IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO: 70,996

DCA CASE NO: 4-86-2409

TERRENCE BOSTICK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER TERRENCE BOSTICK

Submitted by:

LAW OFFICE OF JOSEPH S. PAGLINO
88 N. E. 79th Street
Miami, Florida 33138
Telephone (305) 758-8017
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED:

OTHER AUTHORITIES:

STATEMENT OF THE CASE

This case arises by certification of the Fourth District Court of Appeal of the following question:

> May the police without articulable suspicion board a bus and ask at random, for, and receive consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

The certification arises from a denial of a motion to suppress without findings, delivered orally from the bench. The Fourth District gleaned the factual basis of the Trial Court's decision from the transcript of the hearing, which factual basis appears in the dissent to an initial per curiam affirmance.

Note: Bostick, sub judice, appears to conflict with the recently decided case of U.S. vs. Miller, 821 F. 2d 546 (11th Cir. 1987) which was not available to the Court below at the time Bostick was decided. Miller appears to have construed the 4th Amend. U.S. Const. to prohibit the type of police conduct involved in Bostick.

STATEMENT OF THE FACTS

Two men identifiable as police officers boarded an interstate bus during a stopover in Fort Lauderdale. The officers, without articulable suspicion questioned the defendant, a passenger on the bus, checked his ticket, and searched his luggage, all with the claimed consent of the defendant.

The police found contraband as a result of the alleged consensual search and arrested the defendant.

The defendant moved to suppress the evidence obtained as a result of the "consensual" search. The trial Court denied suppression, without comment. The Fourth District affirmed per curiam, but certified the question presented as one of great public importance. Letts, J. concurred with the certification, but dissented from the per curiam affirmance.

ISSUE ON APPEAL

MAY THE POLICE WITHOUT ARTICULABLE SUSPICION BOARD A BUS AND ASK AT RANDOM, FOR, AND RECEIVE CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE CONSENT TO SEARCH?

SUMMARY OF ARGUMENT

A. The type police conduct present sub judice is inexcusable and illegal, whether tested by 4th Amend., U.S. Const. protections, Art. 1 §12, Fla. Const., Fla. Stat. 901.151, or applicable case law. A citizen who has given no good cause for believing he is engaged in dealing in contraband is entitled to proceed without interference. Law enforcement must proceed to ferret out crime in less intrusive ways.

B. Evidence or statements obtained from a defendant as a result of a random "sweep" of this type is irrevocably tainted and must always be excluded regardless of questions of consent.

C. The type of intrusion sub judice is not akin to an airport search and can not be justified on those grounds.

D. The intrusion is not akin to a traffic stop, vehicle inspection, driver's check or administrative search.

E. The police conduct below is a "general search" which is prohibited in all democratic societies and in America pursuant to the 4th Amendment.

ARGUMENT

ISSUE ON APPEAL

MAY THE POLICE WITHOUT ARTICULABLE SUSPICION BOARD A BUS AND ASK AT RANDOM, FOR, AND RECEIVE CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE CONSENT TO SEARCH

Clearly, police intrusions of this genera can not be condoned under any view of the 4th, 5th Amend., U. S. Const., Art. 1 §12, Fla. Const., Fla. Stat. 901.151, or any valid interpretation of remaining individual liberties.

Admittedly, criminal conduct of the most reprehensible sort may be detected in "random sweeps" of the citizenry, but the ferreting out of even the most abusive crimes by indiscriminate police activity of this sort is a more pernicious evil and can not be justified by the end results which may be produced as a result of the law of averages inherent in such sweeps.

As Judge Letts indicated, the Court was "troubled" by the scenario below, and well it should be. If, as the police officers claimed, the defendant freely and voluntarily gave consent to the search and assuming arguendo, the defendant admitted the possession of contraband, why then should the Court be "troubled".

The answer becomes apparent upon a more reasoned analysis of the factors involved than perhaps the overburdened trial courts can spare the time in which to indulge.

Respectfully, the proffered starting point in the analysis must be the basic theory of probable cause for the initial intrusion, for this was no mere "street encounter" and there was no articulable reason for the police to single out the

particular bus or the particular passenger, nor were there exigent circumstances which required police action. In short, there was no articulable reason for the initial police intrusion, no probable cause, no warrant, no informer and no request by the carrier for the intrusion. The police intrusion, at best, was based upon a mere "hunch", even assuming the "hunch" was based upon professional police experience.

It is important, at the outset, to denote what was not involved in the police intrusion sub judice.

1. This was not a case arising from the use of a trained dog to examine luggage [suspicious or otherwise] in a bus terminal. United States vs. Place, 462 U.S. 696, 707-09, 103 S. Ct. 2637, 2644-46, 77 L. Ed. 2d 110 (1983); United States vs. Salis, 536 F. 2d 880 (9th Cir. 1976); see also: United States vs. Thomas, 757 F. 2d 1359 (2d Cir. 1985).

2. This was not a case arising from a public encounter on a street, bus terminal, airport terminal, or other public place or thoroughfare, nor a routine police inspection for verifiable, promulgated reasons. United States vs. Davis, 482 F. 2d 893 (9th Cir. 1973).

3. This was not a case arising from a police intrusion based upon an articulable reason or consent to the initial intrusion of the defendants zone of privacy. Norman vs. State, 379 So. 2d 643 (Fla. 1980) or conduct approved by a specific United States Supreme Court case, Art. 1 §12.

4. This was not a traffic stop to check a diver or vehicle.

5. This was not a routine, authorized "checkpoint" stop.

THERE WERE NO "PARTICULAR CIRCUMSTANCES" TO DEMONSTRATE PROBABLE CAUSE

The defendant here was a passenger in a bus, i.e., a vehicle, and was doing nothing inconsistent with his status as a mere passenger. The police boarded the bus and accosted the defendant with no articulable reason to do so.

Probable cause for stopping and searching a vehicle and its passengers may exist where officers recognize the vehicle as one belonging to and used by a person known to them beforehand, as being engaged in unlawful transportation of contraband and the vehicle is proceeding from the direction of a known specific source of the contraband toward a possible illegal market under circumstances indicating no other probable purpose than to carry on an illegal venture, and where police have been given by witnesses a description of a car at the scene of a crime and a description of the clothing worn by the suspects. The police then could have probable cause upon locating a vehicle and passengers answering such descriptions, to search the vehicle for guns and contraband. Chambers vs. Maroney, 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975, reh. den. 400 U.S. 856, 27 L. Ed. 2d 94, 91 S. Ct. 23. But absent an articulable reason for the police intrusion, there is no probable cause to believe that a search of the car will be fruitful, Dyke vs. Taylor Implement Mfg. Co., 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472 (19).

The Supreme Court has ruled definitively in fact situations such as that present sub judice, that:

> "A citizen who has given no good cause for believing that he is engaged in dealing in contraband is entitled to proceed in his automobile on a public highway without interference." Brinegar vs. United States, 338 U.S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302, reh. den. 338 U.S. 839, 94 L. Ed. 513, 70 S. Ct. 31.

If this is so, the analysis should apply to a bus passenger as well, as a minimum. Delaware vs. Prouse, infra.

Obviously, a citizen traveling in interstate commerce, on a bus is equally entitled to proceed without interference when there is no reason to suspect that he should be singled out for investigation, search or arrest.

Thus, the officers could not have had a "well founded suspicion of criminal activity" which authorized them to commandeer the bus and detain the Defendant. See: Terry vs. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) and §901.151, F.S.A. (1981).

This issue was discussed in a limited fashion in Carter vs. State, 454 So. 2d 739 (Fla. App. 2DCA 1984), where, as here, an investigatory intrustion resulted in an arrest and seizure of evidence.

