

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 80-2146

TITLE FLORIDA, Petitioner
v.
MARY ROYER

PLACE Washington, D. C.

DATE October 12, 1982

PAGES 1 thru 72



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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Florida against Royer.

4 Mr. Fox, I think you may proceed whenever you
5 are ready.

6 ORAL ARGUMENT OF CALVIN L. FOX, ESQ.,

7 ON BEHALF OF THE PETITIONER

8 MR. FOX: Mr. Chief Justice, may it please the
9 Court, this is a petition to review the decision of the
10 Florida Third District Court of Appeal in which the
11 Florida Third District Court of Appeal reversed both the
12 appellate panel and the trial court upon their denial of
13 the defendant's motion to suppress.

14 The facts are extremely simple. The defendant
15 was arrested at the Miami International Airport carrying
16 65 pounds of marijuana in his luggage. The state's
17 witness, Detective Johnson, an experienced narcotics
18 officer, testified generally as to his training and
19 profile, so-called A, so-called D, a profile, and the
20 fact that he observed thousands of passengers each week
21 at the Miami International Airport eight hours a day,
22 five days a week.

23 On January 3rd, 1978, about noon, the
24 defendant appeared at the airport. Detective Johnson
25 testified that in his experience and Detective

1 Magdalena's experience, it was undeniable that the
2 defendant's conduct and demeanor attracted their
3 attention. The defendant was extremely nervous, pale,
4 uneasy, looking about, and Detective Johnson testified
5 that in his experience, the defendant was not a
6 so-called white knuckled flier, but rather was concerned
7 about being detected.

8 The bags the defendant was carrying were very
9 heavy. He had produced an extremely large roll of cash
10 to pay for his ticket. The defendant was observed
11 placing on the airline identification labels the name of
12 Holt, and his ticket apparently was also in that name
13 also. It was undisputed below --

14 QUESTION: That was on his baggage, you said?

15 MR. FOX: Yes, Your Honor.

16 QUESTION: When did the officer find out that
17 he bought a one-way ticket, if that was the case?

18 MR. FOX: When they examined his ticket and
19 license upon request at the initial encounter with the
20 defendant, Your Honor. It was undisputed, as a matter
21 of fact, including through the defendant's testimony,
22 that they approached him and asked him if he had a
23 moment to talk, and he said, fine. The defendant
24 himself testified that upon request --

25 QUESTION: Did they identify themselves at

1 that time?

2 MR. FOX: Yes, Your Honor, they identified
3 themselves as narcotics officers, and said, may we speak
4 with you a moment. The defendant himself testified that
5 he voluntarily produced his ticket and his license for
6 their examination. They immediately noticed the
7 discrepancy between his ticket and the baggage and the
8 license, and he explained that someone else had made the
9 reservation for him.

10 Johnson then told the defendant that they
11 believed that he was carrying narcotics, and would he
12 come to a room a few feet away for further discussion.
13 Johnson said the defendant was thoroughly cooperative
14 throughout the transaction. The detectives were in
15 plain clothes. They displayed no insignia. They
16 carried weapons but they were concealed. They did not
17 -- There is no showing in this record that they blocked
18 his path in any way. They were courteous at all times.
19 They did not threaten --

20 QUESTION: So what did he say when they asked
21 him?

22 MR. FOX: He followed them to the room.

23 QUESTION: He didn't say anything?

24 MR. FOX: He did not say anything. He went
25 with the room to them.

1 QUESTION: Well, did they indicate that he
2 didn't need to go, or not?

3 MR. FOX: No, Your Honor. There is not a
4 Mendenhall type warning, if you will, in this
5 circumstance. The defendant proceeded to the room, as
6 did Sylvia Mendenhall, without discussion.

7 QUESTION: Who had possession of the ticket?

8 MR. FOX: The ticket was in -- evidently was
9 in Detective Johnson's possession at all times, but it
10 was never taken out of the --

11 QUESTION: Once it was handed over.

12 MR. FOX: Pardon me?

13 QUESTION: Once it was handed over. Did he
14 hand it to the police?

15 MR. FOX: Yes, Your Honor. Yes, but the
16 ticket actually never left the defendant's possession.
17 It was always right there with him, with Detective
18 Johnson, as they were carrying out the discussion, and
19 as they went to the adjacent room.

20 QUESTION: Wait a minute. You said never left
21 his possession. I thought he handed it to the detective.

22 (General laughter.)

23 MR. FOX: Never left his presence. Excuse me,
24 Your Honor.

25 QUESTION: But it was in the possession of the

1 detective. Is that not correct?

2 MR. FOX: That's correct, Your Honor. That's
3 correct.

4 QUESTION: So if he wanted to get on the
5 airplane, he would have had a little difficulty.

6 MR. FOX: He would first of all have to ask to
7 get the ticket back.

8 QUESTION: For his ticket back.

9 MR. FOX: That's correct, which he did not do
10 in this case, of course, but there was also, as an
11 indication of the nature of the transaction, the
12 defendant indicated himself that he understood all that
13 was going on, and there was no physical contact at any
14 time.

15 Detective Johnson, I think important to this
16 Court's consideration here, testified that he wanted to
17 go to the adjacent room to avoid any embarrassment to
18 the defendant and to avoid any possible violence in the
19 crowded airport area. In the room, which was 40 feet
20 away, they again asked him if they could -- they
21 initially asked him for his consent to open his
22 suitcase, and they told him again that they suspected
23 him of transporting narcotics. In response, the
24 defendant produced a key, unlocked one of the --

25 QUESTION: Mr. Fox, let me ask you another

1 question. You mentioned the violence concern that the
2 officer expressed. Do you think the facts that were
3 known to the officer at the time he requested the ticket
4 would have justified a frisk of the passenger for
5 weapons?

6 MR. FOX: Yes, Your Honor. I think in view of
7 the --

8 QUESTION: Did the officer frisk the
9 passenger?

10 MR. FOX: No, Your Honor. I think in view of
11 the extremely agitated condition of the defendant, I
12 think a frisk would have been appropriate, but it was
13 not done.

14 QUESTION: He was carrying two suitcases, was
15 he?

16 MR. FOX: Yes, Your Honor, two suitcases. One
17 of the suitcases, he had the key. He unlocked it. The
18 other suitcase, he did not have the key, but he said that
19 they could go ahead and open it if they wanted to, and
20 thereupon they opened it, and it contained the
21 marijuana.

22 The entire transaction took ten to fifteen
23 minutes. The initial approach took a matter of only a
24 few minutes.

25 QUESTION: Well, suppose when they first

1 stopped him he had said no, I don't particularly care to
2 talk to you, I don't particularly care to identify
3 myself, or hand you over my ticket? Would he have been
4 free to go?

5 MR. FOX: Detective Johnson specifically
6 testified that when people refused to talk to them, that
7 if they don't have enough facts, they let them go.

8 QUESTION: And if he had said, when they asked
9 him to go into the other room, he had said, no, I don't
10 want to, the testimony is, they would have let him go?

11 MR. FOX: Yes, Your Honor, that is --

12 QUESTION: So he gets to the room, and they
13 say, may we search your suitcase, and he says, no, you
14 may not. What is the testimony about that?

15 MR. FOX: There is no indication one way or
16 the other, Your Honor. Now, I was --

17 QUESTION: Did the officers at any time tell
18 him that he was free to go?

19 MR. FOX: No, Your Honor, there was no
20 specific advisement.

21 QUESTION: Did they also tell him that he was
22 free not to turn his ticket loose?

23 MR. FOX: No, Your Honor, they did not
24 specifically advise him of that.

25 QUESTION: And did they also tell him he

1 didn't have to go to the room with them?

2 MR. FOX: No, Your Honor, they did not
3 specifically advise him of that.

4 QUESTION: They didn't tell him any of the
5 no's, did they?

6 MR. FOX: No, Your Honor, they did not.

7 QUESTION: They only told him the do's.

8 MR. FOX: Well, they asked him that, these
9 questions, Your Honor, and the trial court accepted that
10 as a matter of fact, that in fact the transaction was
11 totally voluntary.

12 QUESTION: Well, you have two armed men who
13 say, would you mind coming along with me.

14 (General laughter.)

15 QUESTION: Is there any evidence that he knew
16 that they were armed?

17 QUESTION: And, I mean, how many people do you
18 know wouldn't go?

19 MR. FOX: Your Honor, I certainly wouldn't
20 have gone.

21 QUESTION: Would you go?

22 MR. FOX: No, Your Honor.

23 QUESTION: You wouldn't go?

24 MR. FOX: No.

25 QUESTION: With two armed men?

1 MR. FOX: I didn't know -- I would not have
2 known they were armed.

3 QUESTION: Have you ever tried it?

4 MR. FOX: Pardon me?

5 QUESTION: Have you ever tried it?

6 MR. FOX: I have been to the airport and made
7 observations of couriers.

8 QUESTION: These officers were in plain
9 clothes, weren't they?

10 MR. FOX: Yes, Your Honor.

11 QUESTION: And the fact that they were armed
12 wasn't immediately evident.

13 MR. FOX: It was not immediately --

14 QUESTION: I don't see how you can miss it.

15 QUESTION: But they did say they were
16 narcotics agents.

17 MR. FOX: Yes, Your Honor.

18 QUESTION: Unarmed.

19 QUESTION: And unarmed, that is rather rare,
20 isn't it?

21 MR. FOX: Your Honor --

22 QUESTION: If you had been accosted by two
23 narcotics agents who identified themselves, would you
24 assume they were armed or not?

