Fourth Amendment Forum

BY MILTON HIRSCH AND DAVID O. MARKUS

United States v. Arvizu: the adjective as jurisprudence

You are free to drive past police vehicles so long as you do not "appear[] stiff," and provided that your "posture [is not] very rigid."[1] Stiffness and rigidity (of posture, that is) may justify the police in believing that you are transporting drugs.[2]

You may take your children in the car with you, so long as they are normal children who wave at passing motorists and pedestrians in a normal fashion.[3] An "abnormal [waving] pattern" on the part of your children — one that is "methodical,mechanical ...[or] odd"— may justify the police in believing that you are transporting drugs.[4]

You can drive a minivan, so long as you are not driving on a dirt road. And for God's sake, don't slow down when a police cruiser settles in behind your minivan.[5] Doing so may justify the police in believing that you are transporting drugs.[6]

These are the lessons of *United States v. Arvizu*[7] — these and one other: If the Ninth Circuit orders the suppression of material evidence in your drug case and the Supreme Court grants *certiorari*, it's a fair bet that the High Court isn't planning to commend the court of appeals for its zealous defense of our historic liberties.

Gestalt and conquer

Ralph Arvizu and his family were stopped by a border patrol agent, "while driving on an unpaved road in a remote area of southeastern Arizona."[8] Their minivan was found to contain a distribution amount of marijuana. Arvizu moved to suppress on the grounds that the agent lacked articulable reasonable suspicion to justify the stop of the Arvizu family vehicle. The district court denied the motion, but the Ninth Circuit reversed.[9]

The Ninth Circuit identified ten circumstances upon which the district court relied in finding that reasonable suspicion existed to support the stop and search. Seven of these circumstances, in the view of the appellate court, contributed nothing or next to nothing to the calculus of reasonable suspicion. For example, Arvizu, who had been driving at or near the speed limit before the agent hove into view, slowed considerably at the sight of a law-enforcement vehicle. The Ninth Circuit viewed this as giving rise to no inference of drug trafficking.[10] As the agent followed the Arvizu van, the children in the back seat waved at him in a manner that the district court described as "abnormal" or "mechanical." This, too, was considered by the court of appeals to have no evidentiary significance whatever.[11]

Of the variables in the reasonable suspicion equation relied upon by the district court, the Ninth Circuit found three to have some, but only slight, probative value. That the road on which the Arvizus were driving was unlikely to be used by anyone but a drug smuggler, and that minivans were among the conveyances favored by drug smugglers, were factors to which the court was willing to accord some, but not very much, weight.

In summary, then, the prosecution adduced and the district court considered ten circumstances alleged to give rise to reasonable suspicion, but the appellate court found that seven of the ten were probative of nothing, and the remaining three woefully inadequate to justify the stop of the Arvizu family. Expressed arithmetically, the Ninth Circuit's opinion reflected the unremarkable and incontrovertible axiom that zero, whether multiplied seven times, ten times, or a hundred times, is still zero.

This arithmetic postulate the Chief Justice of the United States denigrated as a "sort of divide-and-conquer analysis."[12] "[E]valuation and rejection of ... the listed factors in isolation from each other does not take into account the totality of the circumstances."[13] But what is "the totality of the circumstances"; what is the whole, but the sum of its parts?

The Supreme Court countered the Ninth Circuit's "divide-and-conquer" analysis with its own "gestalt-and-conquer" analysis. The whole is somehow more than the sum of its parts:

> We think it quite reasonable that a driver's slowing down, stiffening of posture,and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants. ... To the extent that a totality of circumstances

approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule.[14]

The example offered by the Supreme Court tells us little about the operation of the plenipotent "totality of the circumstances" rule. Apparently Arvizu slowed down, tensed up, and kept his eyes on the road when he realized his driving was being invigilated by a law enforcement officer. Driving slowly, remaining alert at the wheel, and keeping one's eyes on the road are generally considered the hallmark of a good, responsible driver, the sort of fellow who might take his wife and children for a ride in the country. Whether such conduct is evidence of a guilty conscience, or of ongoing criminal misconduct, is a matter of speculation. Why such conduct is more likely to constitute evidence of ongoing criminal misconduct in rural Arizona than in urban California is a matter of rank speculation. The *Arvizu* opinion does not tell us why the demised conduct is of evidentiary value, nor why the Ninth Circuit was wrong to think that the demised conduct was not of evidentiary value. [15]

What the *Arvizu* opinion does tell us is that a law enforcement officer is "entitled" to determine the evidentiary value of otherwise innocent or innocuous conduct by reference to "his specialized training and familiarity with the customs of the area's inhabitants." In other words, zero plus zero plus zero may indeed add up to something. The source of this something, this synergy, is not the interstices between the zeros, but the mind of the percipient law enforcement officer. Nor is this something, compounded out of the officer's "training and familiarity with [local] customs," subject to detached, objective, independent review by appellate judges. On the contrary; "it is in the nature of the totality [of the circumstances] rule" to "render appellate review less circumscribed by precedent than otherwise."[16] However long the road on which Arvizu was driving, it was not so long as the road the Fourth Amendment has traveled since Justice William O. Douglas presciently concluded his dissent in *Terry v. Ohio* [17] with these words:

> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.
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> …[I]f the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime.

