IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO: 70,9[illegible]6

DCA CASE NO: 4-86-2409

TERRENCE BOSTICK, :

Appellant, :

vs. :

STATE OF FLORIDA, :

Appellee. :

:

REPLY BRIEF OF AMICUS CURIAE

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RESPONSIVE ARGUMENT

The State and the Honorable Nick Navarro, Sheriff of Broward County, Florida have not argued and there appear to concede certain of the arguments raised by Appellant and your Amicus Curiae.

The State and Sheriff Navarro, do argue, inter alia, that there is an ongoing "war" against drugs which requires drastic action.

This "war" was "declared" unilaterally by President Ronald Reagan on October 14, 1982 when the President gave a speech at the United States Department of Justice declaring [in Sheriff Navarro's opinion] "a war on drugs and pledging an unshakeable committment to do what is necessary to end the drug menace". [P. 4-Amicus Brief of the Hon. Nick Navarro, Sheriff of Broward County, Florida]

DOES THE "WAR" ON DRUGS PERMIT PRETEXTUAL POLICE STOPS

This question must be answered in the negative. The argument advanced by Sheriff Navarro and, to some degree the State of Florida, focuses on (1) their attempts to participate in this "war" and, (2) [in the view of Sheriff Navarro], the compelling need to protect the safety of families and children (sic) who "have unwittingly placed themselves in the potentially hazardous environment aboard certain commercial buses". Sheriff Navarro argues and the State endorses his position, that this "potentially hazardous environment aboard certain commercial buses ["to families and children] and the declaration of "war" by our President demands the attention and action of the Sheriff. pp. 4-5-Amicus Curiae Brief of Hon. Nick Navarro. But see: U.S. vs. Hultgren, 713 F. 2d 79, 86 (5th Cir. 1983), U.S. vs. Bonitz, 826 F.2d 954 (10th Cir. 1987).

Thus, law enforcement personnel in Broward and Palm Beach Counties have been assigned to achieve these ends.

In pursuance of their ends, Broward and Palm Beach Counties and certain inclusive municipal subdivisions, have utilized the pretext of "an ongoing investigation" to board commercial interstate buses to obtain evidence of passenger activities which may be criminal in nature. To buttress this point, Sheriff Navarro in his brief indicates that [although this is not part of the record], the efforts of Palm Beach and Broward County have uncovered cocaine, marijuana and firearms, thus displaying that the end results are impressive and thus justifiable.

The arguments advanced by the State and Sheriff Navarro on the two additional points involved in their briefs as seen by your Amicus Curiae as:

(1) The end results of the questioned police activities [not shown in the record] should justify the means utilized to obtain those results; and

(2) Since buses are commercial transportation which forseeably carry families and children, there should be no requirement of probable cause, or a warrant to initiate the inspection of passengers since the buses are commercial buses and subject to "regulation".

Your Amicus Curiae does not believe either of these points are germaine to the issue before this Court in Bostick.

In any event, it is certainly true as the State and Sheriff Navarro point out, that Courts have sometimes sanctioned warrantless searches of commercial premises in certain industries subject to

long standing governmental oversight. See: New York vs. Burger, 107 S. Ct. 2636 (1987) [junkyards]; Donovan vs. Dewey, 101 S. Ct. 2534, (1981) [mining]; United States vs. Biswell, 92 S. Ct. 1593 (1972) [firearms]; Colonade Catering Corp. vs. United States, 90 S. Ct. 774 (1970) [alcoholic beverages].

But, as the State and Sheriff Navarro overlook, in each and every of this type instances, an act of Congress expressly authorized the terms and conditions of searches on specified premises.

The rationale for not requiring a warrant in such regulated situations is that a statutory inspection program in terms of the initial findings of need and the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.

In that way, there is assurance that the individual's privacy interest and the Government's interest in law enforcement are properly balanced. See: Marshall vs. Barlow's, Inc., 98 S. Ct. 1816 (1978). ["The reasonableness of a warrantless search...will depend upon the specific enforcement needs and privacy guarantees of each statute."] Thus, the enabling statute controls in such cases.

The only authority advanced by the State of Florida and Sheriff Navarro for the uninvited police intrusion on these buses is the "Declaration of War" Sheriff Navarro claims was declared unilaterally by President Ronald Reagan on October 14, 1982, in a speech at the United States Department of Justice. Apparently Sheriff Navarro and the police officials at Broward and Palm Beach County rely upon their "unshakeable committment to do what is necessary to end the drug menace" [P. 4-Amicus Brief of Sheriff Navarro] as reason for departure from settled Fourth and Fifth

Amendment requirements.

