IN THE SUPREME COURT FLORIDA

ADRIAN AVEKY,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 73,289
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, ADRIAN AVERY, was the defendant, and Respondent, STATE OF FLORIDA, was the prosecution, in the suppression proceedings held in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the STATE OF FLORIDA and ADRIAN AVERY will be referred to as Respondent and Petitioner, respectively.

Additionally, the symbol "R" means Record-on-Appeal, before the Fourth District in the above-styled cause; "e.a." means "emphasis added."

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement, to its limited extent, and makes the following additions, clarifications and corrections:

When Officers Turner and Fahey boarded the bus, they were in plainclothes, and did not display any weapons. (R, 6). When the officers approached Petitioner, he unequivocally agreed to talk to them. (R, 7). When asked if he had any luggage, Petitioner pointed to his black bag under his seat, retrieved it, put it in his lap, and unzipped it, for the officers to search it. (R, 8-10). Petitioner did not subsequently say or do anything, to limit this consent. (R, 10-21). Petitioner was advised he had a right to refuse consent. (R, 9). There is no evidence that any consequences of such a refusal, in terms of subsequent searches, in other towns, consent forms, or use of dogs, were conveyed to Petitioner. (R, 9-21). Petitioner's encounter with police, was part of the officers' execution of standard procedure, of questioning all of the bus passengers, starting at the back. (R, 5-7).

In its en banc majority ruling, the Fourth District ruled that the Circuit Court judge had erred, in concluding that Petitioner's consent was per se coerced, by the inherent circumstances of being approached by police, as a ticketed

passenger on a public bus. Avery v. State, 531 So.2d 182, 184-188 (Fla. 4th DCA 1988)(en banc). The majority concluded, inter alia, that the establishment of a "litmus test," that would characterize such encounters, as seizures in all such circumstances, was contradicted by U.S. Supreme Court precedent. Avery, at 184-187. The Court further concluded that delineation of encounters, and consent searches, as opposed to seizures and coerced consent, depended on the totality and circumstances, present in each individual case. Avery, at 186. The six-member majority further found that the fact that police officers approached Petitioner, and that the approach occurred on a public bus, did not per se transform the encounter into a seizure, or invalidate Petitioner's consent, by itself. Id. The Court also analyzed the police conduct, under the circumstances, as appropriate and lawful, and that no restraint or detention of Petitioner occurred under the circumstances. Avery, at 187.

Any and all other relevant facts, not specifically referred to herein, will be discussed in the Argument portion of this brief, to follow.

POINT ON APPEAL

WHETHER THE FOURTH DISTRICT APPROPRIATELY CONCLUDED THAT THE TRIAL COURT ERRED, IN GRANTING MOTION TO SUPPRESS, BASED ON TRIAL COURT'S UNLAWFUL RULING THAT PETITIONER'S CONSENT WAS PER SE INVALID, BECAUSE OF LOCATION OF SEARCH?

SUMMARY OF THE ARGUMENT

The trial court's granting of the suppression motion, was clearly based on the conclusion that the fact of police officers, approaching ticketed passengers, was coercive, in and of itself. The Fourth District correctly reversed this ruling, as an improper attempt to define a per se rule, to operate in all situations where police officers approach passengers on public transit, to conduct questioning. The Fourth District correctly ruled, that the trial court's order did not address or consider whether there was an encounter or seizure between police and Petitioner, and the question of valid consent, under the "totality of circumstances" approach, required by the United States Supreme Court. This Federal precedent, mandating that the resolution of such Fourth Amendment issues and concerns, depends on the facts and circumstances of each case, applying objective criteria, makes the trial court's "per se" approach and ruling improper.

