

5-8

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 17 1988
CLERK, SUPREME COURT
By _____
Deputy Clerk

MIGUEL MENDEZ,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent .)
)
 _____)

CASE NO. 73,447

PETITIONER'S INITIAL BRIEF ON THE MERITS

~~RICHARD L. JORANDBY~~
Public Defender

~~MARG~~
MARGARET GOOD
Florida Bar No. 192356
Assistant Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner.

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
Authorities Cited	ii
Statement of the Case and Facts	1-6
Summary of Argument	7
Argument	8-18
 THE DISTRICT COURT ERRED IN FAILING TO REVIEW THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE OFFICER'S CORNERING PETITIONER, A TICKETED PASSENGER, IN THE NARROW CONFINES OF THE BACK OF A BUS THUS TAINTED ANY ALLEGED CONSENT THE OFFICER'S EXTRACTED ACROSS A PLAIN LANGUAGE BARRIER.	
Conclusion	19
Certificate of Service	19

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Aptheker v. Secretary of State</u> , 378 U.S. 500, 84 S.Ct. 659, 12 L.Ed.2d 992 (1964)	16
<u>Delaware v. Prouse</u> , 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)	17
<u>Florida v. Royer</u> , 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)	9,10
<u>Horvitz v. State</u> , 433 So.2d 545 (Fla. 4th DCA 1983)	12
<u>I.N.S. v. Delgado</u> , 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984)	9,10,11,13
<u>Jordan v. State</u> , 384 So.2d 277 (Fla. 4th DCA 1980)	15
<u>Lehman v. City of Shaker Heights</u> , 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974)	10
<u>Mendez v. State</u> , 534 So.2d 774 (Fla. 4th DCA 1988)	6
<u>Michigan v. Chesternut</u> , 486 U.S. ____ 100 L.Ed.2d 565, 108 S.Ct. ____ (1988)	10,11,12
<u>Restrepo v. State</u> , 438 So.2d 76 (Fla. 3d DCA 1983)	15
<u>Rosell v. State</u> , 433 So.2d 1260 433 So.2d 1260 (Fla. 1st DCA 1983)	15
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218 (1973)	12
<u>Shapiro v. Thompson</u> , 394 U.S. 1322, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)	16
<u>State v. Avery</u> , 531 So.2d 182 (Fla. 4th DCA 1988)	6,9,15
<u>State v. Jones</u> , 483 So.2d 433 (Fla. 1986)	15,16,17

<u>State v. Kerwick</u> , 512 So.2d 347 (Fla. 4th DCA 1987)	12
<u>State v. Rardin</u> , 392 So.2d 350 (Fla. 4th DCA 1981)	12
<u>State v. Santamaria</u> , 464 So.2d 197 (Fla. 3d DCA 1985)	15
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868 (1968)	8,9
<u>United States v. Martinez-Fuerte</u> , 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)	8,15,17
<u>United States v. Mendenhall</u> , 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)	8,9,10,12

OTHER AUTHORITIES

Constitutional Provisions

4th Amendment, U S Const	8,18
--------------------------	------

STATEMENT OF THE CASE AND FACTS

On July 24, 1985, around 4:30 p.m. Detectives Gaffney and Barnes of the Broward Sheriff's Office were routinely boarding northbound buses at the Trailways bus station (R-68-69). Petitioner, the only person on the bus, was seated at the back in the last seat (R-69,80). Gaffney approached petitioner although he had no suspicion petitioner was engaged in any illegal activity (R-87). Gaffney stood in the aisle to the side of petitioner and Barnes stood behind Gaffney (R-80).

Gaffney and Barnes wore police jackets, spoke only English to petitioner and identified themselves as police officers (R-80). Gaffney asked if petitioner had a moment to speak and petitioner said, "Yes." (R-70,78). Gaffney then asked where petitioner was going and petitioner handed Gaffney his ticket, which read either Ft. Meyers or Tampa (R-71). Gaffney returned the ticket and then asked petitioner if he had any baggage. Petitioner pointed to the overhead rack (R-71). Gaffney then said, "Excuse me, sir, I would like to have consent to search and you have a right to refuse the consent to search." Gaffney testified that petitioner replied, "Go ahead and look." (R-73).