In reversing an Order denying suppression because of an unlawful initial stop and directing the lower Court that the evidence be suppressed, on very similar facts as those alleged here, the Court stated:

> "Neither party contends that the officers' initial interaction with the occupants of the suspect vehicle was anything less than an investigatory detention under Terry, which was justifiable only if the officers possessed a "founded" suspicion of the occupants' criminal activity. Wilson vs. State, 433 So. 2d 1301 (Fla. 2d DCA 1983); Freeman vs. State, 433 So. 2d 9 (Fla. 2DCA 1983); R.B. vs. State, 429 So. 2d 815 (Fla. 2DCA 1983); State vs. Perera, 412 So. 2d 867 (Fla. 2d DCA), petition for review denied, 419 So. 2d 1199 (Fla. 1982); §901.151, Fla. Stat. (1981). See: Terry vs. Ohio; United States vs. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 65 L. Ed. 2d 497 (1980) (Distinction exists between a police intrusion which amounts to "seizure" of the person and an encounter which intrudes upon no constitutionally protected interest); Sibron vs. New

> York, 393 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968); United States vs. Thompson, 712 F. 2d 1356 (11th Cir. 1983); Lightbourne vs. State, 438 So. 2d 380 (Fla. 1983); State vs. Cahill, 388 So. 2d 354 (Fla. 2d DCA 1980). Thus, it is clear that the instant investigatory detention was justified only if a "founded suspicion" existed in the minds of the detaining officers that the suspects had committed, were committing, or were about to commit a crime. Wilson; Kearse vs. State, 384 So. 2d 272 (Fla. 4th DCA 1980); State vs. Stevens, 354 So. 2d 1244 (Fla. 4th DCA 1978).
>
> A "founded suspicion" arises if the circumstances observed by the officer, interpreted in light of the officer's knowledge, reasonably indicate the possible presence of criminal activity. Stevens at 1247. The officer's suspicion is "founded" upon an objective foundation which reasonably supports his assessment of the particular circumstances. Conversely, a "mere" or "bare" suspicion lacks sufficient objective justification and thus is akin to random selection, mere guesswork, or a hunch. Id. Accord Wilson; Freeman. Because a mere suspicion cannot support a valid detention, an officer cannot lawfully infringe upon a citizen's fourth amendment interests solely upon a "hunch" sparked by his professional experience..."
>
> "...While the activities observed legitimately may have aroused the officers' suspicions, we do not believe that they created the founded suspicion necessary to justify appellant's detention. Because the initial stop was unlawful, the evidence seized as a result of the illegal detention should have been suppressed. Wong Sun vs. United States, 371 U.S. 471, 83 So. 2d 407, 9 L. Ed. 2d 441 (1963); Caladonato vs. State, 348 So. 2d 326 (Fla. 1977); Lewis vs. State, 382 So. 2d 1249 (Fla. 5th DCA 1980); Whitley vs. State, 349 So. 2d 840 (Fla. 2dDCA 1977). Accordingly, we reverse Carter's conviction and remand with directions for his discharge."

To the same effect, see the later case of Teresi vs. State of Florida, 506 So. 2d 46 (Fla. App. 2DCA 1987) following Carter vs. State, supra, where the appellate court condemned an arrest and seizure of cocaine, where the initial stop was based on mere suspicion.

The Court reversed the lower Court's denial of the Motion to Suppress and Dismiss and explained its rationale as follows:

> "We reverse. The detectives here had nothing more than a bare suspicion (more like a hunch) of criminal activity when they stopped, searched and arrested appellant. Indeed, the facts supporting the officers' conduct here are even weaker than the facts this court found insufficient in Carter vs. State, 454 So. 2d 739 (Fla. 2DCA 1984). Detective Rodriguez did not observe any illegal drugs or activity during either of the two times he had to observe the inside of appellant's car: during the initial "walk by"; and during the time he removed appellant from the vehicle. Appellant gave a very plausible explanation of his activities: bending over because he was reading a map; moving his car because of suspicious characters. Appellant's observed activities were at least equally consistent with non-criminal activity. Id. at 742. The detective did not have a "founded suspicion" to stop appellant. In addition, the detective had no legal justification to search appellant's cigarette pack."
>
> "...the cocaine and paraphernalia were only found after appellant acquiesced to the authority of the detective at the time of the unlawful search of the cigarette pack.
>
> We reverse the trial court, vacate its Order denying the motion to suppress and remand with instructions that appellant's motion to suppress be granted.

Here, sub judice, as in Teresi vs. State, supra, the police claimed acquiesence of a search, by the Defendant. The Court appeared to find the consent insufficient to cure the taint caused by the illegality of the initial stop. The evidence was suppressed and the defendant discharged from custody, regardless of the "consensual search" or "search by acquiesence."

The law of averages will doubtlessly produce evidence of illegal conduct and contraband if sufficient random stops of citizens are made, but these "police sweeps" are impermissible in America. See: U. S. vs. Miller, 821 F. 2d 546 (11th Cir. 1987). They are, in reality, general searches.

The consequences of such procedures are simply impermissible and too drastic and abusive to condone at any level.

Since the initial stop of the defendant, sub judice, was clearly illegal, based on the arresting officers own version of the facts as accepted by the Court, the arrest itself was illegal and the fruits of the illegal arrest are inadmissable.

See: State vs. Heitland, 366 So. 2d 831 (Fla. App. 2DCA 1979); 387 So. 2d 963 (Fla. 1980) [approving and adopting the prior decisions of the Second District invalidating arrests where there was no probable cause for the initial stop.] The Court explained that the admissibility of evidence seized from a suspect depends in the first instance, upon the validity of the initial stop, regardless of what follows: At 834:

> "Stop and frisk" are words of art which first acquired meaning nonjudicially in the development of law enforcement procedures. In law enforcement parlance, a "stop" meant a temporary investigation detention of an individual short of arrest. A "frisk" meant the pat-down of an individual's outer clothing to determine whether he was carrying a weapon, a procedure not amounting to a complete search. As a matter of constitutional law, the validity of the initial stop is crucial in determining whether evidence seized as a result of the stop is admissible in a subsequent prosecution of the person stopped. Such evidence may be obtained as the result of a frisk following the stop, or as the result of the officer's observations upon making the stop, as in the instant case. Either circumstances may provide probable cause for an arrest followed by a search,

> or a search followed by arrest. Evidence may be seized as a result of such an ensuing search. Again, the admissibility of that evidence depends on the validity of the initial stop..."

It would appear that Florida's Stop and Frisk law [F.S. 901.151] would be superfluous if police conduct of the type sub judice were permissible. The only issue involved in stops, searches, seizures, elicitation of statements, etc., would be the question of consent. If so, a great body of law based upon 1st, 4th and 5th Amendment [U. S. Const.] guarantees would simply be obviated. Thus, a question presented by Bostick, is whether the decision logically saps F.S. 901.151 of vitality and renders meaningless all protections of Art. 1 §12, Fla. Const., 4th, 5th Amend, U. S. Const., and turns the analysis only into an analysis of the question of "consent". If so, the words of Judge Letts in his dissent in Bostick vs. State, supra, sum up the only inquiry permissible were this Court to affirm the denial of the Motion to Suppress sub judice.

"Needless to say, there is conflict in the evidence about whether the defendant consented to the search [of the second bag] in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the State, it being a question of fact decided by the trial Judge." Bostick vs. State, dissent, J. Letts.

DOES FLA. STAT. 901.151 HAVE VITALITY

In 1969, after the decision in Terry vs. Ohio, supra, but before the decision in Adams, infra, the Florida legislature enacted F.S. 901.151, Florida's "Stop and Frisk" Law. That law sets forth circumstances under which a law enforcement officer of this state may temporarily detain a person and, additionally make a limited interrogation and search of a person so detained for the purpose of disclosing the presence of a weapon.