25 MR. FOX: Your Honor, I probably would assume

1 they were armed.

2 QUESTION: Well, go ahead.

3 QUESTION: Well, isn't it also true they
4 showed them their badge?

5 MR. FOX: Yes, Your Honor, that's correct.

6 QUESTION: And they also said they had been
7 expecting him, didn't they?

8 MR. FOX: No, Your Honor. That was the
9 defendant's testimony.

10 QUESTION: Oh, I see.

11 MR. FOX: That was not accepted by the trial
12 court in this case.

13 Your Honor, with respect to the voluntary
14 nature of this transaction, which seems to be the
15 Court's concern, we would submit that there was evidence
16 which the trial court chose to believe in this case that
17 the transaction was a voluntary transaction. The
18 defendant was a 22-year-old college educated college
19 graduate. He had a degree in communications. The
20 detectives approached him, asked him if he had a moment
21 to talk. The defendant voluntarily produced his
22 identification and ticket. He was asked if he would
23 accompany them to a room a few feet away. He was asked
24 if he would consent to the search. The defendant
25 produced a key for one bag, and said it was all right.

1 QUESTION: The difficulty with that submission
2 is that the state courts found that he was detained
3 against his will. They found he was arrested.
4 MR. FOX: The state court certainly did,
5 but --
6 QUESTION: Must we overturn that to relieve
7 you of this judgment?
8 MR. FOX: The panel decision in the trial
9 court did not find that he was arrested, Your Honor.
10 What we are asking the Court to do is reinstate the
11 panel decision and withdraw corresponding --
12 QUESTION: Well, I know, but we have to
13 disagree with the Florida Court of Appeals.
14 MR. FOX: Absolutely, Your Honor. I think --
15 QUESTION: They made a finding based on the
16 record, I guess.
17 MR. FOX: They made a finding based upon the
18 fact that his luggage had been detained and --
19 QUESTION: Well, whatever it was, you do say,
20 turn that conclusion over.
21 MR. FOX: This was in no means an arrest, Your
22 Honor. That is what the Florida Third District en banc
23 held, that it was an arrest.
24 QUESTION: What precisely does the holding
25 that something was an arrest mean? Is that basically a

1 factual issue or a legal issue, or is it a mixed
2 question of fact and law?

3 MR. FOX: It is a mixed question based upon
4 the facts presented. We would submit --

5 QUESTION: Does it imply a determination by
6 whoever is making the finding that subjectively the
7 person felt he was not free to go, or that objectively a
8 reasonable person in his position would not have felt
9 free to go, which of those two?

10 MR. FOX: I think objectively, the reasonable
11 person innocent of crime is the standard which this
12 Court has articulated. In particular, Your Honor, the
13 defendant himself said in the room that he was not under
14 arrest. I think that totally belies the Third District
15 Court of Appeals conclusion that he was under arrest.
16 In particular, we would point to the fact that the
17 numerous reasons announced by the Third District Court
18 of Appeals as reasons for the arrest were not thought of
19 or dreamed up by anybody in the trial court. In fact,
20 the argument in the motion to suppress, the defendant
21 said he did what he did because they were police
22 officers. That is the only reason he offered
23 whatsoever. He offered no other reason for the
24 detention which he claimed.

25 We are here years later arguing matters which

1 the trier of fact, the defendant, and the police
2 officers never thought of.

3 QUESTION: But, Mr. Fox, just to interrupt for
4 a moment, what is the court that we should look to for
5 the facts, the trial court or the appellate court? It
6 is a state court, and I suppose we have a limited right
7 to disagree with them on the facts, and the appellate
8 court did say he was in fact not free to leave. They
9 said that unequivocally.

10 MR. FOX: The en banc court.

11 QUESTION: Yes.

12 MR. FOX: Yes, sir.

13 QUESTION: Are we bound by that?

14 MR. FOX: No, Your Honor. I think the record
15 in the trial court is what we are bound by here, as a
16 matter of fact. I think there was another thing that
17 was determined by the Third District Court of Appeal en
18 banc. They kept calling it the police room.

19 QUESTION: What standard of review do we
20 follow in deciding whether or not a state appellate
21 court was wrong in disagreeing with the state trial
22 court on the facts? Is it clearly erroneous, or
23 substantial evidence, or what is the standard we should
24 apply?

25 MR. FOX: I think that if there is substantial

1 evidence in the trial court to base -- for the trial
2 court to have reached the conclusion that this was a
3 voluntary transaction, that that must be flagrantly
4 erroneous, it must be clearly erroneous, and must be a
5 substantial departure from the constitutional law of
6 this Court.

7 QUESTION: Why? Must a state have -- must a
8 state appellate court have some standard about
9 overruling its trial courts? What standard does the
10 Constitution require? Here surely the Florida appellate
11 court overruled the district court.

12 MR. FOX: Well, that --

13 QUESTION: It may be that if it applied the
14 wrong legal standard in adjudicating the federal
15 constitutional question, we could certainly correct
16 that, and even if it didn't apply the right -- even if
17 it applied the right standard, we could disagree with it
18 if it is a mixed question of fact and law.

19 MR. FOX: Absolutely, Your Honor, and we have
20 argued vigorously in our brief that the standard here
21 is, as this Court found in Mendenhall, is that the
22 circuit court of appeal was totally mistaken in
23 substituting its judgment for that of the trier of fact
24 as to the issues of fact before the trial court, and
25 that is --

1 QUESTION: Did the Court of Appeals of Florida
2 have anything before it that we haven't before us in
3 this case now?

4 MR. FOX: No, Your Honor.

5 QUESTION: Didn't it have a concession that
6 the state made at the oral argument before that court
7 which they refer to that the state conceded at oral
8 argument that the officers would not have permitted
9 Royer to leave? We don't have that before us, but they
10 had it before them.

11 MR. FOX: You have my offer in the brief, Your
12 Honor, that in fact after an extensive argument with
13 Judge Schwartz, I stated to him that in fact I wasn't
14 there, I don't know what the officers would have done.

15 QUESTION: Are you telling us there was no
16 such concession?

17 MR. FOX: There was a concession, but the
18 concession was qualified in a certain context, and that
19 context was that in fact if --

20 QUESTION: What I am suggesting to you is, we
21 have something different before us than they had before
22 them. They heard your argument there. We didn't.

23 MR. FOX: Yes, Your Honor, they do -- they
24 did, but I don't think -- I don't think the concession
25 is a dispositive issue in this case.

1 QUESTION: Why not?

2 MR. FOX: I think that the officers would not
3 have let him leave, Your Honor. I don't think that is
4 -- speculating what they might have done is not the
5 issue. The question is what did they do.

6 QUESTION: And you think the issue is what a
7 reasonable person would have thought about whether he
8 was free to leave?

9 MR. FOX: Innocent of crime.

10 QUESTION: The officers may have decided in
11 their own minds, we will never let him go, but a
12 reasonable person might have thought that he was free to
13 go. Is that your argument?

14 MR. FOX: Certainly it could be a voluntary
15 transaction, irrespective as to the officer's intent in
16 the case. They proceeded on the basis that it was a
17 voluntary transaction, and Your Honors, I think at the
18 point where the defendant said, no, I don't want to give
19 you consent to look in my suitcase, and I want to leave,
20 I think that circumstance is a different circumstance
21 than what transpired here. At that point, the officers
22 would have had to make a decision as to whether or not
23 they could detain the defendant within the meaning of
24 the Constitution, but they never reached that point.
25 That's why my concession, which is put in the footnote

1 in the Third District Court of Appeal, if we accept the
2 concession as it is stated facially, which I say is
3 absolutely incorrect, and not in proper context, that
4 concession does not affect the outcome here. The
5 question is what the record shows as to what transpired
6 in the -- between the --

7 QUESTION: Then the only reason we disregard
8 this finding of the court that you did make a concession
9 is that you deny it here?

10 MR. FOX: No, Your Honor. That is not correct.

11 QUESTION: Well, what else do we have?

12 MR. FOX: I have only offered my statement of
13 the context of that remark. That is, I stated, if the
14 defendant had refused consent, then the officer --

15 QUESTION: What other reason do you have for
16 us to disregard it?

17 MR. FOX: Because it's not relevant to a
18 determination of the constitutional issues here, Your
19 Honor.

20 QUESTION: But the en banc court did find that
21 the defendant was under the reasonable impression that
22 he was not free to leave, not just a subjective
23 impression, but on the objective facts, he was under a
24 reasonable impression that he was not free to leave. So
25 that in order to find for you, we must disagree with

1 that mixed question of law and fact.

2 MR. FOX: I -- My analysis of the Third
3 District Court of Appeal decision is that they -- the en
4 banc decision, that is, that they flatly decided that
5 because his luggage had been detained, and that because
6 his ticket was still in the possession of Johnson, that
7 in fact those factors created a situation where he was
8 not free to leave as a matter of law.

9 QUESTION: But he was under the reasonable --
10 as a matter of law, he was under the reasonable
11 impression he was not free to leave. That is what they
12 said.

