IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL McBRIDE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,514

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

PATRICIA G. LAMPERT
Assistant Attorney General
Florida Bar #747394
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

CASE	PAGE

OTHER AUTHORITY

PRELIMINARY STATEMENT

Petitioner, MICHAEL McBRIDE, was the defendant, and Respondent, STATE OF FLORIDA, was the prosecution, in the suppression proceedings held in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

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

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

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found on pages (2) two through *(5)* five of the Petitioner's brief on the merits, but makes the following additions, clarifications and corrections:

Officer Gary Palmer of the Broward County Sheriff's Office, Organized Crime Division, testified at a suppression hearing that on April 9, **1987** he and Officer Bukata boarded a Trailways Bus while at the Fort Lauderdale station as part of their duties in checking for narcotics violations (R **8)**. The officers obtained permission from the driver to board the bus (R **9)**. They initially made contact with a passenger in the back of the bus. Upon returning to the front they met Petitioner seated in the center of the bus (R 9).

Officer Palmer, in a normal conversational tone approached Petitioner and stated "Excuse me. I'm with the Sheriff's Office. Do you have a moment to speak?" (R **10)**. Petitioner answered "yes" (R 10). Officer Palmer, at the time, was positioned such that he was not blocking Petitioner's passageway to and from his seat (R 9). Officer Palmer was standing partially in the aisle of the bus and partially to the back of the seat which was next to Petitioner, such that Petitioner had to turn around to look at Officer Palmer (R **9-10)**. Petitioner's passage to and from his seat and his passage to the front or rear of the bus was not obstructed by Officer Palmer's presence. Additionally, Officer Bukata stood directly behind

Officer Palmer, also partially in the aisle and partially behind a seat (R 11).

Officer Palmer testified he and his partner were wearing plain clothes but wore green jackets which bore patches with the Sheriff's insignias to identify them as police officers (R 8).

Once again, the officers asked Petitioner if he had a moment to speak with them. Petitioner responded yes. They asked Petitioner where he was traveling and then advised him of their purpose in meeting the traveling public and asking them for their cooperation in allowing a search of their baggage (R 12). The officer's also told Petitioner that he had a right to refuse any such search (R 12).

Officer Palmer next asked Petitioner whether he had any luggage (R 12). Petitioner answered yes and displayed a bag which he had with him (R 13). Officer Palmer asked Petitioner if he could search the bag and Petitioner said yes (R 13).

The officer opened and searched the bag and found a small gram scale (R 13). He then continued the search and found a white plastic bottle which contained 67 grams of cocaine (R 13). Officer Palmer testified that Petitioner at no time indicated that he wanted the search stopped (R 14, 77).

Petitioner also testified at the suppression hearing. He testified that Officer Palmer, standing partially in an aisleway and partially in a seat area, identified himself (R 63, R 70). Further, the Officer asked Petitioner whether he had any luggage and whether he could search it (R 65-66). Petitioner

allowed the officer to search his luggage and, in fact, assisted him in going through the bag (R 66, R 71).

At the close of the evidence the trial court denied Petitioner's motion to suppress (R 85). The court ruled that Petitioner's consent to search was made freely and voluntarily and was not coerced (R 84, 85).

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 on correctness, this Court should defer to the trial court 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, and no passenger was singled out, as a matter of law. Inherent factors,

such as the future departure of the bus, or the physical confines or environment on board public transit, are not the result of police conduct, and are known beforehand by all citizens. There is no Constitutional difference, in the "public place" nature of a bus, as a matter of law, from that of a public concourse, terminal or station. ***Any*** factually distinguishing circumstances are adequately addressed by governing U.S. Supreme Court standards and criterion, which allow for adequate balancing of the compelling state interest in enforcement of drug laws, and a citizen's privacy interests, on a case-by-case basis.

The encounter between Petitioner and police was clearly not a seizure, and thus did not invoke Fourth Amendment protections. There was no evidence of any indicia of control or of circumstances *so* intimidating such that a reasonable person, innocent of any crime, would have felt not free to leave, or decline to respond to the police. The police questioned Petitioner without forceful or threatening tone or manner, did not retain Petitioner's ticket, did not physically block or touch Petitioner, and were in plainclothes, without displaying weapons. Thus, the consent search was conducted subsequent to a valid "encounter", and not tainted by any police misconduct. Assuming arquendo there was misconduct, the advisement to Petitioner of his right to refuse consent, attenuated any taint from the misconduct.

Under the totality of circumstances, Petitioner gave free and voluntary consent to the search of his luggage.

Petitioner retrieved the bag, placed it on his lap, and opened the bag for police. Furthermore, Petitioner said and did nothing to limit the scope of the officers' search. The totality of circumstances demonstrated that his consent was unequivocal, and not limited to the outer bag. Regardless of whether, in fact, the consent was limited, upon discovering the gram scale in the outer bag the officer had probable cause to search and open the bottle subsequently found in the bag.