The wording of F. S. 901.151 clearly implies that the circumstances giving rise to a stop must be personally observed by the Officer. State vs. Heitland, supra, 366 So. 2d 831, 835 (Fla. App. 2DCA 1980). The statute sets standards which, as a minimum, are co-extensive with 4th Amend. U.S. Const.; but by its language appears to set a higher standard as to probable cause requirements and does not, by its language, permit stops or detentions of the type present here. The statute evidences great concern for police intrusion of the type sub judice.[1/]

As a matter of constitutional law, the validity of the initial stop is crucial in determining whether evidence seized as a result of the stop is admissible in a subsequent criminal prosecution of the person stopped. Such evidence may be obtained as the result of a frisk following the stop, or as the result of the officer's observation upon making the stop. Either circumstances may provide probable cause for an arrest followed

[1/] Judge Glickstein, did not consider or discuss the added protection of F.S. 901.151 vis a vis the 4th Amend. [See, Fla. Bar News 8/15/87] in his comments to the bar concerning the type police intrusion present sub judice.

by a search, or a search followed by arrest. Evidence may be seized as a result of such an ensuing search. Again, the admissibility of that evidence depends on the validity of the initial stop and the "Frisk" made at that time. Id. at 835.

Here, there is absolutely no reason shown for the initial stop and questioning of the defendant. Thus, the stop, if it had occured on the street, would be in violation of Fla. Stat. 901.151, which requires, as a minimum, a founded suspicion of illegal activity as to the suspect prior to the stop. Can the police engage in intrusive conduct on a bus, which they could not engage in on the street. We think not. Can a random "stop" by a police officer in violation of F.S. 901.151 be cured by "consent" to a suggested police search. We think not. The same is true of the police conduct sub judice.

Florida offers added protection to its citizens from random, unregulated intrusions or "police sweeps" of the type sub judice. This added protection is found in Art. 1 §12 Fla. Const. and is evidenced by the stated public policy of our state as shown by F.S. 901.151, and is in addition to the protections offered by the 4th Amend. U. S. Const. A State may offer added protection to its citizens by statute as easily as by a state constitutional provision, or by construction of a particular federal or state enactment, but cannot offer less protection by construction of these provisions, as happened below in Bostick. F.S. 901.151.

FLORIDA'S CONSTITUTIONAL PROVISIONS PROHIBIT THE INITIAL STOP, THE SEARCH, THE SEIZURE AND THE ARREST SUB JUDICE

Florida's Constitution too, prohibits detentions of the type present sub judice. See: Art. 1 § 12 Fla. Const.

> Art. 1 §12, Fla. Const.
>
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.
>
> Amended, general election, Nov. 2, 1982.

The reach of Florida's Constitution, which specifically prohibits the use of articles or information obtained in violation of the right of persons to be secure in their persons, etc., appears, on its face to exceed the reach and prohibition of U.S. Const. 4th Amend. since by its terms, it does not permit the use of seized evidence to be used in violation of the 4th Amend. U.S. Const. as construed by the Supreme Court. The Fourth Amendment prohibits use of illegally seized evidence by logical construction of its purpose and effect. Infra. Any claimed consent does not cure the taint if Art. 1 §12 is read literally, unless a United States Supreme Court decision is relied upon to cure the taint. There is no such reliance in Bostick.

The Fourth Amendment in its entirety reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Florida's Constitution thus specifically prohibits the use of articles seized or information obtained as evidence [and we proffer] where the admission of such articles would be violative of the 4th Amend. U.S. Const. or Art. 1 §12, Fla. Const.

While there is some dicta as to whether the reach of Art. 1 §12 of Florida's Constitution is now merely co-extensive with the reach of the Fourth Amendment, U. S. Const., [as a result of the 1982 amendment, supra], this question does not appear to be definitively answered.

A brief examination of the effect of the 1982 Amendment which now troubles Judge Glickstein [supra] might be of use to the Court in its present analysis.

(1) Even the most strict constructionist must concede that Florida can not obviate or delimit the reach of the Fourth Amendment by legislation, or by the terms of Florida's Constitution.

Both the Supremacy Clause and Federal case law precludes any such limitation. See: 14th Amend., U.S. Const.

(2) Any interpretation of the 1982 amendment which urges that Art. 1 §12 merely precludes the use of illegally obtained evidence only when such evidence would be inadmissible under decisions of the United States Supreme Court, must also be rejected. If so, no United States Circuit Court decision could

serve as precedent, nor could a United States District Court issue a Writ of Habeas Corpus on the basis of illegally obtained evidence, without violating Florida's Constitution.[2/]

More importantly, if decisions of the United States Supreme Court construing the 4th Amend. are controlling, we have no need of Art. 1 §12, as amended, since it is of no consequence. Simply put, we can use the 4th Amend. U.S. Const, exclusively if Art. 1 §12 is merely co-extensive. In short, the 1982 Amendment, would, self-destruct Art. 1 §12 as being irrelevant to Florida's Judicial process and render its analysis by our courts superfluous. Art. 1 §12 would be impliedly repealed;

(3) The 1982 Amendment set a preliminary threshhold for the exclusion of evidence and permitted a higher state standard than the federal standard, if interpreted literally.

Our sister state of Louisiana faced this question and determined in a similar inquiry that the comparable state exclusionary constitutional provision did set a higher standard than that of the 4th Amend. State vs. Hernandez, 410 So. 2d 1381 (La. 1982), as to individual liberties.

But a similar analysis by Florida's Supreme Court may be unnecessary to determine this case, since this Court has ruled that initial unlawful police activity taints and negates a later consent where, as is logically deductible here [and in all "bus stop" cases by their nature] there is no break in the chain of illegality.

[2/] Pres. Abraham Lincoln suspended the Writ of Habeas Corpus during the Civil War, but to its credit, Florida never has.

[It is however, doubtful that the citizenry can dictate judicial interpretation of a constitutional provision regardless of committee notes as to the "intent" of the provision.]

This Court appears to have discussed the question of admissability in this context in a 1980 decision, prior to the 1982 amendment to Art. 1 §12.

In Norman vs. State, 379 So. 2d 643 (Fla. 1980), the Court utilizing United States Supreme Court precedent states:

> "Among the established exceptions to the warrant requirement is a search conducted pursuant to consent. Schneckloth vs. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). In order to rely upon consent to justify the lawfulness of a search, however, the state has the burden of proving that the consent was in fact freely and voluntarily given. Bumper vs. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). In Florida, the prosecution must show by clear and convincing (sic) evidence that the defendant freely and voluntarily consented to the search. Bailey vs. State, 319 So. 2d 22 (Fla. 1975); Sagonias vs. State, 89 So. 2d 252 (Fla. 1956); Taylor vs. State, 355 So. 2d 180 (Fla. 3DCA 1978).
>
> The voluntariness vel non of the defendant's consent to search is to be determined from the totality of circumstances.
>
> But when consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. Bailey vs. State; Earman vs. State, 265 So. 2d 695 (Fla. 1972); Taylor vs. State. See Brown vs. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); Wong Sun vs. United States, 371 U.S. 471, 83 S. Ct. 406, 9 L. Ed. 2d 441 (1963).
>
> The consent will be held voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action. Bailey vs. State, 319 So. 2d at 28; Sheff vs. State, 329 So. 2d 270 (Fla. 1976)." at 647.

> "Although petitioner was not formally arrested at this time, the evidence shows that he was at least de facto in custody. Deputy Beach admitted at the hearing on the motion to suppress that petitioner was never free to leave, and that for all intents and purposes, he (petitioner) was arrested. In such a coercive setting, and faced with the awesome knowledge that the sheriff (pursuant to an illegal search) had personally seen the marijuana, petitioner's compliance with Deputy Beach's request to view the marijuana might possibly be deemed acquiescence to authority, but it certainly does not rise to the level of free and voluntary consent to search.
>
> In view of the state's failure to establish a valid exception to the warrant requirement, the search of the barn and the seizure of the contraband violated petitioner's constitutional rights, thus the district court erred in affirming the trial court's denial of petitioner's motion to suppress. Accordingly, the petition for writ of certiorari is granted, the decision of the District Court of Appeal, First District, is quashed, and this cause is remanded to the district court with directions to remand to the trial court for proceedings not inconsistent with this opinion.

