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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 01-631  
CHRISTOPHER DRAYTON AND :  
CLIFTON BROWN, JR. :  
- - - - -X

Washington, D.C.

Tuesday, April 16, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

LARRY D. THOMPSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

GWENDOLYN SPIVEY, ESQ., Assistant Federal Public Defender, Tallahassee, Florida; on behalf of the Respondents.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 01-631, the United States v. Christopher Drayton and Clifton Brown.

Mr. Thompson.

ORAL ARGUMENT OF LARRY D. THOMPSON  
ON BEHALF OF THE PETITIONER

MR. THOMPSON: Mr. Chief Justice, and may it please the Court:

This Court has held in several decisions that the police questioning of individuals is a legitimate and, indeed, vital law enforcement technique. The decision below ignores this Court's teachings as to when a police-citizen encounter on a bus may violate the Fourth Amendment and may constitute the seizure of the passenger.

Police-citizen encounters have proven to be effective law enforcement techniques in the area of drug and weapon interdiction. These encounters are also important in today's environment with respect to the protection of passengers in the Nation's public transportation system.

This case is controlled by this Court's decision in *Bostick* and the court below incorrectly applied the *Bostick* test to these facts.

1           QUESTION: Mr. Thompson, isn't it so that in  
2 Bostick the police did inform the passengers that they had  
3 a right to refuse consent?

4           MR. THOMPSON: That is correct, Your Honor, but  
5 also in Bostick this Court clearly pointed out, on remand  
6 to the Florida Supreme Court, the factors that the Court  
7 should evaluate in terms of determining whether or not the  
8 encounter was coercive or otherwise inappropriate. And  
9 two of those factors are important here that would put  
10 into context what the court below considered.

11           For example, this Court pointed out to the  
12 Florida Supreme Court whether or not there were guns  
13 pointed and noted that there were no guns pointed in a --  
14 in the Bostick case. This Court also pointed out to the  
15 Florida Supreme Court that -- whether or not there was the  
16 existence of threatening language, and none of that  
17 existed in the case below.

18           QUESTION: Well, I -- I suppose that the advice  
19 that you have a right to decline the request applies --  
20 and I -- I take it you could read Bostick this way;  
21 perhaps you disagree -- to whether or not the -- the  
22 consent was actually given as opposed to whether there was  
23 a coercive environment.

24           MR. THOMPSON: That's correct, Your Honor, and  
25 as the Bostick Court pointed out with respect to the test

1 to be applied is whether or not, under all the  
2 circumstances, the police conduct communicated to a  
3 reasonable person -- and that presupposes a reasonably --  
4 a reasonable innocent person -- whether or not the  
5 passenger could have refused the officer's request to  
6 consent or otherwise have terminated the -- terminated the  
7 encounter.

8           There is really nothing remarkable about the  
9 facts of this case when you look at this Court's decision  
10 in Bostick and compare Bostick with this Court's decision  
11 in Robinette which clearly pointed --

12           QUESTION: My question, Mr. Thompson, was your  
13 opening statement was that the Eleventh Circuit had ruled  
14 in direct conflict with this Court's precedent. If we're  
15 applying a totality of the circumstances test, that's one  
16 circumstance that was present there, is not present here.  
17 So, whether the Eleventh Circuit erred is for us to  
18 determine today, but I do think it's a bit much to say  
19 that they -- they just disregarded this Court's precedent.

20           MR. THOMPSON: Your Honor, the Eleventh Circuit  
21 considered factors that were unlike the factors that this  
22 Court in Bostick believed were important in determining  
23 whether the police conduct at issue was coercive. And  
24 moreover, Your Honor, the Eleventh Circuit incorrectly  
25 applied the legal principles that this Court formulated

1 with respect to the facts of this case.

2 For example, the Eleventh Circuit noted the  
3 importance of Officer Hoover at the front of the bus and  
4 pointed out that his presence might lead a -- a passenger  
5 to believe that he or she could not leave the bus. Well,  
6 this Court in *Bostick* clearly pointed out that the -- in a  
7 -- in the context of a bus interdiction effort, whether or  
8 not the passenger could leave the bus was the wrong  
9 question. The question was whether or not the passenger  
10 -- whether or not the police conduct communicated to the  
11 passenger whether or not they could refuse the consent  
12 requested or whether or not they could just terminate the  
13 questioning of the police officer.

14 QUESTION: Well, it's -- it's true that the --  
15 the issue of whether someone could leave the bus or not is  
16 -- is not really an issue that -- that focuses the  
17 question, and we said so in *Bostick*. But it doesn't  
18 follow from that that it was irrelevant in *Bostick* or that  
19 it's irrelevant here that there was an officer stationed  
20 at the front of the bus. If we're going to have a  
21 totality of the circumstances test, wouldn't you agree  
22 that that is one relevant fact to consider in trying to  
23 reconstruct the atmosphere and decide whether or not it  
24 signaled to the -- to the person searched the -- the  
25 possibility of just ending the encounter?

1                   MR. THOMPSON: Yes, Your Honor. That -- it is  
2 one relevant fact to be taken into consideration with the  
3 other factors, but here the officer stationed at the front  
4 of the bus -- at the front of the bus really did not  
5 communicate, nor did Officer Lang who was doing the  
6 questioning -- did not communicate that -- to any  
7 passenger that he or she could not terminate the  
8 questioning.

9                   QUESTION: He did -- nobody said, you can't  
10 leave the bus. But isn't it a fact that a passenger would  
11 take into some consideration that there was an officer  
12 stationed at the front of the bus?

13                  MR. THOMPSON: Your Honor --

14                  QUESTION: He wasn't keeping people out,  
15 apparently.

16                  MR. THOMPSON: Excuse me.

17                  QUESTION: It's -- it's a relevant fact in  
18 determining the coerciveness of the atmosphere, is it not?

19                  MR. THOMPSON: Your Honor, not in this case.  
20 The court below and the Eleventh Circuit acknowledged in  
21 -- in their findings, if you will, that the -- the aisle  
22 was not blocked, the exit was not blocked. In fact,  
23 every --

24                  QUESTION: Let me -- let me try a -- a different  
25 suggestion. The fact that the officer at the front of the

1 bus was kneeling in the driver's seat was one graphic  
2 reminder of another fact in this case, and that is, that  
3 the driver was gone. The driver had left the bus. The  
4 only people exercising any kind of official capacity in  
5 that bus were three police officers. One of them was  
6 occupying the driver's seat. Isn't that a signal that  
7 nobody is going to be going anywhere on this bus? This  
8 bus isn't going to be going anywhere until the officers  
9 are satisfied.

10 Now, that may or may not be dispositive of  
11 anything, but it is a relevant fact on the question of  
12 coercion and voluntariness. Isn't it?

13 MR. THOMPSON: Your Honor, the presence of the  
14 officer at the front of the bus is a factor, but in the  
15 context of these facts and if -- in the context of this  
16 Court's decision in Delgado where you had armed agents  
17 surrounding the factory, and this Court held that simply  
18 because the factory workers could not leave without  
19 passing those agents --

20 QUESTION: I agree with you. You're -- you're  
21 absolutely right there. The -- the point that I'm making  
22 is that you can't go through this kind of analysis and  
23 say, well, this fact is irrelevant. This shouldn't have  
24 been considered by the court. That fact was irrelevant.  
25 That shouldn't have been considered. It was a relevant



1 fact. What it all adds up to, as you suggest by the  
2 Delgado reference, is a different question, but it's a  
3 relevant fact, isn't it?

