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## Florida v. Bostick: Voluntary Encounter or the Power of Police Intimidation?

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# Florida v. Bostick: Voluntary Encounter or the Power of Police Intimidation?

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## **Abstract**

On August 27, 1985, two officers from the Broward County Sheriff's Department boarded a Greyhound bus in Fort Lauderdale, Florida. One of the officers, Detective Nutt, carried in his hand a zippered pouch containing a pistol.

**KEYWORDS:** power, police, intimidation

## *Florida v. Bostick*: Voluntary Encounter or the Power of Police Intimidation?

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### I. INTRODUCTION

On August 27, 1985, two officers from the Broward County Sheriff's Department boarded a Greyhound bus in Fort Lauderdale, Florida. One of the officers, Detective Nutt, carried in his hand a zippered pouch containing a pistol. The bus driver immediately left the bus, closing the door behind him. The officers proceeded directly to the back of the bus to Terrence Bostick. They identified themselves, asked for his bus ticket and identification, and for consent to search his luggage.<sup>1</sup> During the search they found 400 grams of cocaine.<sup>2</sup>

In a 4-3 decision, the Florida Supreme Court found the search illegal, because any consent given was tainted by Bostick's belief that he was not free to leave.<sup>3</sup> Since *Bostick*, a number of Florida courts have mirrored the state supreme court's reasoning.<sup>4</sup> The *Bostick* decision has also been followed in jurisdictions other than Florida,<sup>5</sup> and applied in other contexts such as border searches,<sup>6</sup> trespass warnings,<sup>7</sup> and seizure of firearms.<sup>8</sup>

During the October 1990 term, the United States Supreme Court

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1. Brief for Respondent at 1-4, *Florida v. Bostick*, No. 89-1717 (December 21, 1990) [hereinafter Brief].

2. Lipman, *Broward Drug Case Hinges on Permission for Search on Bus*, Palm Beach Post, Feb. 26, 1991, at 3A, col. 5.

3. *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989).

4. *Nazario v. State*, 554 So. 2d 515 (Fla. 1990); *Mendez v. State*, 554 So. 2d 1161 (Fla. 1990); *Jones v. State*, 559 So. 2d 1096 (Fla. 1990); *Serpa v. State*, 555 So. 2d 1210 (Fla. 1990) (decided the same day as *Bostick*); *Avery v. State*, 555 So. 2d 351 (Fla. 1989) (decided the same day as *Bostick*); *Smith v. State*, 556 So. 2d 761 (Fla. 4th Dist. Ct. App. 1990); *State v. Florius*, 563 So. 2d 820 (Fla. 4th Dist. Ct. App. 1990). *But see* *United States v. Fields*, 909 F.2d 470 (11th Cir. 1990) (similar facts, but appellate court upheld trial court's finding that consent to search baggage was freely given); *Anderson v. State*, 566 So. 2d 371 (Fla. 4th Dist. Ct. App. 1990).

5. *E.g.*, *United States v. Lewis*, 728 F. Supp. 784 (D.D.C. 1990), *rev'd* 921 F.2d 1294 (D.C. Cir. 1990).

6. *United States v. Bareno-Burgos*, 739 F. Supp. 772 (E.D.N.Y. 1990).

7. *State v. Melican*, 564 So. 2d 245 (Fla. 5th Dist. Ct. App. 1990).

8. *A.G. v. State*, 567 So. 2d 1008 (Fla. 3d Dist. Ct. App. 1990).

granted certiorari to hear *Florida v. Bostick*.<sup>9</sup> The Court will decide whether the Broward County Sheriff's Office policy on drug searches breaches bus passengers' fourth amendment rights when the police board a bus without articulable suspicion, and randomly ask passengers for "consent" to search their luggage. The decision the Court renders will impact on the manner in which law enforcement officers throughout the nation may collect evidence.

The Supreme Court cannot allow police officers to continue to approach individuals in this intimidating manner. Although the United States is fighting a war on drugs, there is no need to place the citizen in the position of the enemy. The Court must clarify the difference between "voluntary encounter" and "lawful seizure" categories.<sup>10</sup> Current standards are too vague, and applying these standards tends to give greater leeway to the police than is necessary.<sup>11</sup>

The first section of this article gives factual and procedural background leading to the court's decision as well as the rationale followed by the majority and the minority on the court. The second section focuses on the current standards: the governmental and individual interests to be protected; and the requirements for a lawful seizure. The third section calls for a narrower definition of the "voluntary encounter."

