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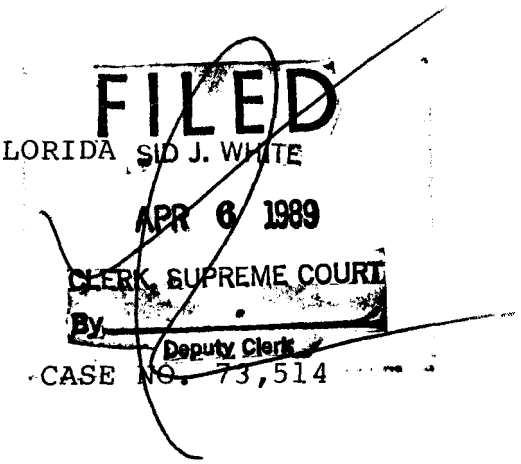

IN THE SUPREME COURT OF FLORIDA

MICHAEL MCBRIDE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,514

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Defendant and the Respondent was the Prosecution 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 Court.

The symbol "R" will denote Record on Appeal.

The symbol "A" will denote Appendix.

STATEMENT OF THE CASE AND FACTS

Petitioner Michael McBride was charged by two count Information filed April 28, 1987 with trafficking in cocaine [Count I of the Information] and misdemeanor possession of drug paraphernalia [Count II of the information] (R 96). Mr. McBride filed a Motion to Suppress Physical Evidence (R 97-100) which was heard July 22, 1987 (R 1-95).

At the July 22, 1987 motion to suppress hearing Broward County detectives Gary Palmer and John Bukata were working the Fort Lauderdale bus station on April 9, 1987. They asked the driver if they could board the bus. The driver of the northbound Trailways bus at issue indicated that the officers could board the bus (R 7-9, 20).

Detective Palmer approached Mr. McBride, who was seated and asleep (R 63). Detective Palmer remained standing, leaned over his [McBride's] seat and displayed his badge and stated, "We have a drug problem in south Florida, do you have a minute?" At that point, Mr. McBride was cornered between the two detectives: Palmer leaning over and Bukata to the rear (R 10-11, 63). Mr. McBride stated he was blocked from leaving his seat (R 63, 69-70). Mr. McBride agreed to speak. The detectives asked Petitioner where he was going; Petitioner replied, "Cherry Point, North Carolina" (R 12). Detective Palmer testified that he asked Mr. McBride if he would consent to a luggage search, that it was strictly routine, and that he (McBride) had a right to refuse (R

12). Mr. McBride said "yes," and Detective Palmer opened the bag and found a small scale and a white plastic bottle in the bag. He could not see through the bottle. He opened the bottle, which hid a white, powdery substance in a plastic bag. This field tested positive for cocaine (R 13, 40).

On cross-examination, Detective Palmer testified that he searched "based totally on speculation," that it was "just a guess" and had nothing to do with Petitioner's particular characteristics (R 20-22). Detective Palmer admitted he had no probable cause or other basis for approaching Mr. McBride for the search (R 25-27). The detective, who is 6' 6", did not tell Mr. McBride he [McBride] could leave or that he [McBride] did not have to speak to him [Palmer] (R 30-31). Detective Bukata stood directly behind Detective Palmer (R 39, 56). Detective Palmer stated he never got additional "consent" from Mr. McBride to search the white plastic container (R 40).

Petitioner Michael McBride testified he was asleep when the northbound Trailways bus he boarded in Miami reached Fort Lauderdale (R 61-62). Detective Palmer stood at a corner in front of Mr. McBride, identified himself with a badge, stated he was a narcotics officer, and questioned Petitioner (R 63). Mr. McBride responded to Detective Palmer's request to search his bag. Detective Palmer did not inform Mr. McBride he could refuse the search. Mr. McBride testified that he did not understand he had the right not to have his bags searched (R 65-71). He did not

feel free to leave the bus (R 78). On cross-examination, Mr. McBride stated that he felt that he did not have a choice - that the detective had given him an ultimatum regarding the search. Mr. McBride felt intimidated by the detective (R 71-77).

The trial court denied Petitioner's motion to suppress (R 85). The court ruled the the conditions here were not so intimidating that Mr. McBride believed that he had an inability to refuse the search in this case (R 85).