4 MR. THOMPSON: It's a relevant fact, but the  
5 factors to be considered and the factors that this Court  
6 clearly announced in -- in the Bostick case were factors  
7 that were threatening, factors that were otherwise  
8 coercive, like pointing a gun. In this particular case,  
9 Your Honor, the Eleventh Circuit even noted that there was  
10 no evidence that any of the passengers saw that this  
11 officer was armed. The officers were --

12 QUESTION: Mr. Thompson, did they know that he  
13 was an officer? Was it clear that he was an officer?

14 MR. THOMPSON: The officer was conducting  
15 individual passenger-specific questioning.

16 QUESTION: The -- the other two officers were I  
17 know, but was there -- was it clear that the person  
18 kneeling in the driver's seat was an officer?

19 MR. THOMPSON: He was casually dressed, Your  
20 Honor, and it's not clear from the record as to whether or  
21 not he was a police officer.

22 QUESTION: Did he have his badge? The other two  
23 showed their badges. Did the one in the front show --

24 MR. THOMPSON: I don't believe the record is  
25 clear as to where the badge was located with respect to

1 the officer at the front of the bus.

2 QUESTION: Did he enter with the other two?

3 MR. THOMPSON: Yes. They all entered as  
4 passengers, all casually dressed.

5 And with respect to the conduct of this -- of  
6 this search --

7 QUESTION: Well, I mean, I -- what -- I don't  
8 know what that -- why should that make a difference. If  
9 somebody shows me a badge and he's casually dressed, I  
10 know he's got a gun, or he's going to be fired. An  
11 officer is fired if he doesn't carry his gun. Everybody  
12 knows that.

13 Let me -- let me ask you this. Would it be  
14 appropriate in your view for this Court to write an  
15 opinion in which we say that citizens have certain  
16 obligations to know their rights and to assert their  
17 rights? That's what makes for a strong democracy. The  
18 law lives in the consciousness of the people. And people  
19 have a certain obligation to assert their rights. If they  
20 don't want to be searched, they say I don't want to be  
21 searched. Should we write that in an opinion?

22 MR. THOMPSON: Well, that follows on with the --  
23 the clear test that this Court announced in Bostick, and  
24 the test was, Your Honor, whether or not the police  
25 conduct commuted anything -- communicated anything to the

1 citizens and these passengers as to --

2 QUESTION: What about the proposition as I -- as  
3 I've stated it? Because if you say yes -- and I think  
4 there's a good answer for it -- then I'd just say, well,  
5 we have to distinguish Miranda at least. Miranda is based  
6 on a contrary assumption. That's what's running through  
7 my mind as I'm asking the question.

8 MR. THOMPSON: Well, here -- here the -- the  
9 citizens -- some citizens did refuse Officer Lang's  
10 request, and what -- what you posit is -- is really the  
11 guts of what is going on here. As Officer Lang testified,  
12 Your Honor, many of the citizens -- most citizens went  
13 along with the police questioning in -- in this particular  
14 -- these particular bus interdictions, and they -- and  
15 they were happy to do so. Officer Lang testified that  
16 many of the bus passengers appreciated his efforts in  
17 coming onto the bus. They -- it made them feel a sense of  
18 -- of safety.

19 And here citizens generally do know their  
20 rights, and here the police did not communicate anything  
21 to these passengers that would indicate that they had to  
22 answer, that they were required or otherwise compelled to  
23 answer Officer Lang's questions.

24 QUESTION: Did any other case that we considered  
25 involve a body pat-down, not just a request to look at

1 luggage? This -- in this case the -- the luggage didn't  
2 turn up anything of interest to the police, but the pat-  
3 down did.

4 And the image of let's take what is -- Mr.  
5 Drayton is sitting next to a man who has just been hauled  
6 off the bus, handcuffed. I imagine he would feel some  
7 intimidation at that point when the police then turned to  
8 him and said, okay, we'd like to search you too.

9 MR. THOMPSON: Well, the -- the Bostick test  
10 presupposes a reasonable, innocent person. In this  
11 particular case, Mr. -- Mr. Brown's consent was  
12 unambiguous. He opened his coat. He -- in response to  
13 the question, he said, sure. He opened his coat. He took  
14 out a cell phone.

15 QUESTION: But Drayton said nothing throughout  
16 the whole encounter.

17 MR. THOMPSON: Drayton's -- Drayton's consent,  
18 as the district court found, was clear and unambiguous.  
19 He raised his hands off of his thighs, Your Honor. There  
20 was nothing that Officer Lang said to Mr. -- or said to  
21 Mr. Drayton or had said to Mr. Brown that would have  
22 indicated that Mr. Drayton could not have terminated the  
23 questioning or that he could have refused consent.

24 And as this Court noted -- as this Court noted  
25 in Bostick, the fact that a lawbreaker knows that the

1 search is going to uncover contraband or is -- knows that  
2 the search is going to uncover drugs does not make the  
3 consent involuntary.

4 QUESTION: Well, it doesn't make it involuntary,  
5 but it -- it does suggest perhaps that there is an  
6 ambiguity here as -- as against your claim that there was  
7 none in Brown's consent because -- and correct me if I'm  
8 wrong on the facts, but I -- I think the first request to  
9 Brown was -- or maybe to the two of them together -- can I  
10 look at your -- your luggage, your bag, whatever they had  
11 pointed to, and they said, sure. And I presume they said  
12 sure because they knew there was nothing in it that was  
13 going to be incriminating. So, the officer looked in the  
14 -- in the luggage and he found nothing.

15 Then he turned to Brown and said, mind if I do a  
16 pat-down, or whatever the phrase was. Well, that's the  
17 search that's in question here, and I would have thought  
18 that at that point Brown was in the situation in which the  
19 reasonable citizen would have thought I'm damned if I do  
20 and I'm damned if I don't. If he pats me down and he's --  
21 he's thorough about it, he's going to find the -- the  
22 drugs. If I say you can't pat me down, having just given  
23 permission to him to -- to look in the -- in the bag, he's  
24 going to know that there must be something on me that  
25 wasn't on the bag. And -- and, therefore, it seems to me

1 that the -- that Brown at that point was by no means in a  
2 position in which he had a kind of free choice to say yes  
3 or no. So, it sounds to me as though it is ambiguous.  
4 Have I got the facts wrong?

5 MR. THOMPSON: You have the facts, but your  
6 conclusion, Your Honor, I would differ with because in --  
7 in the situation both individuals pointed to the bag.  
8 There was nothing in Officer Lang's request to Mr. Brown  
9 that would -- that would -- that -- that would send or  
10 communicate to Mr. Brown that he could not have refused  
11 the request. There was nothing in Officer Lang's question  
12 that would indicate to Mr. Brown that he could not have  
13 otherwise terminated the questioning. Why some of the --

14 QUESTION: Well, you don't agree, I hope, with  
15 the -- with the proposition that there would be no reason  
16 to decline the pat-down search except the reason that he  
17 had something incriminating on him. I mean, the mere fact  
18 that you've -- you've acceded to the luggage search, which  
19 is a much less intrusive search, does not show that --  
20 that you have something to hide when you -- when you  
21 decline to -- to have a pat-down. Don't -- don't you  
22 agree that a consent to a luggage search is a lot less  
23 difficult to obtain than consent to a pat-down?