Gaffney took down the bag, a clear plastic sack with blue checks, and looked in it. He found nine or ten packets of cocaine and a .38 revolver among petitioner's personal belongings (R-74). Petitioner made no response when told of his arrest. Before petitioner's arrest Gaffney heard petitioner speak no more

than six words in English with a Spanish accent (R-79,80). Afterwards, petitioner indicated he did not understand English (R-76).

Petitioner was transported to the Sheriff's Office at the airport where Officer LaSanta read petitioner his rights in Spanish (R-76,91). At no time did Officer LaSanta have any conversation with petitioner or speak to petitioner in English (R-91). LaSanta translated into Spanish questions posed by Gaffney to petitioner (R-94) regarding petitioner's name, place of birth, residence and other simple questions (R-96-97). LaSanta testified at the suppression hearing that he drew a conclusion that petitioner spoke English (R-94); though LaSanta "had a feeling" petitioner could understand and speak English, he also said petitioner's knowledge of English was minimal, that petitioner was unable to understand everything Gaffney asked (R-97-98).

At the suppression hearing, petitioner called Br. Michael Powers as an expert (R-13-20) in linguistics, with the ability to determine a person's knowledge of a language based on testing (R-29). Dr. Powers tested petitioner on December 3, 1985, when petitioner came to Dr. Powers' office with his wife. He tested petitioner's active and passive recognition of Spanish and his passive recognition of English. He did *not ask* petitioner to speak English (R-34). His test was designed to determine petitioner's recognition of specific words, "right to refuse consent" and also "request consent to search." (R-32).

Petitioner understood the concept of consent in his own language (R-36). Petitioner also understood the word "consent" in English but did not understand the words "search" or "right." (R-41-42). In English petitioner confused the word "right" with its homonym "write." (R-43).

Dr. Powers determined petitioner was of a low educational level and not a learned speaker in his native language of Spanish. In addition to the phrases for which Dr. Powers tested, petitioner also did not understand the words "search," "trial," "frisk," "rights," "remain," "show," "prerogatives," "business" or "learn." (R-45). Dr. Powers concluded that petitioner was not linguistically competent to understand the statement Detective Gaffney gave him on that day. Petitioner's understanding of Gaffney's words would have been, "Would you give me consent to _____ your bag. You have the _____ to refuse consent to _____ your bag." (R-47).

Petitioner testified through an interpreter that the detective stood in front of him in the aisle on the bus that day (R-104). He did not think he could leave. He said he knew the English word for ticket and handed the ticket to the officers when they asked (R-105). Petitioner also said he did not know that the officers had asked permission to search or that he could refuse. He said when he pointed to the bag the officers took it.

Petitioner had never studied English. He had gone to school through the fourth grade in Puerto Rico, where he was born. He understood some English words but not alot. He said he spoke Spanish at home and at work and did not speak or understand much English even though he had lived here for 25 years.

He bought his bus ticket in Miami by himself and was going to Ft. Myers (R-114). He did not get off in Ft. Lauderdale but stayed on the bus. At all his prior hearings he had an interpreter or his attorney, Maria Rivas Hamar, had explained to him in Spanish what happened after the hearing. He had never spoken to his co-counsel Richard Hamar (R-109-110).

At the close of the suppression hearing the state was allowed to introduce into evidence petitioner's statements to Judge Franza at a bond hearing on August 5, 1985 (R-101). At that hearing, Judge Franza had addressed petitioner and asked him how many years had he been here. Petitioner responded, "Twenty-five. I don't know how to speak." (Supp. Record of August 5, 1985, SR - 3). Petitioner's specific objection was sustained to giving any evidentiary support to statement by co-counsel Richard Hamar at that August 5, 1985, hearing that petitioner could get by in English (R-99). Co-counsel, Maria Riva Hamar, explained that Statement was made only because her partner did not want to wait for an interpreter to complete the bond hearing (R-99).