## II. BACKGROUND ON *Bostick*

On the morning of August 25, 1985, two Broward County Sheriff's Officers boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. The bus driver immediately left the bus, closing the bus door behind him. The officers, Detective Nutt and Officer Rubino, proceeded directly to the back of the bus where Terrence Bostick, a passenger, was lying with his head on a red tote bag.<sup>12</sup>

The officers asked Bostick for his ticket and identification. They admitted that at this point they did not have any articulable suspicion. Bostick's ticket matched his identification, and both were immediately

9. 111 S.Ct. 241 (1990).

10. The three categories of police contact with individuals are: "voluntary encounters;" "brief, investigatory stops," the lesser level of lawful seizure; and "arrest," the ultimate seizure. See *infra* note 42 and accompanying text.

11. Ambrosio, *The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?*, 12 NOVA L. REV. 273 (1987) (suspect under profile surveillance should be deemed to be seized when initially approached).

12. Brief for Respondent, *supra* note 1, at 1-2.

returned to him.<sup>13</sup>

The two police officers explained their presence as narcotic agents on the lookout for illegal drugs. Detective Nutt then asked Bostick whether the red tote bag, which he was using as a pillow, could be searched for drugs. Bostick looked for approval to another passenger, to whom the bag belonged, and handed the bag to Nutt, who searched it. No contraband was found. Detective Nutt then asked for Bostick's permission to search a blue bag that Officer Rubino had found on the overhead rack. The evidence was unclear as to whether the defendant consented to the search of the second bag in which the contraband was found.<sup>14</sup>

Detective Nutt, testified that they had entered the bus wearing raid jackets clearly identifying them as sheriff's officers, and approached Bostick as he sat in the rearmost seat. During questioning, this officer stood in a position that partially blocked the only exit from the bus. Bostick also testified that Officer Nutt had his hand in a black pouch which appeared to contain a gun. Bostick was not able to leave the bus, as it was ready to depart, and he could only move about the bus if the officers would allow him to do so.<sup>15</sup>

The officers found over 400 grams of cocaine in a blue bag belonging to Bostick. Bostick pled guilty and was sentenced to five years.<sup>16</sup> The Fourth District Court of Appeal issued a per curiam affirmance. However, the court agreed to certify the following question to the Florida Supreme Court: May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?<sup>17</sup>

The Florida Supreme Court rephrased the issue as follows: Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?<sup>18</sup>

The court answered the question in the affirmative and quashed

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13. *Bostick*, 554 So. 2d at 1154.

14. Brief for Respondent, *supra* note 1, at 4.

15. *Bostick*, 554 So. 2d at 1157.

16. Lipman, *Broward Drug Case Hinges on Permission for Search on Bus*, Palm Beach Post, February 26, 1991, at 3A, col. 5.

17. *Bostick v. State*, 510 So. 2d 321 (Fla. 4th Dist. Ct. App. 1987).

18. *Bostick*, 554 So. 2d at 1154.

the opinion of the district court. It found Bostick had been seized by the officers and that any consent he had given to the search of his luggage had been tainted by the illegal detention.<sup>19</sup>

The Florida Supreme Court found that under all the circumstances, the "reasonable traveler would not have felt that he was 'free to leave' or that he was 'free to disregard the questions and walk away.' There was, in fact, . . . no place to which he or she might walk away."<sup>20</sup> The court concluded that although the seizure did not amount to an arrest, it was the lesser form of seizure requiring constitutional protection.<sup>21</sup>

In arriving at this conclusion, the court looked to the area in which the "seizure" occurred and the surrounding circumstances. Bostick was in a bus which he could not leave because it was scheduled to depart soon.<sup>22</sup> Furthermore, the officers partially blocked the only possible exit from the bus. The fact that one of the officers had his hand on what appeared to be a gun added to the intimidation.<sup>23</sup>

Having concluded that there was a detention, the court next looked to the propriety of the seizure. The court properly followed the principle of federal and Florida law that the officers must have had, at a minimum, a reasonable articulable suspicion before detaining Bostick.<sup>24</sup> By their own testimony, the officers never had any basis for suspecting illegal activity.<sup>25</sup> Thus the court's inquiry was at an end. Bostick had been unlawfully and unjustifiedly detained.<sup>26</sup>

In his dissent to the majority's opinion in *Bostick*, Justice Grimes admitted that he was uncomfortable with the Broward County Sheriff's practice of routinely boarding stopped buses to inquire of its passengers

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19. *Id.* at 1155.