Adjective as jurisprudence

The power of the policeman to insulate his evaluation of reasonable suspicion from judicial review — his power to say to a federal court of appeals, in effect, "You cannot review my determination of reasonable suspicion precisely because you are detached and neutral, because you are withdrawn from the context in and upon which I act" — is enhanced when (as in *Arvizu*) the officer is permitted to express the fruit of his "training and familiarity with [local] customs" in adjectives, rather than in nouns and verbs. Reasonable suspicion existed as to Clan Arvizu in part because the children waved at the agent in a manner characterized at the trial court level as "methodical, mechanical, abnormal." Apart from being distinctly un-Hemingwayesque, heavy reliance on adjectives makes factual circumstances more difficult to sift for reasonable suspicion. After *Arvizu*, we can look forward to suppression transcripts that read like this:

Q: Agent, why did you stop the defendant?
A: His facial expression struck me as unusual, in a suspicious sort of way. His walk struck me as ... oh, I don't know, anomalous, singular. His whole demeanor, his way of carrying himself was eccentric, almost eerie ...

Q: Agent, um, I'm trying to get some specifics here. Can you tell me *what*, exactly, it was about his facial expression that caused you to believe that he was in possession of contraband?
A: Look,I've been in law enforcement in this locale for more than a decade. I'm intimately familiar with the norms and mores of the people here. You can't expect me to convey to you in words ...

Q: Yes, that's exactly what I'd like! I'd like you to convey in words what specific things you saw the defendant do, or heard the defendant say, that suggested to you that he was in possession of cocaine!
A: I've already told you — his expression, his demeanor, his bearing, that

sort of thing. When he passed me and we exchanged glances, I was filled with a sense of dread. He was methodical, mechanical, abnormal, and odd.

Bam. With those last magic adjectives, most courts after *Arvizu* are going to approve of the search. Professional witnesses are no less trainable than parrots, and no less likely to follow the path of least resistance. If they are taught that they can insulate their testimony from criticism by couching it in adjectives and preserving it within a wrapper of "my training and experience," they will do so. When, during the 1980s, "profile stops" had their vogue, the same U.S. court of appeals that gave us *Arvizu* noticed that the same profile factors were finding their way into the testimony of every officer in every case. "Coincidence," the Ninth Circuit conceded, "is a fortuity; but it does not come so often to the aid even of the most deserving public law enforcement agents."[18] The court cautioned that when a particular profile factor "becomes a recurrent theme, an incantation in the agent's 'reasonable suspicion' phrase book, its credibility is open to challenge."[19]

Curbing police discretion

Yet again, the Supreme Court deferred to the discretion of police officers, without defining for them (or even guiding them as to) what reasonable suspicion means. By failing to articulate the parameters of reasonable suspicion, "the protections of the Fourth Amendment w[ill] evaporate, and the people w[ill] be 'secure in their persons, houses, papers and effects,' only in the discretion of the police."[20] This undermines the central concern of Fourth Amendment jurisprudence — curbing police discretion.[21] The more police discretion there is, the more likely that innocent people are going to be subject to the prejudices and biases of police officers.[22] Allowing police officers to come into court and say the magic words will quickly do away with Fourth Amendment protections. The words of the *Rodriguez* court perfectly sum this point (and this article) up:

> "The opinions of . . . court[s] have put the nomenclature of reasonable suspicion into the public domain. We must not allow ourselves to be seduced by the reassuring familiarity of its echo."[23]

Notes

1. United States v. Arvizu, 122 S.Ct.744, 749 (2002).
2. *Id.* at 751.
3. *Id.* at 749.
4. *Id.* at 751.
5. *Id.* at 749.
6. *Id.* at 751.
7. *Id.*
8. *Id.* at 749.
9. United States v. Arvizu, 232 F.3d 1241 (9th Cir. 2000).
10. *Id.*
11. *Id.*
12. *Arvizu*, 122 S.Ct. at 751.
13. *Id.*
14. *Id.* at 752.
15. Even Justice Scalia in his concurring opinion points out that while the district court's findings of fact should be given due respect, the inferences therefrom regarding reasonable suspicion "[he] would have thought (if *de novo* review is the standard) is the prerogative of the Court of Appeals. So we have here a peculiar sort of *de novo* review." *Id.* at 754 (Scalia,J. concurring).
16. *Id.*
17. 392 U.S.1,39 (1968) (Douglas, J.dissenting).
18. United States v. Rodriguez,976 F.2d 592,595-6 (9th Cir. 1992).
19. *Id.*
20. *Terry*, 392 U.S. at 22 (quoting Beck v. Ohio, 379 U.S.89,97 (1964)).
21. As the High Court has stated, "The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979) *See also* United States v. Montero-Camargo, 208 F.3d 1122,1143 (9th Cir. 2000) (Kozinski, concurring) ("to rely on every cop's repertoire of war stories to determine what is a 'high crime area' — and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion — strikes me as an invitation to trouble").
22. Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion,* 72 St. JOHN'S L. REV. 1271 (1999). Just by way of example, the ACLU studied traffic stops in California. Of the 34,000 plus stops California police officers made, less than 2 percent resulted in arrest.
23. *Rodriguez*, 976 F.2d at 595-96.

About the Authors

Milton Hirsch
9130 S. Dadeland Boulevard
Suite 1200
Miami,FL 33156
(305) 670-0077
Fax (305) 670-7003
E-MAIL mhirsch@hirschmarkus.com

Milton Hirsch is the author of *Hirsch's Florida Criminal Procedure*, the leading treatise of its kind in Florida. A Past President of the Florida Association of Criminal Defense Lawyers (FACDL) Miami Chapter, he is an adjunct professor at Nova University Law Center. He authored the *amicus* brief for NACDL in *Florida v. Riley*.

David O. Markus
9130 S. Dadeland Boulevard
Suite 1200
Miami,FL 33156
(305) 670-0077
Fax (305) 670-7003
E-MAIL domarkus@hotmail.com

David O' Markus is a *magna cum laude* graduate of Harvard Law School. He is a former Assistant Federal Public Defender in Miami. In January 2002, he and Milton Hirsch formed the partnership of Hirsch & Markus P.A.