On appeal, two other hearings were also made part of the appellate record although not before Judge Carney at the time of the motion to suppress. At an August 15, 1985, bond hearing

before Judge Fleet petitioner had testified through an interpreter (R-4). At a bond hearing of July 29, 1985, with Judge Franza petitioner said through an interpreter that he speaks some English but that legal terms escape him (Supp. Rec. - 18).

In its order denying petitioner's motion to suppress the physical evidence the court determined that whether petitioner understood English was not controlling in any event:

On July 24, 1985, the Defendant was a passenger on a Trailways bus traveling to the Tampa-Fort Meyer area. The Defendant had purchased a ticket and boarded the bus in Miami and was approached by members of the Broward Sheriff's Office in Fort Lauderdale at a scheduled stopover. The Defendant is Puerto Rican but has lived in the United States for a considerable period of time. Deputy Gaffney of the Broward County Sheriff's Department approached the Defendant and asked to look at the Defendant's ticket. The Defendant produced the ticket which Gaffney inspected. Deputy Gaffney then asked if the Defendant was carrying luggage and the Defendant pointed to an overhead rack which contained luggage. According to Deputy Gaffney, the Defendant was asked if he would consent to a search of the bag. The Defendant replied, "Go ahead and look." The luggage was a non-locking, open bag in which Deputy Gaffney found a loaded handgun and various packets of suspected cocaine which the Defendant now seeks to suppress.

Dr. Powers, a linguist from the University of Miami, testified for the Defendant that, in his opinion, the Defendant had a limited grasp of the English language. This was based upon a test Dr. Powers gave the Defendant for this purpose.

This Court is persuaded otherwise. At a bond hearing shortly after the Defendant's arrest, the Defendant was responsive to questions by the Court in English. Further, Deputy DeSanto (sic) of the Broward Sheriff's Department, who spoke with the Defendant in Spanish shortly after his arrest, stated that the Defendant appeared to understand the English that was spoken around him while at the police station. This Court further observes that the

Defendant was responsive to each of the questions asked by the officers on the bus and when questioned by the officers about whether they could examine his luggage, answered - "Go ahead and look."

This Court further finds that the contact by the Sheriff's Department was a citizen contact and that a reasonably prudent person under the same circumstances would not consider himself to be detained or in custody. In viewing the totality of the circumstances, this Court does not find controlling the issue of whether or not the Defendant understood unequivocally that he could refuse consent. State v. Rardin, 392 So.2d 350 (Fla. 4th DCA 1981).

Based upon totality of the circumstances, this Court finds that the State has established, by clear and convincing evidence, that consent was given voluntarily, and therefore, it is

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Physical Evidence be, and the same is hereby denied.

(R-162-163).

Petitioner then pled to no contest to trafficking in more than 28 but less than 200 grams of cocaine and carrying a concealed firearm, specifically reserving the right to appeal the denial of his motion to suppress. He was sentenced to three-and-a-half years imprisonment (R-162). On appeal, the District Court of Appeal, Fourth District summarily affirmed in a decision filed November 16, 1988, with a citation to the authority of State v. Avery, 531 So.2d 182 (Fla. 4th DCA 1988). Mendez v. State, 534 So.2d 774 (Fla. 4th DCA 1988). Petitioner timely sought review in this Court because the en banc decision in Avery is pending discretionary review in this Court in Case No. 73,289 on a certified question. (Appendix -2-19). In an order dated March 20, 1989, this Court accepted jurisdiction of petitioner's case and established a briefing schedule. This brief follows.

SUMMARY OF ARGUMENT

The district court erred in applying a per se rule of law that officers' random questioning of seated passengers on a bus is not a detention or seizure.

Given the totality of the circumstances regarding the officers' conduct and the setting, THIS petitioner was detained. He was the only person on the bus and seated in the last seat of the bus. Detective Gaffney's standing in the aisle next to petitioner with Detective Barnes behind him forced petitioner to remain and participate; by blocking the aisle they restrained petitioner's freedom of movement. This was not a voluntary encounter but a forced one.

Due to petitioner's minimal understanding of English, the confining circumstances, petitioner's solitary position in the back of the bus, and the officers' introduction as authorities requesting to search, the state did not carry its burden to show that the search occurred with petitioner's voluntary consent, rather than acquiescence to apparent authority.

