers who display behavior patterns that may have an innocent explanation but are consistent with the actions of drug couriers. This 7-to-2 decision marks the Court's clearest validation of the techniques developed by the federal Drug Enforcement Administration (DEA) for surveillance and screening of drug traffickers in airports and railroad depots. These techniques consist of various methods of matching a traveller to a set of characteristics which investigators contend, based on their experience and training, are typical of drug couriers. The Court's ruling reinstated the drug-possession conviction of Andrew Sokolow, who was detained at Honolulu International Airport in 1984 by Drug Enforcement Administration agents because his appearance and behavior matched a "profile" of a typical drug courier.

The facts surrounding the arrest of Sokolow were considered by Chief Justice Rehnquist to be "typical" of attempts to smuggle drugs through airports in the United States. Federal agents learned that Sokolow had paid \$2,100 for two roundtrip Hawaii-to-Miami tickets from a wad of \$20 bills and determined that the name he gave the ticket agent did not match the name under which his telephone number was listed. Sokolow and his companion stayed in Miami, a city on the DEA's list of "drug-source" cities, only 48 hours, even though the roundtrip flight takes 20 hours. They checked no luggage en route to Miami or on their return flight and the pair behaved nervously during a stopover in Los Angeles. These facts

led the agents to detain Sokolow and his companion as they were about to leave Honolulu International Airport in a taxi. The stop resulted in the discovery of 1,063 grams of cocaine in a carry-on bag.

However, the Court did not specifically sanction the "drug courier profiles" used by the DEA since 1974. Instead, Chief Justice Rehnquist, in writing for the Court in U.S. v. Sokolow (87-1295), said that the evidence gathered by the DEA agents gave them sufficient reason to detain Sokolow. The Chief Justice appeared to be endorsing the "totality of the circumstances" approach to establishing "reasonable suspicion." Sokolow was stopped because the combination of characteristics he displayed made trained and experienced DEA agents suspect him of trafficking in illegal narcotics. Although any one of these characteristics would be consistent with innocence when considered by itself, when viewed altogether they created a valid suspicion. Furthermore, the Chief Justice stressed that the observation of these characteristics was given additional significance when made by trained and experienced law enforcement agents. DEA spokesman Maurice Hill was quoted in The Washington Post as having said that the agency was "very elated" by the high court ruling, but that the agency no longer uses profiles in its investigations.

Therefore, it appears that the Court's decision may eliminate the need for "profiles." Testimony from trained and experienced police officers concerning their reasons for detaining a traveller upon whom drugs are found will probably be sufficient to gain a conviction if they can

articulate their reasons and the criteria possess evidentiary significance. In U.S. v. Sokolow, only six articulated characteristics suggestive of illegal conduct were known to the DEA agents at the time they stopped Sokolow. No one characteristic taken alone was evidence of the existence of an ongoing crime. Furthermore, according to the Court, not even all six characteristics needed to be observed in order to justify the detention and search. The fact that a suspect displayed these characteristics, and that trained and experienced agents detected these characteristics, enabled the agents to stop and search the suspect without violating his Fourth Amendment right to freedom from unreasonable search and seizure.

The dissenting justices, Thurgood Marshall and William J. Brennan Jr., warned of the dangers to the Fourth Amendment posed by the majority's opinion. They felt that the Court's decision would encourage police officers to mechanically apply a formula of personal and behavioral traits or a "profile" in deciding whom to detain. "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[.]" said the dissenters. The April 4, 1989 edition of The Los Angeles Times quoted University of Michigan law professor Yale Kamisar, a criminal law expert, on his criticism of the Supreme Court justices: "I think they feel pressure because of the horrors of drug trafficking, so they are trying to bring into line the few liberal courts we have left." Indeed, since Rehnquist

became chief justice in 1986, the Court has not ruled that government agents violated the Fourth Amendment's prohibition on unreasonable search and seizure in any drug case. The Court appears to be giving law enforcement agencies legal leeway to fight the war against drugs more effectively.

The decision in U.S. v. Sokolow undoubtedly narrows the protection of the Fourth Amendment by setting a lower standard for "reasonable suspicion." Experience has shown that whenever a high court decision abridges a freedom in order to deal with a social problem, the right remains abridged after the crisis has passed. In order to fully understand the significance of the Court's decision in U.S. v. Sokolow, the following history and analysis of that case and the "drug courier profile" follows.