The State and Sheriff Navarro appear to argue, that even without probable cuase sufficient to obtain a warrant or explicit statutory authorization for their searches, the gravity of the situation in and of itself, [as seen by them], serves as a substitute for a warrant.

The Supreme Court, in construing the Fourth Amendment has always and without exception disagreed with the logic advanced by the State and Sheriff Navarro.

Sheriff Navarro [and the State] urges that warrantless inspections of "commercial buses" [p. 4,5-Brief of Sheriff Navarro] are reasonable within the meaning of the Fourth Amendment. Among other things, he relies on the "totality of conditions" to authorize the questioning of bus passengers without a warrant and which the Sheriff and the State urge represents an exception to the Fourth Amendment that the courts should honor. We are unable to agree with this position.

The Warrant Clause of the Fourth Amendment protects commercial zones as well as private zones. To hold otherwise would belie the origin of that Amendment. The Supreme Court has analyzed the historical underpinnings of the Fourth Amendment's application to commercial premises in Marshall vs. Barlow's, Inc., 98 S. Ct. 1816 (1978).

> "An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed." The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered

> was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. "[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance...[that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." United States vs. Chadwick, 433 U.S. 1, 7-8, 97 S. Ct. 2476, 2481, 53 L. Ed. 2d 538 (1977). See also G. M. Leasing Corp. vs. United States, 429 U.S. 338, 355, 97 S. Ct. 619, 630, 50 L. Ed. 2d 530 (1977). Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence." Id. at 1820.
>
> "These same cases also held that the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. Ibid. The reason is found in the "basic purpose of this Amendment...[which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara, supra, 387 U.S. at 528, 87 S. Ct. at 1730. If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards."

The Standards or Rules under which the police of Broward and Palm Beach County operate in accosting bus passengers do not impose any meaningful limitations on their discretion. Their activities may be focused or random and are not restricted to particular times or restricted to areas or items which are in plain view. Neither the State or Sheriff Navarro argue that the police could not, in a proper case, obtain an ex parte warrant, upon probable cause.

Nor does the argument that the police authorities can avoid Fourth Amendment strictures and operate outside of the perameters of the Fourth and Fifth Amendments, by seeking oral consents,

help them, since the initial, unprovoked intrusion is wrong.

Thus, most respectfully, the State and Sheriff Navarro misapprehend the functions of the Fourth Amendment and the requirements for warrantless searches of "commercial buses".[1/]

The State also feels Art. 1 Sec. 23, Fla. Const., is not applicable to the type intrusion involved here. In support of this proposition it cites the recent opinion of this Honorable Court, State vs. Hume, 12 Fl. W. 464 (Sept. 11, 1987).

Hume, supra, involved the admissibility of statements transmitted by an electronic eavesdropping device worn by a police undercover agent in the defendant's home, and a motion to suppress contraband seized immediately after the suspect's arrest. There was a warrant issued in State vs. Hume and there appears to be no questions concerning a warrantless intrusion of the type sub judice.

This Court did note that the 1982 Amendment to Art. 1 Sec. 12, Fla. Const., was intended, in part, to overrule the decision of State vs. Sarmiento, 397 So. 2d 643 (Fla. 1981), which had disapproved the interception and simultaneous transmission of personal conversations within the Defendant's home. This issue is not present sub judice.

In State vs. Hume, supra, this Honorable Court appears to find that United States Supreme Court decisions involving privacy rights are made applicable in the State of Florida through Art. 1 Sec. 12, as amended. If so, the United States Supreme Court cases cited by Appellants and your Amicus Curiae, as well as Florida precedent, would appear to militate against the arguments made by the State and the Honorable Nick Navarro in their answer brief.

[1/]We presume the Sheriff means "passengers on commercial buses."

If, indeed, Art. 1 Sec. 12 now is a mirror-image of the Fourth Amendment, then the recent Supreme Court decision of Arizona vs. Hicks, 107 S. Ct. 1149 (1987), would appear to render the police conduct below clearly violative of the Fourth Amendment.

We are not dealing with formalities in this case. The presence of a search warrant serves a high function in American Society. This requirement makes our form of government different from many others. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the American citizen and the police. This was not done to shield criminals nor to make any particular vehicle or situs a safe haven for illegal activities, it was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.