An encounter between police and citizens is not rendered per se seizure, and does not per se a consent search, merely because the police are conducting questioning, and the questioning occurs on a public bus, parked at a public bus terminal. Such factors may be considered, under the totality of circumstances, in determining the nature of the encounter, and

validity of consent, but are not themselves dispositive. A ticketed passenger, on public transportation, enjoys no greater right, to be free from minimal investigative encounters, than he would in a public concourse or terminal, as a matter of law. While stopped at a bus station, there is unrestricted access to a bus, by all citizens, and a passenger's movement is not inherently or necessarily restricted, on or off, or within the bus. The bus was not stopped or detained by police actions or conduct, and no passenger is singled out, as a matter of law. Inherent factors, such as the future departure of the bus, or the physical confines or environment on board public transit, are not the result of police conduct, and are known beforehand by all citizens. There is no Constitutional difference, in the "public place" nature of a bus, as a matter of law, from that of a public concourse, terminal or station. Any factually distinguishing circumstances are adequately addressed by governing U.S. Supreme Court standards and criterion, which allow for adequate balancing of the compelling state interest in enforcement of drug laws, and a citizen's privacy interests, on a case-by-case basis.

The encounter between Petitioner and police, was clearly not a seizure, and thus did not invoke Fourth Amendment protections. There was no evidence of any indicia of control, or of circumstances so intimidating, such that a reasonable person,

innocent of any crime, would have felt not free to leave, or decline to respond to the police. The police questioned Petitioner, without forceful or threatening tone or matter; did not retain Petitioner's ticket; did not physically block or touch Petitioner; and were in plainclothes, without displaying weapons. Thus, the consent search was conducted, subsequent to a valid "encounter," and was not tainted by any police misconduct. Assuming arquendo there was misconduct, the advisement to Petitioner, of his right to refuse consent, attenuated any taint from the misconduct.

Under the totality of circumstances, Petitioner gave free and voluntary consent to the search of his luggage. After being advised of his right to refuse, Petitioner retrieved the bag, placed it on his lap, and opened the bag for police. Furthermore, Petitioner said and did nothing, to limit the scope of the officers' search, and the totality of circumstances, demonstrated that his consent was unequivocal, and not limited to the outer bag.

The encounter herein, as a permissible method of the exercise law enforcement investigative techniques and tools, did not violate Petitioner's state Constitutional rights to privacy. Such a right does not include the right to smuggle or transport drugs, immune from police investigations designed to limit and/or punish such activity.

ARGUMENT

FOURTH DISTRICT APPROPRIATELY CONCLUDED THAT TRIAL COURT ERRED, IN GRANTING MOTION TO SUPPRESS, BASED ON TRIAL COURT'S UNLAWFUL RULING THAT PETITIONER'S CONSENT WAS PER SE INVALID, BECAUSE OF LOCATION OF SEARCH.

In granting Petitioner's motion to suppress the cocaine, taken from his luggage pursuant to a valid "encounter" and consent search, the trial judge clearly relied upon his subjective view, that an encounter between police and seated passengers, on a public bus, was per se coercive. (R, 41-42). In his brief, Petitioner has essentially maintained that any bus passenger, who is approached by police, while on board public transit, will always be coerced, by the inherent and attendant circumstances, and that every such "encounter" must be classified as per se "seizure," invoking Fourth Amendment protections. It is clear that the Fourth District, in its en banc majority opinion, correctly applied controlling United States Supreme Court precedent, in reversing the trial court's per se coercive approach to the evaluation and determination of the Fourth Amendment implications involved, in this case.

In its majority opinion, evaluating the circumstances, the Fourth District cited and relied on compelling U.S. Supreme Court case law, instructing that a determination of whether a

valid encounter and subsequent consent search is involved, depends on analyzing the totality of circumstances. State v. Avery, 531 So.2d 182, 183-185 (Fla. 4th DCA 1988)(en banc). Writing for a 6-2 majority, Judge Stone rejected the formulation by the Circuit Court, of a "litmus test" to cover every police/citizen encounter on public bus transit, and analyzed the factors and circumstances involved, to conclude that there was an "encounter" between the police and Petitioner. Avery, 531 So.2d, supra, at 185-188. In focusing upon the specific circumstances, the six-member majority concluded that the police officers did not engage in any police misconduct, or any inappropriate detention of Petitioner, that transformed the encounter, to a "seizure" that would invoke Fourth Amendment protections. Avery, 531 So.2d, at 187, 188. The majority left no doubt, that it would answer the certified question -- whether a consent search is rendered necessarily coercive, by the fact that police board public transportation, and randomly seek consent from passengers -- in the negative. Avery, 531 So.2d, at 185-188.