Mr. McBride entered a plea of nolo contendere to trafficking in cocaine and possession of drug paraphernalia (R 86, 88-91). Mr. McBride specifically reserved his right to appeal the denial of the motion to suppress (R 86, 88-90). The lower court accepted the plea and found that the denial of the motion to suppress was dispositive of the case. The court questioned Mr. McBride to establish that the plea was freely and voluntarily entered and accepted the State's rendition of the factual basis for the plea (R 87-91).

The court adjudicated Mr. McBride guilty to each charge and as to Count I imposed a three an one-half (3 1/2) year sentence, applied the three (3) year mandatory minimum, and assessed Petitioner a fifty thousand ($50,000.00) fine and a two thousand five hundred ($2,500.00) surcharge (R 93-94, 103), with credit for one hundred five (105) days time served. As to Count II, the court sentenced Mr. McBride to ninety (90) days in the county jail with credit for one hundred five (105) days time served.

Petitioner filed a timely notice of appeal (R 104). The Fourth District Court of Appeal affirmed the trial court on the authority of its opinion in State v. Avery, 531 So.2d 82 (Fla. 4th DCA 1988) (Al). State v. Avery is pending discretionary review in Supreme Court Case No. 73,289 on a certified question of great public importance as follows:

> MAY EVIDENCE, OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

(A 6).

Petitioner McBride timely filed his notice to invoke the discretionary review jurisdiction of this Court. On March 20, 1989, this Court issued an order setting a briefing schedule for this cause. This brief on the merits follows.

SUMMARY OF THE ARGUMENT

The police actions, without a founded suspicion of criminal activity, tainted any alleged consent. The police actions of cornering Petitioner, a ticketed passenger on a northbound bus, with their badges prominently displayed, was not a mere consensual encounter. Petitioner was not in a public place when police approached him. Rather he was a passenger who boarded a northbound bus in Miami. When the bus stopped at the Fort Lauderdale station, Mr. McBride had the right to be left alone in the midst of his journey. By boarding the bus without tickets, the police were exercising a superior right not enjoyed by any other citizen to approach Petitioner and question him regarding his travel plans, destination, and luggage. Assuming that no founded suspicion of criminal activity was required, at a minimum police may only interfere with travellers in transit if such is done with written guidelines to prevent unbridled police discretion and with sufficient warnings so that travellers will not be surprised by the interference.

Assuming arguendo that there was no arbitrary intrusion, the totality of the situation supports a finding that Petitioner's consent was involuntary. No matter how subtle the implied coercion to consent, the resulting consent is invalid. Here the police cornering Petitioner with an accusatory request, combined

the other factors indicate a coercion that a layman would not feel free to ignore. There were sufficient circumstances to support a finding that Petitioner's consent was not voluntary.

Assuming, arguendo that Petitioner's alleged consent was not merely acquiescence to apparent police authority, nor tainted by the police intrusion into his privacy, because the search went beyond the scope of the alleged consent the trial court did not err in suppressing the evidence. Any alleged consent to search the luggage did not automatically extend to the containers within the luggage.

Assuming, arguendo that no violation of the right to be free from unreasonable searches and seizures occurred, the intrusion, without any suspicion of illegal activity, into Petitioner's privacy by boarding the bus and questioning him in the midst of his journey violated Petitioner's right to be left alone under Article I, Section 23, of the Florida Constitution. Without any suspicion of illegal activity occurring on the bus, there was no compelling state interest to board the bus. More importantly, whatever state interest was involved, it was not being attempted through the use of the least intrusive means. Consequently, the resulting intrusion was in violation of Petitioner's right to be let alone under Article I, Section 23, of the Florida Constitution.

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS BECAUSE CORNERING PETITIONER ON A NORTHBOUND BUS WAS NOT A VOLUNTARY ENCOUNTER

Petitioner's motion to suppress was erroneously denied. The trial court essentially found that Petitioner's arrest was voluntary (R 85). The district court affirmed citing State v. Avery, 531 So.2d 182 (Fla. 4th DCA 1988) (A 1). In Avery, the district court held that the trial court erred in finding that the search was improper and certified the following question:

> MAY EVIDENCE, OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORTATION) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

(A 6), 531 So.2d at 188.