13 MR. FOX: Flatly because of those factors.

14 QUESTION: Mr. Fox, could you turn to Page --
15 if you have it before you, Page 49 of the supplemental
16 appendix, which I think contains the opinion of the D.C.
17 -- or perhaps you are familiar enough. I just wanted to
18 read you one sentence which I think is what the DCA said
19 about this thing. Do you call them DCA's in Florida?

20 MR. FOX: Yes, Your Honor, District Court of
21 Appeal.

22 QUESTION: The court said, "Applying the test
23 adopted in Frost, it is obvious that Royer, as he
24 himself testified, was 'under the reasonable impression
25 that he was not free to leave the officers' presence,'"

1 and then I guess it is a cite to the Frost opinion.
2 Now, why did they incorporate the test adopted in Frost
3 in what would otherwise appear to be pretty much of a
4 factual finding? Did Frost say something about when you
5 would find that someone was under a reasonable
6 impression?

7 MR. FOX: Frost went off and said, as a matter
8 of law, when you keep a defendant's ticket, he is
9 absolutely detained.

10 QUESTION: So they were simply applying Frost
11 to this situation?

12 MR. FOX: They were applying that ruling in
13 Frost. Frost went on and made a number of other
14 rulings, but they were applying that -- that is the
15 single factor which they say -- as a matter of law, you
16 are detained. Now, that conflicts with Elmore, and
17 Elmore just flatly says, just because the officer has
18 gotten the ticket does not mean you are detained. You
19 are not detained until he leaves your presence with that
20 ticket, and Elmore is the leading case in the Fifth
21 Circuit, and Frost absolutely disregarded and severely
22 criticized the Elmore court, which was brought to its
23 attention. That holding was brought to its attention.

24 I would like to reserve some time for
25 rebuttal. Thank you.

1 CHIEF JUSTICE BURGER: Mr. Frey.

2 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

3 ON BEHALF OF THE U.S. AS AMICUS CURIAE

4 MR. FREY: Thank you, Mr. Chief Justice, and
5 may it please the Court, this case has several issues in
6 it that are of great importance doctrinally to Fourth
7 Amendment law and to federal law enforcement.

8 If you analyze the sequence of events that
9 arose here, you begin with the initial contact between
10 the agents and Mr. Royer, and there is an issue whether
11 at that point you had a seizure of his person within the
12 meaning of the Fourth Amendment or simply a contact not
13 regulated by the Fourth Amendment. That issue is
14 important because if you had a seizure, you can consider
15 in the effort to justify that seizure only the facts
16 known to the agents at the time they first approached
17 Mr. Royer, and not facts that they learned during the
18 initial interview with him.

19 Now, when the situs of the transaction moved
20 from the concourse to the office nearby, you have a
21 question whether that movement was either fully
22 voluntary and not subject to the Fourth Amendment, as
23 was said in Mendenhall, or a continuation of an
24 investigative detention, or an arrest requiring probable
25 cause.

1 Now, I would like to turn first to the arrest
2 issue, because I believe that is what the state court
3 rested on. There is, of course, a final issue as to
4 whether the consent to the search of the suitcases was
5 voluntary. I won't address that. I don't think it was
6 decided by the lower court. The rationale of the lower
7 court was a fruits rationale, that even if the consent
8 was voluntary, it was the product of an antecedent
9 illegal seizure of Mr. Royer's person.

10 Now, I think it is crystal clear that the
11 lower court used the wrong test in identifying whether
12 Mr. Royer was under arrest at the time he was moved to
13 the office and the consent was secured.

14 QUESTION: You are talking about the court of
15 appeals?

16 MR. FREY: The District Court of Appeal, yes.

17 QUESTION: En banc?

18 MR. FREY: En banc. The opinion that is under
19 review here. That opinion suggests that the criterion
20 for determining whether there was an arrest requiring
21 probable cause is whether the suspect was free to
22 leave. As we have indicated in our brief --

23 QUESTION: I thought that it said whether he
24 reasonably believed he was free --

25 MR. FREY: Well, if he reasonably believed he

1 was free to leave, yes.

2 QUESTION: Well, that is quite different.

3 That is quite different.

4 MR. FREY: Well, not for my point. I
5 absolutely agree that the test is an objective one, and
6 not his subjective belief or the subjective intentions
7 of the officer. But the point that I am making here is
8 that the test of free to leave is a test that
9 distinguishes not arrests from non-arrests, but Fourth
10 Amendment seizures from non-seizures, and it is well
11 settled that Fourth Amendment seizures consist of two
12 kinds of things, the Terry type investigative detention
13 or an arrest. One can be based on reasonable suspicion
14 not amounting to probable cause; the latter requires
15 probable cause.

16 Now, in deciding whether what happened here
17 was an arrest, it seems to me that it strains the
18 English language and the logical structure of Fourth
19 Amendment analysis to call this an arrest. If you view
20 these events as occurring to an innocent traveler who
21 has mistakenly been seized upon as a possible drug
22 courier by the agents, it would be quite clear to that
23 person that he had not yet been arrested, that he was
24 being detained for a brief course of investigation which
25 would result in his release if he knew he was innocent

1 after the officers looked in the luggage.

2 It did not have the indicia of duration. If
3 you compare it to Dunaway, you are talking about moving
4 him a number of miles to the police station, keeping him
5 for an indefinite period until he confessed. From the
6 standpoint of Mr. Dunaway, even if he were innocent, he
7 would have perceived what happened to him, I think,
8 quite clearly as being -- having the essential
9 attributes of a formal arrest, which is the language the
10 Court used last term in Michigan against Summers.

11 Now, it is important in our view not to place
12 undue emphasis in defining an arrest on the factors that
13 the lower court here, the en banc court relied upon,
14 which is movement or detention or extended custody
15 beyond a momentary stop, because those factors may arise
16 in many contexts where we believe that they can be
17 legitimately done as part of an investigative detention,
18 for instance, the detention of a suspected robber near
19 the scene of the robbery and the question whether he
20 could be moved, let's say, a block to the scene of the
21 robbery for purposes of a show-up without having
22 probable cause.

23 Now, let me say finally on the arrest issue
24 that if you don't say this was not an arrest, that does
25 not leave the subject of investigative detentions

1 unregulated under the Fourth Amendment. An
2 investigative detention, like an arrest, must be
3 reasonable, and you have the ability to say in this case
4 that the detention under the circumstances may have been
5 unreasonable, but calling it an arrest, I think, would
6 be most unfortunate.

7 QUESTION: Mr. Frey, may I just ask you one
8 question? You say the court used the wrong test in the
9 free to leave business for an arrest. How would you
10 phrase the test of an arrest?

11 MR. FREY: Well, I think that is a difficult
12 question. We know what a formal arrest is, but I
13 think --

14 QUESTION: Well, if that is the wrong test,
15 you ought to know what the right test is.

16 MR. FREY: Well, I don't have to. I can know
17 what it isn't when I don't see it --

18 (General laughter.)

19 QUESTION: But you don't have something --

20 MR. FREY: -- without knowing necessarily
21 exactly what --

22 QUESTION: You don't have a test to propose to
23 us that is better?

24 MR. FREY: Well, I think what you would look
25 at is the duration and the reasonable understanding of

1 the individual as to whether he is likely to be charged
2 with a crime or held for an indefinite period until he
3 is presented --

4 QUESTION: Well, under that test, if one
5 believed the testimony that the man said -- he must have
6 thought he was going to be charged with a crime, didn't
7 he?

8 MR. FREY: He couldn't have thought -- well, I
9 think it is very important that you look at it from the
10 perspective of an innocent person, because the purpose
11 of these rules is to protect against innocent people
12 being mistakenly seized upon and imposed upon by police
13 officers.

14 QUESTION: And so an innocent person who is
15 just patient and knows if he waits out several hours,
16 say, in the room --

17 MR. FREY: Oh, we are not --

18 QUESTION: -- he knows he will get free
19 eventually. Is that it?

20 MR. FREY: Well, the purpose of what -- what
21 occurred here, which took about ten to fifteen minutes,
22 was to secure his consent and then carry out on the
23 basis of his consent the examination of his luggage. If
24 it had turned up nothing, he clearly would have been
25 released.

1 QUESTION: Arrest turns on what happens after
2 the investigation is over?

3 MR. FREY: But the suspect would know what
4 would happen. That is, that he would give his consent.
5 There is nothing in this situation --

6 QUESTION: In other words, it all -- so you
7 are backing into a corner where it is the suspect's
8 state of mind that determines whether the officer's
9 conduct constitutes an arrest, as I understand it.

10 MR. FREY: It is not his subjective state of
11 mind. It is what a reasonable person in his situation
12 would perceive based on the officer's conduct. I think
13 that is very important.

14 QUESTION: You apparently agree that there was
15 a seizure, then.

16 MR. FREY: Well --

17 QUESTION: Or at least you say that if you
18 accept the trial court or the court of appeal's finding,
19 at least there was a seizure. There may not have been
20 an arrest.

21 MR. FREY: I -- Well, let me say this. We
22 strongly disagree that there was a seizure at the point
23 of initial contact.

24 QUESTION: Well, all right, but you do agree
25 that at least it is the right test for the seizure, if a

1 person --

2 MR. FREY: The test for whether there is a
3 seizure is whether the person reasonably believes that
4 he is free to leave.