It is apparent, that the Fourth District's majority opinion remains the valid approach, under governing Federal and State case law. The approach by the trial court, and Petitioner, establishes a litmus test for encounters aboard

public transit, by police, by virtue of such facts, alone. Petitioner essentially suggests that citizens engaged in drug smuggling can never validly consent to speak with or permit searches by police, as a matter of law, and are immune from legitimate police investigatory techniques, in all situations where a citizen is a ticketed passenger, on board public transit. This viewpoint has been consistently rejected, by the court's adoption and reaffirmation, in case after case, of a "totality of circumstances," rather than "per se" evaluation of any particular set of facts.

In United States v. Mendenhall, **446** U.S. **544 (1980),** Justice Stewart initially observed that, since the issuance of Terry v. Ohio, **392** U.S. **1 (1968),** the Supreme Court had recognized the legitimate nature of police-citizen encounters, in public areas. Mendenhall, **446** U.S., supra, at **553**, quoting Terry v. Ohio, **392** U.S. **1**, **31-34** (Harlan, J, concurring opinion). Justice Stewart observed that the purpose of the Fourth Amendment was not to eliminate or restrict all police-citizen contact, but to provide for the formulation of standards that would prevent arbitrary interference, with a citizen's privacy interests. Mendenhall, **446** U.S., at **553**, **554.** Stewart concluded that all street encounters between police and citizens could not be characterized as "seizures," because such an

approach would be antagonistic to the purpose of the Fourth Amendment, and place unrealistic restrictions on law enforcement and police questioning of citizens, as a method to properly enforce criminal laws. Mendenhall, at 554. Thus, Justice Stewart formulated and reiterated the criteria for evaluating and distinguishing between encounters and seizures, and in the voluntariness of a subsequent consent search, respectively, to be applied to the facts of each particular case, based on review of all circumstances. Mendenhall, at 554-555; Mendenhall, at 557, 560 (Powell, J; Burger, C.J; and Blackman, J, concurring in part and concurring in the judgment);[1] Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Concurring in the judgment, Justice Powell (writing for himself, Chief Justice Burger, and

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[1] While Justices Powell, Burger and Blackmun, did not specifically join the formulation of the standard ("whether a reasonable person, under all circumstances would believe he was not free to leave," Mendenhall, at 554), by Justices Stewart and Rehnquist in this case, all five justices agreed that a determination of voluntariness of consent, was based on a "totality of circumstances" approach in each case. Mendenhall, at 546, 557, 560. While the three concurring justices decided the case by assuming a "seizure" had occurred, and finding the seizure valid, Mendenhall, at 560-563, the concurring justices observed that they did not "necessarily disagree" with Justice Stewart's approach. Mendenhall, at 560, n. 1 (Powell, J; Burger, C J; Blackmun, J, concurring in part and concurring in the judgment). As will be discussed, in subsequent cases, Justice Stewart's approach, and application of standards and criteria for finding a "valid" encounter, has been accepted and applied by a majority of the Court, infra.

Justice Blackmun, and joining, to form a five-member plurality opinion, with Stewart and Rehnquist), specifically emphasized the "compelling" public interest, in detecting and policing drug smuggling and trafficking, noting that the ability to easily conceal drugs, in public transit, created law enforcement obstacles perhaps "unmatched in any other areas of law enforcement." Mendenhall, at 562 (Powell, J; concurring in part, concurring in judgment). The inception of "encounter versus seizure" analysis, in Mendenhall, unequivocally adopted a case-by-case approach, based on objective factors and criteria, to be examined and applied to each set of facts. The Court further recognized the legitimate nature of police investigations and legitimate tools of such investigations, to further a very highly regarded public interest, in enforcement of drug laws.