ARGUMENT

THE DISTRICT COURT ERRED IN FAILING TO REVIEW THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE OFFICER'S CORNERING PETITIONER, A TICKETED PASSENGER, IN THE NARROW CONFINES OF THE BACK OF A BUS THUS TAINTED ANY ALLEGED CONSENT THE OFFICER'S EXTRACTED ACROSS A PLAIN LANGUAGE BARRIER.

Without any founded suspicion of criminal activity, the police officers boarded a northbound bus at the Ft. Lauderdale bus station, approached petitioner sitting in the last seat of the bus and stood over him in the aisle so as to block his exit. Under these circumstances, their request to petitioner for consent to search did not produce a voluntary consent but only acquiescence to apparent authority since petitioner, with minimal ability to understand English, was not effectively advised of his right to refuse consent.

The Fourth Amendment is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074,3081, 49 L.Ed.2d 1116 (1976). A consensual encounter between police and a citizen does not implicate the Fourth Amendment. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Voluntary interaction between police and citizens is not inhibited because "there is nothing in the Constitution which prohibits a policeman from addressing questions to anyone on the streets." Terry v. Ohio, 392 U.S. 1,34, 88 S.Ct. 1868,1886 (1968). Such a

consensual street encounter between police and citizen is premised on a police officer's enjoying "the liberty (again, possessed by every citizen) to address questions to other persons," id. at 31, 32-33, 88 S.Ct. at 1885-1886. "Ordinarily the person addressed has an equal right to ignore his interrogator and walk away." Id. Accordingly, a person is "seized" only when, by means of physical force or show of authority the officer "has in some way restrained the liberty of a citizen" id. at 19, n.16.

The standard analysis to be employed is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." United States v. Mendenhall, 446 U.S. at 554. See also Florida v. Royer, 460 U.S. 491, 502, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). In contravention of this standard, the Fourth District in petitioner's case affirmed with citation to State v. Avery, which established a per se rule that officers randomly seeking consent from seated passengers aboard buses is not an unconstitutional practice.

What occurred here between petitioner and the Broward Sheriff's detectives was not a police-citizen voluntary encounter. The Supreme Court of the United States has repeatedly emphasized that in determining whether a "reasonable person would have believed that he was free to leave" I.N.S. v. Delgado, 466 U.S. 210, 215 (1984), Florida v. Royer, 460 U.S. at 502, the courts must assess not only the coercive affect of police conduct taken

as a whole, but also the setting within which the conduct occurs. Michigan v. Chesternut, 486 U.S. _____, 100 L.Ed.2d 565,572, 108 S.Ct. _____ (1988).

The circumstances of the setting here are of prime importance. Unlike the situations in Royer or Mendenhall, or Delgado petitioner was not approached in a street, a public area or a work place where people are free to come and go and move about. There was nothing about the police conduct here which respected or allowed for petitioner to be anything other than forced to have contact with the officers due to the narrow confines of the bus, his position in the last seat and the officers blocking his passage way in front of him. This was not a voluntary encounter but one forced upon petitioner. That a commuter seated on a form of public transportation is a captive audience was emphasized by Justice Douglas in his concurring opinion in Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), where he recognized that even precious First Amendment rights would have to give way to the special interest of a bus passenger to be let alone:

The First Amendment, however, draws no distinction between press privately owned, and press owned otherwise. And if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.

In asking us to force the system to accept his message as a vindication of his constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right

of the commuters to be free from forced intrusions on their privacy precludes the city from transporting its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

There Justice Douglas further noted that bus passengers are captive and not free to ignore the activities on a bus by merely exiting like people in other public places.

In the present case, petitioner would not have felt free to leave. The two officers were together in the aisle next to him and in front of him on the bus obviously blocking the exit as he was seated in the last seat of the bus. These circumstances do not clearly indicate that in this setting petitioner would have felt free to walk away. For the petitioner to walk away under these circumstances would have required him to walk away from his journey and forfeit his ticket.

