IN THE SUPREME COURT OF FLORIDA

MIGUEL MENDEZ,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

CASE NO: 73,447

AMENDED RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINA TATEMENT

Respondent was the prosecution and petitioner the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court except that respondent may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal including Motion to Suppress Hearing.
"SR"	Supplemental Record including change of plea hearing and Bond Reduction Hearing of July 29, 1985.
"**SSR**"	Supplemental Record including Bond Reduction Hearing of August 5, 1985
"**SSSR**"	Supplemental Record including Bond Hearing of August 15, 1985.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's the Statement of the Case and Facts with the following additions and/or clarifications:

Petitioner was arrested on the instant offenses on July **24, 1985**. On July **29, 1985** a hearing was held pursuant to respondent's Motion to Reduce Bond (SR). An interpreter was present at the hearing (SR **18**). The court asked "who is Mendez" and petitioner himself indicated to the court his whereabouts (SR **18**). The court asked how long petitioner had been in this country and the interpreter answered **25** years (SR **18**). The court asked how respondent could be in this country for **25** years and not speak English (SR **18**). The interpreter answered, "He speaks, he says, some, but legal terms escape him" (SR **18**).

On August **5, 1985**, petitioner had another hearing on his Motion for Bond Reduction (SSR). When asked by the court how long he had been in the country, petitioner himself answered, "Twenty-five. I don't know how to speak" (SSR 3). Petitioner's attorney told the court that petitioner could get by in English (SSR 3).

Petitioner appeared before the court on August **15, 1985** for another hearing for bond reduction (SSSR). Through an interpreter, petitioner told the court that he was born in Puerto Rico and raised in the United States (SSSR **8**). Petitioner is a United States Citizen (SSSR **8**). Petitioner's counsel told the

court that petitioner understood English, "but felt uncomfortable" **(SSSR 9-10)**.

At the hearing on petitioner's Motion to Suppress, Detective Gaffney testified that when he and Detective Barnes boarded the bus, petitioner was the only person on the bus and was sitting in the rear of the bus (R 69). Gaffney identified himself and Barnes as being police officers and both were wearing police jackets (R 80). Gaffney testified that he and Barnes stood to the side of petitioner's seat and that petitioner could have gotten up and come out into the aisle of the bus (R 79). Gaffney was not standing in front of petitioner (R 80). Gaffney asked petitioner if he had a minute to speak and petitioner said "yes" (R 78). Gaffney testified that while looking at petitioner's bus ticket, he noticed it was in English (R 87). Gaffney did not retain petitioner's ticket after looking at it (R 71). Gaffney testified that he was positive he didn't retain it because to do so would amount to detainment (R 82). Gaffney testified that he spoke in English to petitioner and petitioner never gave any indication that he didn't understand what Gaffney was saying (R 73, 77). Petitioner told Gaffney to "Go ahead and look'' in English, in response to Gaffney's question (R 73). Gaffney testified that after petitioner was arrested, he only spoke Spanish (R 75). Petitioner never indicated that he didn't understand English prior to his arrest (R 77).

Detective Barnes testified that Detective Gaffney identified himself and Barnes as police officers when they first came into contact with petitioner (R 124). Both were wearing

police jackets (R **124**). Barnes testified that Gaffney began his conversation with petitioner by asking him if he could "talk to him a minute'' (R **121**). Petitioner indicated in English that it was o.k. to look in his bag in response to Gaffney's question (R **122-123**). Barnes was positive that he heard petitioner speak English (R **123**). Petitioner never indicated that he couldn't understand English, prior to his arrest (R **123**).

Petitioner testified that before moving to the United States **25** years ago he lived in Puerto Rico but that he never heard anyone speak English there (R **111**). Petitioner testified that he almost never watches television (R **113**). Petitioner did understand when the officers asked to see his ticket and his bag (R **111**). He testified that although he couldn't speak English, he purchased the bus ticket in Miami and paid for it himself. (R **114**).

Petitioner admitted that he spoke to the judge in English at his bond hearing (R **115**). He also admitted that he knew that when he went to see Dr. Powers, he was seeing him about this case because his attorney sent him there (R **108**). Petitioner testified that the officers never touched him on the bus (R **116**).

Dr. Powers testified that he tested petitioner for his understanding of the English language on December **3, 1985** (R **30-31**). Dr. Powers testified that he specifically tested petitioner on his understanding of the statement made by Gaffney on the bus, and that petitioner's attorney had told him what Gaffney had asked petitioner (R **32**). Dr. Powers testified that it was his

opinion that petitioner couldn't understand Gaffney, although petitioner did understand the word "consent" (R 47, 60). On cross-examination, Dr. Powers testified that he had never spoken with petitioner before the test and that petitioner could have deceived him while taking the test (R 56, 60).