In Florida v. Royer, 460 U.S. 491 (1983), the Supreme Court continued to apply these objective criteria, to the facts of the particular case, to delineate an encounter from a seizure. Royer, 460 U.S.. supra, at 501. In continuing to apply the Mendenhall approach and standards, the four member plurality in Royer, expressly rejected the contention, that Fourth Amendment concerns were initiated or violated, merely because police officers approached a citizen, in a public place,

for questioning purposes. Royer, 460 U.S., at 497. The Court's plurality concluded that, without more, self-identification by police, a questioning of citizens in a public place, was not a per se seizure, and that detentions, short of full-scale "stops", were permissible exercises of police investigations, directed to furthering the strong public interest in drug enforcement, as well as enforcement against other serious crime. Royer, at 497-499; Royer, at 508 (Powell, J, concurring opinion). Thus, the conclusions in Royer, continued to reject the application of a litmus test, to cover all categories of police-citizen contact:

> We do not suggest that there is a litmus paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigatory stop. Even in the discrete category of airport encounters, there will be endless variations in facts and circumstances, so much variation that it is unlikely the courts can reduce to a sentence or paragraph a rule that will provide unarguable answers ...".

Royer, at 506-507; Royer, at 508 (Powell, J. concurring opinion).

In INS v. Delgado, 466 U.S. 210 (1984), a six-member majority continued to apply a case-by-case, fact-oriented

approach in distinguishing between encounters and seizures. Delgado, 466 U.S., supra, at 215. The Court again noted the "diversity" of police-citizen contact, and refused to categorize or define limits, to be applied in every single set of facts. Id. In analyzing factual circumstances involving a full-scale immigration survey, by armed Federal agents with walkie-talkies, in a factory environment, the Court's majority expressly concluded that the fact of police questioning of a citizen, in a public area, (even one with limited access to the public), did not in and of itself translate automatically to a "seizure." Delgado, at 216; 217, n. 5. Delgado made it further clear that the fact of such questioning, in such a setting, does not per se impact or invalidate the consensual or voluntary nature of a citizen's response. Delgado, at 216. The Delgado court, in defining the general limits of an encounter, distinguished factual circumstances, interpreted as encounters versus seizures, by particular intimidation factors, present in a given case, used as part of additional steps by police, to ***get*** responses from citizens who refused to answer or cooperate. Delgado, at 216-217. Thus, as the Fourth District correctly noted, in its reliance on the Mendenhall/Royer/Delgado line of cases, courts can only classify an encounter as a "seizure," when there are objective factors of intimidation present in a

particular case, beyond the fact of police questioning, in a public place. Royer; Mendenhall; Delgado; Avery, 531 So.2d, at **184-187.**

Petitioner's position was most recently, and squarely rejected in Michigan v. Chesternut, **486 U.S.___, 108** S.Ct **1975,** 100 L.Ed.2d **565 (1988).** In this decision, the Court unanimously reversed the Federal appeals court's conclusion, that a police car driving beside a citizen, running along a public street, always presents a per se "seizure" classification. Chesternut, 100 L.Ed.2d, supra, at **569, 570.** The Court rejected defense and State arguments, that such circumstances were a per se seizure or encounter. Chesternut, at **571.** In so doing, the Court concluded that either approach, "fails to heed this Court's clear direction," that an assessment of whether an encounter or seizure is involved, depends on a case-by-case analysis, of the totality of circumstances present. Id. This direct rejection of the same approach urged by Petitioner, confirms the validity of the Avery majority's conclusions.

Acceptance of Petitioner's argument would require this Court to expressly contradict the clear and consistent adherence, by the U.S. Supreme Court, to a case-by-case ''totality'' approach, and rejection of the development of per se rules. The standards developed, from Terry to Chesternut,