Petitioner submits that he police actions, without a founded suspicion of criminal activity, tainted any alleged consent; that the totality of the situation supports finding of coercion; that the search went beyond the scope of any alleged consent, and that the government intrusion invaded Petitioner's right to privacy under Article I, Section 23, of the Florida Constitution. Petitioner maintains that each of these grounds, singly and/or cumulatively mandates reversal. Petitioner will address each of these issues below.

A. THE POLICE ACTIONS, LACKING FOUNDED SUSPICION OF CRIMINAL ACTIVITY, TAINTED ANY ALLEGED CONSENT.

The 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). To reach its decision in this case and in Avery, the district court was required to first conclude the act of the officer's boarding the bus, displaying authority, and standing over a bus passenger in a narrow bus aisle while questioning him, without a founded suspicion of criminal activity, was a mere voluntary "encounter" rather than an interference with a cognizable privacy right so as to vitiate the alleged consent.

Petitioner recognizes that consensual encounters between police and citizen do not implicate the Fourth Amendment, as discussed in United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). The Fourth Amendment does not inhibit voluntary interaction between police and citizens because "there is nothing in the constitution which prohibits a police man from addressing questions to anyone on the streets." Terry v. Ohio, 392 U.S. 1, 34, 88 S.Ct. 1868, 1886 (1968). Such consensual street encounter between police and citizens is premised on police officer's enjoying "the liberty (again, possessed by every citizen) to address questions to the 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, his freedom of movement is restrained. United States v. Mendenhall, 100 So.2d 1877. Otherwise put, an "encounter" becomes a detention as soon as a reasonable person would have believed he was not free to leave. Florida v. Royer, 460 So.2d 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, reh'g, denied, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980); Nease v. State, 484 So.2d 67 (Fla. 4th DCA 1986). Application of this standard makes it clear that what occurred here was a detention and not police-citizen voluntary encounter.

The officers were exercising a superior right not enjoyed by any other citizen to approach Petitioner and question him regarding his destination and luggage. Clearly, this is not a Mendenhall voluntary encounter such as putting a question to a pedestrian without blocking his path, but is rather a "brief detention" or "stop" which must be supported by reasonable, specific and articulable suspicion, Terry v. Ohio, supra; United States v. Berry, 670 F.2d 583 (11th Cir. 1982).

The requirement of some objective justification for an encounter is necessary when a citizen's liberty has been restrained, A seizure has occurred when a reasonable person under

the totality of the circumstances would have reason to believe that he was not free to walk away. United States v. Mendenhall, supra.

The factors which were present here that rendered this encounter coercive where that Petitioner testified that he felt intimidated and he felt that the officers gave him an ultimatum (R 65, 68, 71, 77). Petitioner believed if he stood up to walk out, the detectives would have blocked his way. Petitioner did not feel free to leave the bus (R 70, 78).

In United States v. Waksal, 709 F.2d 653 (11th Cir. 1983), Waksal had been "encountered" while walking in a public area of the Fort Lauderdale International Airport. The officers retained his ticket and identification. The Court there said, "We fail to see how appellant could have felt free to walk away when the police officers still possessed the documents necessary for him to continue his journey." Id. at 660. Similarly, the circumstances her raise a presumption of seizure. Petitioner could not have felt free to walk away when to do so would have required him to leave his seat, walk pass two officers and abandon his baggage and his journey. The lower court erroneously failed to find these circumstances as coercive and intimidating.

The totality of the circumstances here, as interpreted and relied on by the trial judge, demonstrate a clearly coercive situation.

The evidence fails to support the trial courts's determination that Petitioner was legally detained. Given the above-mentioned intimidating coercive circumstances, the state did not carry its burden to prove that consent was freely and voluntarily given.