20. *Id.* at 1157.

21. *Id.*

22. *Id.* The court compared this circumstance with that of *Alvarez v. State*, 515 So. 2d 288 (Fla. 4th Dist. Ct. App. 1987). In *Alvarez*, the defendant had already boarded his train and begun his journey. To leave in the sense contemplated by *Terry* and *Mendenhall* would have meant to abandon his private berth and possibly miss his destination. The fourth district concluded that the police activity was tantamount to a detention. However, the Florida Supreme Court ignored the fact that one would have a greater expectation of privacy in a private berth than on a bus. Note also that Officer Nutt, one of the officers who "detained" Bostick, was also an officer involved in the seizure of *Alvarez*.

23. *Bostick*, 554 So. 2d at 1157.

24. *Id.* at 1157-58.

25. *Id.* at 1158.

26. *Bostick*, 554 So. 2d at 1158.

whether they would consent to a search of their luggage.<sup>27</sup> However, law enforcement agents are permitted to board buses, and are free to communicate with passengers.<sup>28</sup> Although the location is a factor in determining whether a seizure has taken place, he found that whether a reasonable person would have felt free to terminate the encounter was a question of fact to be determined by the totality of the circumstances.<sup>29</sup> Justice Grimes noted that in this case, the trial judge had not considered Bostick to be seized.<sup>30</sup>

### III. CURRENT REQUIREMENTS FOR A LAWFUL SEIZURE

The fourth amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . .”<sup>31</sup> The U.S. Supreme Court has long recognized the right of every individual to be “free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>32</sup> In other words, the fourth amendment does not protect citizens from all searches and seizures, but only *unreasonable* searches and seizures.<sup>33</sup>

The basic premise of fourth amendment protection is that every person has the right to live his life without impediment from others.<sup>34</sup> However, the citizen loses this right of personal autonomy when he acts

27. *Id.* at 1159 (Grimes, J., dissenting).

28. *Id.* at 1160.

29. *Id.*

30. *Id.* In Florida, findings of fact by a trial court are presumed to be correct. *Marsh v. Marsh*, 419 So. 2d 629, 630 (Fla. 1982); *Strawgate v. Turner*, 339 So. 2d 1112, 1113 (Fla. 1976); *see also Medina v. State*, 466 So. 2d 1046, 1049 (Fla. 1985) (presumption of correctness for ruling on motions to suppress). The appellate court may disturb the trial court's conclusion only when there is a lack of substantial evidence to support the court's conclusion. *Strawgate*, 339 So. 2d at 1113 (citing *Chakford v. Strum*, 87 So. 2d 419 (Fla. 1956)). Otherwise, the appellate court would be improperly substituting its judgment for the trial court's in reaching a contrary decision. *Id.*

31. U.S. CONST. amend. IV. The fourth amendment is enforceable against the states pursuant to the due process clause of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). Florida's constitution also provides against unreasonable searches and seizures. FLA. CONST. art. I §, 12.

32. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

33. *Id.*; *see also Elkins v. United States*, 364 U.S. 206, 222 (1960).