24 MR. THOMPSON: The nature -- the nature of the  
25 search is not necessary to the Bostick inquiry.

1           QUESTION: Well, I think you're -- I think  
2 you're missing my point. Justice Souter was suggesting  
3 that having acceded to the luggage search, the only  
4 plausible reason for objecting to the pat-down would be  
5 that I have something on me that is incriminating. And I  
6 -- I acceded to the luggage search because I knew there  
7 was nothing incriminating. But don't you think that an  
8 innocent citizen could agree to a -- a policeman's search  
9 of luggage but not agree to a pat-down?

10           MR. THOMPSON: Absolutely, Your Honor.

11           QUESTION: And -- and, of course, I would  
12 agree --

13           QUESTION: You know, let's be reasonable here.

14           QUESTION: Yes. But don't -- don't you think  
15 the most probable inference is the inference I gave you?

16           MR. THOMPSON: No, Your Honor. You have --  
17 again, you have to understand this Court's holding in  
18 Bostick and that is the --

19           QUESTION: The holding in Bostick, if I remember  
20 it, was that the Florida Supreme Court was wrong in  
21 adopting a per se rule and left open the question of  
22 whether there was a seizure in that case. Isn't that  
23 right?

24           MR. THOMPSON: Yes, Your Honor. But in this  
25 particular case, the reasonable person, as this Court

1 said, presupposes a reasonable, innocent person.  
2 Lawbreakers sometimes agree to be -- agree to be searched,  
3 knowing that the drugs are in their luggage or on their  
4 person, for a number of reasons, sometimes as -- as these  
5 gentlemen did. They want to be cooperative. They do not  
6 want to send some kind of message that they indeed have  
7 the items in question. They want to appear innocent.  
8 They do this for any number of reasons, hoping that the  
9 police officer will not search them and go away.

10 QUESTION: Mr. Thompson, you --

11 MR. THOMPSON: It has nothing to do with --

12 QUESTION: -- you were about to say --

13 MR. THOMPSON: -- compulsion. Excuse me.

14 QUESTION: -- that the police -- you were about  
15 to say when the police go over the line. I think you said  
16 here they did nothing that would imply that consent or  
17 that -- that the search was required of the citizen. What  
18 -- can -- can you give a description of when the police  
19 would step over the line? Is it -- must the police give  
20 words of command, get up, I want to search you? Is that  
21 -- does it take that?

22 MR. THOMPSON: The -- if -- if the police would  
23 communicate to the citizen somehow that the citizen's  
24 response was compelled. For example, in -- in Bostick  
25 this Court noted that pointing guns, drawn guns would lead



1 to that -- that kind of compulsion or coercion. For  
2 example, if the police used threatening language. If the  
3 police communicated to the reasonable person that he or  
4 she could not refuse the request for consent or could not  
5 otherwise terminate the questioning.

6 QUESTION: And that explains Miranda, of course,  
7 to the extent anything explains it.

8 (Laughter.)

9 QUESTION: That -- that was a custodial  
10 interrogation, wasn't it?

11 MR. THOMPSON: Yes, Your Honor.

12 QUESTION: And the -- the physical custody would  
13 have had that -- that effect of -- of causing the person  
14 to believe that he had no choice.

15 MR. THOMPSON: Absolutely. Here you have  
16 unstructured, rapidly developing police-citizen  
17 encounters, and what is important here --

18 QUESTION: And you have a request and a  
19 response. And the response is that there is no objection  
20 to the search. And it seems to me that that is an  
21 objective consideration of the highest importance.

22 MR. THOMPSON: That's correct, Your Honor.

23 QUESTION: May I ask, Mr. Thompson, do you  
24 regard this primarily as a seizure case or a search case?

25 MR. THOMPSON: This is a seizure case, Your

1 Honor. That's the -- the court below decided this case  
2 under the -- under the Bostick test. Both parties before  
3 the Eleventh Circuit urged the Bostick test, and this is  
4 -- I would submit that this is a seizure case.

5 QUESTION: Do you think it always would follow  
6 if you concluded that there was no seizure, that there was  
7 necessarily voluntary consent to the search?

8 MR. THOMPSON: If there was no seizure?

9 QUESTION: Right.

10 MR. THOMPSON: It -- in this Court's test in  
11 Bostick, the Court merged the voluntary issue and the  
12 voluntariness in with the -- in with the Bostick seizure  
13 analysis. So, I would say that -- that the two are merged  
14 together and are related.

15 QUESTION: It doesn't seem to me that  
16 analytically they have to be. It seems to me you could  
17 have a case in which you could -- the officer could say to  
18 the man, you're perfectly free to get off the bus anytime  
19 you want to, but I'd like to -- to search you first, and  
20 may I do so? And then the question would be whether the  
21 search was voluntary even if there had been no seizure.  
22 It seems to me that could be a scenario that would make  
23 sense.

24 MR. THOMPSON: It's -- it's hard to -- in the  
25 context of these bus -- police-citizen encounters on a

1 bus, it's hard to really see the distinction between the  
2 voluntariness test and the seizure test.

3 QUESTION: But it does seem to me the passenger  
4 might have two different thoughts. One, I better not get  
5 off the bus. I want to get to Columbus or Cleveland or  
6 wherever we're going. So, I -- that -- maybe I can get  
7 off the bus, but it just doesn't make any sense. But  
8 that's one inquiry. The second inquiry is, do I want to  
9 let this fellow search me? It seems to me they are really  
10 two separate questions.

11 MR. THOMPSON: I don't know, Your Honor, but I  
12 -- I would posit here that we do not really need in this  
13 particular case to -- to understand the full extent of the  
14 scope of the voluntariness test because the court below  
15 clearly decided this case under Bostick and as a seizure  
16 case.

17 QUESTION: A seizure of the person or seizure of  
18 the contraband?

19 MR. THOMPSON: The person, Your Honor.

20 QUESTION: If we were writing on a blank slate  
21 and other cases weren't there, what would be the  
22 Department's objections to a rule of law that said when  
23 you're on a bus, only 11 inches of an aisle, three people  
24 get on. One is sitting in the back looking over the  
25 crowd. The other two systematically work their way to the

1 front. What would be the objection to saying, policeman,  
2 of course, you can ask citizens to cooperate? Certainly  
3 that's a very desirable thing. But in those closed,  
4 cramped quarters where you have three, just say you don't  
5 have to answer if you don't want to. You don't have to be  
6 searched if you don't want to, making clear that you're  
7 eliciting voluntary cooperation and nobody is under  
8 compulsion. What would be the objection to that?

9 MR. THOMPSON: Well, as this Court noted in  
10 Bostick, Your Honor, just because the police-citizen  
11 encounter happens on a bus, there's no reason to establish  
12 some kind of per se rule.

13 QUESTION: Well, I assume Congress could enact a  
14 statute like that, couldn't it, for Federal officers?  
15 Couldn't Congress prescribe that whenever Federal drug  
16 agents enter a bus, they -- and to conduct a -- a search,  
17 they shall make such a statement?

18 MR. THOMPSON: I -- I don't know --

19 QUESTION: You would have no problem with  
20 Congress doing that, would you?

21 MR. THOMPSON: I would -- I would say, Your  
22 Honor, here that --

23 QUESTION: It might. It might be bad policy.  
24 And my question was are there policy objections to -- I'm  
25 not saying what the constitutional rule is. I understand

1 those arguments. I'm just, for my own benefit, trying to  
2 find out if that would cause a practical problem or not.

3 MR. THOMPSON: I can think of three reasons.  
4 Your Honor, this Court has consistently held that we --  
5 you do not want to saddle law enforcement officers with  
6 some kind of bright line test in Fourth Amendment cases.  
7 That's very important here when I would submit that  
8 Bostick is an appropriate vehicle to determine the  
9 validity of consent.