U.S. v. Sokolow originated as a case in the United States Court of Appeals for the Ninth Circuit, U.S. v. Sokolow, 831 F.2d 1413 (9th Cir. 1987). That court was concerned about law enforcement agencies' use of the "drug courier profile" as "probabilistic evidence" sufficient to create reasonable suspicion justifying an investigative stop by law enforcement officials. The Supreme Court granted the government's petition for a writ of certiorari after the Court of Appeals reversed Sokolow's conviction. The question the Supreme Court agreed to hear was whether reasonable suspicion could be based on an investigating officer's common sense analysis of all the information available to him or her, or, whether one of the factors to be considered had to indicate an ongoing crime.

The Supreme Court's concern arose from its belief that the Court of Appeals was complicating the meaning of "reasonable suspicion" by creating

a two-part test for determining reasonable suspicion. Indeed, the Court of Appeals, in defining a valid profile, appears to have dichotomized the characteristics:

The drug-courier profile, if used as a measure of reasonable suspicion, operates in a different manner than did the officer's trained evaluation that warranted the stop in Terry. Profile elements include aspects of a suspect's behavior that clearly are consistent with an ongoing crime, such as when a suspect takes an evasive or erratic path through an airport in a manner that demonstrates a desire to avoid detection. Traveling under an alias or evasive movements are part of the performance of the crime. These elements of the profile demonstrate behavior that, absent unusual circumstances, reasonably may demonstrate an ongoing crime. An officer seeking to justify a seizure based upon these profile characteristics can testify to the suspicious behavior, and if the court finds the testimony credible, the seizure will be justified. The seizure is justified not because a requisite number of profile elements have been satisfied, but because some elements of the profile may create a reasonable suspicion of an ongoing criminal enterprise. Sokolow, 831 F.2d at 1420.

In other words, the Court of Appeals ruled that at least one fact describing "ongoing criminal activity" - such as the use of an alias or erratic movement through an airport - was necessary for determining "reasonable suspicion." Then, the other elements of the profile may consist of "probabilistic" facts describing "personal characteristics" of drug couriers - such as carrying large amounts of cash in small bills, paying cash for tickets, a short trip to a city considered by the DEA as a drug "source" city, extreme nervousness, and unchecked luggage. The Court of Appeals felt that these "probabilistic" facts were only relevant if there was evidence of "ongoing criminal activity" and the government offered "empirical documentation" that the combination of facts at issue

did not describe the behavior of "significant numbers of innocent persons." Despite its failure in designing an acceptable test for "reasonable suspicion," the Court of Appeals offered a practical approach for evaluating the validity of the problematic "drug courier profile."

Since the inception of the "profile" as a drug courier detection technique, courts have disagreed on the basic issues of what characteristics or combination of characteristics determine a valid profile. Another threshold issue in profile searches is determining the point at which the suspect was seized in order to see if "reasonable suspicion" existed at that point. In Sokolow, 831 F.2d at 1416, the Court of Appeals held that Sokolow was seized at the point he was grabbed and seated, and before any questioning occurred. This fact clarifies the issue in Sokolow by eliminating tangential issues to the profile search such as consent to search and the "plain view" doctrine or the legitimate discovery of evidence after the police are close enough to the suspect to see, smell, or hear anything that indicates an ongoing crime. At the point Sokolow was seized, the DEA agents knew only six or seven things about him that made them suspicious. These known factors generally are characteristics which law enforcement officials believe are common to all drug couriers.

Therefore, the Court of Appeals' decision hinged on the fact that it found no evidence of ongoing criminal activity in the six or seven characteristics that prompted DEA agents to stop Sokolow. The Supreme Court found the following facts known by the DEA agents before they stopped Sokolow to be significant:

(1) [Sokolow] paid \$2,100 for two roundtrip plane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name 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 roundtrip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.

Also included in the fact list in the Court of Appeals decision is the item "that Sokolow dressed in a black jumpsuit and wore a lot of gold jewelry." Sokolow, 831 F.2d at 1417.

The Court of Appeals showed concern over the implications of Sokolow's stop on the concept of "reasonable suspicion." It did not feel that the DEA agents had sufficient reason to believe that Sokolow was using an alias. He had given the airline his correct telephone number.

Consequently, the Court of Appeals felt that the government's position in its petition for rehearing "...unwittingly equates evidence of behavior that a criminal may engage in with behavior indicating an ongoing crime, and thus significantly dilutes our constitutional guarantees...."

(Emphasis in text.) In other words, while the court saw the issue as "...whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion[;]" (Id. at 1418) it felt that at least one fact had to indicate an ongoing crime. The Supreme Court disagreed with the Court of Appeals on this point.