In the context of the question certified, it is clear that a construction of Art. 1 §12 vis a vis the Fourth Amend. would be helpful in resolving the propriety of the initial police intrusion upon the defendants "zone of privacy" perhaps raising probative analysis of psychological studies indicating the unsettling effects of any official intrusions within this zone of privacy. Obviously, the police had not boarded a bus on a short loading stop to socialize, nor were they there to say their "pater nosters". The police presence was intrusive, out of the ordinary and intimidating. Such unusual police intrusions always are. That is why they are condemned. If they were permissible, we would not need the 4th Amend., the 4th District would not be troubled by this case and there would be no controversy about the practice.

But, there is 5th Amendment interplay as well inherent in the question certified. Here, the police were assuredly on duty and in search of criminal activity. There is a hint that the defendant was told affirmatively that he was free to leave the detentive situation, but no finding on that issue.

He was seated on a bus, confronted by two police officers who had targeted him for questioning. The Fourth District did not treat 5th Amendment questions, but, like the trial court, made no analysis of the question of custody or detention.

Judge Letts, on the other hand, did offer a reasoned analysis of the inherent custody issue in his dissent, and there is ample law to support his analysis in relation to the question certified. Hence, the entry of "Miranda".

Miranda requires the police to give certain warnings to a person in various types of custody before interrogating him. 284 U.S. at 444-45, 86 S. Ct. at 1612-13. A person is in custody if he is under arrest, or as is indicated here, if his freedom of movement is restrained to a degree associated with formal arrest. New York vs. Quarles, 467 U.S. 649, 655, 104 S. Ct. 2626, 2631, 81 L. Ed. 2d 550 (1984), F.S. 901.151, supra.

If the police stop a person, a court should inquire whether the "stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." Berkemer vs. McCarty, 468 U.S. 420, 437, 104 S. Ct. 3138, 3149, 82 L. Ed. 2d 317 (1984). If a stop is brief, public, and not dominated by the police, a Miranda warning is not required. Id. at 437-39, 104 S. Ct. at 3148-50, but if it is not brief, or not public, or if it is police dominated in any way, then

the requirement of a Miranda warning is triggered and the warning must be given prior to any questioning, or, obviously, the seeking of a consent to search, etc. Florida vs. Roger, 103 S. Ct. 1319 (1983).

Moreover, this is equally true if the officer(s) conversation with the defendant constituted interrogation of a detainee. Florida vs. Roger, supra, as here.

"The term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police ...that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island vs. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297 (1980) (footnotes omitted), cited with approval in Arizona vs. Mauro, 107 S. Ct. 1931, 1934, 95 L. Ed. 2d 458 (1987). By asking the defendant where he was going, whether he would consent to a search, etc., it is clear that the officers were conducting an ongoing investigation of suspected crime, and any response could incriminate the defendant in several ways. It could indicate that he was violating state statutes that regulate possession of firearms, narcotics or the conduct of an investigation under F.S. 893, or other criminal activity.

As a result, it is clear that if the defendant was in "custody" as defined in Quarles, supra, he was also being questioned to elicit testimonial evidence to be used against him. Although not handcuffed, there is no finding that he was advised that he was free to leave. In fact, he was advised that the officers were conducting an investigation into criminal activities, implying that he must cooperate and that he was not

free to leave the bus. U.S. vs. Quarles, 467 U.S. at 652, 655, 104 S. Ct. at 2629, 2631. F.S. 901.151.

The case before us falls between the polar cases of Quarles, which illustrates questioning exempt from Miranda, and Orozco vs. Texas, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969), which illustrates questioning subject to Miranda. In Orozco, police accosted the suspect in his bedroom at 4:00 A.M. to ask him about his whereabouts at the time of a murder and whether he owned a pistol. 394 U.S. at 325, 89 S. Ct. at 1096. The questions were investigatory and sought to elicit testimonial evidence. They were not aimed at controlling an immediate threat to public safety. Therefore Orozco was entitled to a Miranda warning. The same applies here. The defendant was a victim of a random search to elicit evidence of crime. That is why the police were on the bus.

Here, the police were admittedly investigating crimes, otherwise what was their purpose on the bus. Hayes vs. Florida, 470 U.S. 811, 812-19, 105 S. Ct. 1643, 1645-48, 84 L. Ed. 2d 705 (1985). The stop below was pretextual, not a casual encounter.

If the police detain a suspect as a pretext to conduct a search for which probable cause is lacking, the subsequent search is unconstitutional, regardless of any Miranda warnings which might be given, or later "consents".

The illegality of the initial police conduct is decisive, regardless whether the police thereafter conduct a search or a custodial interrogation. The Supreme Court explicitly stated in Brown vs. Illinois, supra, and reiterated in Dunaway vs. New York, that a violation of the fourth amendment by a detention without probable cause is not automatically cured by the later

provision of Miranda warnings and a subsequent voluntary confession. The primary taint is the violation of the fourth amendment by the unlawful detention, the continuing effect of which is to make the confession inadmissible. Whether a subsequent fifth or sixth amendment violation occurred is a conceptually distinct issue which must be addressed. The issue of "consent" is irrelevant in this context.

The police sub judice knew that they lacked probable cause to make an arrest for criminal activity prior to detaining and questioning the defendant. This conduct is simply impermissable at this stage of our political system's development. See: e.g. Hayes vs. Florida, supra, 470 U.S. 811, 812-19, 105 S. Ct. 1643, 1645-48, 84 L. Ed. 2d 705 (1985); Davis vs. Mississippi, 394 U.S. 721, 725-28, 89 S. Ct. 1394, 1396-98, 22 L. Ed. 2d 676 (1969); United States vs. Lefkowitz, 285 U.S. 452, 462-67, 52 S. Ct. 420, 422-24, 76 L. Ed. 877 (1932); see also, Amador-Gonzales vs. United States, 391 F. 2d 308, 313-18 (5th Cir. 1968); cf. Mills vs. Wainwright, 415 F. 2d 787, 790 (5th Cir. 1969); Taglavore vs. United States, 291 F. 2d 262 (9th Cir. 1961).

In Amador-Gonzalez vs. United States, 391 F. 2d 308 (5th 1968) the court held that a confession obtained as a result of a search, conducted after a pretextual detention of the defendant, was procured in violation of the fourth amendment and must be suppressed. Here the pretextual detention similarly taints the articles seized and any statements made by the suspect.

The Supreme Court has rejected the "silver-platter doctrine", preventing the use of evidence obtained by state officials through intentional and unconstitutional means. A consent "secured

through an exploitation of an illegal detention is undoubtedly inadmissible." United States vs. Wilson, 569 F. 2d 392 (5th Cir. 1978). The police conduct sub judice is equally wrong.

This is not a case in which the suspect goes free simply because the constable blundered. As the Court held in U.S. vs. Causy, 818 F. 2d 354, (5th Cir. 1987), at 362, "although [Causy] may indeed be a criminal, the evidence obtained from him is not the result of a mere blunder. The police deliberately set out to interrogate him by employing a method that violated his constitutional rights. "The evidence thus obtained is as tainted as if it had been obtained by coercion, brutality."

The Fourth District normally follows this rationale and requires suppression of evidence obtained as a result of illegal police conduct or improperly obtained consents. See: State vs. Gantz, 297 So. 2d 614, 616 (Fla. App. 4DCA 1974), Nease vs. State, supra. Bostick appears to depart from this precedent.