5 QUESTION: That is the right test for a
6 seizure.

7 MR. FREY: And in the circumstance, I think it
8 is very important in the circumstance in which there is
9 no clarification either by a statement from the officer
10 or an inquiry from --

11 QUESTION: But you wouldn't state that even if
12 -- if there was a seizure here, under the right test,
13 and you haven't said there wasn't yet, you wouldn't
14 think that would give the officers ipso facto the right
15 to search his luggage.

16 MR. FREY: Certainly not. The search has to
17 be based on a consent. The issue in this case is
18 whether the consent was the fruit of an illegal
19 seizure. Our position is that if at the time they moved
20 him to the office he had been seized, they had ample,
21 reasonable suspicion --

22 QUESTION: Well, let's just assume everybody
23 agreed there was a valid Terry stop. There is a quick
24 frisk, and the fellow says, I want to ask you a
25 question. May I search your luggage? The fellow says,

1 sure, and right on the spot, right then, in 30 seconds,
2 the luggage is searched. You say that, A, there is a
3 seizure, but B, it is a completely consensual search.
4 That is your --

5 MR. FREY: The search would have to be
6 consensual in that case because there was no warrant.

7 QUESTION: Yes, and your only difference is
8 that they -- instead of searching him on the spot, they
9 moved him into another room.

10 MR. FREY: We are saying that that does not
11 convert what would otherwise be a valid --

12 QUESTION: But it certainly extends the
13 seizure, doesn't it?

14 MR. FREY: It is a somewhat extended seizure
15 beyond --

16 QUESTION: And have we ever approved that kind
17 of seizure? Mendenhall.

18 MR. FREY: Michigan against Summers.

19 QUESTION: And Summers?

20 MR. FREY: Michigan against Summers. Not
21 really in Mendenhall, because Mendenhall rested on a
22 consent rationale, but in Summers quite clearly there
23 was an extended seizure of, I think, quite considerably
24 longer duration than this, which involved moving him a
25 distance equal, I assume, to the distance that he was

1 moved in this case. So I don't think that --

2 QUESTION: Yes, but that was incident to the
3 issue of the warrant.

4 MR. FREY: But the court's discussion first --

5 QUESTION: And here's a person who came out of
6 the house that was about to be searched.

7 MR. FREY: I understand, but if you look at
8 the court's analysis, the court begins by creating an
9 analytical framework within which the issue is to be
10 decided.

11 QUESTION: There is nothing like that here.

12 MR. FREY: We have exactly like that. We have
13 a reasonable suspicion justifying an investigative
14 detention, an investigative detention --

15 QUESTION: Well, no one is -- we don't have
16 any cases justifying this long of an investigative
17 detention.

18 MR. FREY: Well, I am not sure what that -- I
19 think that the detention in Summers was investigative.
20 They were -- the execution of the warrant was an
21 investigation, and it was an investigation which as it
22 happened --

23 QUESTION: I know, but it was at least
24 authorized by a warrant, which is the whole argument
25 here --

1 MR. FREY: Well, there is nothing in the
2 warrant that --

3 QUESTION: -- that there was no warrant for
4 the search of the luggage.

5 MR. FREY: The warrant did not authorize the
6 detention of Summers.

7 I see my time has expired.

8 CHIEF JUSTICE BURGER: Mr. Klein.

9 ORAL ARGUMENT OF THEODORE KLEIN, ESQ.,

10 ON BEHALF OF THE RESPONDENT

11 MR. KLEIN: Mr. Chief Justice, and may it
12 please the Court, Mr. Royer was walking in the airport,
13 he was stopped by the police, told that they suspected
14 him of carrying drugs. He was moved into a converted
15 storage closet. They keep his tickets. They get his
16 bags without his consent. He is told by the police that
17 they would like to look in his bags to either confirm or
18 dispel their suspicions, and he opens the bags.

19 Under those circumstances --

20 QUESTION: When you say he --

21 MR. KLEIN: The officer opens the bags.

22 QUESTION: With the consent of your client.

23 MR. KLEIN: No, Your Honor. We do not contend
24 that there was any consent whatsoever in this case.

25 QUESTION: How did he get the key?

1 MR. KLEIN: Your Honor, the exact words of the
2 agent when questioned about this issue of consent was,
3 we told them we suspected him of carrying narcotics, and
4 we asked him to open the bags to either confirm or
5 dispel our suspicions. Mr. Royer, without saying a
6 word, took his key out of the bag -- out of his pocket,
7 opened the bag, unlocked it, and then the officer
8 actually did the opening of the bag.

9 QUESTION: And you say that was not
10 voluntary?

11 MR. KLEIN: Pardon me?

12 QUESTION: You say that was --

13 MR. KLEIN: We say that it was not voluntary,
14 Your Honor. We say -- our position basically under
15 these circumstances is that --

16 QUESTION: Don't you think he could have said,
17 you can open my bag when you get a warrant?

18 MR. KLEIN: Your Honor, he could have said
19 very many things.

20 QUESTION: Well --

21 MR. KLEIN: He could have said a number of
22 things.

23 QUESTION: -- I am just posing one to you.

24 MR. KLEIN: Pardon me?

25 QUESTION: I am just posing one hypothetical,

1 not many.

2 MR. KLEIN: All right, Your Honor. If he had
3 said that, then I think that there would be no consent
4 at all, if he said you can open my bags when you get a
5 warrant. I think that would be quite clear that there
6 would be no consent whatsoever under those circumstances.

7 QUESTION: Then we don't know what would have
8 happened, whether he would have been detained while they
9 went to get a warrant, or whether they would have opened
10 it without a warrant.

11 MR. KLEIN: Your Honor, we can go on the basis
12 of either the state's concession at oral argument or as
13 they now --

14 QUESTION: The state's concession isn't
15 evidence in the case.

16 MR. KLEIN: No, Your Honor, but I think that
17 the state's argument that is set forth in their reply
18 brief points out specifically on Page 9, it said, what
19 would have -- what would have happened after that is
20 that certainly in that event the officers could have
21 readily sought other means of gathering information,
22 including the use of a trained narcotics dog.

23 So I think that their basic argument is that
24 irrespective of whether or not the consent was
25 ultimately granted, then this individual was not going

1 anywhere until the police had completed their
2 investigation. Now, we maintain that either this
3 situation represents the most expansive Terry stop that
4 has ever been recognized, and possibly the most coercive
5 consent that could ever be validated, or, as we say,
6 that it was an illegal arrest, and regardless of the
7 nomenclature, it was tantamount to an arrest --

8 QUESTION: Mr. Klein --

9 MR. KLEIN: Yes, Your Honor.

10 QUESTION: -- at what point in time did the
11 arrest become illegal?

12 MR. KLEIN: Your Honor, it is impossible to
13 say at the precise moment when it occurred.

14 QUESTION: Do you agree there was reasonable
15 suspicion to ask questions?

16 MR. KLEIN: Your Honor, I would concede that
17 there was reasonable suspicion for the officers to
18 approach the defendant in the airport and to engage in a
19 contact, and nothing more.

20 QUESTION: What do you mean by a contact?

21 MR. KLEIN: A contact is a voluntary
22 encounter, as the Court pointed out in the footnotes in
23 Terry, and all of its progeny, it is a voluntary
24 encounter. The police are not isolated from citizenry.
25 They are permitted to talk to them and to go and engage

1 and to see whether or not there is something that
2 arouses their suspicions any further.

3 QUESTION: So there was a limited Terry type
4 stop or seizure up to what point?

5 MR. KLEIN: Your Honor, we maintain that there
6 was a limited encounter that took place in the form of
7 the conversation, and then beyond that I think that it
8 is unreasonable to say that anybody who is approached by
9 officers in a public place, regardless of whether they
10 are guilty or they are innocent, and the standard is an
11 innocent person, we maintain that an innocent person who
12 is asked by officers to please show his driver's license
13 and his ticket, that it is unreasonable for --

14 QUESTION: Do you think the conversation
15 became unlawful at the moment the request was made to
16 see the driver's license?

17 MR. KLEIN: Your Honor, we maintain that at
18 the point that they asked for -- at the point that he
19 was asked for his driver's license and his ticket, at
20 that juncture a reasonable person would not feel that
21 they were free to walk away. It is natural for an
22 individual, whether they are guilty or they are
23 innocent, when they are approached by a police officer,
24 to produce those documents.

25 QUESTION: Mr. Klein, in the Summers decision

1 that has been mentioned, it is perfectly clear that the
2 individual there was not free to walk away.

3 MR. KLEIN: Yes, Your Honor.

4 QUESTION: The rationale of that case, as I
5 understood it, was that under circumstances that create
6 a reasonable suspicion, the officers may detain an
7 individual for a period of time.

8 MR. KLEIN: Your Honor --

9 QUESTION: Do you agree with that or not?

10 MR. KLEIN: Your Honor, Michigan versus
11 Summers was a highly limited situation, and I think that
12 the underlying rationale there was that the issue of
13 probable cause had already been submitted to a neutral,
14 detached magistrate.

15 QUESTION: Probable cause to detain the
16 individual outside of his home?

17 MR. KLEIN: No, Your Honor. It was probable
18 cause for the search of the house, and under those
19 circumstances, a limited seizure detention of the
20 individual was appropriate in order to ascertain if
21 there was going to be any evidence that was turned up in
22 the house. But I don't think the Michigan versus
23 Summers reflects the proper model for determination of
24 the issues here.

25 QUESTION: Who was the person detained in that

1 case?