34. *Bostick*, 554 So. 2d at 1155.

to harm another.<sup>35</sup> Therefore, the state has the power to interfere with the individual's autonomy through search or seizure when it has reason to believe that an individual has committed a crime.<sup>36</sup> This power to interfere does fall within constitutional constraints.<sup>37</sup> For "[t]he right protected by the [f]ourth [a]mendment include[s] the right to be immune from conviction on the basis of unconstitutionally seized evidence."<sup>38</sup>

In *Bostick*, the state had a compelling interest in finding those who traffic in illegal drugs. The drug problem affects the health and welfare of our society.<sup>39</sup> Therefore, the Broward County Sheriff's Office had a legitimate interest in finding the contraband in Bostick's luggage. However, Bostick did have a "privacy interest in continuing his travels without governmental intrusion."<sup>40</sup> He also had a well established privacy interest in the luggage he carried during his travels.<sup>41</sup>

The question is whether, given the government's compelling interest in stemming the drug flow, Bostick's fundamental right to privacy, and the particular circumstances of the case, the state violated Bostick's personal autonomy with an unreasonable search and seizure.

In determining whether the state's interference with the individual is lawful, courts must take into account the degree of contact and its basis. The United States Supreme Court has recognized three main types of encounters: "voluntary encounters," or "mere communication," which do not involve the fourth amendment; the "short detention," or *Terry* stop, involving some seizure and requiring reasonable suspicion; and an arrest requiring probable cause.<sup>42</sup> Thus, courts must ask whether the individual has been seized, and on which level.<sup>43</sup> But the "central inquiry under the [f]ourth [a]mendment [is] the reasonableness in all the circumstances of the particular governmental invasion

35. *Id.*

36. *Id.*

37. *Id.*

38. B. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY (1986).

39. *United States v. Mendenhall*, 446 U.S. 554, 561 (1980).

40. *Bostick*, 554 So. 2d at 1157 (quoting 3 W. LAFAVE, SEARCH AND SEIZURE § 11.3 at 571 (1978)).

41. *Id.* (citing *United States v. Chadwick*, 433 U.S. 1, 13 (1977)).

42. *Terry v. Ohio*, 392 U.S. 1 (1968). This article does not deal with the arrest.

43. Schleuter, *Survey: Criminal Law and Procedure*, 19 TEX. TECH. L. REV. 483, 491 (1988)). *See, e.g., United States v. Hanson*, 801 F.2d 757 (5th Cir. 1986).

of a citizen's personal security."<sup>44</sup>

The first mode of interference, the voluntary encounter, does not raise any fourth amendment issues. For "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons."<sup>45</sup> Nothing in the Constitution prevents a policeman from addressing questions to citizens on the street.<sup>46</sup> The police officer enjoys "the liberty (again, possessed by every citizen) to address questions to other persons."<sup>47</sup> But by the same token, the "person addressed has an equal right to ignore his interrogator and walk away."<sup>48</sup>

The voluntary encounter is considered permissible because the purpose of the fourth amendment is not to eliminate all contacts between the police and the individuals, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."<sup>49</sup> Therefore, as long as the individual encountering the governmental official is free to walk away without answering any questions, the state has not intruded upon the citizen's expectation of privacy. Under these conditions, the U.S. Constitution does not require any specific justification.<sup>50</sup>

Nonetheless, once an officer uses physical force or a show of authority to restrain the citizen's freedom, the officer has "seized" him within the meaning of the Constitution.<sup>51</sup> The test is whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>52</sup>

44. *Terry*, 392 U.S. at 19.

45. *Id.* at 19 n.16.

46. *Id.* at 34 (White, J., concurring).

47. *Id.* at 32 (Harlan, J., concurring).

48. *Id.* at 33.

49. *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (quoting *United States v. Martinez-Fuente*, 428 U.S. 543, 554 (1976)).

50. *Id.* at 554.

51. *Id.* at 553. At this point, there is a brief, investigatory (*Terry*) stop. A brief detention is justifiable under the fourth amendment if there is a reasonable, articulable suspicion that a person has committed or is about to commit a crime. *Royer*, 460 U.S. at 498. "[S]pecific articulable facts, together with rational inferences from those facts, [must] reasonably warrant suspicion of a crime." *Bostick*, 554 So. 2d at 1158. There is no set standard as to what constitutes a reasonable suspicion. Instead the standard seems to be based on a variety of factors: the seriousness of the offense; the likelihood that the detainee committed or will commit the offense; consequences of delay; and the extent of the intrusion. 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1(d) (2d ed. 1987) [hereinafter W. LAFAVE, TREATISE].

52. *Id.* at 554.