Florida also appears to require, in stops of this type, that the suspect be advised that he was free to leave. State vs. Kassidy, 495 So. 2d 907 (Fla. App. 3DCA 1986) at 909. See, supra. The trial Court made no finding on this issue. Perhaps this is why the trial Court and the Fourth District was "troubled". At the very least, conflict appears to have arisen between the Districts which but for the "per curiam" label on Bostick, might have resulted in a quest for certiorari in this Court, due to the compelling questions presented by Bostick and its frightening ramifications of illegal police conduct which now can be "legitimized" by mere oral "consents" without regard to other factors if Bostick controls.

THE ABSENCE OF SIGNED "CONSENT TO SEARCH FORMS"

The question certified fails to mention that the defendant was requested to sign a standard written consent to search form. The absence of such forms in the context of a claimed "consensual search" is totally incongruous. Courts have deemed the absence of a signed "consent to search" form to conclude that the claimed "consent" was non-existant. State vs. Kassidy, supra, 495 So. 2d 907 (Fla. App. 3DCA 1986). In that remarkably similar case, at 909, the Court noted that although the arresting officer(s) claimed to have obtained a valid oral consent [and so testified], to search, and discovered narcotics as a result of the search...the absence of a signed consent form, negated the police officer(s) claims of consent. Id. at 908, 909. The reluctance of Courts to reject police testimony as to "oral consent", and the invitation to 4th Amend. abuses in the absence of a signed consent form is also troubling in the context of cases of this type. See, dissent, Bostick vs. State, supra.

But, can this "stop" be analogized to an airport "stop", which might lead to a conclusion of "implied consent" and legitimatcy and obviate the need for a signed consent?

This question must be answered in the negative. Here, it is obvious that the officers in quo were "screening" bus passengers, on a regular or random basis, in order to ferret out suspected criminal activities on their own volition.

The episode sub judice did not occur at an airport, or within a terminal, nor was there any hint of portending violence, hijacking, bombs or indeed, any hint of any illegal or unlawful activity. Thus any analogy with an "airport" search is unjustified for both reasons of logic and law.

Assuming, for the purposes of the defendant's Motion to Suppress, below, that the justification for such "bus stops" was based upon or supported [officially or by the officer(s)] upon the "airport search" rationale, it is clear that the stop and search in quo cannot be so justified. The rationale supporting airport stops and searches, is based upon completely different underpinnings of logic and stated law.

The difference between the stop and search of a bus passenger, in transit and someone in an airport wishing to initially board a plane is determinative.

Airport searches have received considerable attention since the late 1960's because of the frequency of skyjacking, which poses a severe threat to human life. See: United States vs. Moreno, 475 F. 2d 44 (5th Cir. 1973); United States vs. Lopez, 328 F. Supp. 1077 (E.D. N.Y. 1971). This menace engendered the development of screening procedures to detect potential hijackers prior to boarding the aircraft. See: 3 W.R., Lafave Search and Seizure, A Treatise on the Fourth Amendment, section 10.6(a)-(g) at 327-56 (1979). Under the current American system all persons entering the boarding area and their effects are mechanically checked.[3/] A practical but unavoidable ramification of this 100% screening process is that persons with contraband in their carry-on luggage may be identified and apprehended. United States vs. Davis, 482 F. 2d 893 (9th Cir. 1973. The Courts warn that care must be taken to see that these routine airport inspections do not become vehicles by which otherwise impermissible searches and seizures are validated. Infra.

[3/] Similar security checks are in force, pursuant to judicial decree at some of Florida's courthouses.

At this point in time when airplane hijacking and international terrorism is at a crisis level, an expectation of being free from the limited intrusion brought about by the screening process utilized in the boarding area of the airports, is not justifiable under the circumstances. One who enters the boarding area of the airport knows or should know that he is subject to being searched for weapons or other devices which could be used for hijacking. Notices posted in front of boarding areas inform prospective air passengers that all are subject to anti-hijacking searches. These searches are not directed against individuals but rather are a part of a general screening process to avoid the carrying of weapons or explosive devices onto an aircraft. Shapiro vs. State, 390 So. 2d 344 (Fla. 1980)

Implied or actual consent is presumed, but even with the giving of consent, this limited security boarding area search may not violate Fourth Amendment rights. The Fourth Amendment provides that the people are entitled to be secure from unreasonable searches and seizures. The specific content and incidents of the fourth amendment guarantee are shaped by the context in which it is asserted. Terry vs. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). On boarding an airplane, one is aware of the intrusive policies, unlike the case sub judice involving an already boarded bus passenger, on a carrier not subject to pre-boarding screening.

To assess the reasonableness of security checks at airport boarding areas, we must balance the governmental interest justifying the governmental intrusion against the invasion which occurs as a result of the search. See: Dunaway vs. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

As a result of serious problems caused by airplane hijackings, the federal government developed screening procedures to detect potential hijackers and terrorists prior to their boarding the airplane. The governmental interest in these screening procedures is to prevent the carrying of weapons or explosives aboard an aircraft and thereby to prevent jeopardy to hundreds of lives and millions of dollars of property at the hands of a lunatic, extortionist, political terrorist, or political refugee. The intrusion resulting from these procedures is minimal compared to the monumental governmental interest involved. Tragic experience has taught us that in order to protect the prospective victims of violence, the hijacker must be discovered on the ground and before he boards the airplane. There is a very limited period of time in which the authorities can act to detect a possible hijacker and always prior to boarding.

Security searches in the boarding area are the least intrusive possible because they are aimed at only those boarding the airplane and only those who could pose imminent danger to the air passengers, crew and aircraft.

Furthermore, the intrusion is minor because no stigma attaches when a person is searched at a known designated airport search point and because the person subject to the search voluntarily enters the search area and can avoid the search by not entering the boarding area. See, United States vs. Skipwith. Cf. United States vs. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). Shapiro vs. State, supra. [Here, there are no such checkpoints for buses and no warning or knowledge that a passenger will be accosted once on board the bus.]

THE RATIONALE PERMITTING AIRPORT "STOPS" CAN NOT BE USED TO JUSTIFY BUS "STOPS"

The Courts cannot justify police detainment, interrogation and searches of bus passengers, by analogy to pre-boarding procedures used at airports throughout America because there are no regulations for "bus" searches or guidelines.

Airport pre-boarding procedures, stops of passengers and then interrogation, search, etc., do not rest upon compliance with 4th Amendment guarantees, but upon specific Presidential findings and specific promulgated rules. See: 36 Fed. Reg. 19173-74 (Sept. 30, 1971), 14 C.F.R. §121.538; 14 C.F.R. §107; 37 Fed. Reg. 2500-01 (Feb. 2, 1973).

Because of the outbreak of airplane hijackings, bombings, etc., supra, the Federal Government, through its respective branches, acted to prevent loss of life by promulgating procedures to be followed in all airline boardings, thus evidencing the public policy of the United States as to airline safety. This procedure provides for comment on proposed rules and judicial approval of the process and rule.

(1) In July of 1972, the President "ordered" the screening of all passengers and inspection of all carry-on baggage, initially on all "shuttle-type" flights.

(2) On August 1, 1972, the FAA issued a directive that no airline "shall permit any person" meeting a specific profile to board a plane unless his carry-on baggage had been searched and he had been cleared through a metal detector or had submitted to a "consent search" prior to board.

(3) On December 5, 1972, the FAA ordered that searches of all carry-on items and magnetometer screening of all passengers be

instituted by January 5, 1973. Routine screening and searching under this procedure was to be conducted by airline personnel, but in the presence of armed law enforcement officers "(1) Authorized to carry and use firearms", and "(2) Vested with a police power of arrest under Federal, State, or other political subdivision authority." Specific procedures and guidelines were set and agreed upon. U.S. vs. Davis, infra.