supra, provide for a balancing of the significant public interest in drug and law enforcement, with the citenzenry's interests, in each case. Chesternut; Delgado; Mendenhall; Royer; Schneckloth, 412 U.S., supra, at 218, 225-227, 233. Respondent does not suggest that every bus search, conducted by police, will qualify under the facts, as a legitimate "encounter." By the same token, not every bus search is a "seizure," or produces an invalid consent, absent some form of actual factors of intimidation or coercion, beyond the mere fact of police interrogation in public places. Id.; Nazario v. State, 13 F.L.W. 2388, 2386 (Fla. 4th DCA, October 26, 1988); Avery, 531 So.2d, at 184; Alvarez v. State, 515 So.2d 286, 288 (Fla. 4th DCA 1987); Jacobsen v. State, 476 So.2d 1282, 1285 (Fla. 1985); Denehy v. State, 400 So.2d 1216 (Fla. 1980). The Mendenhall and Schneckloth standards "filters out" those detentions that go beyond the permissible scope of an encounter or consent search, without undermining the underlying validity and rationale of such investigative techniques, during police-citizen contacts. Mendenhall, at 553-554; Schneckloth, at 225, 229, 232.

The judicial imprimatur, on this case-by-case approach, instead of inflexible per se rules that cannot practically accommodate all situations of public detentions,

required the result reached by the Fourth District's majority. Avery, at 185-188. Judge Mounts clearly imposed such an erroneous subjective rule, in classifying police boarding and questioning of a "seated passenger'' on a bus, as "an intimidating and coercive situation in and of itself." (R, 42). In light of this Court's directive, as well as state Constitutional requirements, that the U.S. Supreme Court's construction of the Fourth Amendment must be followed, Art. I, Sec. 12, Fla. Constitution (1980); State v. Hume, 512 So.2d 185, 188 (Fla. 1987). The Fourth District's opinion must be affirmed.

Petitioner has argued that there should be a Constitutional distinction between police-citizen encounters in a public terminal or concourse, and encounters that occur on board public transit. He asserts that the basis for this distinction is the inherent aspects of law enforcement authority, and of the location, on board public transportation. It is widely recognized, as already argued, that the fact that police officers question citizens in public places, does not automatically implicate the Fourth Amendment. Mendenhall, at 553, 555; Terry, at 31-34 (Harlan, J, concurring opinion); Royer, at 497-500; Delgado, at 216, 220-221; Jacobsen, 476 So.2d, at 1285. The fact that most people are likely to respond

to such questioning by police officers, does not by itself invalidate or eliminate the consensual nature of a response. Delgado, at 216. Petitioner's argument actually implies that police officers, by virtue of their status, have inferior right to address questions to citizens, which is not logically or legally acceptable. Mendenhall, at 553; Jacobsen, at 1285. Similarly, absent some specific indicia of forcefulness and intimidation, a detention cannot be considered per se coercive, because of the alleged inherent nature of the physical surroundings. Delgado; Avery, 531 So.2d, at 186. This is not intended to suggest, that such a factor may be considered; however, such a factor cannot be deemed dispositive.

In Delgado, supra, the Supreme Court was confronted with the physical surroundings of a factory, with drug agents stationed at the exits, as well as questioning employees within with their consent. Delgado, 466 U.S., at 212, 213. However, the Court did not accept a Constitutional distinction, between the factory, where the public usually does not have unlimited access, and a public place with full access. Delgado, at 217, n. 5. The Court observed that the agents were lawfully present, pursuant to either consent or a warrant,[2] and that there were

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[2] Justice Powell, in his concurring opinion, did not attribute any significance to the fact that a warrant was involved,

other people present during the questioning (namely, the remainder of the employees). Delgado, at 217, n. 5. Due to these factors, the Court rejected any distinction between police-citizen encounters, "in public places," and those in less-public areas. Id. The focus of the Delgado majority, consistent with the underlying purposes of the Fourth Amendment, was upon the lawfulness of the officers' presence and conduct, and the absence of any "singling out," of any individual employee.