For a person to come under the protection of the fourth amendment, he must "have exhibited an actual (subjective) expectation of privacy and . . . the expectation [must] be one that society is prepared to recognize as 'reasonable.'"<sup>53</sup> Thus, the area in which a person encounters the police will have some impact on whether his expectation of privacy is reasonable, and whether he has been "seized."<sup>54</sup> In the context of public transportation, there would be a greater expectation of privacy in a sleeper car where one would not expect to encounter anyone in one's own cabin, and only a few other passengers in the hallway.<sup>55</sup> But the individual has a lesser expectation of freedom from governmental interference in an airport, which requires extensive hijacking surveillance and equipment.<sup>56</sup>

Examples of circumstances indicating a seizure include: the threatening presence of several officers; display of a weapon by an officer; some physical touching of the individual; and use of language or tone of voice indicating that compliance with the officer's request might be compelled.<sup>57</sup> These are circumstances which might reasonably make the individual think he is not free to leave.

There is some question as to the relevance of a government agent's intent to detain an individual. Under the *Mendenhall* test, whether an officer intends to detain the citizen is irrelevant, except to the extent to which he conveys his intention.<sup>58</sup> However, a more recent Supreme Court case, *Brower v. Inyo County*,<sup>59</sup> held that a "[v]iolation of the [f]ourth [a]mendment requires an intentional acquisition of physical control . . . . [T]he detention or taking itself must be willful . . . . [I]t must be] a governmental termination of freedom of movement *through*

53. 1 W. LAFAVE, TREATISE § 2.1(b) (quoting *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring)). Although the Court generally identifies the protection of privacy as the fourth amendment's paramount purpose, it has also recognized that the amendment is intended to protect other interests such as bodily integrity, freedom of movement, and possession of property. Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174 n.2 (1988).

54. *Alvarez v. State*, 515 So. 2d 286, 290 (Fla. 4th Dist. Ct. App. 1987).

55. *Id.*

56. *Florida v. Royer*, 460 U.S. 491, 515 (1983) (plurality opinion) (Blackmun, J., dissenting).

57. *Mendenhall*, 446 U.S. at 554 (citing *Terry*, 392 U.S. at 19, n.16; *Dunway v. New York*, 442 U.S. 200, 207 (1979)); 3 W. LAFAVE, SEARCH AND SEIZURE at 53-55).

58. *Id.* at 555, n.6.

59. 489 U.S. 593 (1989).

*means intentionally applied.*"<sup>60</sup>

Although based on one or more of the above circumstances an individual might be considered "seized," these situations are not absolutely determinative in and of themselves as to whether there has been a seizure. Indeed, the United States Supreme Court has failed to find a seizure where the police officer requested production of an airline ticket and identification.<sup>61</sup> The court could not come up with a "litmus-paper" test:

[T]here will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the [f]ourth [a]mendment.<sup>62</sup>

Hence, each court must balance these factors and determine whether the individual has been seized.

As evidenced by the *Bostick* court's split decision,<sup>63</sup> in practice, this balancing of factors is difficult to apply. In two other cases with similar facts involving the Broward County Sheriff's Office practice of routinely boarding stopped buses, the Eleventh Circuit Court of Appeals found that the district court had sufficient evidence to warrant its finding that the defendant had not been seized.

In the later case, *United States v. Fields*,<sup>64</sup> two Broward County Sheriff's officers boarded a north-bound bus that had just arrived from Miami, Florida. The detectives had no information regarding the defendant suggesting that he was carrying illegal drugs. Both men were armed, but concealed their weapons under their jackets which bore the insignia of the Broward County Sheriff's Department. In accordance with usual procedure, the officers proceeded to the rear of the bus with the intention of working their way to the front. The detectives identi-

60. *Id.* at 596-97 (emphasis in original); see also Clancy, *The Supreme Court's Search for a Definition of a Seizure: What Is a "Seizure" of a Person within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 640-45 (1990) (*Brower* does away with the reasonable person test, requiring officer's intent and actual control over the individual).

61. *Royer*, 460 U.S. at 511 (Brennan, J., concurring in the result, but dissenting to the portion which finds that *Royer* was not seized when the police officers requested his airline ticket and identification).