The search of air passengers occurs as part of a screening process directed not against them or any other person as such, but rather against the general introduction of weapons or explosives into a restricted area. The airport search is indiscriminate, and, in view of its object, necessarily so, absent a foolproof means of isolating in advance those few individuals who were genuine hijack risks. Moreover, it requires an intrusion sufficient in scope to detect not only weapons that were immediately accessible to appellant when he was stopped prior to boarding, but also any weapons that would be accessible to him after boarding.

There is no evidence of any bus hijacking, blowing up of buses, etc., nor the promulgation of any federal guidelines for anti-hijacking measures of buses, nor any Rule promulgated by any federal or state agency for this purpose.

Any comparison of bus travel with airplane travel, or boarding procedures is unwarranted. See: U.S. vs. Davis, 482 F. 2d 893 (9th Cir. 1973).

Moreover, the appropriate standards for evaluating the airport search program under the Fourth Amendment are found in a series of Supreme Court cases relating to "administrative" searches and in two Court of Appeals decisions applying these precedents.

The essence of these decisions is that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a "criminal investigation" to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched. This is not permissible in a search or sweep looking for criminal conduct as was done sub judice.

United States vs. Biswell, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972); Wyman vs. James, 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971); Camara vs. Municipal Court, 387 U.S. 423, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); See vs. City of Seattle, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967); United States vs. Schafer, 461 F. 2d 856 (9th Cir. 1972); Downing vs. Kunzig, 454 F. 2d 1230 (6th Cir. 1972); see: Frank vs. Maryland, 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959); see also: Biehunik vs. Felicetta, 441 F. 2d 228 (2d Cir. 1971).

Biswell for instance, upheld a search of a licensed firearms dealer's storeroom as part of inspection procedures authorized by §923(g) of the Gun Control Act of 1968.

Wyman upheld conditioning receipt of future welfare benefits on the recipient's consent to periodic home visits by caseworkers as part of established routine in the administration of New York welfare statutes and regulations. No criminal investigations were

involved.

In fact, the Court in U. S. vs. Davis, supra, foresaw the abuse possible in general "sweeps" of the type which the state seeks to justify sub judice. The Court [482 F. 2d at 999], citing Supreme Court authority, stated:

> "There is an obvious danger, nonetheless, that the screening of passengers and their carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crime. If this occurs, the courts will exclude the evidence obtained. Appellant does not argue that airport searches are currently being used as a subterfuge for the prohibited "general search".

Thus, even with all of its safeguards, airport screening simply can not be used in the manner the police admittedly use in "screening/sweeping" buses. Any reliance upon the rationale of an "airport search" to justify a "bus search" is erroneous. Yet, the State has consistantly relied upon an analogy to airport searches to justify the "bus sweeps" in question here. The analogy is not well taken.

Essentially, the police simply can not be permitted to engage in the type conduct in question based upon any recognized 4th Amendment exception.

The United States Supreme Court and federal Courts considering the same type issue present sub judice have categorically condemned "general searches" of the type admittedly used below and stated categorically that evidence obtained as a result of such general searches should be excluded.

Courts have generally held that airport security measures, such as pre-boarding questioning and searches, which were instituted to detect a prospective hijacker, are reasonable and constitutionally justified as a limited and relatively insignificant intrusion of privacy viewed against the grave necessity to protect an aircraft and its passengers and crew.[4/] See: United States vs. Edwards, 498 F. 2d 496 (2d Cir. 1974); United States vs. Cyzewski, 484 F. 2d 509, 512 (5th Cir. 1973), cert. dismissed, Cyzewski vs. United States, 415 U.S. 902, 94 S. Ct. 936, 39 L. Ed. 2d 459 (1974); United States vs. Moreno, 475 F. 2d 44 (5th Cir. 1973), cert. dismissed, Moreno vs. United States, 414 U.S. 840, 94 S. Ct. 94, 38 L. Ed. 2d 76 (1973). [No Court appears to have sanctioned the type of stop involved here, of a previously boarded bus passenger on a policeman's mere whim.] But even airport stops, searches and seizures can not be unlimited in scope. The Fourth District raised these limitations in Nease vs. State, 484 So. 2d 67 (Fla. App. 4DCA 1986).

> "In order to detain someone even momentarily, police must have an articulable suspicion that he has engaged in, or is about to engage in criminal conduct. Royer, 460 U.S. at 498, 103 S. Ct. at 1324, 75 L. Ed. 2d at 236. In Florida vs. Rodriguez, 469 U.S. 1, 105 S. Ct. 308, 83 L. Ed. 2d 165 (1984), the court noted that the defendant's strange behavior, including attempts to get away, and his companions' contradictory statements about their identity provided the articulable suspicion necessary to justify a brief detention and seizure.

[4/] Airport search rationales have never been extended to a stop/search of the type sub judice, nor is there any articulated reason to do so. No one asked or authorized the police sub judice to screen bus passengers. A search of the authorities reveals no precedent for this type conduct.

> Id., 105 S. Ct. at 311, 83 L. Ed. 2d at 171. Similarly, in Royer, supra, the court concluded that the fact the defendant was traveling under an assumed name, in addition to his behavior and appearance, which fit the drug courier's profile, was sufficient to suspect him of carrying drugs and to detain him for the purpose of investigating that suspicion. Royer, 460 U.S. at 502, 103 S. Ct. at 1326, 75 L. Ed. 2d at 239."

Nease, supra, also holds that one detained by a police officer for questioning is not free to leave, because fleeing from the questioning permits the police officer to pursue and stop you, and constitutes a violation of §843.02, Fla. Stat. (1985). Nease vs. State, 484 So. 2d 67 (Fla. App. 4DCA 1986) at 69. Thus, as Judge Letts observed, the defendant sub judice was not free to leave, once accosted.

> "In the present case, the agents discovered that Nease was travelling under an assumed name in the course of a consensual encounter. This, as well as the surrounding facts including his nervousness and the fact that he fit within the profile, gave rise to an articulable suspicion that he was carrying drugs. At all times prior to this, Nease had been free to leave because the agents had returned his ticket to him. He agreed, however, to have his luggage searched. Before any further questioning could take place, Nease fled from the agents, leaving his luggage behind.
>
> Nease's running constitutes a nonverbal withdrawal of consent to search his luggage. See, e.g., Jacobson, supra. However, because a founded suspicion had developed at this point, the agents no longer needed to rely on Nease's consent to detain him under a Terry stop. Consequently, the agents were justified in pursuing Nease for further questioning. The struggle that followed when they caught him would have been sufficient to justify his arrest for interfering with an officer in the performance of his legal duty. §843.02, Fla. Stat. (1985). See, e.g., Jacobson, 476 So. 2d at 1287. Nease vs. State, supra, at 69.

As the Fourth District reasoned [and Judge Letts reasons], a person being questioned by an investigating officer is not free to leave. If he does, he can be arrested for interfering with an officer in the performance of his legal duty.

If he leaves without using violence, he can be charged with interference, if he resists he can be charged with resisting with violence. If he tries to leave he can then be arrested. If arrested, he can be "searched incident to the arrest".

In short, once accosted, the defendant like Nease, is in a no win situation as a result of the stop sub judice, and is clearly detained. Thus the proffered construction of 4th Amendment guarantees in Bostick, construing the holding in Nease in its context would appear to protect the more fleet footed of the citizenry and penalize the rest.

More likely, the protection offered by the 4th and 5th Amendments is to all categories of citizens and protects against the initial, unprovoked police contact of a bus passenger who is sitting in his seat, minding his own business. This would appear true in all non-casual police encounters, in the absence of some articulated public policy which permits 4th Amend. intrusions in the first instance.

Simply put, Bostick would legitimize any police intrusion if the police can convince the Judge the defendant was told he was free to leave and that oral consent was given by the defendant to the resulting search. Is this then to be Florida's stated public policy? If so, where is this public policy articulated?