The setting here is vastly different than what was considered by the Supreme Court in I.N.S. v. Delgado where the factory survey was conducted while employees continued to move about. In Michigan v. Chesternut the Supreme Court found of obvious significance that the police conduct there of driving parallel to a running pedestrian, although somewhat intimidating, did not standing alone constitute a seizure where the officers did not operate the car to block the respondent's course or otherwise control the direction or speed of his movement. Here, the officers did intrude upon petitioner's freedom of movement by rendering him captive in his seat by the positioning of their bodies to block the aisle and exit which was "some way" of restraining petitioner's liberty. Officers positioning themselves so as to

block a citizen's pathway is clearly a factor to be considered in determining whether a Terry stop has occurred. Michigan v. Chesternut, *supra*, Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983), State v. Kerwick, 512 So.2d 347 (Fla. 4th DCA 1987).

Other than the coercive setting, it is significant that the police conduct here did not include an effective advisement to petitioner that he could decline to consent to the search. The trial court, in its order denying the motion to suppress, did not decide the question of whether petitioner understood he had a right not to consent (R-163). Rather, the court relied on State v. Rardin, 392 So.2d 350 (Fla. 4th DCA 1981), that failure to advise a citizen of his right to refuse a search does not automatically render consent involuntary. Yet, failure to advise the citizen of his right to refuse consent is one of the factors to be considered in assessing voluntariness. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Significantly, advising Mendenhall that she had a right to refuse consent to the search was an important consideration that showed the voluntariness of her consent. United States v. Mendenhall, *supra*. Given the confines of the setting, unless officers effectively communicated that petitioner did not have to agree with their request, petitioner's participation was not shown to be voluntary.

The officers' conduct toward petitioner in this setting clearly restrained his freedom to move about, was intimidating and entailed a show of authority. Confining petitioner by his position and their persons and requesting travel information and permission to search upon an introduction as police officers is a

show of authority completely at odds with a normal citizen encounter. Citizens do not usually ask one another if they might look through another's private belongings. But for there introduction as police officers, petitioner might otherwise have reasonable assumed he was being accosted while alone by two persons who wished to search **his** possessions to determine if he carried anything worth stealing. Although police questioning by itself is not a detention what occurred here is significantly more than police questioning:

Unless circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. I.N.S. v. Delgado, 466 U.S. at 216.

Here, the circumstances were extremely intimidating due to the narrow confines of the bus, the petitioner's seat at the way back, the officers' position in front of him and that he was the sole person on the bus at the time the officers approached. The manner of the officers' introduction was similar to a conductor or bus employee who would board the bus to make sure the passengers' papers are in order.

Another circumstance which bears heavily on a totality of the circumstance's analysis is petitioner's minimal understanding of English. Even the state's witness, Officer LaSanta, testified that petitioner's understanding of English was minimal, that he was unable to understand many of the simple questions Gaffney asked petitioner in English (R-97-98). The trial court's determination that petitioner's grasp of English was other than

limited is not factually supported by the record. The trial court was persuaded as to the defendant's competency in English because "at a bond hearing shortly after the Defendant's arrest, the Defendant was responsive to questions by the Court in English." (R-163). The only transcript of a bond hearing before the trial court at the time he ruled, was the transcription of the hearing on August 5, 1985. During that hearing only ONE question was addressed by the court to petitioner in English which was as follows:

THE COURT: Let him say how well [he can get by in English]. How many years have you been here?

THE DEFENDANT: Twenty-five. I don't know how to speak.

(Supp. Record page 3, August 5, 1985).

Ability to answer a simple question of how long have you lived here is hardly indicative of competency to understand legal concepts of a right to refuse a search.

At another point in the proceedings the trial court itself was convinced of petitioner's inability to speak English because at the beginning of the suppression hearing, in calling for the interpreter, the court announced, "The state is present in court and it is my understanding Mr. Mendez does not speak English, is that correct?" (R-3). To which Attorney Maria Rivas Hamar replied, "That's correct, Judge, very limited." (R-3). Petitioner's sole answer to Judge Franza's question of how long he had been here and how well he spoke English, his five or **six** words of English to Detectives Barnes and Gaffney on the bus and

LaSanta's impression that petitioner's understanding of English was quite minimal is hardly sufficient to carry the state's heavier burden to demonstrate voluntary consent where the defendant is a foreigner or a non-English speaking person. Restrepo v. State, 438 So.2d 76 (Fla. 3d DCA 1983). Significantly, petitioner was advised of his Miranda rights in Spanish. See State v. Santamaria, 464 So.2d 197 (Fla. 3d DCA 1985).