In examining the nature of a public bus, while stopped at a public bus terminal, the same analysis should apply. As far as "public access" is concerned, there are far less restrictions to access, to a public bus stopped at a station, than the Delgado employee factory scenario. Police officers, ticketed passengers and other members of the public, can board a bus, while stopped in a station. Members of the public, with tickets or not, can get on or off a bus, in such circumstances, prior to its departure. Furthermore, it is significant that the bus was not stopped herein, pursuant to any police actions, such

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maintainting that the requirement of a warrant was not at issue. Delgado, at 222, n. 1 (Powell, J, concurring). Powell observed, as did the majority, that the agents were lawfully within the premises, either by warrant or consent of the factory owners. Delgado, at 212, 213, 217, n. 5; Delgado, at 222, n. 1 (Powell, J, concurring).

as sirens, lights, or other conduct. United States v. Adegbite, 846 F.2d 834, 837-838 (2nd Cir. 1988); United States v. Rembert, 694 F.Supp. 163, 173 (WD N Car 1988). These circumstances are thus unlike those in Delaware v. Prouse, 440 U.S. 648 (1979), where a vehicle was stopped by affirmative police conduct. A bus passenger knows he is also subject to intrusions, by other citizens and by a bus driver who takes money or tickets, thus further augmenting the degree of access by others. While Petitioner had a seat on the bus, by virtue of his ticket, he could not restrict access, by lock or key or other reservation, to a particular seat. United States v. Whitehead, 849 F.2d 849, 855 (4th Cir. 1988)(no right/ability to restrict access, to a sleeping compartment on a train). These factors contribute, to further defining the character of a bus passenger, as similarly public in nature, to a terminal or concourse "encounter" situation.

Petitioner has placed considerable reliance, on the fact that he had a ticket, as distinguishing his situation, for Constitutional purposes, from that of an individual who is approached on the street. While the retention or giving back of a ticket, by police to a citizen, has been used as a factor, in distinguishing encounters from seizures, the mere fact of possession of a ticket, cannot be considered significant.

Petitioner does not require any superior rights "to be alone," because of the purchase of a ticket. Under the illogical extension of Petitioner's argument, buying a ticket to a public event, such as a county fair, baseball game, or a sporting event at a public stadium, would immunize an individual from legitimate police investigation.

It cannot be said, as a matter of law, that an individual's freedom of movement is restricted, by police officers boarding a bus, stopped in a public terminal. Delgado; Mendenhall. A reasonable person, innocent of any wrongdoing, Nazario, 13 F.L.W., supra, at 2386, n. 2; Login v. State, 394 So.2d 183 (Fla. 3rd DCA 1981), would clearly feel free to get on and off the bus, for personal needs, or move within the bus. Delgado; Rembert, supra. Moreover, the inherent narrow confines of a bus aisle, or seat, are known to the reasonable person, from when he initially boards a bus, and is not the creation or result of any police conduct. Rembert, 694 F. Supp., supra, at 174; Avery, 531 So.2d, at 187. It is clear that all persons on the bus were randomly questioned herein, so that an innocent person would not feel "singled out." Delgado; Rembert. The officers' approach on the bus was discrete, and not accompanied by an fanfare, forcefulness, threats, or display of weapons. Mendenhall. Any inherent psychological restraint,

such as the potential departure of the bus, is not, as a matter of law, caused by police actions and investigations. Delgado; Rembert. Just as the employees in Delgado remained free to conduct their business within the factory, and were "compelled" to remain, because of the fulfillment of the obligations of the job, a ticketed passenger on the bus is not compelled per se to remain on board public transportation, by virtue of police conduct. There is no evidence to suggest that a reasonable person would believe that, by virtue of police random investigations on public transit, he will become stranded, without recourse, in a strange place. Rembert. Finally, the regularity of these encounters, in South Florida, and the degree of public regulation of public transportation, does not present any unconstitutional surprise, or lack of warning to a bus passenger, particularly when all other passengers are subjected to the same "encounter," for the limited purpose of questioning and asking for consent to search. Delgado, supra; Delgado, at 222 (Powell, J, concurring); Whitehead, supra; United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Chesternut, supra. These circumstances are not so intimidating, as a matter of law, that a reasonable innocent person would feel that his freedom to move, or to refuse to cooperate with police, is restricted. Delgado; Delgado, at 221 (Powell, J, concurring opinion);

Chesternut; Mendenhall; Jacobsen, supra, at 1285; Rembert, at 175.