PUBLIC POLICY

There is no stated national or State public policy requiring or providing for random or systematic sweeps, surveillance or searches of passengers on buses, nor were the police here requested to search buses by the bus owner or anyone else. Nor does the State so contend.

Nor are there articulated local policies [nor could there be] for random sweeps of buses, since such local "policies" would, of themselves, be impermissibly intrusive of 4th Amend. rights. If so, what then are the minimum requirements for constitutionally permissible searches and seizures, even those which are supposedly "ratified" by later consent of a bus passenger, arising from unpermitted police contact in the first place.

The Fourth Amendment requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest. Davis vs. Mississippi, 394 U.S. 721 (89 S. Ct. 1394, 22 L. Ed. 2d 676) (1969); Terry vs. Ohio, 392 U.S. 1, 16-19 [88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889] (1968)." United States vs. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607.

A person is "seized" when either by means of physical force or a show of authority, his freedom of movement is restrained. When such restraint is imposed by either method there exists autonamous constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary or oppressive interference or contact by enforcement officials with the privacy and personal security of individuals." United States vs. Martinez-

Fuerte, 428 U.S. 543, 554, 96 S. Ct. 3074, 3081, 49 L. Ed. 2d 1116. In America, citizens still have the right to be left alone when they are not bothering anyone else.

In the context of a casual encounter or a street encounter, as long as the person to whom questions are put really remains free to disregard the questions "and walk away", there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. United States vs. Mendenhall, 100 S. Ct. 1870 (1980), but, there must be a reason for the stop. F.S. 901.151.

Here, sub judice, we do not have a casual encounter, or a street encounter or any recognized exception to Fourth Amendment requirements. We do have a pre-set random, unarticulated "sweep" by armed police agents for no proper purpose.

This type police sweep cannot simply be characterized as a casual or street encounter which might result in simple conversation." This was premeditated police conduct.

The Supreme Court has on occasion referred to the acknowledged need for police questioning in casual street encounters, or in an investigation of specific crimes upon probable cause as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, and those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. Haynes vs. Washington, 373 U.S. 503, 515, [83 S. Ct. 1336, 1344, 10 L. Ed. 2d 513]." Schneckloth vs. Bustamonte, supra, at 225, 93 S. Ct. at 2046.

But, here, sub judice, we do not have a casual "street encounter" by the police or the investigation of a specific

crime. This scenario turns, inter alia, upon whether or not the police had any particular reason to suspect bus passengers of wrongdoing or to detain them. If not, the arrest, search, seizure, etc. are inalterably tainted pursuant to the "Brown" doctrine, requiring dismissal and suppression. Brown vs. Texas, supra, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357. See: U.S. v. Miller, 821 F.2d 546 (11th Cir. 1987) on similar facts.

The Supreme Court's decisions involving investigatory stops of automobiles demonstrate this logic. In United States vs. Brignoni-Ponce, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607, the Court held that a roving patrol of law enforcement officers could stop motorists in the general area of an international border for brief inquiry into their residence status only if the officers reasonably suspected that the vehicle might contain aliens who were illegally in the country. Id., at 881-882, 95 S. Ct., at 2580. The Government did not contend in that case that the persons whose automobiles were detained were not seized, in fact they acknowledged that the suspects were seized. Indeed, the Government also acknowledged that the occupants of a detained vehicle were required to respond to the officers' questions and on some occasions to produce documents evidencing their eligibility to be in the United States. Id., at 880, 95 S. Ct. at 2579. But, the stop was upon probable cause.

However, stopping or diverting a vehicle in transit, with the attendant opportunity for a visual inspection of the passenger compartment not otherwise observable, is materially more intrusive than a question put to a passing pedestrian in a street encounter. The former amounts to a "seizure". Delaware vs.

Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660; United States vs. Martinez-Fuerte, 428 U.S. 543, 556-559, 96 S. Ct. 3074, 3082-3083, 49 L. Ed. 2d 1116.

See also, U. S. vs. Mendenhall, 100 S. Ct. 1870 at 1879, where the Supreme Court condemns the diverting or stopping an automobile in transit to observe things not otherwise observable as a seizure of the vehicle [and obviously a detention of its passengers]. U.S. v. Prouse, supra; U.S. v. Miller, supra.

Here then, the police commandeering of a bus certainly amounts to a seizure and detention of the passengers, requiring suppression and dismissal as in all other type seizures and detentions without probable cause and gives them standing.

A confession or seizure, infected with an illegal detention, must fall, nor could there even be a "ratification" or "consent" which can cure such a seizure or arrest. This public policy is well buttressed by case law and the 4th Amendment.

In essence, beginning with Terry vs. Ohio, 392 U.S. 1, 16 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968), the Supreme Court has recognized repeatedly that the Fourth Amendment's proscription of unreasonable "seizures" protects individuals during encounters with police that do not give rise to an arrest. United States vs. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607 (1975); United States vs. Martinez-Fuerte, 428 U.S. 543, 556, 96 S. Ct. 3074, 3082, 49 L. Ed. 2d 1116 (1976); Delaware vs. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660 (1979). In Terry the Court "emphatically reject[ed]" the notion that a "stop" "is outside the purview of the Fourth Amendment because...[it is not a] 'seizure' within the meaning of the Constitution." Terry vs. Ohio, 392 U.S. at 16,

88 S. Ct., at 1877. In rejecting any analysis which would permit police stops of this type, the Court concluded that "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." Id., at 18, n. 15, 88 S. Ct. at 1878. Applying this principle, the Court stated:

> "[w]e have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in a criminal activity, as is required for a traditional arrest. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Brown vs. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357 (1979) (citations omitted).

The Court also found in reviewing such "stops" that a significant query is whether the suspect was told that they were free to go. This would require a "finding" by the Court.

In Dunaway vs. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), the Court held that a person who accompanied police officers to a police station for purposes of interrogation undoubtedly "was 'seized' in the Fourth Amendment sense," even though "he was not told [that] he was under arrest." Id, at 207 203, 99 S. Ct., at 2253, 2251. The Court found, inter alia, that the suspect "was never informed that he was 'free to go,'" and "would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody." Id., at 212, 99 S. Ct. at 2256. [The same is true sub judice.]

The question certified here recognizes that the Government has the burden of proving that bus passengers "consented" to incriminate themselves, in applicable situations. But, on the record before us, the Court's conclusion can only be based on the notion that knowing consent can be assumed from the absence of proof that a suspect resisted police authority. This is a notion that is squarely rejected. In Bumper vs. North Carolina, supra, 391 U.S. 543, 548-549, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797 (1968), the Court held that the Government's "burden of proving that the consent was, in fact, freely and voluntarily given...cannot be discharged by showing no more than acquiescence to a claim of lawful authority." (Footnotes omitted) Johnson vs. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948); Amos vs. United States, 225 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921), assuming a valid initial police intrusion.

While the State need not prove that a particular passenger knew that he had a right to refuse to accommodate the officers, Schneckloth vs. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), it cannot rely solely on acquiescence to the officers' wishes to establish the requisite consent in a case of this type where the police had no business in the first instance, i.e., an oral consent cannot cure the taint.

Essentially the use of the conclusionary term "consent" or "consented" or that "the defendant consented" is not determinative, in fact, it is meaningless. See: Johnson vs. U.S., supra, 66 S. Ct. 367, and has no bearing on the initial illegal stop. Even a signed, sworn "consent" cannot prevent exclusion.

In all cases of bus sweeps, the police commandeering the bus are armed. Assuming that there may be someone committing

a crime on the bus, it is quite logical to assume that gunfire will one day erupt. This is inevitable.

One can imagine the consequences of gunplay between the police and a criminal suspect on a crowded bus. The possibility of serious bodily harm, even death to innocent passengers is apparent. Certainly, the absence of guidelines is ominous.