Absolutely nothing was shown by the state in the trial court to sustain its heavier burden of proving that the consent was in fact freely and voluntarily given by an individual who had such a minimal understanding of English. When considering the totality of the circumstances, the state must be able to prove voluntary consent as opposed to mere submission to apparent authority in order for the search to be upheld. Restrepo v. State, supra, Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983). See also Jordan v. State, 384 So.2d 277 (Fla. 4th DCA 1980).

Plainly, the state simply failed in this case to demonstrate a voluntary and knowing consent and the District Court of Appeal, Fourth District, erred by a summary affirmance by reference to a rule of law than an encounter between officers questioning passengers on a bus is not per se involuntary. Another erroneous basis on which the State v. Avery decision is based is its "note" that "even the random stopping of motor vehicles at roadblocks without cause has been found to pass constitutional muster where the detention procedure is designed to meet minimum standards," citing United States v. Martinez-Fuerte, supra and State v. Jones, 483 So.2d 433 (Fla. 1986). Petitioner strongly asserts

that his situation as a seated, ticketed passenger on a common carrier in interstate transportation is vastly different and subject to more privacy rights than a driver of an automobile who must be licensed and registered with the state. Random detention and inquiry to persons in the confines of their seats for their travel documents, about their travel plans and requesting permission to search upon a show of authority should not be permitted by a constitutional analogy to random roadblocks to drivers. In State v. Jones this Court held that a properly run DUI roadblock under established standards was constitutional. There the Court said that the public must keep in mind that driving an automobile over the public highway does not amount to an absolute organic right. The state retains extensive authority to safeguard the driving public via its police power. Therefore, the police may make random checks to determine if driver's licenses, registration papers, and other traffic laws are being obeyed. Contrary to the situation in State v. Jones, petitioner here does not have to be licensed, registered by the state or carry identification papers to travel. He possesses a constitutionally recognized, absolute, organic right to travel unimpeded by the authorities request that he produce his documents or travel papers, although he might be required to do so in some totalitarian, police state. The right to travel unimpeded is a fundamental personal liberty that is essential to our concept of a federal union. Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 659, 12 L.Ed.2d 992 (1964), Shapiro v. Thompson, 394 U.S. 1322, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

Even if random roadblock-type stops of citizens as they travel on the country's common carriers are permissible under the Constitution, similar to the roadblock procedures authorized in Jones v. State and Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), such checkpoints for citizen documentation to verify by "consent searches" that do not carry contraband in contravention of the law may not be done arbitrarily. The written guidelines and specific procedures for spot checks which are required in order to assure that arbitrary intrusions into the liberties of citizens do not occur, Jones v. State, supra, were not utilized in petitioner's case. Random intrusion into privacy is to be avoided because it is completely subjective as to be frightening. The Supreme Court has anticipated that such a reaction of fright would commonly be generated and of concern to travelers when they were stopped by a roving roadblock. United States v. Martinez-Fuerte, supra, 96 S.Ct. at 3083. Assuming there is some authorization for interfering into the privacy right of travelers as was done in petitioner's case, there must be some minimal guidelines and some type of warning to the public of the potential interference to remove any random or arbitrary use of such investigatory detentions which would be inconsistent with the Constitution's limitations. State v. Jones, supra.

No such safeguards or warnings were used here. The unconstrained exercise of the officers' discretion resulted in a frightening, arbitrary and unreasonable detention of petitioner.


The contraband was not found consistent with the Fourth Amendment requirements consequently the decision below must be quashed, reversed and remanded.

CONCLUSION

Based on the foregoing reasons and authorities cited, petitioner requests this Court to quash the decision of the district court in petitioner's case and to order his motion to suppress be granted.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



MARGARET GOOD
Florida Bar No. 192356
Assistant Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 13th day of April, 1989.



MARGARET GOOD
Assistant Public Defender