IN THE SUPREME COURT OF FLORIDA

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MIGUEL MENDEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,447

P ONER REPLY BRIEF ON THE MERITS

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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.

The state responds only to its only made up silliness instead of the legal arguments advanced by petitioner. Never did Mr. Mendez so much as hint that "drug smugglers can never validly consent to speak with or permit searches by police," which is the position respondent sets out to refute (Amended Respondent's Brief - 9). Petitioner's arguments were directed solely at his own individual circumstances.

The state concedes tnat not "every bus searcn conducted by police will qualify under the facts as a legitimate 'encounter'" (ARB - 11) but avoids analysis of factors present nere that demonstrate the coerciveness in this police-citizen "encounter." Respondent notes with satisfaction the Court's observations in I.N.S. v. Delgado, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), that there were other people present there during the questioning, namely the other employees. Id at 217, n.5 (ARB -13). The presence of other persons in the factory was a compelling factor to the Court's determination that the setting there was like any other public place so the circumstances of the encounters were not intimidating. Yet, petitioner's circumstance of being completely alone at the back of a bus when approacned by

two officers receives not the slightest mention by respondent. Respondent re-emphasizes the need for a case-by-case evaluation of objective criteria but nowhere gives any objective examination to the facts of petitioner's case.

What happens in bus stop cases in general is not what happened here. The test, as set forth by the Supreme Court in I.N.S. v. Delgado, supra, states:

> 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.

Id. at 216.

Respondent's conclusions abound. In that portion of its brief beginning "examining the instant case," respondent discusses only in vague generalities this setting involves a bus stop where people can come and go, etc. Where is the fact that there were no other people present, but only petitioner on an isolated bus, at the very back in the last seat when two officers approached him? These physical circumstances do not comport with respondent's conclusions that the officers were not blocking the aisle so as to prevent petitioner from leaving the bus, when the objective testimony of Detective Gaffney was that he was standing in the aisle to the side of the petitioner and Barnes was standing behind Gaffney (R-30). Now then, in these physical circumstances, could they not have been blocking the aisle? Petitioner was in the last row, in the last seat of the bus!

The state directs this Court to the correct legal principle of a case-by-case approach, the same principle advanced by petitioner in his brief, but respondent then clothes the circumstances in the common cloak present in other bus stop searches, which simply was not worn in the present case.

Furthermore, Delgado's analysis finding that the factory workplace was a public place is not really applicable to the instant situation. First, the encounters in Delgado were in a workplace where the workers do not enjoy the same freedoms or privacy interest as bus passengers in interstate commerce. (The state has made no response to petitioner's constitutional claims that the right to travel unimpeded is a fundamental personal liberty under precedent from the United States Supreme Court. Petitioner's Initial Brief - 16). In Delgado, the Supreme Court emphasized that it was not the presence of police authority that would make the workers not free to leave, rather it was their voluntary obligation to their employers. 104 S.Ct. at 1763. In the present case it was not a voluntary obligation to someone else that would make petitioner feel he could not leave. Instead, he could only leave if he forfeited his journey, i.e., an obligation owed to him.

More importantly, unlike here, the workers in Delgado sought injunctive relief. Thus, as the Court explained, only the actual description of the actual encounters between the actual respondents and the I.N.S. agents could be considered in deciding Delgado. 104 S.Ct. at 1763, f.4, 1765. Unlike here, because the particular respondents in Delgado were actually permitted to

leave the building during the survey, 104 S.Ct. at 1764, f.7, it could not be said that the respondents did not feel free to leave. Finally, in Delgado, the respondents were merely asked where they were from, 104 S.Ct. at 1764. The questioning did not involve randomly requesting consent to search one's personal belongings. It must be remembered that a consensual encounter between police and citizens is premised on the officer's enjoying "the liberty [possessed by every citizen] to address questions to other persons." Terry v. Ohio, 392 U.S. 1, 31-33 (1968). While normal citizens frequently ask one another where they are from, citizens do not ask one another for consent to search luggage for drugs. It is only due to a show of police authority that such a request is granted. (Petitioner argued in his initial brief just how intimidating such a request to search would have been from someone not a police officer and that to an isolated person sitting on an empty bus it most certainly would nave implied a robbery; this is another individual circumstance which respondent did not see fit to address in its answer brief).

Respondent also claims that the advisement of the right to refuse as a matter of law removes the taint of the detention. This claim is specious. Particularly so since petitioner would have been informed of his right to refuse consent to search during the time of the coercive circumstances and in language significantly more complex than questions of where are you from and how long have you been here. There is no showing petitioner understood the advisement of his right to refuse. Respondent's

reliance on a portion of the transcript concerning his co-counsel's representations at the August 5, 1985, hearing, is factually incorrect as the trial court specifically ruled that no evidentiary support would be given to those statements. The motive for co-counsel's making those statements was explained to be only because co-counsel did not wish to wait for an interpreter to complete the bond hearing (R-99).

Additionally, the simply advisement of the right to refuse is not an effective advisement as required. See Schneckloth v. Bustamonte, 412 So.2d 218,231 (1973) (advisement not dispositive because it is normally impractical to inform as "the detailed requirements of an effective warning." This is precisely why the presentation of written consent forms prior to obtaining consent is important to prove. The written forms would show an effective advisement of the right to refuse; where the advisement of the right to refuse was only given during the time of the coercive circumstances, and was not a detailed effective warning, it did not unequivocally break the chain of the coercive circumstances.

Lastly, respondent's claim that the regularity of these procedures, the searching of seated bus passengers by law enforcement officers in South Florida, "does not present any unconstitutional surprise or lack or warning to a bus passenger." (ARB - 17). However, this argument fails to recognize that this law enforcement technique is relatively new and is not used on local public transportation which has regular daily passengers.

Rather, it is used on interstate bus routes which a passenger may use only once a year, or once in a lifetime. There is no warning that the procedure will be used just before the bus is about to leave. Moreover, the regularity of the procedure, without guidelines limiting the discretion of police, merely heightens the quantity of arbitrary invasions into a traveler's privacy. See Jones v. State, 483 So.2d 433,438 (Fla. 1986).

CONCLUSION

For these reasons, and the reasons advanced in Petitioner's Initial Brief, the decision of the district court should be quashed and to order that his motion to suppress be granted after individual examination of the circumstances of his case.

Respectfully submitted,

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CEKTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Reply Brief on the Merits was furnished by courier, to JAMES CARNEY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 26th day of June, 1989.

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