In his dissent in Snider v. State, 501 So.2d 609 (Fla. 4th DCA 1986) Judge Glickstein correctly perceived that approaching a ticketed passenger aboard a bus is not like approaching a citizen on the street. Unlike the situations in Royer and Mendenhall, Petitioner was not approached in a street or public area where people are free to come and go. Petitioner was seated on a bus, in the midst of a journey. Only passengers on the Trailways bus were on board. The detectives were authorized by the Trailways driver to board the bus and question the passengers (R 9, 49-50). Accordingly, the officers boarding a northbound bus, to confront the seated passengers, display their badges and request to examine their luggage clearly entailed a show of authority similar to a conductor on a train or a bus employee who would board its common carrier to make sure the passenger's papers were in order. These officers were exercising a superior right not enjoyed by any other citizen to approach Petitioner and question him regarding his travel plans, destination, and luggage. Cf., Alvarez v. State, 515 So.2d 286, 290 (Fla. 4th DCA 1987) (person in sleeping car on train should legitimately expect that "his or her privacy will not be intruded upon, with the possible ex-

ception of a brief entry by a ticket collector, or encounters in the passageway with other similarly ticketed passengers or train personnel").

A passenger aboard a bus has a special privacy interest to be let alone which he does not enjoy in public places. This is emphasized by Justice Douglas, a well-known guardian of First Amendment rights, 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 view 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.

419 U.S. at 306-307, 94 S.Ct. at 2719 (emphasis added). 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 feel free to leave. He could only leave if he were to forfeit his journey.

Petitioner was already a traveller in the stream of commerce, the rule of Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d. 660 (1979) should apply here. In that case the Court held that invasion into privacy by conducting a license and registration check of persons travelling the highway cannot be arbitrary; there must be at least a reasonable suspicion that the law is being violated. Since Petitioner was already a passenger on a common carrier, he must have, and he asserts he did have, the same rights as all other travellers.

Of course, under some limited circumstances police may invade the privacy of travellers. However, the intrusion cannot be random or arbitrary. For example, in Jones v. State, 483 So.2d 433 (Fla. 1986) this Court recognized that there must be written guidelines and specific procedures created to ensure that arbitrary intrusions into the liberties of citizens do not occur:

> Paramount among all other considerations, the fourth amendment requires that all seizures be based on either: (1) specific evidence of an existing violation; (2) a showing that reasonable legislative or administrative standards are met; or (3) a showing the officers carry out the search pursuant to a plan embodying specific neutral criteria which limit the conduct of the individual officers.. .. We agree and find that it is essential that a written set of uniform guidelines be issued before a roadblock can be utilized ... so as to minimize the discretion of field officers,

> thereby restricting the potential intrusion into the public's constitutional liberties. Written guidelines should cover in detail the procedures which field officers are to follow at the roadblock.

483 So.2d **438** (emphasis added) (citations omitted). In addition, in United States v, Martinez-Fuerte, **428** U.S. **543, 96** S.Ct. **3074, 49** L.Ed.2d **116 (1976)** the Court emphasized that the intrusion into privacy that occurred was not unconstitutional during a permanent roadblock because the "subjective intrusion -- the generating of concern or even fright on the part of lawful travellers" is appreciable less than a roving roadblock. **96** S.Ct. at **3083.** The Court also noted that "motorists using these highways are not taken by surprise as they know, or may obtain knowledge of the location of the checkpoints and will not be stopped elsewhere." Id. In other words, assuming that there is a statutory authorization for interfering into the privacy rights of a traveller,[1] there must be minimum guidelines and some type of warning to the public of the potential interference. In this case there were no guidelines for the police to follow nor warnings to the passengers that the police were going to board the bus and ask questions. **As** noted by Judge Anstead's dissent in Avery, citing a trial judge, the traveller does not know how

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[1] Border Patrol agents had the statutory authorization to interrogate those believed to be aliens. Martinez-Fuerte, **96** S.Ct. at **3080** ftnot.8.

many times he will be intruded upon during his trip:

> In so ruling, I have some strong personal reservations about the drug interdiction program described herein, in spite of the fact that drug smuggling is a major problem in our society today. The procedure is inherently intrusive on a person's right of privacy. It invites abuse and tends to diminish fourth amendment protections. For example, how many times must a person be confronted with this procedure while he is traveling from Miami to New York City? And, where will it all end, i.e., can it be used on board airlines during a layover? Can police officers go through a neighborhood, knocking on doors and asking for consent to search houses in their war against drugs?