Officer LaSanta was working at the airport on the date of the incident (R **89).** He is fluent in English and Spanish (R **89-90).** He has often been used as a translator for the Sheriff's Office (R 90). LaSanta stated that based on his experience and petitioner's reaction to questions posed to him in English, Officer LaSanta believed petitioner could speak English (R 93-96)

SUMMARY OF THE ARGUMENT

The trial court was correct in denying the petitioner's suppression motion. As this ruling comes to this Court with a presumption of correctness, this Court should defer to the trial court's findings. The Fourth District correctly affirmed this ruling in reliance on State v. Avery which examined the facts of the case under the "totality of circumstances" approach as required by the United States Supreme Court. This Federal precedent mandates that the resolution of such Fourth Amendment issues depends on the facts and circumstances of each case, applying objective criteria.

An encounter between police and citizens is not rendered a per se seizure and does not invalidate a consent search, merely because the police are conducting questioning 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 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. 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. 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 United States 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 manner, did not retain petitioner's ticket, did not physically block or touch petitioner, and were in plain clothes, without displaying weapons. Thus, the consent search was conducted subsequent to a valid "encounter", and 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. The trial court's factual determination that petitioner understood the officers questioning should not be "second-guessed" by this Court. Under the totality of circumstances, petitioner gave free and voluntary consent to the search of his luggage.

ARGUMENT

POINT N APPEAL (Restated)

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION TO SUPPRESS WHERE NO SEIZURE OF PETITIONER OCCURRED AND PETITIONER VOLUNTARILY CONSENTED TO THE SEARCH.

Initially, respondent would note that the ruling o the trial judge on a motion to suppress comes to this Court clothed with a presumption of correctness and this Court should not substitute its judgment for that of the trial judge. This Court, should defer to the trial judge's authority as a fact-finder. Wasko v. State, 505 So.2d 1314 (Fla. 1987). The reviewing court interprets evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978).

The trial court was correct in denying petitioner's motion to suppress the cocaine taken from his bag pursuant to a valid "encounter" and consent search. In his brief, petitioner essentially maintained that any bus passenger, approached by police on board public transit will always be coerced by the inherent and attendant circumstances. He also claims that every such "encounter" must be classified as a per se "seizure", invoking Fourth Amendment protections. It is clear that the Fourth District, relying on State v. Avery, 513 So.2d 182 (Fla.

4th DCA 1988) correctly applied United States Supreme Court precedent in affirming the trial court's ruling.

Avery relied on United States Supreme Court case law in instructing that the existence of a valid encounter and subsequent consent search is dependent upon the totality of circumstances. Id. at 183-185. In focusing upon the specific circumstances, the Avery court concluded that the police officers did not engage in any police misconduct or any inappropriate detention that transformed the encounter into a "seizure" that would invoke Fourth Amendment protections. Id. at 187, 188.

It is apparent that the Avery opinion relied upon in the case below remains the valid approach under governing Federal and State case law. 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 the "totality of circumstances", rather than "per se" evaluation of any particular set of facts.

In United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), Justice Steward initially observed that, since the issuance of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Supreme Court had recognized the legitimate nature of police-citizen encounters in public areas. Mendenhall, 446 U.S. at 553. 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. Id. at **553, 554.** Stewart concluded that all street encounters between police and citizens cannot be characterized as "seizures". Such an approach would be antagonistic to the purpose of the Fourth Amendment. Further, it would place unrealistic restrictions on law enforcement and police questioning of citizens as a method to properly enforce criminal laws. Mendenhall, **446** U.S. at **554.** Thus, the criteria for evaluating and distinguishing between encounters and seizures, and for evaluating the voluntariness of a subsequent consent search, are to be applied to the facts of each case based on review of all circumstances. Id. at **554-555; 557, 560.** The Court 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". Id. at **562.** The Court further recognized the legitimacy of police investigations in advancing the very highly regarded public interest -- enforcement of drug laws.

In Florida v. Royer, **460** U.S. **491, 103** S.Ct. **1319, 75** L.Ed.2d **229 (1983),** the Supreme Court continued to apply these objective criteria to the facts of the particular case to distinguish an encounter from a seizure. Id. at **501.** In applying the Mendenhall approach, 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. Id. The plurality concluded that, without more, self-identification by police and 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 crimes. 460 U.S. at 497-499; 508. Thus, the Court 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...

Id. at 506-507; 508.