Petitioner has acknowledged that a citizen's's right to travel can be limited by legitimate and minimal intrusions. The encounter between police and citizens, on board public transit, parked at a public terminal cannot be said to be a seizure, under all circumstances. Petitioner's fear of the potential for abuse and/or unlimited discretion to police officers in the field, is fully accommodated, by application of the Mendenhall and Schneckloth factors and standards, as safeguards, to the facts of a particular case. Mendenhall; Schneckloth.

Petitioner has argued that, assuming arguendo, the police conduct herein was improper, any advisements to Petitioner of a right to refuse consent, does not attenuate the taint of the prior conduct. It has been consistently held that such an advisement removes the taint of a prior unlawful seizure, as at matter of law. State v. Martinez, 459 So.2d 1062 (Fla. 3rd DCA 1984); State v. Milwood, 430 So.2d 563 (Fla. 3rd DCA 1983); State v. Champion, 383 So.2d 984 (Fla. 4th DCA 1980); State v. Husted, 370 So.2d 853 (Fla. 2nd DCA 1979). The advisement of a right to refuse, (R, 9), was subsequent to the officer's original approach and questioning of Petitioner.

Furthermore, the absence of a written form advisement of the right to refuse, cannot be read as invalidating the advisement, which clearly informed Petitioner, that he did not have to consent, to a search of his bags. The absence of any advisement does not itself invalidate an otherwise valid consent. Florida v. Rodriguez, 469 U.S. 1, 6-7 (1984); Schneckloth, supra, so the absence of a written advisement would not have any impact on the validity of the consent search.

Petitioner has furthermore maintained that, assuming the validity of detention, Petitioner's consent was not valid. This issue should more appropriately be remanded for consideration by the Circuit Court, since the Court did not apply the appropriate standard order Schneckloth, but concluded the consent to be per se invalidly tainted, as a matter of law, by the inherent circumstances of the encounter. (R, 41-42); Avery, 531 So.2d, at 184-187; State v. Martin, 13 F.L.W. 2344, 2345 (Fla. 4th DCA, October 19, 1988); State v. Fuksman, 468 So.2d 1067, 1071 (Fla. 3rd DCA 1985). In the event this Court proceeds to determine this issue on the merits, it is apparent that Petitioner's consent was not coerced. None of "indicia of control" suggested by the factors in the Mendenhall line of cases was present herein. The Record establishes that the officers were in plainclothes, (R, 6, 18), did not display any

weapons, (R, 6); returned Petitioner's ticket to him, after examining it, (R, 8); did not block Petitioner's path, or physically touch Petitioner, (R, 3-19); and clearly advised him that he had a right to refuse consent, (R, 10), e.g., Mendenhall; Jacobsen; Cross, supra; Pastor v. State, 498 So.2d 962 (Fla. 4th DCA 1986); State v. Jones, 454 So.2d 774 (Fla. 3rd DCA 1986); United States v. Armstrong, 772 F.2d 681, 685 (11th Cir. 1986); United States v. Waksal, 709 F.2d 653, 659 (11th Cir. 1983). Thus, the consent was clearly the result of a legitimate "encounter,'' under the totality of circumstances. Mendenhall.

Under examination of all circumstances, the State demonstrated by a preponderance of the evidence, Hurtado v.State, 13 F.L.W. 2454, 2455 (Fla. 1st DCA, November 7, 1988); State v. Elsleger, 503 So.2d 1357 (Fla. 4th DCA 1983); Denehy v. State, 400 So.2d 1216 (Fla. 1980),[3] that Petitioner's consent was voluntary and unequivocal. Schneckloth. The evidence demonstrates that after being advised of his right to refuse consent, Petitioner himself agreed, and unzipped the luggage he had identified as his own, brought out from under his seat, and

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[3] Assuming arguendo the prior contact between Petitioner and police is construed as improper, the State's evidence of consent was also sufficient, under a "clear and compelling" quantum of proof. Id.

placed on his lap. (R, 8, 9; 10). The evidence was undisputed, that Petitioner never made any statements, or performed acts, that were at all inconsistent, with giving the police permission to search his bag. This consent was unquestionably voluntary. Schneckloth; Denehy, supra; Cross, 13 F.L.W., supra, at 77; Nazario, supra; State v. Fuksman, 468 So.2d, supra, at 1069; State v. Milwood, 430 So.2d, supra, at 565; Champion, supra. There was simply no evidence, that Petitioner's consent was coerced, or was mere acquiescence to authority.