10 In these particular cases, it's -- it's very  
11 difficult. You have an unstructured, rapidly evolving and  
12 developing situation, and warnings would not be --

13 QUESTION: And one of the difficulties with --  
14 with a warning is, you know, Miranda was supposed to be a  
15 bright line test where, you know, we didn't have to argue  
16 about anything. Well, we had at least 60 or 70 cases here  
17 deciding whether somebody introduced -- was interrogating  
18 and that sort of thing. So, if you have some sort of a  
19 requirement like that, it's just another layer of  
20 litigation.

21 MR. THOMPSON: Absolutely, Your Honor, and I  
22 would direct the Court's attention to a case that was  
23 cited in the Government's brief, United States v.  
24 Stephens, where there was some appropriate warning, and  
25 the court -- the Ninth Circuit in that particular case

1 said that the warning confused the passengers, intimidated  
2 the passengers. But --

3 QUESTION: Well, I assume the other policy  
4 objection is, the underlying premise of Justice Breyer's  
5 suggestion is the Government has some obligation to teach  
6 everybody about their rights. And that's a -- that's a  
7 sweeping proposition.

8 MR. THOMPSON: I would agree.

9 QUESTION: Especially when it's not required by  
10 the Constitution.

11 MR. THOMPSON: I would agree, Justice --

12 QUESTION: May I ask you what significance, if  
13 any -- I don't know if it's significant or not -- do you  
14 attach to the fact that, as I understand it from the court  
15 of appeals opinion, that this officer had made similar  
16 requests several hundred times and only five or six people  
17 had ever said no? Is that relevant at all?

18 MR. THOMPSON: It is not relevant, Your Honor.  
19 Some people did say no. Most people --

20 QUESTION: You don't think that suggests that  
21 perhaps most people thought they had an obligation to  
22 answer?

23 MR. THOMPSON: Well, Your Honor, as this Court  
24 -- as this Court held in Delgado, simply because most  
25 citizens cooperate and most citizens agree with the

1 officer's request, that's no indication that the consent  
2 at issue is involuntary.

3 If there are no further questions, I would like  
4 to reserve the remainder of my time.

5 QUESTION: Very well, Mr. Thompson.

6 Ms. Spivey, we'll hear from you.

7 ORAL ARGUMENT OF GWENDOLYN SPIVEY

8 ON BEHALF OF THE RESPONDENTS

9 MS. SPIVEY: Mr. Chief Justice, and may it  
10 please the Court:

11 This Court should reaffirm Bostick in its  
12 entirety. We are not arguing that advice should be  
13 required. Rather, we think that Bostick got it entirely  
14 right with the language that advice is a factor  
15 particularly worth noting. If Bostick is revised, we  
16 would ask the Court to remand to the court of appeals, as  
17 it did in Bostick, so that it can reconsider.

18 I believe the key to this test -- and I don't  
19 mean to sound presumptuous. Having thought long and hard,  
20 I think the key is that the Eleventh Circuit really was  
21 trying to give voice to the seizure or -- and the consent  
22 test, as set out in Bostick. In Bostick at U.S. 437, the  
23 Court wrote -- it focused on what the police conduct --  
24 conduct would have communicated to a reasonable person.

25 And in Washington at 1357 and Guapi at 1395,

1 what the Eleventh Circuit focused on -- it said, it is  
2 enough that the circumstances themselves would indicate  
3 that the search can proceed only if consent is given. So,  
4 I believe that the Eleventh Circuit parallels Bostick's  
5 use of the word -- that focused on what does it  
6 communicate with their use of the word indicate. And  
7 indicate necessarily refers back to -- it expressly refers  
8 back to the circumstances, which is the totality.

9 And while courts tend to focus most commonly on  
10 whether or not advice was given or not given, I think  
11 there are any number of acts or omissions that focus on  
12 the police conduct --

13 QUESTION: That -- that I think is true, but  
14 could -- if their point is that if -- if you were to take  
15 your case, this case before us, and say under the present  
16 law and the test that you're enunciating, that you do have  
17 to tell the passengers what I suggested earlier -- tell  
18 them they don't have to answer or respond -- well, then  
19 you'd have to in every case. So, why don't you give me an  
20 example of one where they wouldn't.

21 MS. SPIVEY: Yes, sir. I would -- I would posit  
22 a -- a -- I could posit a scenario, and the best one I  
23 thought of is that that we've all flown on airplanes and  
24 --

25 QUESTION: No. On a bus. Could you possibly do



1 -- because actually oddly enough Bostick is about buses.

2 MS. SPIVEY: Yes, sir.

3 QUESTION: And -- and there -- it's about buses.

4 MS. SPIVEY: Yes, sir.

5 QUESTION: And the buses are stopped and  
6 somebody comes on. All right. So, what is -- can you  
7 think of any example in those circumstances where they  
8 wouldn't have to make that announcement?

9 MS. SPIVEY: Yes, sir. In a -- besides  
10 referring to the specific factors here and suggesting that  
11 the police conduct ratchet down the coerciveness of any  
12 factor, I would suggest that if the police did not delay  
13 the -- the departure of the bus, did not engage in bag-  
14 matching, and did not do any more than a -- a flight  
15 attendant does standing in the aisle and talking  
16 individually to the passenger and does not use language  
17 that would communicate to a reasonable, innocent person  
18 that cooperation is required -- for example, using  
19 language that it's voluntary. They could use language  
20 that it's voluntary. They could say, are you willing,  
21 with your permission.

22 Or specifically in this case, relating to Mr.  
23 Drayton, they could engage in acts. For example, when you  
24 ask --

25 QUESTION: Didn't they use language like that in

1 this case? Did they say, you know, open your coat, I want  
2 to pat you down?

3 MS. SPIVEY: They used --

4 QUESTION: Didn't they make it clear that they  
5 were asking permission which suggests that the person has  
6 the ability to deny permission?

7 MS. SPIVEY: Respectfully, Justice Scalia, I  
8 don't believe so. I think it was very clear that what  
9 they were asking for was cooperation.

10 QUESTION: What -- what words did they use in --  
11 in particular?

12 MS. SPIVEY: They immediately approached each  
13 individual passenger --

14 QUESTION: Right.

15 MS. SPIVEY: -- and said, I'm Officer so and so.  
16 I'm doing this.

17 QUESTION: Right.

18 MS. SPIVEY: Do you have a bag on the bus?

19 QUESTION: Yes.

20 MS. SPIVEY: I believe that point right there  
21 denied the Bostick right to refuse to engage with the  
22 officer.

23 QUESTION: Wait. And -- and that's all they  
24 asked, and when the person said yes, they immediately  
25 searched the bag?

1 QUESTION: No.

2 MS. SPIVEY: No.

3 QUESTION: Surely, surely they required more.

4 MS. SPIVEY: Then they asked another question.

5 QUESTION: What was the other question that they  
6 asked?

7 QUESTION: On page 4 of the Government's  
8 brief --

9 MS. SPIVEY: Do you mind --

10 QUESTION: -- it says, do you mind if I check  
11 it?

12 MS. SPIVEY: Do you mind if I check it?

13 QUESTION: Does -- does that not suggest exactly  
14 what you want them to suggest, that the person has the  
15 ability to withhold that consent?

16 MS. SPIVEY: No, Justice Scalia. In Schneckloth  
17 at U.S. 229, this Court referred to the, quote, subtly  
18 coercive police questions. And I think one really does  
19 have to look at the nuances of the questions and how a  
20 reasonable, innocent person would take them.