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

ARGUMENT

POINT ON APPEAL

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 point out that the ruling of 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, but rather, 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** (Fla. **1978).**

Petitioner alleges that its motion to suppress was erroneously denied. In an effort to support this theory, Petitioner claims the following: the police actions, without a founded suspicion of criminal activity, tainted any alleged consent; the totality of the situation supported a finding of coercion; the search went beyond the scope of any alleged consent; and the government intrusion invaded Petitioner's right to privacy. On the contrary, as the trial court accurately stated below, as the State correctly argued on appeal, and as affirmed by the Fourth District Court of Appeal in reliance on

State v. Avery, **531** So.2d **1182** (Fla. 4th DCA **1988),** Petitioner voluntarily consented to the search of his luggage pursuant to a voluntary police/citizen encounter.

A. THE POLICE ACTIONS DID NOT TAINT THE CONSENT OF THE PETITIONER.

The trial court was correct in denying Petitioner's motion to suppress the cocaine taken from his luggage pursuant to a valid "encounter" and consent search (R **84-85).** 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 Avery, supra, correctly applied United States Supreme Court precedent in affirming the trial court's ruling.

Avery relied on compelling U.S.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 would establish a litmus test for encounters aboard public transit by police by virtue of such facts, in and of themselves. He 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** (1980), Justice Stewart initially observed that, since the issuance of Terry v. Ohio, **392** U.S. **1** (1968), the Supreme Court had recognized the legitimate nature of police-citizen encounters in public areas. Mendenhall 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, 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** (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. Id. at 497-499; 508. Thus, the conclusions in Royer continued to reject the application of a litmus test, to cover all categories of police-citizen contact:

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

Id. at 506-507; 508.

In INS v. Delgado, 466 U.S. 210 (1984), a six-member majority continued to apply a case-by-case, fact-oriented approach in distinguishing between encounters and seizures. 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". Id. 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 most recently, and squarely rejected in Michigan v. Chesternut, 486 U.S.___, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). In this decision, the Court unanimously reversed the Federal appeals court's conclusion, that a police car driving beside a citizen, running along a public street, always presents a per se "seizure" classification. Id. 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 direction" that an assessment of whether an encounter or seizure is involved, depends on a case-by-case analysis of the totality of circumstances present. 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, supra, provide for a balancing of the significant public interest in drug and law enforcement with the citenzenry's interest, in each case. Chesternut; Delgado; Mendenhall; Royer; Schneckloth v. Bustamonte, 412 U.S. 218 (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, 13 F.L.W. 2388, 2386 (Fla. 4th DCA, October 26, 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 U.S. Supreme Court's

construction of the Fourth Amendment must be followed, Art. I, Sec. 12, Fla. Constitution (1987), the Fourth District's opinion must be affirmed.

Petitioner claims there should be a Constitutional distinction between police-citizen encounters in a public terminal or concourse, and encounters that occur on board public transit. He alleges that the basis for this distinction is the inherent aspects of law enforcement authority and of the location on board public transportation. As already argued, 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 exits, 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, Delqado focused on lawfulness of the officers' presence and conduct, and the absence of any "singling out" of any individual employee.

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 Delqado 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 which Petitioner relies on in Delaware v. Prouse, 440 U.S. 648 (1979), where a vehicle was stopped by affirmative police conduct. A bus passenger knows he is also subject to intrusions by other citizens and by a bus driver who takes money or tickets, thus further augmenting the degree of access by others. While Petitioner had a seat on the bus by virtue of his ticket, he could not restrict access by lock, 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 individuals'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, 13 F.L.W., at 2386, 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. 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. It appears that all persons on the bus were randomly questioned so that an innocent person would not feel "singled out". Delgado; Rembert. 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, particularly when all other passengers are subjected to the same "encounter" for the limited purpose of questioning and asking for consent to search. Delgado, supra; Delgado, at

222 (Powell, J, concurring); Whitehead, supra; United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Chesternut, supra. These circumstances are not so intimidating that a reasonable innocent person would feel that his freedom to move, or to refuse to cooperate with police, is restricted. Delgado; Delqado, at 221 (Powell, J, concurring opinion); Chesternut; Mendenhall; Jacobsen, at 1285; Rembert, at 175.

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

Petitioner has argued that, assuming arquendo, the police conduct herein was improper, any advisements to Petitioner of a right to refuse consent, does not attenuate the taint of the prior conduct. It has been consistently held that such an advisement removes the taint of a prior unlawful seizure as a matter of law. State v. Martinez, 459 So.2d 1062 (Fla. 3rd DCA 1984); State v. Milwood, 430 So.2d 563 (Fla. 3rd DCA 1983); State v. Husted, 370 So.2d 853 (Fla. 2nd DCA 1979). The solicitation of consent (R 12, 13) was subsequent to the officer's original approach and questioning of Petitioner. Furthermore, the absence

of any written advisement does not itself invalidate an otherwise valid consent. Florida v. Rodriquez, 469 U.S. 1, 6-7 (1984); Schneckloth, supra. Therefore, assuming any improper conduct by the officers, the consent search was sufficiently attenuated as to be deemed valid.