In INS v. Delgado, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), a six-member majority continued to apply a case-by-case, fact-oriented approach in distinguishing between encounters and seizures. The Court again noted the "diversity" of police-citizen contact, and refused to categorize or define limits to be applied in every set of facts. 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 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". 466 U.S. at 216; 217, n. 5. Delgado further stated that the fact of such questioning in such a setting does not per se impact on or invalidate the consensual or voluntary nature of a citizen's response. Id. at 216. In defining the general limits of an encounter, Delgado 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. Id. at 216-217. Thus, as the Fourth District in Avery 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 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, presents a per se "seizure" classification. 100 L.Ed.2d at 569, 570. The Court rejected defense and State arguments that such

circumstances were a per se seizure or encounter. Id. at 571. In so doing, the Court concluded that either approach "fails to heed this Court's clear directions" that an assessment of whether an encounter or seizure is involved, depends on a case-by-case analysis of the totality of circumstances present. This direct rejection of the same approach urged by petitioner, confirms the validity of the decision below.

Acceptance of petitioner's argument would require this Court to negate 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, provide for a balancing of the significant public interest in drug and law enforcement with the citizenry's interest, in each case. Chesternut; Delgado; Mendenhall; Royer; Schneckloth v. Bustamonte, 412 U.S. 218 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). 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, 535 So.2d 295, 296 (Fla. 4th DCA 1988); Avery 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 "filter 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. In light of this Court's directive, as well as state Constitutional requirements that the United States Supreme Court's construction of the Fourth Amendment must be followed, Art. I, Sec. 12, Fla. Constitution (1985), the Fourth District's opinion must be affirmed.

It is widely recognized and well-settled 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 an inferior right to address questions to citizens. This 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 not be considered; however, such a factor cannot be deemed dispositive.

In Delgado the Supreme Court was confronted with the physical surroundings of a factory, with drug agents stationed at the exists, as well as questioning employees with their consent. 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. Id. at 217, n. 5. The Court observed that the agents were lawfully present pursuant to either consent or a warrant, and that there were other people present during the questioning (namely, the remainder of the employees). Id. 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. Consistent with the underlying purposes of the Fourth Amendment, Delgado focused on lawfulness of the officers' presence and conduct.

In examining the instant case, 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 or without tickets 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 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, 49 S.Ct. 1391, 59 L.Ed.2d 660 (1979), where a ve icle 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, 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). 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. These factors contribute to further defining the character of a bus passenger, as similarly public in nature to a terminal or concourse "encounter" situation.

An individual's freedom of movement is not restricted by police officers boarding a bus stopped in a public terminal. Delgado; Mendenhall. A reasonable person, innocent of any wrongdoing, Nazario, 535 So.2d 296, n. 2: Login v., State, 394 So.2d 183 (Fla. 3rd DCA 1981), would clearly feel free to get on and off or move within the bus as well as simply state that he did not wish to speak with the officers. Delgado; Rembert, supra. Moreover, the inherent narrow confines of a bus aisle or

seat are known to the reasonable person when he initially boards a bus; it is not the creation or result of any police conduct. Rembert, 694 F. Supp., at 174; Avery, 531 So.2d, at 187. The officers' approach on the bus was discrete, and not accompanied by any fanfare, forcefulness, threats, or display of weapons. Mendenhall. Any inherent psychological restraint, such as the potential departure of the bus, is not 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 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.

Looking at the facts in this case it is clear the trial court did not abuse its discretion in finding that this was a voluntary encounter,. and/or consensual stop, rather than a "seizure" of the person within the meaning of the Fourth Amendment, and was a legitimate exercise of law enforcement functions. Florida v. Rodriquez, 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984); Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall; Jacobsen v. State, 476 So.2d 1282 (Fla. 1985).

It is further clear that the officers, as part of daily law enforcement duties, and as a narcotics tactical team approached petitioner on public transportation, and identified themselves as police officers. The officers then asked petitioner some questions. The record reveals that the questions were not coercive and that neither of the officers surrounded petitioner in such a way as to prevent him from leaving the bus (R 79-80). Detective Gaffney asked petitioner if he had a minute to speak with the officers and petitioner said "yes" (R 78). Gaffney asked petitioner where he was travelling and petitioner handed him the ticket (R 70). Gaffney testified that the ticket was not retained, but given back to petitioner (R 71, 82). Gaffney then asked petitioner if he had any baggage and petitioner responded by pointing to the bag in the overhead rack (R 71-72). Gaffney then asked petitioner for consent to search the bag. Gaffney explained to petitioner that petitioner had the right to refuse to consent to the search. Gaffney's words were, "Excuse me, Sir, I'd like to have consent to search and you have a right to refuse the consent to search". Petitioner responded by saying, "go ahead and look" (R 73). The petitioner never indicated to the police officers, either verbally or through mannerisms, that he did not understand them or that he did not speak English (R 73, 123). It was only after petitioner was arrested that he indicated that he didn't speak English (R 75, 77). The circumstances sub judice did not present any meaningful "indicia of control" over petitioner's person such as the threatening presence of officers, physical touching, or other

evidence of coercion that went beyond an "encounter" for Fourth Amendment purposes. Jacobson, at 1285-1286; Mendenhall; Royer.