21 QUESTION: Well, what is the nuance of a  
22 question, do you mind if I inspect it?

23 MS. SPIVEY: Because I think no matter how a  
24 reasonable, innocent person answers it, Mr. Chief Justice,  
25 the police can construe it as consent. If they say --

1           QUESTION: But -- well, is there any doubt that  
2 this person answered it in a way that indicated consent?

3           MS. SPIVEY: Mr. Chief Justice, I believe there  
4 is doubt because I believe -- not as to the bag, but as to  
5 the question, do you mind if I check your person. I do  
6 believe there's definitely doubt because of the indirect  
7 question and also because of his --

8           QUESTION: Well, what's -- what's indirect? Do  
9 you mind if I check your person?

10          MS. SPIVEY: Because no matter whether you  
11 answer it yes or no, it's not may I check your person. If  
12 you say no, it means no. Yes means yes. But if you say,  
13 do you mind if I, if the person says yes --

14          QUESTION: So, it -- it turns on that sort of a  
15 subtle distinction?

16          MS. SPIVEY: I think it can, Your Honor. I  
17 think it's one factor --

18          QUESTION: But if we do, then don't we have to  
19 follow the district court? I mean, the district court  
20 there concluded in the facts that everything was  
21 cooperative, there was nothing coercive, there was nothing  
22 confrontational.

23          MS. SPIVEY: Yes, sir.

24          QUESTION: And he heard the officer and he heard  
25 the tone of voice. So, how -- how could we possibly get

1 around that?

2 MS. SPIVEY: Well, Justice Breyer, the district  
3 court applied the wrong test. It applied the free-to-  
4 leave test. That -- that's at the joint appendix at 132,  
5 and that's specifically what this Court rejected in  
6 Bostick the Florida Supreme Court had done.

7 He also -- I disagree with the Government's  
8 representation that he said that Mr. Drayton was clear or  
9 unambiguous. He did not address -- he did not make any  
10 factual findings as to the actual encounter. And --

11 QUESTION: The freedom-to-leave test actually is  
12 -- is more beneficial for your client. Everybody knows  
13 you're not free to leave the bus. You'll miss the bus. I  
14 mean, that's -- that's what we said in Bostick. So, it  
15 seems to me that the district court applied a higher  
16 standard than -- than was necessary and still found  
17 voluntary search.

18 MS. SPIVEY: Well, Justice Kennedy, from my  
19 perspective, the important point is that he applied the  
20 wrong test, the test this Court has rejected.

21 And also, he made two other legal --

22 QUESTION: Do you want us to reverse because  
23 there was a test that's too favorable to your client? I  
24 don't understand that.

25 MS. SPIVEY: No. I -- I have no -- I have no

1 objection with the Bostick test, either the test for  
2 seizure at U.S. 437 or the test for consent at U.S. 438.  
3 I think that the court of appeals then applied the correct  
4 test and overturned the -- the legal conclusion which the  
5 district court reached.

6 The district court said that -- he made a global  
7 conclusion. He said, quote, their consent leads me to  
8 believe there was no violation. Well, I think that, with  
9 all respect, is a tautology. Just because they consent,  
10 it doesn't mean there's no violation. And I think that --  
11 he said --

12 QUESTION: Surely he meant their consent in  
13 those circumstances. Didn't he recite in the opinion all  
14 of the circumstances involved?

15 MS. SPIVEY: No, Your Honor.

16 QUESTION: Don't you think it's a little unfair  
17 to -- to read that after -- after he describes the whole  
18 situation as simply saying, well, since they consented, it  
19 must be okay?

20 MS. SPIVEY: Justice Scalia --

21 QUESTION: I mean, you can say, you know, I'm  
22 going to torture you if you don't let me look at it.  
23 Okay, okay, okay, look at it.

24 (Laughter.)

25 QUESTION: Surely nobody is going to say his

1 consent shows that it was voluntary.

2 MS. SPIVEY: No, Justice Scalia, I don't agree  
3 with the first part of the question because the district  
4 court made no findings whatsoever regarding the specifics  
5 of the actual encounter or exchange between the -- the  
6 defendants and the -- or the police officers and  
7 individual passengers.

8 QUESTION: Did you ask for findings -- did you  
9 ask for findings that were that detailed?

10 MS. SPIVEY: The trial -- neither trial counsel  
11 for the Government nor the defense did, Your Honor.

12 But the district court then said there's nothing  
13 coercive about this encounter, and I believe that's an  
14 ultimate legal conclusion which, when the court of appeals  
15 applied the correct test from *Bostick*, reached the correct  
16 result.

17 QUESTION: As far as Drayton is concerned,  
18 there's nothing in the record other than that he lifted  
19 his hands from his lap. Is there -- he didn't utter any  
20 words, and so his consent rides on that gesture and what  
21 it meant.

22 MS. SPIVEY: Yes. Yes, Justice Ginsburg, that  
23 is correct. And I think it's clear under *Schneckloth* and  
24 *Bumper* that mere acquiescence -- and that was -- is not  
25 sufficient. And that's why I was saying I think that the

1 police conduct can be either acts or -- and/or omissions.  
2 And I think the omission here or the act here was simply  
3 not waiting on an answer.

4 QUESTION: Excuse me. When -- when you're asked  
5 a question, do you mind if I conduct a pat-down, and you  
6 raise up your arms like that, what -- what does that  
7 naturally convey?

8 MS. SPIVEY: I think that's a classic example,  
9 Your Honor -- after you've just watched the other  
10 passenger arrested and hauled across the top of you,  
11 that's a classic example of mere acquiescence to a show of  
12 authority.

13 QUESTION: Mere acquiescence.

14 QUESTION: That's apparently the opposite --

15 QUESTION: Acquiescence would be just to sit  
16 there, it seems to me.

17 QUESTION: I mean, isn't that the opposite of  
18 what the district court thought --

19 MS. SPIVEY: The district --

20 QUESTION: -- who saw all this? I mean, the  
21 district court heard the witnesses. He heard the tone of  
22 voice. I mean, I don't see how to get very far with this  
23 notion of the question.

24 What about the other two things? Was this a  
25 case where the passengers knew that the bags were being



1 matched?

2 MS. SPIVEY: Justice Breyer, in response to your  
3 first question, the district court never addressed the  
4 specifics of Mr. Drayton's nonverbal response --

5 QUESTION: All right. I -- I see it.

6 What about -- but was this a case where the --  
7 where -- was this a case where the passengers knew that  
8 the bags were being matched?

9 MS. SPIVEY: I think it was very clear. I don't  
10 think a reasonable person sitting in that bus, unless they  
11 were deaf, could not have known that the bags -- they were  
12 asking every person, do you -- as the first question. Do  
13 you have a bag? If they did, may I check it. In fact,  
14 Officer Lang --

15 QUESTION: Well, I don't know what you meant  
16 then by bags being matched. I thought you meant that they  
17 went outside or did something. I --

18 MS. SPIVEY: No, Your Honor. The carry-on  
19 luggage, which this Court, you know, focused on in Bond,  
20 the privacy of that carry-on luggage. I believe that the  
21 Government -- the officer used that as a means of  
22 basically forcing an encounter by asking a person, do you  
23 have a bag.