Not only did Chief Justice Rehnquist, in writing for the majority, criticize the dichotomy created by the Court of Appeals, he also did not agree with the lower court's test for distinguishing evidence that indicates an ongoing crime. The Chief Justice gave examples of times when

a traveller's use of an alias or erratic path through an airport could be consistent with innocent behavior:

But certainly instances are conceivable in which traveling under an alias would not reflect ongoing criminal activity: for example, a person who wished to travel to a hospital or clinic for an operation and wished to conceal that fact. One taking an evasive path through an airport might be seeking to avoid a confrontation with an angry acquaintance or with a creditor. (87-1295 opinion, p. 6).

Clearly, this analysis indicates that the Supreme Court does not intend to second guess a decision by a trained and experienced law enforcement agent to detain a suspect for an investigative stop. The Sokolow decision does not attempt to draw lines around categories of evidence or the quantity of suspicion a particular characteristic carries. Instead, the decision gives deference to the conclusions of law enforcement agents whose background and experience allow them to perceive certain combinations of characteristics and behavior that tend to indicate criminal activity. This deference to a trained officer's conclusions is not new; indeed, it was clearly articulated in Terry v. Ohio, 392 U.S. 1 (1968). Therefore, the Sokolow decision should take the focus of the courts away from the validity of the profile and toward the testimony of the police officer.

Certainly, the issue of using a "drug courier profile" has been a troublesome one for the courts. In U.S. v. Sokolow, 831 F.2d 1413 (9th Cir. 1987), the Court of Appeals proceeded to criticize the chameleon-like nature of the "drug courier profile" by citing numerous cases where the profile changed to fit the particular set of observations. The court analyzed recent Supreme Court cases on the "drug courier profile" such as

United States v. Mendenhall, 446 U.S. 544 (1980) (noting that Judge Powell's concurrence reached the issue when he noted that the "...respondent, who appeared very nervous, engaged in behavior that the agents believed was designed to evade detection." Id. at 564.); Reid v. Georgia, 448 U.S. 438 (1980) ("Particular conduct of an ongoing criminal enterprise is required; evidence regarding the type of person suspected does not suffice." Sokolow, 831 F.2d at 1422); Florida v. Royer, 460 U.S. 491 (1983) ("Royer was not seized [as was Sokolow] when initially approached, and therefore the officers properly discovered that he was traveling under an alias, since the name they observed on his luggage was different than the name on his [driver's] license and ticket. It was this indication of ongoing criminal activity, and not the factors of the profile noted by the Court ... that justified the stop." Sokolow, 831 F.2d at 1422.)

The Ninth Circuit applied its interpretation of these Supreme Court cases to Sokolow and found that nothing in the government's evidence created a reasonable suspicion that Sokolow was engaged in an ongoing criminal enterprise. It decided that the profile used by the DEA best served as an investigative tool:

It is hazy in form, susceptible to great adaptations, and almost entirely speculative. It may generate good police work, but absent more, it certainly would generate bad law. Sokolow, 831 F.2d at 1424.

Ninth Circuit Judge Ferguson, who authored this opinion, examined particular observations used by DEA agents to establish reasonable suspicion. In Sokolow, 831 F.2d at 1418, he cites cases from the various

circuits where these particular observations are directly in conflict. In United States v. Moore, 675 F.2d 802, 803 (6th Cir. 1982), the suspect generated suspicion by being the first to exit the plane. The suspect was the last one to leave the plane in United States v. Mendenhall, 446 U.S. 544, 564 (1980), and the suspect in United States v. Buenaventura-Ariza, 615 F.2d 29, 31 (2d Cir. 1980), left the plane in the middle of the crowd. Sometimes, no luggage generates suspicion, sometimes only carry-on luggage, and sometimes both carry-on and checked luggage generates suspicion. The inconsistencies in profiles are extensive.

The "drug courier profile" can be a valuable weapon in the war against drugs, and can be used without causing courts to draw up strange and inconsistent tests that try to transform an unconstitutional arrest into a constitutional one. The profile should be a preliminary investigative tool of the police - a litmus test to determine if agents should initiate surveillance or investigate further. The police must ultimately rely on their experience and training in deciding to approach a traveller whose conduct arouses their suspicions. They can safeguard the traveller's Fourth Amendment rights by not making their approach until they can point to specific acts or characteristics that makes them suspect the person is trafficking in illegal narcotics. But fishing expeditions initiated by a randomly selected traveler's match to a meaningless profile seriously undermines the fourth amendment. The recent Supreme Court decision in U.S. v. Sokolow (87-1295) will direct the attention of courts away from

the profile and onto the testimony of the investigating police officer. Therefore, the decision gives the police greater freedom to combat drug trafficking, and leaves the decision to act responsibly with the individual police officer.

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