The present police conduct is flawed and unconstitutional and should not be upheld by the Courts when less intrusive methods are readily available to the police, such as pre-boarding screening in accordance with established rules, regulations and safeguards, such as are provided in airport stops. If pre-boarding or after-boarding screening of bus passengers is to be held, then proper guidelines and proposed rules should be promulgated, with an opportunity for comment, etc. Florida has provisions for such practices if it wishes to attempt to implement such procedures to screen bus passengers, passengers on boats, or other means of transit. Florida has not done so to date. It would appear that any such general intrusion would have to be based upon findings, promulgated guidelines and, as a minimum, administrative procedures providing for comment on the proposed rules. Absent such promulgated guidelines, 4th Amendment intrusions are presented, as sub judice.

The type of police stop sub judice was held illegal in U.S. vs. Bowen, 500 F. 2d 960 (9th Cir. 1974). The Court, in reliance upon the Supreme Court decision in Almieda-Sanchez [supra] noted that if government agents feel, from experience, that illegal activities occur sufficiently at a given point, a warrant must be sought, based upon the probable cause which would [in the view of the government] support the intrusion. Id. at 967.

The Federal Courts have wrestled with almost the precise question presented to this Court and have uniformly ordered suppression. Since Florida is in the Eleventh Circuit, this Honorable Court's attention is respectfully drawn to the recent case of United States vs. Miller, 821 F. 2d 546 (11th Cir. 1987). This case, which was apparently not available to or was not drawn to the attention of the Fourth District, involved the stop and search of a car which Mr. Miller was driving. Miller, the Defendant there, was driving on Interstate 95 in the State of Florida when a Florida State Trooper apparently felt or had a "hunch" that the driver might be transporting narcotics, stopped the car. The Trooper requested the driver's license and the car's registration which were produced. The Trooper then briefly questioned the driver and requested that the driver sign a voluntary consent to search form. The driver signed the voluntary consent to search form and the Trooper thereupon searched the car and discovered cocaine hidden under and behind the back seat of the car.

Miller was charged with possession of cocaine with intent to distribute it. U. S. vs. Miller, supra, at 547.

Prior to trial, Miller filed a motion to suppress the fruits of the search which the Trial Court denied. Miller was then convicted at a jury trial and sentenced to ten (10) years in prison, pursuant to the Federal Statute.

On appeal, the Eleventh Circuit presented an analysis, Id. at 547-8, which reached only the Appellant's challenge to the denial of his motion to suppress the evidence uncovered in the consented to search. The crux of the analysis, Id. at 549-550, was determined by the Court to be "whether the initial

stop of the appellant's car was legitimate". The prosecution, of course, argued that the initial stop of the Appellant's car was legitimate police activity, but the Court determined that the traffic stop was merely a pretext to legitimate (sic) the impermissible stop and resulting search. The Court reasoned that a reasonable officer would not have stopped the appellant without an invalid purpose to obtain evidence which indicated criminal activity, for the stated reason that the policeman had decided to pursue and stop Miller's car before any alleged traffic violation occurred. Taken all together, the Eleventh Circuit reasoned, the record reveals that the police officer made the stop because of his hope to catch a courier, and not because the Appellant had violated any particular traffic law.

The Court then reasoned and held that "a reasonable officer would not have stopped Miller absent some other motive " and thus held that the initial stop of the defendant was not legitimate. U. S. vs. Miller, supra, 821 F. 2d 546 at 549.

The Government argued that even if the initial stop of the defendant was not reasonable and was, in fact, violative of Fourth Amendment guarantees, the intervening fact that Miller signed a voluntary consent to search form would excuse the unreasonable stop and sufficiently attenuates the taint of the search so as to legitimate the search. Id. at 549.

However, the Eleventh Circuit rejected this argument, despite its initial appeal. The Court reasoned that the signed consent was the product of the illegal detention and that the taint of the unreasonable stop was not sufficiently attenuated. The request for consent followed almost immediately upon the stop, and there were insufficient intervening circumstances

that might have reduced the coercive nature of the stop and permitted the appellant to make a voluntary decision about the consent to search. Id. at 550.

We have, in essence, the precise situation in the case sub judice and presented in the certified question itself. The certified question does not state, nor could it, that there was any intervening circumstances between the initial stop of the defendant and the "consent" which was allegedly obtained from the defendant. [Although sub judice, there does not appear to be even a signed consent form].

Nevertheless, the Eleventh Circuit's reasoning appears sound and would appear to be directly applicable to the certified question now before this Court.

Surprisingly, the Eleventh Circuit decision in U. S. vs. Miller, supra, cited and relied upon Supreme Court decisional law [Reid vs. Georgia, 448 U.S. 438, 441, 100 S. Ct. 2752, 2754, 65 L. Ed. 2d 890 (1980)], wherein the Supreme Court of the United States had expressed concern, in the airport search context that a drug courier profile that would "describe a very large category of presumably innocent travelers, could be subject to virtually random seizures if the Court validated the use of the procedure. In this context, the Eleventh Circuit noted that the record does not reveal how many unsuccessful searches the Florida police officer in Miller, supra, had conducted, or how many innocent travelers the officer had detained. In the view of the Eleventh Circuit, "common sense suggests that those numbers may be significant." The Court ended its opinion with the following phrase, which your Amicus Curiae feels is also an appropriate way to end this

brief:

> "As well as protecting alleged criminals who are wrongfully stopped or searched, the Fourth Amendment of the Constitution protects these innocent citizens as well.
>
> For the reasons stated in this opinion, the denial of the Appellant's motion to suppress the fruits of the search is reversed, and the Judgment of the District Court is VACATED." U.S. vs. Miller, supra, 821 F. 2d at 551.

CONCLUSION

Both Florida's Courts and the Federal Courts which have treated questions dealing with aspects of the question certified for resolution by this Honorable Court, have been unable to permit police activity of the type present sub judice. The reasoning of the Judges as demonstrated by those cases appears sound and on common ground. Simply put, the Constitution of the United States and of each state treating these type issues, does not permit police intrusion upon American citizens who are minding their own business and have not given any reason to be accosted, questioned, etc. Bostick ignores this.

The apparent device of a obtaining "oral" consents (sic) or even signed consents on forms issued by the police department, is not enough to overcome the illegality of the initial taint. This is especially true in cases of the type sub judice involving "bus stops" since there could never be a scenario which would permit, under any theory, intervening circumstances which could possibly dissipate the effect of the initial unlawful intrusion and the giving of the consent to the search. Certainly the few minutes which are involved in the "bus stops" at issue would present a more egregious situation in the bus stops than

was present in United States vs. Miller, supra. For these reasons, these type "bus stops", should be condemned by the Court and any evidence obtained as a result of the "bus stops" or statements concerning said evidence or conduct, etc. should be suppressed. If the State of Florida has a legitimate interest in screening bus passengers, it should, by administrative or other process, develop guidelines, and define and provide for comments by citizens who might be affected by the Rules so promulgated. In the event it is necessary to conduct "bus stops", they must be conducted in a manner consistant with the constitutional guarantees provided by the Federal Government and the State of Florida for its citizens.

Respectfully submitted:

Law Office of Joseph S. Paglino
Amicus Curiae
88 N. E. 79th Street
Miami, Florida 33138 (758-8017)

By: Jos S. Paglino
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 15th day of September, 1987 to Robert A. Butterworth, Jr., Attorney General of Florida, Tallahassee, Florida; Georgina Jimenez-Orosa, Asst. Attorney General, 111 Georgia Avenue #204, West Palm Beach, Florida 33401; Kenneth P. Speiller, Esq., & Max P. Engel, Esq., 1461 N. W. 17th Avenue, Miami, Florida 33125, Clerk, Fourth District Court of Appeal, P.O. Box A, West Palm Beach, Fla. 33402.

By: Joe Paglino
Joseph S. Paglino, Esq.