24 And Stephens pointed out the Hobson's choice  
25 that a passenger faces. They don't -- it -- it denies

1 their right to ignore the officer because if they say  
2 nothing, the bag is construed as abandoned. You have to  
3 respond to the officer. So, I think Bostick gives you the  
4 right to ignore --

5 QUESTION: An American citizen has to protect  
6 his rights once in a while. That's -- that's a very bad  
7 thing?

8 MS. SPIVEY: I think the Bostick, Justice  
9 Kennedy, gave citizens, bus passengers, the right to  
10 ignore officers.

11 QUESTION: Of course. The right to say,  
12 officer, don't bother me.

13 MS. SPIVEY: But that's not ignoring them, Your  
14 Honor. That's having to engage with them, and I think  
15 that's part of the technique that's used, is getting a  
16 person -- if you can get them to --

17 QUESTION: Well, I -- I don't read Bostick that  
18 way.

19 Now, this -- this argument that because the  
20 first person is arrested, the second person feels coerced,  
21 that seems to me it goes the other way around. The second  
22 person now knows the consequences of giving consent.  
23 Under your theory, the first person is arrested and the  
24 second person says, oh, I -- I'd like to be arrested too.  
25 Come and search me.

1 (Laughter.)

2 MS. SPIVEY: I don't think --

3 QUESTION: That -- that doesn't make sense.

4 MS. SPIVEY: I don't think a reasonable,  
5 innocent person would take what happened to -- to a  
6 passenger sitting next to him as anything but a classic  
7 example of a show of authority.

8 In -- in response to your question, Justice  
9 Kennedy, to the Government earlier, I think that putting  
10 the burden on the citizen shifts the -- the burden is on  
11 the Government in every case to prove that the encounter  
12 is consensual and that any consent given is voluntary and  
13 is uncoerced. And I think --

14 QUESTION: The question is whether or not the  
15 Government also has the burden to educate citizens as to  
16 their rights in every encounter, whether or not there  
17 isn't some obligation on the part of the citizen to know  
18 and to exercise his rights or her rights.

19 MS. SPIVEY: Justice Kennedy, I believe that  
20 that ignores the demographic realities of the reasonable  
21 bus passenger. The Government acknowledged below that  
22 most bus passengers are economically disadvantaged, and  
23 they don't know who their Congressman is or the Governor.  
24 They don't -- that was not acknowledged below. I don't  
25 mean --

1                   QUESTION: So, you want people to travel on  
2 buses where people might have weapons and drugs and can't  
3 be searched. You think that's better for passengers.

4                   MS. SPIVEY: Certainly not, Your Honor.  
5 Certainly not, but I think there is a limit to the  
6 imposition on millions of innocent people for the purpose  
7 of ferreting out ordinary criminal wrongdoing. And to the  
8 extent that the -- the departure of this bus was delayed,  
9 I think this case is right on point with the Edmund case.  
10 To the extent they delayed the forward movement of that  
11 bus, I believe every passenger on it was seized even  
12 though I disagree that the court below addressed the  
13 seizure issue.

14                   QUESTION: Ms. Spivey, is there anything in the  
15 record that -- that indicates whether the police knew that  
16 these two people were traveling together?

17                   MS. SPIVEY: They knew that they were seated  
18 next to each other in a seat. There was no testimony  
19 whatsoever -- there was testimony that the officer had  
20 seen the respondents in -- depending on which transcript  
21 we're looking at. There is testimony in the joint  
22 appendix that the officer had seen them boarding the bus,  
23 and that is at J.A. 105. In response to questioning by  
24 the court, he indicated he had seen them boarding the bus,  
25 but there was no testimony in this record that he ever saw

1     them together before he saw them seated next to each other  
2     in the seat.

3             And the other point I wanted to make, going to  
4     that question, if I might, is that --

5             QUESTION: Well, the -- he did associate the two  
6     of them because of the fact that they were both wearing  
7     heavy, baggy clothes, although the weather wasn't that  
8     cold in Tallahassee at the time.

9             MS. SPIVEY: Yes, sir. But he never said that  
10    they were traveling together.

11            QUESTION: Okay, but they're sitting next to  
12    each other, and unlike the other passengers in the bus,  
13    they're all -- they're both wearing heavy, baggy clothes.

14            I'm not sure that -- that the major result of  
15    the first -- of the first seizure wouldn't really have  
16    been to give the police probable cause anyway to -- to  
17    search the second passenger, even without his consent.

18            MS. SPIVEY: Well --

19            QUESTION: You see -- you see two guys dressed  
20    extravagantly sitting next to each other. You search the  
21    first one and find drugs on him. You think you're not  
22    going to search the second?

23            MS. SPIVEY: I think that if they had looked at  
24    the -- at the passengers' tickets, they would have had  
25    reasonable suspicion, but I do not think there are any

1 facts in this case -- and the police officer -- they're  
2 the best ones to judge -- and the prosecutor at trial all  
3 agreed there was no reasonable suspicion here.

4 QUESTION: I would have searched the second one.  
5 I would have thought I had probable cause having two guys  
6 both dressed in baggy clothes in warm weather, I find  
7 drugs on the first, they're sitting next to each other. I  
8 think I would have probable cause to search the second.

9 MS. SPIVEY: Yes, Justice Scalia, I think the  
10 record adequately points out reasons why all of those  
11 factors could have been -- could have been determined to  
12 be totally innocent. The innocent people could have been  
13 doing that same thing. Baggy pants are very popular these  
14 days. One can look anywhere and see them. There were  
15 reasons why they would have had their coats on.

16 QUESTION: Not in Tallahassee in the summertime.

17 MS. SPIVEY: It was February 4th, 1999, Your  
18 Honor, which is not --

19 QUESTION: You -- you think that the police  
20 should have asked them -- told the people in the bus  
21 you're free to leave. That's basically -- would that make  
22 it all right in your opinion?

23 MS. SPIVEY: No, Your Honor, because I --

24 QUESTION: No. What -- what -- is it that the  
25 police in your opinion can't search anyone in the bus?

1 Period? What -- what is your view on that?

2 MS. SPIVEY: I -- I don't believe that either.  
3 I think that -- I clearly agree with Bostick that on-bus  
4 searches, consensual --

5 QUESTION: No, no. I'm trying to -- I'm sorry.  
6 I misspoke. Your -- your view is that they should have  
7 told the passengers explicitly in a strong way you do not  
8 have to cooperate if you don't want to. Is that -- is  
9 that your view?

10 MS. SPIVEY: My view is that in a case like  
11 this, which is at the margins, where a court of appeals  
12 looks at it and feels that it's so coercive that there are  
13 various acts or omissions that the police can do to  
14 ratchet down the coerciveness of the environment, or they  
15 can choose to counter it, which the most -- the typical  
16 example we see is the giving or -- or withholding of  
17 advice. And certainly that's been determinative in some  
18 of the Court's cases or appears to have been outcome-  
19 determinative. But I think there are other things the  
20 police can do.

21 QUESTION: So, we -- we should accept the feel,  
22 as you describe it, of the court of appeals in this case?

23 MS. SPIVEY: Well, Your Honor, I think that was  
24 one of the main -- there were two main points of Arvizu.  
25 One was to reject the divide and conquer approach of the

1 Government that, well, because this -- this factor didn't  
2 weigh heavily, we shouldn't even look at it.

3 But the other was that it recognized the  
4 importance of a court of appeals in a totality test,  
5 employing de novo review, to unify precedent and to  
6 provide guidance to district courts --

7 QUESTION: What -- I'm trying to look at what to  
8 do. I'm -- I'm not -- suppose I think for argument's sake  
9 in many circumstances where policemen come up and question  
10 people, even if they say politely, are you willing to  
11 answer my questions or be searched, the person feels  
12 coerced. But the law still tries to draw a line even if  
13 that's fictional in reality. Very well. What's the right  
14 line? I mean, are buses special? What is it that's  
15 supposed to be done? That's what I'm trying to elicit  
16 from you.