2 MR. KLEIN: It was the owner of the house.

3 QUESTION: And that house was covered by a
4 search warrant?

5 MR. KLEIN: That's correct, and that was
6 really the underlying rationale, that a neutral,
7 detached magistrate had issued a search warrant, and I
8 think the Court made it quite clear that that function
9 should be served by someone in that position rather than
10 those who are on the front line such as police who are
11 often engaged in the competitive aspects of ferreting
12 out crime.

13 QUESTION: Refresh my recollection, Mr.
14 Klein. Did the Court in Sumner rely on Terry? That was
15 my recollection.

16 MR. KLEIN: Your Honor, it was a Terry
17 extension.

18 QUESTION: A Terry type limited seizure, was
19 my recollection.

20 MR. KLEIN: Your Honor, it was a Terry type
21 limited seizure.

22 QUESTION: Right.

23 MR. KLEIN: But it was based upon the
24 rationale of a neutral magistrate already having secured
25 a warrant, and I think that that is the way that that

1 can be justified under those circumstances, and it was
2 justified on the basis that it was necessary in order to
3 determine whether or not there was any individual or any
4 proof that might turn up during the course of the search
5 itself, which is far more intrusive in and of itself
6 than the seizure of the individual.

7 Now, what our position is is that whatever
8 Terry stop may have been justified in the first instance
9 in this matter became increasingly more custodial and
10 ultimately culminated in an illegal arrest. The
11 traditional dividing point has always been, of course,
12 probable cause. The Terry case recognized an
13 intermediate step which was limited in nature and in
14 purpose. It is between the contact and an arrest.
15 Articulate suspicion permits a limited seizure of the
16 person, but it must be done with the clear caveat that
17 whatever intrusion takes place pursuant to this seizure
18 must be limited to that which made its initiation
19 permissible in the first place. So that asking a seized
20 driver to get out of his car for the immediate safety of
21 the officer has been upheld. A patdown, as in Terry,
22 has been upheld. In Fuenta, Martinez, Martinez Fuenta,
23 border stop inquiry with reference to immigration status
24 has been upheld, but none of those cases and none of the
25 Terry line of cases have expanded the intermediate step

1 to the extreme here without either requiring probable
2 cause or calling it an arrest.

3 So therefore the real question is, is what
4 happened here, up to the actual point of the search of
5 the luggage, can it be justified as a Terry stop. Now,
6 first of all, I think it is important to distinguish
7 this case from the Mendenhall --

8 QUESTION: Could I ask you what I asked your
9 colleague?

10 MR. KLEIN: Yes, Your Honor.

11 QUESTION: A voluntary stop, even, you would
12 say that is a voluntary stop, a quick patdown and one
13 question, may I search your luggage. The man says yes.
14 The luggage is searched. Wouldn't the only question be
15 the question whether the consent was voluntary? You
16 wouldn't say --

17 MR. KLEIN: I would have no problem with
18 that.

19 QUESTION: And you wouldn't say that just
20 because there was a seizure, a momentary seizure under
21 Terry, that his consent to search would be an invalid
22 fruit?

23 MR. KLEIN: I would have no problem with that
24 whatsoever.

25 QUESTION: And you think that -- Let's assume

1 there was a valid Terry stop here initially. Just
2 assume that.

3 MR. KLEIN: Yes, Your Honor.

4 QUESTION: If they had then asked him, may we
5 search your luggage, and he said yes, and they searched
6 it right on the spot, no problem.

7 MR. KLEIN: I have no problem with that
8 whatsoever.

9 QUESTION: It is just the movement into the
10 other room?

11 MR. KLEIN: Even under certain circumstances,
12 a movement may be appropriate, but it was the
13 combination of factors here.

14 QUESTION: A movement could be a lot less
15 embarrassing.

16 MR. KLEIN: Your Honor, that is true, but if
17 that is the case, then every time that the police
18 conduct a so-called Terry stop, and they want to avoid
19 embarrassment to the subject of the Terry stop, that
20 would in their rationale permit them to move him off to
21 some isolated place.

22 QUESTION: And then what?

23 MR. KLEIN: And then conduct whatever it is
24 that they want to do.

25 QUESTION: Is it just the lapse of time, or is

1 it the change of atmosphere which makes it reasonable
2 for somebody to think that he is still being detained?

3 MR. KLEIN: Your Honor, the lapse of time is
4 only one factor, and I don't think this is critical in
5 this case. The lapse of time has been held to be a long
6 time to be reasonable. In Michigan versus Summers, two
7 hours was reasonable.

8 QUESTION: But let's concede there was an
9 initial seizure, as in my example.

10 MR. KLEIN: Yes, sir.

11 QUESTION: A Terry stop and seizure, and then
12 he is just moved somewhere, and they ask him, may we
13 search your luggage, and he says yes. That consent then
14 is bad, although it wouldn't have been --

15 MR. KLEIN: I'm sorry, I didn't follow.

16 QUESTION: A voluntary stop initially --

17 MR. KLEIN: Your Honor --

18 QUESTION: -- and a seizure, and they take him
19 away to another place, and five minutes later they ask
20 him, may we search your luggage, and he says yes. You
21 think that is necessarily a fruit of an arrest?

22 MR. KLEIN: I'm sorry, I didn't quite follow
23 the question. If there is an initial Terry stop --

24 QUESTION: Well, if he can consent to
25 searching his luggage initially --

1 MR. KLEIN: Yes, Your Honor.

2 QUESTION: -- under a valid stop, why can't he
3 validly consent to it five minutes later?

4 MR. KLEIN: He could, if the circumstances
5 were right. If they hadn't engaged in any more coercive
6 conduct.

7 QUESTION: Like what?

8 MR. KLEIN: Like taking his ticket, as they
9 did here. Like going and getting his bags and putting
10 them in the room, isolating him, as they did here,
11 advising him, now, we suspect you under these
12 circumstances of carrying narcotics, we would like you
13 to open the bag to see whether or not there is anything
14 in there.

15 QUESTION: And that makes it more likely that
16 he would consent to searching his bags?

17 MR. KLEIN: I think it would, Your Honor. I
18 think that placing him in that kind of a coercive
19 atmosphere makes it more likely. I think it is
20 unreasonable after an individual such as this has been
21 removed to a room, they've gotten his bags, they've
22 gotten his ticket, they tell him, now, we suspect you of
23 carrying narcotics, and we would like you to open up the
24 bag in order to confirm or dispel our suspicions, I
25 think it is unreasonable to think that anybody, guilty

1 or innocent, can simply say, well, I've had quite enough
2 of this, gentlemen, I've got to go on my way.

3 QUESTION: Is your conclusion then that his
4 consent is coerced, or that there is an arrest and a
5 fruit of an invalid arrest? That is a completely
6 different thing.

7 MR. KLEIN: Your Honor, it's both. It's
8 both. I haven't gotten to the consent --

9 QUESTION: Well, you don't need to get to the
10 arrest then. It is just a coerced --

11 MR. KLEIN: We don't have to.

12 QUESTION: It's just a coerced consent.

13 MR. KLEIN: I believe that it is. I think
14 that that would be the easiest way to decide this, is
15 that this was a coerced consent under the circumstances,
16 and regardless of whether or not we call it an arrest or
17 not, it is a clear confinement which exceeds the scope --

18 QUESTION: Well, the court below didn't decide
19 that.

20 MR. KLEIN: Your Honor --

21 QUESTION: The court below said there was an
22 arrest and a fruit of an invalid arrest.

23 MR. KLEIN: Your Honor, I think that the
24 exact --

25 QUESTION: Isn't that what it said?

1 MR. KLEIN: Your Honor, I think that the exact
2 holding of the court --

3 QUESTION: Well, they said there was an
4 arrest.

5 MR. KLEIN: They said that regardless of the
6 exact nomenclature employed to describe this situation,
7 it is unimportant.

8 QUESTION: Where are you reading from in the
9 supplemental appendix?

10 MR. KLEIN: I don't have the supplemental
11 appendix. I am reading under the section that is
12 Consent Invalid, and then then it says -- Royer
13 Involuntarily Confined is the first section, and then
14 the second section, Number Two, it's Page 50.

15 QUESTION: No Probable Cause?

16 MR. KLEIN: Pardon me? That's correct. The
17 section that says No Probable Cause.

18 QUESTION: It says Royer had been placed under
19 arrest, no probable cause.

20 MR. KLEIN: Yes, Your Honor. It says, "For all
21 practical purposes, he had been placed under arrest when
22 the alleged consent was given. The exact nomenclature
23 employed to describe this situation is, however,
24 unimportant."

25 I don't think that the term "arrest" should be

1 dispositive of the situation, because of his precise
2 situation.

3 QUESTION: I know, but we have held that even
4 so-called voluntary consents or voluntary statements
5 after an invalid arrest are still fruits --

6 MR. KLEIN: Yes, Your Honor.

7 QUESTION: -- and inadmissible.

8 MR. KLEIN: Yes.

9 QUESTION: Without finding them coerced.

10 MR. KLEIN: Yes, Your Honor, I agree.

11 QUESTION: What is your submission here? Is
12 it that the consent was coerced and therefore invalid?

13 MR. KLEIN: Your Honor, the consent -- there
14 was no consent, is our position, is therefore invalid,
15 but irrespective of that, it was a Terry stop that
16 exceeded the scope of what is reasonably necessary.