62. *Id.* at 506-07.

63. 554 So. 2d 1153.

64. 909 F.2d 470 (11th Cir. 1990).

fied themselves to Fields and his seatmate, and explained that they were seeking the permission of passengers to search their luggage in an effort to obstruct the flow of illicit drugs. The detectives and Fields diverge as to whether the defendant was informed of his right to refuse consent. The officers found cocaine.<sup>65</sup>

The court took an interest in the *Bostick* opinion, as well as the D.C. Circuit's opinion in *United States v. Lewis*:<sup>66</sup>

The very nature of the encounter between Detective Hanson and Mr. Lewis placed the latter in a position in which he could reasonably believe that he was not free to walk away. To walk away from this encounter, Mr. Lewis, who was waiting for the bus to depart for his Richmond destination, would have had to stand up from his seat, work his way out of the narrow row in which he was situated, and then negotiate his way past Detective Hanson, who was positioned in the narrow exit aisle. In effect, he would have had to leave the bus, give up his seats, and lose his ability to travel to Richmond in accordance with his travel plans.<sup>67</sup>

The *Fields* court found the *Bostick* and *Lewis* opinions disturbing, and the court was reluctant to effectuate "the gradual erosion of the [f]ourth [a]mendment."<sup>68</sup> However, the eleventh circuit was bound by its previous decision in *United States v. Hammock*.<sup>69</sup> In *Hammock*, the eleventh circuit had already examined the Broward County Sheriff's Office policy regarding random searches on buses. The court found that under the circumstances, the defendant would have felt free to leave the bus.<sup>70</sup>

It would appear that given the totality of the circumstances, under current standards, a court would be justified in both finding there was a detention, and finding there was not a detention. The standards with which the courts are working are too vague. With *Bostick*, the Court will have an opportunity to redefine what is meant by "whether the reasonable person would have felt free to walk away."

65. *Id.* at 471-72.

66. 728 F. Supp. 784 (D.D.C. 1990).

67. *Fields*, 909 F.2d at 473 (quoting *Lewis*, 728 F. Supp. at 787)). *Lewis* has since been overruled. 921 F.2d 1294 (D.C. Cir. 1990). The circuit court distinguished the *Bostick* opinion on the basis that in *Lewis*, the officers did not wear badges or carry visible weapons. *Id.* at 1299.

68. 909 F.2d at 473.

69. 860 F. Supp. 390 (11th Cir. 1988).

70. *Fields*, 909 F.2d at 473.

#### IV. NARROWING THE SCOPE OF THE "VOLUNTARY ENCOUNTER"

The evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation'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-wielding police, for identification, travel papers - in short a *raison d'être* - is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it 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 just 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.<sup>71</sup>

The *Bostick* court found that the government had "exceeded its power to interfere with the privacy of an individual citizen who is not even suspected of any criminal wrongdoing."<sup>72</sup> In arriving at this conclusion, the court was acting on its fear that these "repressive measures, even to eliminate a clear evil, usually result only in repression more mindless and terrifying than the evil that prompted them."<sup>73</sup> The Florida Supreme Court's decision seems to go beyond the facts of the *Bostick* case to fears regarding police conduct in general. However, the issue raised by *Bostick* is fact specific:

Whether two police officers violated the [f]ourth [a]mendment when, as a routine practice unprovoked by any suspicion, they boarded an interstate bus during a scheduled stop and, while the door to the bus was closed and one officer carried a pistol in his hand and partially blocked the aisle, questioned respondent and obtained permission to search his luggage.<sup>74</sup>

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71. *Bostick*, 554 So. 2d at 1158 (quoting *State v. Kerwick*, 512 So. 2d 347 (Fla. 4th Dist. Ct. App. 1987)).

72. *Id.* at 1158.

73. *Id.* at 1159.

74. Brief for Respondent, *supra* note 1, at (i) (Question Presented).

The Supreme Court should go beyond the facts of *Bostick*, and address police conduct in general. The Court should not only clarify the differences between the "voluntary encounter" and the "*Terry* stop," but also decrease the amount of police contact which would come within the scope of the "voluntary encounter."