17 MS. SPIVEY: Justice Breyer, I don't believe I  
18 can give this Court a bright line test because of the  
19 totality of the circumstances. I think it's the nature of  
20 the totality test that, under the right circumstances, any  
21 factor can -- can serve to tip the balance in the right  
22 circumstances. And so, I -- I don't think I can give a  
23 bright -- I don't think a bright line test can be devised  
24 when the totality of the circumstances --

25 QUESTION: May I ask you a question that I keep



1 -- perhaps this is sort of strange. But if the police  
2 made it perfectly clear to everyone that they -- in the  
3 bus that there will be no adverse consequences whatsoever  
4 if you refuse to let me search your -- your luggage, why  
5 would anyone let them search? Why --

6 MS. SPIVEY: Well --

7 QUESTION: In other words, I want to look  
8 through your luggage. Why would you say yes? If you know  
9 there can be no adverse consequences, it seems to me they  
10 would never be able to search anybody.

11 MS. SPIVEY: Unless they had an overwhelming  
12 desire to cooperate and have their personal stuff gone  
13 through.

14 QUESTION: Well, what is the cooperation? We're  
15 going to let you find out that I don't have guns and drugs  
16 in my -- I know I don't have guns and drugs in my luggage.  
17 So, why should -- don't -- don't bother me. I don't want  
18 you to search me. I don't see why anyone would ever  
19 consent if they knew it was totally risk-free.

20 MS. SPIVEY: I agree, Justice Stevens.

21 QUESTION: I don't agree. I -- I know it's  
22 risk-free, and I would certainly give my consent. I think  
23 it's a good thing for the police to do.

24 MS. SPIVEY: Well, Justice Scalia, I would  
25 certainly never consent to them checking my person for

1 anything. But I'm a lawyer and I know that --

2 QUESTION: If I was dressed like that, I would.

3 If I was dressed like that on a hot day, I'd be

4 probably --

5 QUESTION: On a hot day in February.

6 (Laughter.)

7 QUESTION: I'm -- I'm only using the record,

8 Chief Justice. The record -- the record says it was

9 unusually hot.

10 (Laughter.)

11 MS. SPIVEY: I would like to address the

12 Government's argument that there is a per se rule in this

13 case. And one of the points they make is -- in their

14 reply brief at 4, they argue that because we have not

15 identified one case in which the Eleventh Circuit has

16 ruled in favor of the Government in an on-bus case -- I

17 have been able to identify three unpublished decisions,

18 which I'd like to cite to the Court. And at Mr. Souter's

19 direction, I will lodge them with the Clerk after

20 argument. They are: the McLean case, which is case number

21 01-10678, dated July 6th, 2001, after Washington; the

22 Reese case, 00-11291, dated March 15th, 2001; and the

23 Garrett case, dated -- case number 97-2202, dated November

24 19th, 1997.

25 QUESTION: Does the Eleventh Circuit have any

1 rule about using its unpublished opinions for any purpose  
2 other than preclusion in a particular case?

3 MS. SPIVEY: It's considered persuasive  
4 authority but not binding authority.

5 But my point was simply that if they had -- if  
6 they had a de facto per se rule, then it would be outcome  
7 -- the presence or absence of rights would be outcome --  
8 outcome-determinative in every case. But in those three  
9 cases, which were on-bus searches, there was either no  
10 advice or no mention of it in the opinion. And of course,  
11 these unpublished opinions are very hard to get, but the  
12 Government gave me an incentive to find them.

13 QUESTION: The -- the briefs make a big deal  
14 about the fact that they didn't announce that everybody on  
15 the bus first -- a general announcement what was going to  
16 happen. I -- I -- it seems to me that if we go down that  
17 road and it'd be like our cases, where one case says they  
18 didn't look at the officer, and the next case said they  
19 didn't look at the -- I -- I just think that's equivocal.  
20 I think you can argue that either way.

21 And you go on for 15 pages in -- in your brief  
22 about the -- the police chose the -- the locus, the bus  
23 locus, the fact that they were close to the passengers,  
24 which they obviously had to be in the bus, and -- and  
25 talked individually to each passenger, the officer's

1 appearance and demeanor, they constructively blocked the  
2 aisle, they presented their badges, but they didn't show  
3 the gun.

4 It -- it seems to me this world you're creating  
5 for us is -- is not strong for the Constitution. It seems  
6 to me a strong world is when officers respect people's  
7 rights and -- and people know what their rights are and --  
8 and assert their rights. I don't want to be searched.

9 MS. SPIVEY: Well, Justice Kennedy --

10 QUESTION: I don't want to be searched. Leave  
11 me alone.

12 MS. SPIVEY: I agree that would be an ideal  
13 world if all our citizens took civics or took law and knew  
14 their rights, but I don't believe they do.

15 And I think the fact that we go through the  
16 factors is simply a product of the totality test. That's  
17 necessary to look at all the relevant factors in that  
18 totality test. But I don't think there is any defining  
19 point at which one -- a person can say I think it's up to  
20 the court in every case, is this too coercive, does it go  
21 too far?

22 I would note that in *Bostick*, *Bostick* did -- did  
23 set out the seizure test at 437, the consent test at 438.  
24 The one thing it really in my mind didn't really clearly  
25 focus on was the test that the Eleventh Circuit was

1 looking at. The question they looked at is whether the  
2 circumstances here were so coercive that no reasonable  
3 person could have given a consent that would have been  
4 determined to be voluntary. And I think that's why in the  
5 court's opinion, the court of appeals opinion -- this is  
6 -- excuse me -- footnote 4 at page 6a of the petition to  
7 the appendix. That is why they then used the language --  
8 I'm sorry. I'm sorry. It's footnote 6 at page 8a. They  
9 then used the language, quoting Bostick, but whether a  
10 reasonable person would have felt free to decline the  
11 officer's request.

12           And I think that is -- was their attempt to go  
13 to the element of was this -- was this a coercive  
14 environment. It distinguishes it from the seizure test  
15 which focuses on the police conduct and what it would have  
16 communicated and I -- and then the consent test, which is  
17 at 438, which focuses -- under Schneckloth includes a  
18 focus on the personal factors, factors personal to the  
19 defendant. And I think that's why the Court here said  
20 that those factors personal to the defendant were not  
21 determinative because we're looking at a little higher  
22 level of analysis as to whether this environment was so  
23 coercive.

24           I do agree that in the context of your average  
25 bus case, it's a very short encounter, very brief. The

1 testimony was that in 15 to 20 minutes, the officer could  
2 engage with two to three people. So, you're looking maybe  
3 5 to 10 minutes per person. And I think that the test --  
4 that the factors relating to seizure and the factors  
5 relating to the -- the consent tend to be conflated, and  
6 so it is sometimes sort of hard to sort out. And a lot of  
7 the factors will apply to both of those tests.

8 QUESTION: Why -- why is it that the most  
9 immediate expression of the police officers does not  
10 counteract whatever other indications of compulsion might  
11 exist under the circumstances? I mean, if the policeman  
12 comes up and says, you know, lean up against the wall,  
13 spread your legs, I'm going to pat you down, you're under  
14 compulsion. But if he comes up and says, do you mind if I  
15 search your person, you know, I don't care what other --  
16 there's a policeman in the front of the bus. Who cares?  
17 He -- he has made it very clear that he's asking for your  
18 permission. What -- what more need he do than that? Do  
19 you mind if I search your person?