(A 14), 531 So.2d 198, (emphasis added). This arbitrary intrusion which is without warning and is potentially unlimited is like the random intrusions which the Supreme Court does not tolerate:

> We conclude there that random roving patrol stops could not be tolerated because they "would subject the residents ... [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of the Border Patrol officers.... [They] could stop motorist at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road...." Ibid. There also was a grave danger that such unreviewable discretion would be abused by some officers in the field. Ibid.
>
> Routine checkpoints stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere.

Martinez-Fuerte, 96 S.Ct. at 3083) (emphasis added). Any consent after the arbitrary intrusion into Petitioner's privacy was invalid, State v. Frost, 374 So.2d 593 (Fla. 3d DCA 1979), or tainted the voluntariness of any consent. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). There can be no valid consent unless there is clear and convincing evidence of an unequivocal break in the chain of illegality between the unlawful detention and the purported consent. Norman v. State, 379 So.2d 643, 646-647, (Fla. 1980); Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987). Here, there was no such break.

The fact that Petitioner was advised of his right to refuse is not an unequivocal break in the chain of illegality. This statement was given during the same time as the coercive circumstances . In Norman v. State, 379 So.2d 643, 647 (Pla. 1983), this Court made it clear that consent is voluntary "only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action." Because the coercive circumstances occurred at the same time as the warning, the state cannot prove that there ws clear and convincing evidence that the warning dissipated those circumstances. Here, the simple advisement of the right to refuse consent was not an effective advisement as required. See, Schneckloth v. Bustamonte, 412 U.S. 218, 231, 93 S.Ct. 2041, 2050, 36 L.Ed.2d 854 (1973) (advisement is not dispositive because it normally is impractical to inform of the

detailed requirements of an effective warning). The advisement during the time of the intimidating circumstances, is not an unequivocal break in the chain of illegality.

B. THE TOTALITY OF THE CIRCUMSTANCES DEMONSTRATES COERCION CAUSING PETITIONER'S ACQUIESENCE TO APPARENT POLICE AUTHORITY

As explained in Schneckloth v. Bustamonte, 412 U.S. 227, 228-229, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973), no matter how subtle the implied coercion, the resulting consent is invalid:

> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed.2d 746:
>
> > "It may be that it is the obnoxious thing in its mildest and least repulsive form: but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In the present case Petitioner as a ticketed passenger aboard a bus, knowing that police were not aboard as ticketed passengers, would reasonably believe that the police were aboard the bus due to their special status. Petitioner had no warning that the police regularly boarded the buses. When questioning Petitioner the police stood over him in the narrow aisle of the bus. By telling Petitioner that there was an investigation going on and then requesting to search his luggage, the police request was implicitly accusatory. Certainly, no reasonable person, with the exception of train judges and lawyers, would feel free to ignore the intrusion into his privacy by police.[2]

It is well-settled that for consent to be valid it cannot be mere acquiescence to apparent police authority. Lockwood v. State, 470 So.2d 822 (Fla. 2d DCA 1985); Mosley v. State, 335 So.2d 880 (Fla. 4th DCA 1976); Bailey v. State, 319 So.2d 22, 27 (Fla. 4th DCA 1975). The circumstances in this case support a finding that Petitioner merely acquiesced to apparent police

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2 Indeed these are the very comments by Judge Letts in his dissent in Bostick v. State, 510 So.2d 321, 323 (Fla. 4th DCA 1987):

> Moreover, my version of common sense tells me that a paid and ticket passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover while the policeman, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was free to leave, as all of us trained lawyers would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

authority. The following portion of State v. Kerwick, 512 So.2d 347 (Fla. 4th DCA 1987) further illustrates how coercive these bus intrusions are:

> "Even if the Rulings of Law made herein were not amply supported by the evidence, the Court would find extremely troublesome the admitted policies of these Broward deputies regarding 'encounters' with the public. Despite the apparent protections of Article One, Section 23 of the Florida Constitution, commonly referred to as a 'right to privacy', the evidence in this cause has evoked images of the days, under other flags, when no man travelled his nations's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-weilding police for identification, travel papers -- in short a raison d'etre -- is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, or Stalin's Moscow, or it is the white supremacist South Africa. Yet, in Broward County, Florida, these police officers approach every person on board buses and trains (that time permits) and check identification, tickets, ask to search luggage -- all in the name of 'voluntary cooperation with law enforcement -- to the shocking extent that one officer, Damiano, admitted that during the previous nine months, he, himself, had searched in excess of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck. It certainly shock's the Court's conscience that the American public would be 'asked,' at badge-point, without the slightest suspicion, to interrupt their schedules, travels and individual liberties to permit such intrusions. This Court would ill-expect any citizen to reject, or refuse, to cooperate when faced with the trappings of power like badges and identification cards. It is much like the feeling that an ordinary citizen has on seeing a patrol car behind him, or observing blue

lights flashing, or being confronted by a police officer asking questions.

512 So.2d 348-349 (emphasis added).

The show of authority and intrusion into Petitioner's privacy in this case demonstrates that the trial court's ruling must be reversed.

C. THE SEARCH WENT BEYOND THE SCOPE OF ANY ALLEGED CONSENT

Assuming arguendo that Petitioner's alleged consent was not merely acquiescence to apparent authority, nor tainted by the police intrusion into his privacy, the search went beyond the scope of alleged consent. Here, the consent sought was for a search of Petitioner's luggage. Detective Palmer testified that the could not see through the white bottle in Petitioner's luggage. He further stated he did not stop his search and ask Petitioner if he could search the bottle (R 40). There was not consent to open any containers within the luggage. E.g. See, State v. Cross, 13 F.L.W. 270 (Fla. 4th DCA January 26, 1988) (consent to search luggage did not constitute permission to search inside tape-wrapped ball located within luggage).

As this Court stated in State v. Wells, 14 F.L.W. 87 (Fla. March 2, 1988) a consent to conduct a warrantless search gives the police no more authority than reasonably conferred by such consent. The consent to search inside the bag could not reasonably constitute consent to open the bottle within the luggage. See Wells, supra at 88, (and cases cited therein) ("If that

consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to so *so...*").

Decisions by the district courts of Florida have also refused to extend the consent to search luggage to packages contained within the luggage. See Hutchinson v. State, 505 So.2d 579 (Fla. 2d DCA 1987) (consent to search purse does not constitute consent to search small unopened bag in purse): State v. Cross, 13 F.L.W. 270 (Fla. 3d DCA January 26, 1988) (consent to search luggage did not constitute permission to search inside tape-wrapped ball located within luggage); Major v. State, 389 So.2d 1203 (Fla. 3d DCA 1980) (that accused opened tote bag for an airport agent did not give the agent consent to reach in and grab the contraband); Moorehead v. State, 378 So.2d 123 (Fla. 2d DCA 1980) (holding that consent for an officer to look at a pool cue was not consent to unscrew the cue to see what was rattling inside); Rose v. State, 369 So.2d 447 (Fla. 1st DCA 1979) (consent to look inside camper did not extend to containers).

The conclusion in these cases that consent to search luggage does not mean that all containers in the luggage may be rifled receives support from the United States Supreme Court's decision in United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) decided subsequent to United States v. Ross, 456 U.S.798 (1982) in which Justice O'Connor, writing for the majority, re-affirmed the continuing validity of United States v.

Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), requiring police to obtain a warrant before searching closed containers:

> The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Although in the context of personal property, and particularly containers, the Fourth Amendment challenge is typically to the subsequent search of the container rather than to its initial seizure by the authorities, our cases reveal some general principles regarding seizures. In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. See, e.g., Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927). Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the court has interpreted the amendment to permit seizure, of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present. See, e.g., Arkansas v. Sanders, 442 U.S. 753, 761, 99 S.Ct. 2586, 61 L.Ed.2d 253 (1979); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476. 53 L.Ed.2d 538 (1977); Coolidge v. New Hampshire, 403 U.S. 433; 91 S.Ct. 2025, 29 L.Ed.2d 564 (1971).