The right of privacy was and is deemed too precious in America to entrust it solely to the discretion of those whose job is the detection of crime and the arrest of criminals. And so the Constitution was amended to require a magistrate to pass on the desires of the police, before they act without founded suspicion of criminal activity. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." Chimel vs. California, 395 U.S. at 761, 89 S. Ct. at 2039 (quoting McDonald vs. United States, 335 U.S. 451, 455-56, 69 S. Ct. 191, 193, 93 L. Ed. 153 (1948).

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inference be drawn by a neutral and detached magistrate instead of being judged by the

> officer engaged in the often competitive enterprise of ferreting out crime."

Mincey vs. Arizona, 437 U.S. 385, 395, 98 S. Ct. 2408, 2415, 57 L. Ed. 2d 290 (1978) (quoting Johnson vs. United States, 333 U.S. 10, 13-14, 68 S. Ct. 367, 368-69, 92 L. Ed. 436 (1948).

The question presented to this Honorable Court speaks to one of the basic rights of the citizenry. With the utmost respect to Sheriff Navarro, the question presented goes far beyond the momentary impetus for the inquiry. Needless to say, the random stop of any appreciable number of citizens will produce statistically predictable evidence of crime. Such stops, as well as the bus stops sub judice, will also result in no indication of criminal activity by the overwhelming majority of citizens so stopped.

The framers of our Constitution granted various rights to the citizenry as a whole, one of which was discussed by the Supreme Court in Olmstead vs. United States:

> "The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." Olmstead vs. United States, 277 U.S. 438, 478 (1928).

Here, your Amicus Curiae respectfully suggests that police initiated contact based only on empirical experience or hunches, do not rise to the level of probable cause or founded suspicion. The conduct sub judice should be found to require suppression of any articles seized as a result of such conduct or any statements made.

The Court might also consider the impact of the unusual and out-of-ordinary aspect of bus passengers seeing police "in mufti" board a bus, for no apparent reason and begin to question passengers. Most people know policemen are armed. Obviously, the police are not there to socialize.

One submits to apparent authority in America because we are taught to do so and we fear the consequences of refusal. The founding fathers recognized this compelled acquisance to police authority and the Supreme Court recognized and discussed it in Olmstead, supra. See: State vs. Carroll; State vs. Kerwick, supra.

Fourth and Fifth Amendment protections should not be so easily overridden as was done sub judice and turn merely on the often unascertainable distinction between "acquiesance" and "voluntary consent", since the question presented would, in and of itself obviate the rights guaranteed to each of us by these unparalled constitutional safeguards.

Respectfully, this Court should declare the police conduct below to be improper as measured against Fourth and Fifth Amendment protections because the initial police intrusion is wrong.

Police should not be permitted to engage in general searches of the type engaged in below and then avoid the constitutional prohibition against such intrusions by utilizing "consent" as a defense to the intrusion.

PAGE 10 MISSING

THE "CONSENT" TO SEARCH A SUITCASE DOES NOT INCLUDE THE RIGHT TO OPEN A PACKAGE WITHIN THE SUITCASE

Assuming arguendo, on the fact situation below, that the Officers proceeded on an exception to the warrant requirement, there was no requirement to open or search any package in the suitcase. Arizona vs. Hicks, 107 S. Ct. 1149, 1152-53 (1987).

If the police suspected the closed package within the suitcase contained contraband, they must then obtain a warrant. Arkansas vs. Sanders, 99 S. Ct. 2586 (1979), at 2592-93, U.S. vs. Bonitz, 826 F. 2d 954 (10th Cir. 1987) at 957. [The bag containing the contraband was "closed" - P. 5 Initial Brief of Appellant]. If the police had probable cause to suspect the bag contained contraband at that point, they were compelled to obtain a warrant from a neutral magistrate to search the "closed bag". The search of the "closed bag" being illegal, suppression was required.

CONCLUSION

The initial stop and the resultant search below were offensive to 4th and 5th Amend. requirements, requiring reversal.

Respectfully submitted:

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CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 28th day of October, 1987 to Georgina Jimenez-Orosa, Esq., Asst. Attorney General, 111 Georgia Avenue Room 204, West Palm Beach, Florida 33401; Kenneth P. Speiller, Esq./Max P. Engel, Esq., 1461 N. W. 17th Avenue, Miami, Florida 33125; Edward A. Hanna, Jr., Esq., 2600 S. W. 4th Avenue, Fort Lauderdale, Florida 33135.

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