20 MS. SPIVEY: I believe, Justice Scalia, if the  
21 Court ruled that, it would be a bright line test as  
22 opposed to a totality test. And I think one has to --  
23 when one applies a reasonable person -- reasonable,  
24 innocent person test, one of necessity puts themselves in  
25 the seat of that bus passenger. How do they feel? And

1 that's why, Justice Breyer, I tried to give the -- the  
2 little example of the airplane because --

3 QUESTION: My problem, of course, is I think if  
4 you go with an all-facts test, you've got to go with the  
5 district court. He saw it and the court of appeals  
6 didn't. And that's why I've been wondering if maybe  
7 there's something inherently coercive about the bus  
8 environment that suggests a -- a need for a warning. But  
9 you don't agree with that and -- and therefore I'm sort of  
10 stuck. And there we are.

11 QUESTION: Why -- why don't you agree with that?  
12 I mean, it seemed that was almost the question that I -- I  
13 asked when -- when you were responding to Justice Stevens  
14 and you said, well, ultimately sure, anybody who gets  
15 these warnings, with a teaspoonful of brains, is going to  
16 say no, I -- I'm not going to let you search.

17 And -- and it seemed to me that maybe the -- the  
18 answer to the problem is there are some situations in  
19 which if you don't give the warning, it does get to the  
20 point of -- or is virtually a -- a coercive situation per  
21 se, and it may be that there's no easy answer in those  
22 circumstances.

23 If you don't let them know that they have a  
24 right to refuse, there's inherent coercion. If you do let  
25 them know, most people are going to say, no, you can't

1 search. But you resist that. You -- you don't regard it  
2 as inherently coercive. And I -- I guess I'm not sure why  
3 you -- you resist it. Why isn't it?

4 MS. SPIVEY: Justice Souter, personally yes, I  
5 do agree with you. I think it is an inherently coercive  
6 environment. But I simply didn't take that position  
7 because I didn't think that was a position that I could --

8 QUESTION: Sell.

9 MS. SPIVEY: -- prevail upon.

10 QUESTION: Sell to the Court?

11 (Laughter.)

12 MS. SPIVEY: Yes, sir. Yes, sir. I -- I did  
13 not because of it being sort of a bright line.

14 But I guess my feel about it is that there seems  
15 to be some contradiction between when we talk about in  
16 Miranda, we're talking about a coercive -- we're talking  
17 about someone who's suspected of a crime. There's  
18 probable cause, and so we're going to give them some  
19 warnings. But yet, a reasonable, innocent person,  
20 millions of bus passengers -- they don't get anything.  
21 And there just -- I don't know -- it seems to me something  
22 wrong with that --

23 QUESTION: Ms. Spivey, is there anything in the  
24 record about what the innocent people actually felt when  
25 the police officers came on the bus?



1 MS. SPIVEY: There's nothing but the testimony  
2 of the officer as to what he thinks they felt. There is  
3 no testimony of the passengers.

4 QUESTION: So, we really don't know how the  
5 innocent passengers felt.

6 MS. SPIVEY: No, sir, we don't. We just have to  
7 try to put ourselves in their shoes and how would we feel.  
8 Not being lawyers --

9 QUESTION: The only testimony was -- Officer  
10 Lang was the only one. He was one of the three. He was  
11 one of the two questioners. He's the only one who  
12 testified in the district court. Is that right?

13 MS. SPIVEY: Yes, Justice Ginsburg.

14 QUESTION: Do you think -- you haven't said  
15 anything about the difference between, say, a bus terminal  
16 or a street where when the police say whatever -- you --  
17 you are in a large space. There is something different  
18 about a bus and -- or the airplane cabin where you -- you  
19 are rather confined compared to being stopped in the  
20 street.

21 MS. SPIVEY: I think that is the primary point  
22 that goes to Justice Souter's question about why it is  
23 inherently coercive. It sort of goes back to a Royer's  
24 situation where you had a person in a small, enclosed  
25 room. But I personally -- if you're sitting in a seat and

1 that's why I said if -- if the person like a stewardess  
2 would just stand there and not come right in your face,  
3 but a person gets in your face, you can't move over, you  
4 can't back up, I don't see how you could possibly get out  
5 of the seat without -- even if you wanted to. But that's  
6 not the test.

7 QUESTION: I thought the testimony showed that  
8 the officer leaned over from the back, not in your face.

9 MS. SPIVEY: The -- the district court  
10 characterized his style as sort of in your face. He  
11 clearly stood. His testimony was he was standing in the  
12 aisle, but I guess behind -- he didn't say this. This is  
13 how I understand it -- behind the arm -- behind the  
14 armrest so that a person could theoretically get their  
15 legs out. My -- but he was very clearly leaning over 12  
16 to 18 inches from Mr. Drayton's face, holding his badge  
17 up.

18 QUESTION: Thank you, Ms. Spivey.

19 MS. SPIVEY: Thank you very much.

20 QUESTION: Mr. Thompson, you have 4 minutes  
21 remaining.

22 REBUTTAL ARGUMENT OF LARRY D. THOMPSON

23 ON BEHALF OF THE PETITIONER

24 MR. THOMPSON: Your Honor, I have a couple  
25 points.

1           There was nothing in -- in the record that would  
2 indicate that the bus was in fact delayed.

3           On the -- on the consent point, the district  
4 court specifically held that the defendants consented  
5 after hearing the evidence at the -- at the suppression  
6 hearing. And the respondents were not naive individuals  
7 or unable to understand or assert their -- their rights.  
8 Respondent Drayton was 26. He was employed for 6 of the  
9 last 8 years, and he had experience in dealing with  
10 previous drug charges. Respondent Brown was 29 and had  
11 been a -- a corrections officer.

12           And the point with respect to Justice Breyer's  
13 question. Your Honor, buses, as -- as the Government  
14 pointed out in its reply brief, buses today in today's  
15 environment are vulnerable. They are vulnerable to  
16 specific public safety concerns, and the Government would  
17 submit that bus passengers are entitled to the kind of  
18 efficient, effective, and fair bus interdiction efforts  
19 that are -- that characterize --

20           QUESTION: Do passengers on the buses go through  
21 the same kind of check that we do on airlines?

22           MR. THOMPSON: No, they do not, Your Honor.

23           QUESTION: That's -- that's what I was wondering  
24 because today people might think if you're on a airport  
25 and you don't go through the detector, you don't fly.

1 Well, they might think that if you don't answer the  
2 questions, you don't go --

3 MR. THOMPSON: We do not --

4 QUESTION: -- on the bus. And -- and -- so  
5 maybe there's more need now for something.

6 MR. THOMPSON: We -- we do not have that  
7 specific kind of program, and certainly that was not the  
8 -- the reason relied upon for the consent in -- in the  
9 record below. But in this particular case, Your Honor,  
10 Officer Lang testified that not only did most of the  
11 passengers that he encountered consent, but of them  
12 appreciated what he was doing. It gave them a sense of  
13 comfort. It made them feel that their bus travel was  
14 safe. And that would be the point that I would like to  
15 make here.

16 And unless the Court has any further questions.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
18 Thompson.

19 The case is submitted.

20 (Whereupon, at 11:07 a.m., the case in the  
21 above-entitled matter was submitted.)

22  
23  
24  
25

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