103 S.Ct. 2637 (emphasis added) (footnotes omitted). Thus, the United States Supreme Court cases are very far from suggesting that the scope of a "consent" search is automatically extended, in the absence of probable cause, to include search of every closed container discovered.

In the present case assuming arguendo that the police obtained consent to search Appellant's luggage, this consent did not extend to the packaging inside the luggage.[3] Here the consent granted was logically limited to the opening of the luggage. Since the detectives exceeded the scope of any alleged consent, the present cause must be reversed.

D. VIOLATION OF PETITIONER'S RIGHT TO PRIVACY PURSUANT TO ARTICLE I

Assuming arguendo that no violation of the right to be free from unreasonable searches and seizures guaranteed by the United States Constitution occurred, the intrusion, without any suspicion of illegal activity, into Petitioner's privacy by boarding

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[3] In Sanders, the Court explained:

> "The police acted properly -- indeed commendably -- in apprehending respondent and his luggage. They had ample probable cause to believe that respondent's green suitcase contained marijuana. .... Having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle ... and seizing the suitcase they suspected contained contraband." 442 U.S. at 761, 00S.Ct. at 1591.
>
> The Court went on to hold that the police violated the Fourth Amendment in immediately searching the luggage rather than first obtaining a warrant authorizing the search. Id. at 766, 99 S.Ct. at 2594. "That holding was not affected by our recent decision in United States v. Ross, 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982)."

United States v. Place, supra, ftnt.3, 103 S.Ct. at 2641.

the bus and questioning him in the midst of his journey violated Petitioner's right to be left alone under Article I, Section 23 of the Florida Constitution.

Article I, Section 23, reads as follows:

> Section 23. Right to privacy.--Every natural person has the right to be let alone from government intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access to public records and meetings as provided by law.

Fla. Const., Art. I, 5 23. Section 23 "expressly and succinctly provides for a strong right to privacy not found in the United States Constitution." Winfield v. Division of Pari-Mutual Wagering, Department of Regulation, 477 So.2d 544, 548 (Fla. 1985). As explained by this Court's opinion in Winfield the right to be left alone from governmental intrusion was made as strong as possible by excluding words such as "unreasonable" or "unwarranted":

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right or privacy not found in the United States

> Constitution, it can only be concluded that the right is much broader in-scope than that of the Federal Constitution.

477 So.2d at 548 (emphasis added). This Court also noted that it is the state's and not the federal government's responsibility to protect the personal privacy of its citizens to he let alone by the people:

> However as noted, the United States Supreme Court has also made it absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy: "the protection of a person's right to privacy--his right to be let alone by other people--is, like the protections of his property and of his very life, left largely to the law of the individual States." Katz v. United States, 389 U.S. 347, 350-351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

Id. See also: State v. Wells, supra. Thus, Section 23 must be relied upon to determine if Petitioner's right to be left alone during his journey was violated.

It must be recognized that Section 23 is not an absolute guarantee against al governmental intrusion. However, the right to privacy is a fundamental right and it is the burden of the state to justify the intrusion into that right. Winfield, supra, at 546. The state's burden was defined by this Court in Winfield, supra as follows:

> The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. See, Estate of Greenberg, 390 So.2d 40 (Fla. 1980).

477 So.2d at 547.

In the present case there was no compelling state interest to board a bus and question its occupants without suspicion that an illegal activity was occurring on the bus. Assuming arguendo that there was a compelling state interest, the state interest was not being attempted through the use of least intrusive means. The police operation of obtaining truly voluntary cooperation from the public would only be advanced, and not compromised, if it occurred in the less coercive atmosphere of the station or terminal. Aside from the psychological coercion of questioning the passengers on board the bus, there is no necessity in boarding the bus and cornering passengers to conduct police business where there is no founded suspicion of criminal activity. The police could as easily conduct its business inside of the station without the resulting intrusion into an individual's rights to be let alone during his travels.[4]

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[4] What is generally not revealed in the bus cases is how many times the right to be let alone is violated. However, one officer using this technique over a nine month period searched over 3,000 bags. State v. Kerwick, 512 So.2d 347, 348 (Fla. 4th DCA 1987).

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Patricia G. Lampert, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 3rd day of April, 1989.

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