The Court needs to redefine what is meant by "whether the reasonable person would have felt free to walk away." This standard, as applied now, seems to use the reasonable person who is looking at the set of circumstances, but is not experiencing them. For example, one can say that *Bostick* should have known that he did not have to answer the officers' questions, and that he could have ignored them.<sup>75</sup> The average law student or practitioner knows this; however, the average person traveling on a bus does not. Most people are brought up considering the law enforcement officer as an authority figure, and many see the officer as the law.

It is generally accepted that citizens rarely feel free to end an encounter initiated by a police officer and walk away.<sup>76</sup> If taken literally, the test would make almost all police-citizen encounters seizures, eliminating the voluntary encounter. In the place of the true reasonable person, courts have constructed an artificial reasonable person, one who is much more assertive than the average citizen when encountering a police officer. In doing so, courts have described many situations as voluntary encounters, when in fact, the individual could not feel free to walk away.<sup>77</sup>

The Court's interpretation of the voluntary encounter does not take this view of the police officer into account. This is probably because there is an underlying attitude that the innocent person has nothing to fear. Indeed, courts have asked the question, "what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes."<sup>78</sup> Nonetheless, in deciding "whether a reasonable person would feel free to walk away," courts must necessarily remem-

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75. "All he had to do was to literally say 'no' to the officers." Palm Beach Post, February 26, 1991, at 3A, col. 5 (quoting Joan Fowler, Assistant Florida Attorney General).

76. Butterfoss, *Bright Line Seizures: the Need for Clarity in Determining when Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439 (1988).

77. *Id.*

78. W. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1184, n.77 (1983) (citing *United States v. Willie*, 569 F.2d 62, 68 (D.C. Cir. 1977) (quoting *Coates v. United States*, 413 F.2d 371, 373 (1969))).

ber the average person's awe of authority, whether reasonable or not. Anything beyond a cordial greeting can be intimidating.

This includes an officer's request for the individual's identification and bus ticket. Currently, the Court considers such a request as a "non-seizure."<sup>79</sup> It is only when the officer does not promptly return the documents that he has seized the individual.<sup>80</sup> However, the Court should define this intrusion into the citizen's privacy as a detention, and demand that the officer have reasonable suspicion. "It is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license."<sup>81</sup>

Furthermore, courts should give greater weight to the area in which the contact takes place. A bus is a very small, often crowded, place. A reasonable person brought up to give deference to the police would not be comfortable refusing to answer questions while remaining in the continued presence of an officer in such tight confines.

In addition, if the passenger does move from his seat, he may be acting against his own interest. A "reasonable person would fear engaging in such a suspicious act as a sudden exit from a departing bus when he is being questioned by a police officer."<sup>82</sup> Indeed, such abnormal behavior would raise the suspicion of any law enforcement official.<sup>83</sup> In *United States v. Lewis*,<sup>84</sup> the District of Columbia Circuit Court rejected such an argument because "it is clear that a mere refusal to cooperate cannot spawn the reasonable suspicion required to justify more intrusive police methods."<sup>85</sup> Justified or not, the police officer's suspicion is raised, and the person avoiding questioning must pay the consequences:

If she [the passenger] gets off the bus, she has nowhere to go. If she nonetheless attempts to leave she will probably be stopped for further inquiry and confronted by dogs. If she refuses permission to search she may be confronted again by police at the next stop pursuant to police alert. She is without any practical option except to

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79. See *supra* notes 61 and accompanying text.

80. *Royer*, 460 U.S. at 503.

81. *Id.* at 512 (Brennan, J., concurring in the result).

82. *United States v. Madison*, 744 F. Supp. 490, 497 (S.D.N.Y. 1990).

83. *Id.* at 495.

84. 921 F.2d 1294 (D.C. Cir. 1990).