Respondent would further submit that petitioner's consent to the search was freely and voluntarily given. Scheckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); Martin v. State, 411 So.2d 169 (Fla. 1982); Denehy v. State, 400 So.2d 1216 (Fla. 1980). The evidence demonstrates that the officers identified themselves as such, and although dressed in plain clothes, both were wearing police jackets (R 80, 124). Gaffney asked petitioner if he could look in the bag and was told unequivocally by petitioner "Go ahead and look" (R 73) (R 73). Moreover, petitioner was informed that he could refuse consent (R 73), but still said: "Go ahead and look" (R 73). Furthermore there is no evidence of any form of resistance by petitioner or of any coercive acts or statements by the police officers. Petitrioner's argument that he did not understand Gaffney when Gaffney told him he wanted petitioner's consent to search his bag and that petitioner could refuse consent, is completely rebutted by the record below which reveals that petitioner does have an understanding of the English language. Both Gaffney and Barnes testified that petitioner was asked in English where he was going and in response to that question handed them his bus ticket (R 70). The ticket was printed in English (R 87). Further, when petitioner was asked in English whether he had any bags, petitioner pointed to his bag in the overhead rack (R 71-72). When petitioner was asked in English for consent to search the bag, petitioner stated in English, "Go ahead and look" (R 73).

Additionally Officer LaSanto, who read petitioner his rights in Spanish, testified that petitioenr appeared to understand English (R 96). It cannot be said the trial court erred in determining that petitioenr understood the officers.

Petitioner's understanding and ability to speak English were also demonstrated at various court hearings. On July 29, 1985 a hearing was held pursuant to petitioner's Motion to Reduce Bond (SR). An interpreter was present at the hearing (SR 18). The court asked "who is Mendez" and petitioner himself indicated to the court his whereabouts (SR 18). The court asked how long petitioner had been in the country and the interpreter answered 25 years (SR 18). The court asked how petitioner could be in the country for 25 years and not speak English (SR 18). The interpreter answered, "He speaks, he says, some, but legal terms escape him" (SR 18). At yet another hearing on August 25, 1987 petitioner told the Court in English that he had been in the country 25 years but that he didn't know how to speak (SSR 3). At that time petitioner's own attorney told the court that petitioner could get by in English (SSR 3). On August 15, 1985 at another hearing, petitioner told the court, through an interpreter that he was born in Puerto Rico, raised in the United States and was a Untied States citizen (SSSR 8). At that hearing, petitioner's attorney told the court that petitioner understood English "but ~~felt~~ uncomfortable" (SSSR 9-10). Respondent would also point out that both Detectives Gaffney and Barnes testified at the hearing on petitioner's Motion to Suppress that petitioner never did or said anything to indicate

that he didn't understand them, or English, before petitioner was arrested (R 73, 123). It was not until after petitioner was arrested that he indicated he couldn't speak English (R 76).

Respondent thus submits that there is more than sufficient record to support the factual finding made by the trial court in denying petitioner's Motion to Suppress. The factual determination as to petitioner's "consent" was the exclusive province of the trial judge. See e.g., Snider v. State, 501 So.2d 609 (Fla. 4th DCA 1986) (J. Letts concurring specially); Dooley v. State, 501 So.2d 18 (Fla. 5th DCA 1986); State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981). The state proved by a preponderance of the evidence that petitioner's consent was freely and voluntarily given. Elsleqer v. State, 503 So.2d 1367 (Fla. 4th DCA 1987). Respondent would point out that even under the stricter standard of "clear and convincing evidence", the state still proved petitioner voluntarily consented to the search (R 162-163).

There being competent, substantial evidence in the record to support the trial court's findings as to the issue of consent to search and as to the nature of the encounter between Appellant and the officers, the denial of the motion to suppress must be affirmed. Racz v. State, 486 So.2d 3 (Fla. 4th DCA 1986); Jordan v. State, 384 So.2d 277 (Fla. 4th DCA 1986).

CONCLUSION

Based on the foregoing argument and authorities, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to Margaret Good, Assistant Public Defender, 9th Floor, Governmental Center, 301 N. Olive Avenue, West Palm Beach, Florida 33401 this 12th day of June, 1989.

Of Counsel