B. THE TOTALITY OF CIRCUMSTANCES DOES NOT DEMONSTRATE COERCION.

Petitioner has furthermore maintained that, assuming the validity of detention, Petitioner's consent was invalid as coerced. However, none of "indicia of control" suggested by the factors in the Mendenhall line of cases was present herein. The record establishes that the officers were in plainclothes (R 8), did not display any weapons (R 6), did not ask for or retain Petitioner's ticket, did not block his path or physically touch Petitioner (R 10) and clearly asked him if he would consent (R 12); e.g., Mendenhall; Jacobsen; Paster v. State, 498 So.2d 962 (Fla. 4th DCA 1986); State v. Jones, 454 So.2d 774 (Fla. 3rd DCA 1986); United States v. Armstrong, 772 F.2d 681, 685 (11th Cir. 1986); United States v. Waksal, 709 F.2d 653, 659 (11th Cir. 1983). Thus, the consent was clearly the result of a legitimate "encounter" under the totality of circumstances. Mendenhall.

Under examination of all circumstances, the State demonstrated by a preponderance of the evidence, Hurtado v. State, 13 F.L.W. 2454, 2455 (Fla. 1st DCA November 7, 1988); State v. Elsleger, 503 So.2d 1357 (Fla. 4th DCA 1983); Denehy v.

State, 400 So.2d 1216 (Fla. 1980), that Petitioner's consent was voluntary and unequivocal.[1] Schneckloth. The evidence demonstrates that after asking for his consent, Petitioner himself agreed, and assisted in opening the luggage he had identified as his own, brought out from under his seat, and placed on the next seat (R 64, 65). The evidence was undisputed that Petitioner never made any statements or performed acts that were at all inconsistant with giving the police permission to search his bag. This consent was unquestionably voluntary. Schneckloth; Denehy, supra; Nazario, supra; State v. Fuksman, 468 So.2d, 1067, 1069 (Fla. 3rd DCA 1985); State v. Milwood, 430 So.2d, at 565. There was simply no evidence that Petitioner's consent was coerced, or was mere acquiescence to authority.

C. THE SEARCH DID NOT *GO* BEYOND THE SCOPE OF CONSENT.

Petitioner next argues that even a valid consent to search his luggage did not extend to the opening of the "white bottle" within the luggage by police which produced the cocaine (R 13). On the contrary, Petitioner's consent was to a "search" of the luggage, followed by the opening of the bag, not just a "look" (R 13). Petitioner did and said nothing at the time the officer picked up the white bottle from the bag and opened it (R 13, 40, 41). Officer Palmer was not restricted by Petitioner's conduct

---

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

or statements, and was not compelled to refrain from opening the bottle. In fact, Petitioner's assistance in helping the officer to go through his luggage could only convey that his consent was not only voluntary but also unbounded (R **66**). In light of the unequivocal and unlimited nature of this conduct by Petitioner, he cannot reasonably maintain that his consent was limited to the outer bag. Schneckloth; Hurtado, **13** F.L.W., at **2455**; Fuksman, **468** So.2d at **1070**; **1070-1071**, n. **5**. Palmer v. State, **467** So.2d **1063**, **1064** (Fla. 3rd DCA **1985**); State v. Price, **363** So.2d **1102** (Fla. 3rd DCA **1985**); State v. Price, **363** So.2d 1102 (Fla. 2nd DCA **1978**).

Assuming arguendo that Petitioner's consent was limited, the search of the bottle is, nonetheless, justified. Respondent is not unmindful of this Court's recent decision which rejected the consent to search an inner bag as a per se result of consent to search the outer bag. State v. Wells, **14** F.L.W. **87**, **88** (Fla. March **2**, **1989**) However, the Wells decision did not reject such consensual searches if the search could be justified on some other ground. Specifically, this Honorable Court stated that "[i]f that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do *so* unless the search can be justified on some other basis.'' Id. at **88**. (e.a.) Thus, if probable cause arises, the search of an inner bag, or, as in this case, a bottle, is valid.

In the instant case, during the search Officer Palmer found a small gram scale (R 13, 40). These portabale gram scales are necessary equipment among drug traffickers. Accordingly, the officer's suspicions were clearly aroused upon discovery of the scale as to present probable cause once the officer located the white bottle which subsequently revealed the cocaine.

D. THE ENCOUNTER DID NOT VIOLATE PETITIONER'S RIGHT OF PRIVACY PURSUANT TO ARTICLE I.

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

result of the dominance of drugs. However, the prevalence of these cases should not be cause for rethinking the encounter/consent analysis and expanding travelers' rights to privacy in situations such as these.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that the lower court's decision be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

PATRICIA G. LAMPERT
Assistant Attorney General
Florida Bar #747394
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been furnished by courier to: ELLEN MORRIS, ESQUIRE, Assistant Public Defender, Fifteenth Judicial Circuit, The Governmental Center, 301 N. Olive Avenue/9th Floor, West Palm Beach, 33401 this 19th day of April, 1989.

Of Counsel