Petitioner has argued that even a valid consent by Petitioner, to search his luggage, did not extend to the opening of the "foam ball" within the luggage, by police, which produced the cocaine. (R, 9-10). Petitioner's consent was to a "search" of the luggage, not just a "look," followed by the opening of the bag by Petitioner. (R, 9, 10). Petitioner did or said nothing, at the time the officer picked up the foam rubber "softball" from the bag, squeezed it, and/or pulled it open. (R, 9-10). Officer Turner was not restricted by Petitioner's conduct or statements, and was not compelled to refrain from using his sense of touch and sound, to feeling and then opening the "softball." Henderson v. State, 14 F.L.W. 19, 19-20 (Fla. 3rd DCA, December 30, 1988). In light of the unequivocal and

unlimited nature of this conduct and actions by Petitioner, he cannot reasonably maintain, that his consent was limited to the outer bag. Schneckloth; Hurtado, 13 F.L.W., at 2455; Fuksman, 468 So.2d at 1070; 1070-1071, n. 5. Palmer v. State, 467 So.2d 1063, 1064 (Fla. 3rd DCA 1985); State v. Price, 363 So.2d 1102 (Fla. 2nd DCA 1978).

Respondent is not unmindful of this Court's recent decision in State v. Wells, 13 F.L.W. 686 (Fla., December 2, 1988), in which this Court rejected State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982), to the extent Wargin authorized consent to search an inner bag, as a per se result of consent to search an outer bag. Wells, supra, at 686-687. The Wells decision merely rejected a per se approach, to evaluating the scope of consent to search an inner bag, and in fact relied on Fuksman, supra, and a "totality of circumstances" evaluation. Wells, at 687. This Court refused to accept the Wargin analogy of probable cause searches of car trunks, as contained in United States v. Ross, 456 U.S. 798 (1982), but clearly did not abandon the Schneckloth standards. Id. The extent of Petitioner's consent to a search of the entire bag, and all of its contents, as measured by the surrounding circumstances, and words and conduct of Petitioner and the police, was unequivocal and complete. Wells; Fuksman, at 1070. Unlike Wells, there

appears no testimony herein, where Officer Turner agreed that his consent was limited to the outer bag. Compare, Wells, at 687; 688, n. 3.

Petitioner has finally asserted that the police conduct in this case, violated his state Constitutional right to privacy. As earlier discussed, this Court must follow U.S. Supreme Court dictates, under Article I, Section 12, Fla. Const., in analyzing Fourth Amendment-related issues. Avery, 531 So.2d, at 184; Hume, supra. It is clear that the police conduct was perfectly appropriate, and constituted an "encounter," thus not even triggering Petitioner's Fourth Amendment rights to be free from unreasonable searches and seizures. Chesternut; Rodriquez; Delgado; Royer; Mendenhall. In view of the legitimacy of police questioning of citizens in public places, the compelling State interest in enforcement of drug laws to eradicate trafficking and smuggling, and the totality of circumstances analysis required in distinguishing "encounter" from "seizures," Id., Petitioner's rights to privacy do not encompass a right to traffick in drugs with impunity on public buses, as a matter of law.

The trial court's subjective disapproval of the police procedures used herein, and construction of a "bright line" standard, was contrary to law. Avery, 531 So.2d, at 186, n. 2;

187. The Fourth District's ruling must be affirmed, and the Circuit Court should be directed to apply the appropriate standards and criteria.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Respondent respectfully requests that this Honorable Court AFFIRM the opinion of the Fourth District, answer the certified question in the negative, quash the Circuit Court's ruling, and remand for proceedings consistent with such opinions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been mailed to JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 30th day of January, 1989.

Of Counsel