17 QUESTION: And thereupon became an arrest.

18 MR. KLEIN: Yes, Your Honor, it did, and in
19 connection with that, the Court's inquiry of the
20 government as to when a seizure becomes an arrest, and
21 the government was unable to come up with a clear
22 definition. Well, I like the definition that the
23 government itself gave, and that was in their brief in
24 this case. They advert to their brief in the Michigan
25 versus Summers case, and on Page 10, they point out in

1 their brief that after saying that Dunaway made it clear
2 that the formal label is not dispositive, that "probable
3 cause is required whenever there is a sufficiently
4 substantial invasion of the suspect's freedom of
5 movement. What constitutes a sufficiently substantial
6 deprivation of liberty to require probable cause remains
7 to be fleshed out. If, however, a detention is deemed
8 to be of sufficient severity to fall within this
9 category, its lawfulness will not be evaluated by
10 reference to a general reasonable analysis, but will
11 ordinarily depend solely upon the existence of probable
12 cause."

13 That's what we have here, Your Honor. I
14 maintain that the Terry stop exceeded the initial reason
15 for the intrusion. It was unnecessary to expand it to
16 the point that it was. It was unnecessary under these
17 circumstances, and therefore constitutionally
18 unreasonable.

19 QUESTION: You indicated that you thought the
20 initial stop was perfectly valid, the stop and the
21 inquiry. Is that right?

22 MR. KLEIN: Yes, Your Honor.

23 QUESTION: Now, it was about roughly 15 steps
24 from where they then stood to the room. At what point
25 did he -- you say he became under arrest? The first

1 step, fifth step, tenth step?

2 MR. KLEIN: No, Your Honor. I would say that
3 by the time he was asked for his consent, he was under
4 arrest, and I think that it is impossible to single out
5 any of those crucial elements that I have adverted to,
6 and the court, the Florida court, the appeals court did
7 not try to distinguish between those crucial elements,
8 and I think that the government is incorrect when they
9 say that the sole basis of the Florida court's position
10 about an illegal arrest was based upon his -- the
11 reasonable apprehension that he was not free to go.
12 That was merely one of the factors that the Florida
13 court adverted to in making its ultimate determination
14 that an arrest had occurred.

15 It specifically cited the other instances of
16 misconduct indicating that the man was not free to go,
17 such as the -- and that he was in effect in a classic
18 case of imprisonment.

19 QUESTION: You haven't argued, unless I have
20 missed it, that there was not even any grounds for a
21 valid Terry stop here.

22 MR. KLEIN: No, Your Honor, I have not as yet,
23 but I will be glad to address that point.

24 QUESTION: Well, that is part of your
25 submission, I take it.

1 MR. KLEIN: Yes, Your Honor, and on that
2 particular point, what our problem is is that this is --
3 this Terry stop was based upon the so-called profile,
4 drug courier profile, and the government has submitted
5 in their orange book to the Court a compilation of the
6 law and the cases, and they point out, for one thing,
7 that there is no national profile, and the reason for
8 this is that a perusal of the cases that they have in
9 their book shows that all of the elements are
10 contradictory.

11 In one case, it is the last passenger off the
12 plane. The next time, it is the first passenger. No
13 bags, heavy bags, or empty bags. Walking very fast,
14 very slow. A one-way ticket, a round-trip ticket.

15 QUESTION: They are always nervous.

16 MR. KLEIN: They are always -- not always.
17 Sometimes nervous. Nervousness seems to be a factor in
18 Atlanta but not necessarily in Los Angeles.

19 (General laughter.)

20 QUESTION: What point are you trying to make.

21 MR. KLEIN: Pardon me?

22 QUESTION: What point are you trying to make?

23 MR. KLEIN: The point that I am trying to make
24 is that it is very much like analyzing why the stock
25 market has gone up the previous day. It permits the

1 police to take what is essentially a hunch. They select
2 out the factors that fit. They give it a label, and
3 they mask what is essentially a hunch and essentially
4 arbitrary action --

5 QUESTION: What is arbitrary about following a
6 hunch?

7 MR. KLEIN: There is nothing.

8 QUESTION: I personally am not persuaded that
9 police officers enjoy running around after red herrings
10 or running after people who really aren't going to
11 provide any leads or clues. Shouldn't the courts give
12 some deference in this situation to the considered
13 experience of law enforcement personnel, just on the
14 basis that they are the ones on the scene, and probably
15 know a little bit more about it than we do?

16 MR. KLEIN: Your Honor, in some instances,
17 that's true. First of all, though, we are dealing with
18 a particular case, and here, this case, the officer had
19 all of one month's experience. He had been on the job
20 since November. This was January.

21 QUESTION: Well, but the profile was
22 presumably devised by people other than him.

23 MR. KLEIN: All right. Yes, Your Honor.

24 QUESTION: What does the one month's
25 experience have to do with it?

1 MR. KLEIN: All right, Your Honor, because we
2 are talking about what essentially must be
3 individualized suspicion, and a perfect example here is
4 that some of the characteristics that were adverted to
5 by the officer in his testimony as to why he suspected
6 this person was because he was carrying American
7 Tourister luggage. He said he was carrying one old
8 suitcase, one new suitcase, and he put them up near the
9 counter, and most people carry their luggage with them.
10 Now, the profile has its place. It is an excellent
11 administrative tool for the police to use to single out
12 possible suspicious activity for further investigation,
13 but it should not be used as a justification for
14 intruding on the Fourth Amendment.

15 QUESTION: Why not?

16 MR. KLEIN: Because the fact of being part of
17 a profile in and of itself should not be used in
18 connection with a Terry stop as a substitute for
19 individualized suspicion. I think every case since
20 Terry has talked about individualized suspicion as to
21 why it was that a particular element in the profile was
22 or was not --

23 QUESTION: Supposing the government could
24 produce evidence, which I take it it hasn't here, that
25 if each of these elements of the profile when they were

1 run down, 70 percent of the follow-ups indicated a
2 person who was probably guilty of some offense and 30
3 percent didn't. Now, would you say that an officer
4 couldn't simply apply that profile across the board if
5 it were documented in that way, without making any
6 further individualized determination?

7 MR. KLEIN: I still think that he needs to
8 make an individualized determination in every instance.
9 I think that that sort of statistical approach --

10 QUESTION: Well, what if the individualized
11 determination he makes was that this person whom I am
12 following now exhibits eight of the ten characteristics
13 that the profile says to look for, and each of those ten
14 characteristics is documented by experience?

15 MR. KLEIN: I still think, Your Honor, under
16 those circumstances, that he has to be able to
17 articulate whether or why any particular item of
18 behavior, regardless of whether it is on or off the
19 profile --

20 QUESTION: Any particular item or the
21 combination of all of them?

22 MR. KLEIN: He can use a combination of all of
23 them, but he still must articulate why it is that he
24 believes that these things lead him to suspect that a
25 crime is being committed.

1 QUESTION: Why not past experience? If 80
2 percent of the follow-ups in the past of people with a
3 particular kind of luggage have indicated that you find
4 a guilty person, why isn't that a perfectly adequate
5 basis of using that in the case of an expert who comes
6 along?

7 MR. KLEIN: Your Honor, I still think that
8 under those circumstances, that there has got to be some
9 showing that in this particular case that they suspect
10 him of a crime, because each of those things are
11 innocent in and of themselves.

12 QUESTION: Of course, but that is a very
13 fallacious approach of the undistributed middle, which
14 really doesn't mean anything in this kind of situation.
15 You say -- You keep referring to what you think and what
16 you believe.

17 MR. KLEIN: Yes, Your Honor.

18 QUESTION: What cases from this Court support
19 your view that a profile of this sort is not usable in
20 any circumstances?

21 MR. KLEIN: Your Honor, I think that the
22 concurring opinion in the Mendenhall case in Footnote
23 Number 6, Justice Powell specifically indicated that a
24 mere profile match in and of itself would not take the
25 substitute -- it would not be a substitute for that sort

1 of individualized suspicion. Its appearance on the
2 profile may or may not have significance, but the mere
3 fact that it does appear on the profile cannot be used
4 as a substitute to make the determination that in fact a
5 suspicion of a crime has been committed. There still
6 must be something that is articulated as to why --

7 QUESTION: On your approach, a profile has no
8 use whatsoever.

9 MR. KLEIN: No, I believe that it has a very,
10 very useful approach, to single out from the very large
11 universe of people those whom there is some unusual
12 activity that would cause the police then to go and
13 conduct a further inquiry.

14 QUESTION: It worked pretty well here, didn't
15 it?

16 MR. KLEIN: Pardon me?

17 QUESTION: It worked pretty well here.

18 MR. KLEIN: Well, I think we must look at
19 things at the point prior to the search. Otherwise --
20 we can't look at it afterwards as a bootstrapping sort
21 of thing, because in every case in which there is a -- a
22 criminal case in which there is a motion to suppress, it
23 means that it works, but the determination still must be
24 made prior to the actual --

25 QUESTION: You were emphasizing the individual

1 components here some time back.