85. *Id.* at 1300.

capitulate to police demands. She is, in a word, seized. And she is illegally seized because all of this occurred without any grounds for suspicion.<sup>86</sup>

It follows that any time an officer requests consent to search a person's luggage, he is in effect detaining that individual.<sup>87</sup> In *Schneckloth v. Bustamonte*,<sup>88</sup> the Court recognized that a search pursuant to a valid consent is constitutionally permissible. In reaching this conclusion, it looked to a line of cases dealing with voluntary confessions.<sup>89</sup> The Court balanced the need for police questioning as a tool for the enforcement of criminal laws, with "society's deeply felt belief that criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice."<sup>90</sup> In applying this balance, it reached the conclusion that the government could present evidence resulting from a voluntary consent to search.<sup>91</sup> However, the state has the burden of proving that the consent was voluntarily given.<sup>92</sup>

The Court did not specifically define "voluntary." Instead, it contrasted voluntary consent with "the result of duress or coercion, express or implied."<sup>93</sup> The Court held voluntariness to be a question of fact to be determined from all the circumstances.<sup>94</sup> But the same fears of in-

86. *United States v. Colthran*, 729 F. Supp. 153, 158 (D.D.C. 1990) (officer testified that, when passengers refused to permit a search of their luggage, he would sometimes notify authorities at the next stop to subject the passengers to further scrutiny), *rev'd* *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990); *see also* *United States v. Felder* 732 F. Supp. 204 (D.D.C. 1990).

87. Law enforcement officers rely on searches to introduce evidence of a defendant's guilt and to prevent or curtail criminal activity. The three main types of searches are: searches incident to an arrest; searches with search warrants, and consent searches. L. TIFFANY, D. MCINTYRE & D. ROGENBERG, *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* (The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the U.S.), 97-98 (1967).

88. 412 U.S. 218 (1973).

89. 412 U.S. at 222 (citing *Katz*, 389 U.S. at 358; *Vale v. Louisiana*, 399 U.S. 30, 34 (1970)).

90. *Id.* at 225.

91. *Id.* at 248.

92. *Id.*

93. *Id.*

94. *Id.* at 249. Among the factors bearing on consent are: an express or implied claim by the police that they can make the search in any event; show of force by police at time the consent is sought - confrontation by many police officers, display of weap-

timidation apply to the voluntary consent as to the *Terry* stop. The fact that Officer Damanio was able to search over 3000 bags in nine months demonstrates the power of police intimidation.<sup>95</sup> Once a person has been asked for consent to search his luggage, it is not likely he will feel “free to walk away.” At this point, a person should therefore be considered “seized,” and the police officer should at least be required to meet the “reasonable suspicion” standard required for the *Terry* stop.<sup>96</sup>

## V. CONCLUSION

The Court would be correct in deciding that Bostick had been seized within the meaning of the fourth amendment. The two sheriff's officers boarded the bus and asked him for his ticket and identification.<sup>97</sup> They were wearing raid jackets which clearly identified them, and one of the officers had his hand on what appeared to be a gun.<sup>98</sup> Who wouldn't be intimidated? The Court can not possibly expect that a person with any respect for the law would reasonably “feel free to walk away.” The Court should find that Bostick was seized, and therefore require reasonable suspicion of the officers.

Even without a prior seizure, the Court should find that upon being asked to consent to a search of his luggage, Bostick was seized. The police were attempting to intrude into a private area, his luggage. Such an intrusion should not be permissible without reasonable suspicion. Only after reasonable suspicion has been proven should the Court look into the validity of the consent. In determining whether the consent was valid, the Court should look to the same set of circumstances involved in a seizure. The Court should examine the possibility of intimidation, even if the officer had no intention of coercing the citizen.

Although Broward County's measures may not be as oppressive as those of Soviet Russia and South Africa, there is an unsettling resemblance. Intimidation is a powerful tool in authoritarian countries, but it

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ons, police custody of suspect; threat to seek or obtain a warrant; prior illegal police action; maturity, sophistication, mental or emotional state of the citizen; prior or subsequent refusal to consent; confession or other cooperation; denial of guilt; warning or awareness of fourth amendment rights; Miranda warnings; “implied” consent by engaging in certain activity; suspect's deception as to identity; and his deception as to purpose. 3 W. LAFAVE *supra* note 51, § 8.2.

95. See *supra* note 71 and accompanying text.

96. See *supra* note 51 and accompanying text.

97. *Bostick*, 554 So. 2d at 1154.

98. *Id.* at 1157.

has no place in the United States. It is up to the United States Supreme Court to narrow the scope of voluntary encounters, and to protect the American citizen from these oppressive measures.

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