2 MR. KLEIN: Yes, Your Honor.

3 QUESTION: It turned out that one of these
4 suitcases weighed 65 pounds.

5 MR. KLEIN: No, they were 65 together, Your
6 Honor.

7 QUESTION: Together?

8 MR. KLEIN: It was an aggregate. Yes.

9 QUESTION: That is quite a lot for two
10 suitcases for the size indicated by this record.

11 MR. KLEIN: They were heavy suitcases, Your
12 Honor. There is no doubt about it. But the fact that
13 somebody is carrying heavy suitcases does not give one
14 the kind of articulable suspicion that a crime is being
15 committed.

16 QUESTION: Not standing alone.

17 MR. KLEIN: Pardon me.

18 QUESTION: Not standing alone. But it is one
19 of the factors, you would concede.

20 MR. KLEIN: Your Honor, it is a factor, but it
21 still does not show why a crime has been committed. The
22 fact that it is American Tourister, or that it is a
23 heavy suitcase, the fact that the person looked nervous
24 -- and by the way, there is a case that says -- pointed
25 out as one of the characteristics that the defendant

1 looked very calm, so again, there is a contradiction to
2 every single one of these items that occurs.

3 QUESTION: Well, then I say again that in your
4 position the profile is perfectly useless.

5 MR. KLEIN: No, I believe that it is very
6 useful for the police to go and to make the initial
7 contact so that they don't have to just select people
8 out at random to see whether or not they are drug
9 couriers in an airport, and at that point, then, they
10 would go and make their contact.

11 Now, if the state and the government are
12 fearful of a person getting away with crime, the police
13 don't have to shrug their shoulders and simply walk
14 away. They can still limit the intrusion to the reason
15 within the Terry standards.

16 QUESTION: You are not suggesting that they
17 have to have reasonable suspicion to go up and ask the
18 fellow just to --

19 MR. KLEIN: No, I am not suggesting that at
20 all, Your Honor. They could do it --

21 QUESTION: So, let's assume on these facts you
22 applied the rationale of the plurality in Mendenhall.

23 MR. KLEIN: Yes, Your Honor.

24 QUESTION: Where would you be then?

25 MR. KLEIN: I'm sorry, I didn't understand.

1 QUESTION: Justice Stewart's opinion in
2 Mendenhall.

3 MR. KLEIN: Yes, Your Honor.

4 QUESTION: Apply that to this case.

5 MR. KLEIN: If you would apply that to this
6 case, then there would be no seizure at all in the first
7 instance, but --

8 QUESTION: The facts aren't really different
9 from Mendenhall, are they?

10 MR. KLEIN: Yes, Your Honor, there are.

11 QUESTION: Why was there more of a seizure
12 here than there was in Mendenhall?

13 MR. KLEIN: First of all, the ticket was
14 handed back in Mendenhall. The trial court made a
15 specific finding in Mendenhall that Mrs. Mendenhall had
16 agreed to go to the room in a spirit of cooperation.
17 She was never told --

18 QUESTION: That's a finding. I'm talking
19 about the facts.

20 MR. KLEIN: All right. She was never told
21 either out in the concourse or in the office that she
22 was suspected of carrying narcotics, so that there is a
23 focus issue that is involved there. There was no
24 retrieval of her luggage. She was advised in the room
25 of her right to refuse.

1 QUESTION: Well, let's assume there was no
2 reasonable suspicion in this case, there was just the
3 profile, and assume we agreed with you that that doesn't
4 amount to reasonable suspicion, but nevertheless it did
5 sort this person out.

6 MR. KLEIN: Yes, Your Honor.

7 QUESTION: So you go up to him, and you say,
8 may I ask you some questions? We are narcotics
9 officers, and we suspect you of carrying narcotics. We
10 want to ask you one question. May we search your
11 luggage, and he says yes.

12 MR. KLEIN: Again, I still would have --

13 QUESTION: You don't have any problem at all.

14 MR. KLEIN: If that took place out in the
15 concourse, I would have no problem with it, and in fact
16 I think that if --

17 QUESTION: So, next question.

18 MR. KLEIN: Yes, sir.

19 QUESTION: He goes up to him, we are narcotics
20 officers, we suspect you of carrying narcotics, but we
21 have no articulatable suspicion about that. One
22 question. Would you come over and let us search your
23 luggage in this room over here? And he says yes.

24 MR. KLEIN: Your Honor, now we are beginning
25 to build hypothets that I can't answer, because I think

1 that it may or may not be.

2 QUESTION: Well, he doesn't say -- now they
3 just say, will you come over to this room, and he says
4 yes, and he gets over there, and they say, may we search
5 your luggage.

6 MR. KLEIN: Then we are closer to a Mendenhall
7 situation.

8 QUESTION: Now, Justice Stewart said that is
9 just complete consent all the way down, no seizure, no
10 nothing.

11 MR. KLEIN: Your Honor, then perhaps we get
12 closer to a Mendenhall situation, but that's not the
13 situation that we have here, and I think again in order
14 to determine --

15 QUESTION: Well, one of the government's
16 arguments is that it is.

17 MR. KLEIN: Your Honor, that's correct, but I
18 think in order to determine these issues of the scope of
19 the Terry seizure, that we have got to go back and look
20 at the Terry poll stars, and see what it is that is
21 sought to be accomplished, and one of the things that
22 must be determined is how far we can extend this Terry
23 stop without running afoul of the original principle.

24 The whole object of all of the Terry cases,
25 including the investigative stop cases, is that the

1 scope of the intrusion must be limited to the reason for
2 the initial seizure, and that is what justified the
3 Terry rationale in the first place.

4 Now, if we limit that under these
5 circumstances to the Terry seizure, then I think it is
6 clear that whatever occurs should occur out there in the
7 concourse. It is constitutionally unreasonable to take
8 all the --

9 QUESTION: Why should the test of a seizure be
10 what the seizee reasonably thought about whether he was
11 free to go or not?

12 MR. KLEIN: Why should it be?

13 QUESTION: Yes, because on that basis, you
14 probably will never permit the police to go up to
15 anybody and say, may I ask you a question.

16 MR. KLEIN: Your Honor, I agree, but that is
17 what the Court has said, that that is the test, because
18 I don't think there's any way --

19 QUESTION: Why shouldn't it rest on some act
20 of compulsion or show of force by the police?

21 MR. KLEIN: Your Honor, the cases have said
22 the question is whether or not the "seizee" is under the
23 reasonable belief that he was not free to walk away. I
24 think it's a very, very difficult rationale to apply,
25 but nevertheless that is the standard that this Court

1 has adopted --

2 QUESTION: In what cases was that?

3 QUESTION: What case?

4 MR. KLEIN: Your Honor, I think that it's a
5 number of cases that follow Terry, and I think that
6 under -- I can't recall exactly which of those cases,
7 but the question has always been stated under whether or
8 not the seizure --

9 QUESTION: In one case, have five Justices
10 agreed to that? It was Justice Stewart's opinion joined
11 by one other Justice in Mendenhall.

12 MR. KLEIN: All right. My own feeling is that
13 that is an unworkable standard, that it ought to be a
14 standard as to whether or not -- whether or not some act
15 is done by the police officer that would reasonably
16 indicate that the defendant was not free to go, not the
17 subjective standard of what was in the defendant's mind,
18 because that's an impossible standard to apply, and I
19 think that looking at it from the standpoint of the law
20 enforcement authorities rather than from the subjective
21 standard of the defendant makes a lot more sense.

22 And looking at it from that standard, if a
23 police officer asks an individual on the street or
24 anywhere, can I see your license, it is unreasonable to
25 believe that the person thinks that he can freely walk

1 away without giving up his license or without arousing
2 further suspicion.

3 QUESTION: Well, there is one way to find out,
4 and that is by saying no.

5 MR. KLEIN: That's correct, Your Honor, but
6 again, we are talking about what would happen afterwards
7 on the basis of a hypothetical. Now, if the state and
8 the government are fearful of a person in Mr. Royer's
9 position getting away with crime, the police do not have
10 to shrug their shoulders and walk away. They can still
11 limit the intrusion to the reason within the Terry
12 standards and yet carry on with a number of efficacious
13 techniques.

14 They can continue the brief seizure on the
15 spot. They can continue the questioning. They can ask
16 there if he would consent. They can check with the
17 ticket agent. They can do a dog sniff of his luggage.
18 Also, they know that he's getting on a plane, and they
19 know where he's going to --

20 QUESTION: How long can they continue the
21 questioning?

22 MR. KLEIN: Pardon me?

23 QUESTION: How long can they continue the
24 questioning?

25 MR. KLEIN: How long? Your Honor, I think

1 that the standard just has to be one of whether or not
2 it is reasonable, and I don't think that they can --

3 QUESTION: Can they retain the man's ticket
4 while they do the questioning, in your view?

5 MR. KLEIN: Your Honor, if it's a seizure on
6 the spot, I think that they could retain his ticket.
7 That would be a means of holding him on a leash, because
8 if there is a proper Terry seizure in the first
9 instance, then I would think that under those
10 circumstances it would be reasonable to hold their
11 ticket while they are questioning him on the spot, but
12 if they are going to attempt to remove him to some other
13 place, then in order to expand that, they've got to have
14 some legitimate reason why it is necessary to go to
15 another place other than the general law enforcement
16 objectives.

17 QUESTION: Do I understand you to say, then,
18 that if they had asked him in the terminal rather than
19 in the office to open the bags, you'd have no
20 objection?

21 MR. KLEIN: I think that that would be
22 appropriate under those circumstances. They can ask for
23 a consent there, but it was merely the coercive elements
24 that inhered in the situation in this instance. Also,
25 they know -- I started to give some reasons as to why it

1 was that they could conduct it in another manner. He is
2 getting on a plane for New York, so they know very well
3 where he is going to be for the next two and a half
4 hours. And the agent testified in this case that he is
5 in constant communication with agents in every other
6 city throughout the country, checking on passengers
7 coming and going in these instances, so it is very easy
8 for them to do what they have to do.

9 QUESTION: The logical result of what you say,
10 that they could have required him to open his suitcases
11 right on the spot --

12 MR. KLEIN: Yes, Your Honor.

13 QUESTION: -- in your response to Justice
14 Stevens, but because he takes 15 steps to save him some
15 public embarrassment, then they lose some rights?

16 MR. KLEIN: Your Honor, it is not just the
17 movement of the 15 steps. First of all, they put him
18 into a converted storage closet. It could be five
19 steps, but once they move behind a door which is only
20 three inches wide --

21 QUESTION: You call it a closet. How big was
22 the room, as long as you have defined it as a closet?

23 MR. KLEIN: It was defined by the police as a
24 converted storage closet. The Court of Appeals pointed
25 out that the officer did testify, contrary to what the

1 state says, that it was a police room. It was outfitted
2 with a desk and two chairs, and it's impossible to say.
3 There's nothing in the record to indicate.

4 QUESTION: A big closet.

5 MR. KLEIN: Pardon me?

6 QUESTION: The size of a closet with a desk
7 and two chairs?

8 MR. KLEIN: Yes.

9 QUESTION: The situation would be different in
10 your view if it were as large as this courtroom?

11 MR. KLEIN: Your Honor, I think that that
12 would be an element, but I don't think that it is
13 dispositive at all. I think that the coercive elements
14 that all combined in this case added up to the situation
15 that existed here.

16 QUESTION: Well, let's assume that the
17 officers said, we hereby arrest you, and then they
18 asked --

19 MR. KLEIN: It could be an illegal arrest.

20 QUESTION: Well, let's assume there was even
21 probable cause.

22 MR. KLEIN: Yes, Your Honor.

23 QUESTION: And they say, may we search your
24 suitcase, and he says yes. There is nothing wrong with
25 that consent necessarily, is there?

1 MR. KLEIN: I would say that there is, Your
2 Honor.

3 QUESTION: There was probable cause.

4 MR. KLEIN: If there was probable cause, even
5 -- oh, if there was probable cause, no. I would say
6 not. Under Schneckloth it would be an acceptable -- it
7 would be an acceptable standard.

8 QUESTION: Even if the case turned on the
9 voluntariness, it could be found completely voluntary.

10 MR. KLEIN: That's correct, Your Honor, it
11 could.

12 CHIEF JUSTICE BURGER: Very well.

13 Mr. Fox, do you have anything further?

14 ORAL ARGUMENT OF CALVIN L. FOX, ESQ.,

15 ON BEHALF OF THE PETITIONER

16 MR. FOX: Yes, Your Honor, I have --

17 CHIEF JUSTICE BURGER: You have six minutes
18 remaining.

19 MR. FOX: Yes, Your Honor. Thank you.

20 First of all, Your Honor, we certainly do not
21 abandon any arguments we raise in our extensive brief,
22 including the good faith exception. I would like to
23 address why the voluntariness issue in this Court should
24 be overturned, and that is, this Court's various
25 holdings, and we quote United States versus Price that a

1 finding of consent should not be overturned unless it is
2 clearly erroneous. The evidence in this case is not so
3 overwhelming that either this Court or the District
4 Court of Appeal en banc should overturn both the panel
5 opinion and the trial court on the question of
6 voluntariness.

7 The defendant just stated that this was a
8 police room, and the witnesses so testified. In fact,
9 Johnson was asked, "Is that an official police room."
10 No, it's a closet that has shelves on one end. Do you
11 have any police paraphernalia whatsoever in that room?
12 No, because it's an area that we really couldn't secure
13 very well."

14 The police room is something that the Third
15 District called this room. It is not something that it
16 was in fact.

17 With respect to why the defendant was stopped
18 -- assuming the defendant was detained -- excuse me --
19 when he was taken to the room, he was not detained
20 because he had American Tourister luggage, Your Honor.
21 He was detained because of numerous facts and
22 circumstances, not the least of which included the
23 profile as a written indication of the officers'
24 experience, and particularly his efforts to avoid
25 detection as are observed by the officers, and

1 particularly Johnson's observations of the defendant's
2 countersurveillance, if you will. Certainly, normal
3 airline passengers don't conduct countersurveillance to
4 see if they are being observed.

5 QUESTION: When did they discover that he was
6 using a false name, at least a different name?

7 MR. FOX: The alias was discovered at the very
8 moment of the initial contact with the defendant, Your
9 Honor, and that alias, Elmore, and Partino, cited in our
10 brief, Elmore said, "It would be a failure of duty had
11 the federal agents not detained Elmore at that point to
12 investigate him further." Now, that is detained to
13 investigate further, which, assuming this was a
14 detention, that it was absolutely lawful under Elmore.

15 Elmore also said, "Upon these facts, profile
16 or no profile, the officers also had a right to ask the
17 defendant if he would consent to the search of his
18 luggage." Patino reached exactly a similar result.

19 With respect to the test to be applied, Your
20 Honors, there's a two-part test here that we've argued
21 in our brief. First of all, Terry and Menienhall held
22 that there is no detention unless there is physical
23 force or a show of authority, and neither one of those
24 circumstances was present in this case. The second --

25 QUESTION: Didn't they say they were

1 officers? Isn't that -- They showed him a badge?

2 MR. FOX: That is not a show of authority,
3 Your Honor.

4 QUESTION: Well, what is it a show of?

5 MR. FOX: It's a show of the officers not
6 wanting to have a nervous courier react to the fact that
7 he was about to be taken out in the Everglades and left
8 in the trunk of an automobile. These officers identify
9 themselves for that specific reason, that the courier
10 realizes that he is not being trailed by somebody else.

11 QUESTION: Then you must not object to the
12 word "authority." You want to show them the authority
13 to protect them.

14 MR. FOX: You want to show them the authority
15 to --

16 QUESTION: You want to show them authority.

17 MR. FOX: -- alleviate their fear that
18 somebody who is not lawful and who --

19 QUESTION: Well, do you want to show them
20 authority or not?

21 MR. FOX: It is not a show of authority.
22 Merely identifying oneself as a police officer is not a
23 show of authority.

24 QUESTION: How does an officer make a show of
25 authority?

1 MR. FOX: Pardon me?

2 QUESTION: How does an officer make a show of
3 authority if he doesn't by identifying himself and
4 showing the authorization to act as an officer?

5 MR. FOX: He does it by announcing to the
6 defendant, you stay here, some sort of announcement,
7 some sort of indication to the defendant.

8 QUESTION: They asked him to open the
9 baggage. Would that be a show of authority?

10 MR. FOX: Merely a request to open the bag is
11 not a show of authority, Your Honor. This Court has so
12 held in Schneckloth. If this Court accepts that
13 announcement of identification is a show of authority,
14 then we are out the window on the mere contact concept,
15 which this Court accepted in Mendenhall.

16 QUESTION: Your friend has conceded that they
17 could have told him to open the bags immediately on the
18 spot.

19 MR. FOX: Yes, Your Honor. His whole thing
20 apparently rests at this point on whether or not the
21 movement to the room is some sort of detention.

22 QUESTION: Is that a show of authority or an
23 exercise of authority?

24 MR. FOX: No, Your Honor, I think it was
25 merely a request.

1 QUESTION: Well, there still could be a
2 difference between asking a person, may we search your
3 luggage, and saying to him, stay right here, now, open
4 your luggage, we are officers.

5 MR. FOX: Yes, Your Honor.

6 QUESTION: That's an order.

7 MR. FOX: That's a different circumstance.

8 Exactly. That is a show of authority. Now, the second
9 part of the --

10 QUESTION: That is an exercise of coercion.

11 MR. FOX: Stay right here, we are going to get
12 a warrant, that certainly is an exercise --

13 QUESTION: Well, or saying, now, open your
14 luggage, we order you to open your luggage.

15 MR. FOX: Assuming that had been held in the
16 trial court, that would be an exercise of authority.
17 Your Honor, there is a second part to our analysis here
18 as to the test to be applied in this case, and that is,
19 there must be a balancing test between the public's
20 interest in -- the compelling public interest in law
21 enforcement and the de minimus intrusion which is
22 present in this case, and we would urge this Court to
23 follow the balancing test as articulated in Michigan
24 versus Summers. Thank you.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen.

1 The case is submitted.

2 (Whereupon, at 3:04 o'clock p.m., the case in
3 the above-entitled matter was submitted.)

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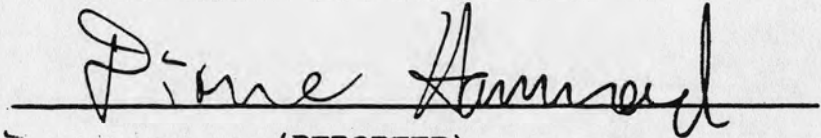
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FLORIDA v. MARK ROYER # 80-2146

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BY

A handwritten signature in cursive script, appearing to read "Pine Hammond", is written over a horizontal line.

(REPORTER)