

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: FLORIDA, Petitioner V. TERRANCE BOSTICK

CASE NO: 89-1717

PLACE: Washington, D.C.

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PAGES: 1 - 54

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C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	JOAN FOWLER, ESQ.	3
4	On behalf of the Petitioner	
5	KENNETH W. STARR, ESQ.	19
6	On behalf of the United States,	
7	as amicus curiae, supporting	
8	the Petitioner	
9	DONALD B. AYER, ESQ.	25
10	On behalf of the Respondent	
11	REBUTTAL ARGUMENT OF	
12	JOAN FOWLER, ESQ.	51
13	On behalf of the Petitioner	
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



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

2 (10:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We will hear argument  
4 now in No. 89-1717, Florida v. Terrance Bostick.

5 Ms. Fowler.

6 ORAL ARGUMENT OF JOAN FOWLER

7 ON BEHALF OF THE PETITIONER

8 MS. FOWLER: Mr. Chief Justice, and may it  
9 please the Court:

10 Terrance Bostick was reclining on the rear-most  
11 seat in a Greyhound bus when he was approached by Officer  
12 Nutt.

13 Office Nutt spoke to Mr. Bostick in a  
14 conversational tone. He asked Mr. Bostick where he was  
15 traveling to. Mr. Bostick replied that he was going to  
16 Atlanta. Mr. Nutt asked Mr. Bostick for his  
17 identification and for his bus ticket. Those were  
18 reviewed by the officer and quickly returned to Mr.  
19 Bostick.

20 Mr. Bostick was then asked if he would be  
21 willing to cooperate with the police by allowing a search  
22 of his bag. Mr. Bostick agreed to the consent, excuse me,  
23 consented to a search of the red bag upon which he was  
24 reclining.

25 As it turned out, that bag did not belong to



1 him. It did not reveal any contraband. There was a blue  
2 suit bag in the overhead rack above Mr. Bostick. When Mr.  
3 Bostick was asked whether or not it was his bag he said  
4 that it was.

5 He was asked again whether or not he would  
6 consent to the search, and he consented to the search of  
7 that bag which revealed over 400 grams of cocaine. Mr.  
8 Bostick was subsequently arrested.

9 It is the position of --

10 QUESTION: Did they explain what their mission  
11 was?

12 MS. FOWLER: It is unclear from this record as  
13 to whether or not they went through what is usually gone  
14 through, which is saying that we have a drug problem in  
15 South Florida. It is very serious. We are asking the  
16 cooperation of citizens.

17 It is not clear from the hearing on the motion  
18 to suppress in this case if that was said to Mr. Bostick.

19 QUESTION: And is it also unclear whether they  
20 told the person that he need not consent?

21 MS. FOWLER: Officer Nutt told Mr. Bostick at  
22 the time that he requested the consent for the search of  
23 the blue bag that he had the right to refuse.

24 QUESTION: Is that clear or is that disputed?

25 MS. FOWLER: I don't believe that is in dispute,

1 Your Honor.

2 QUESTION: So we may judge this case on the  
3 basis that he was told that he had the right to refuse?

4 MS. FOWLER: Right to refuse the search. He was  
5 not told that he had a right not to talk with the  
6 officers.

7 QUESTION: Yes, all right.

8 MS. FOWLER: But the encounter between Mr. --

9 QUESTION: But he could have -- you think it is  
10 clear enough that we judge the case on the basis that he  
11 was told that he could refuse the search?

12 MS. FOWLER: Yes, absolutely. These officers  
13 were wearing plain cloths covered with a windbreaker which  
14 had a sheriff's department insignia on the shoulders. It  
15 also said sheriff's department across the back. Other  
16 than that, they were wearing normal clothing as any other  
17 citizen would do.

18 Officer Rubino had his firearm in the waistband  
19 of his pants. It was not readily visible. Officer Nutt  
20 had his gun in a pouch which was held in his hand. We do  
21 not know exactly where that pouch was at any given time  
22 during this encounter.

23 Mr. Bostick, since he was in the rear-most seat  
24 of the bus, Officer Nutt and Officer Rubino were in the  
25 seats in front of his, sort of half in and half out of the

1 aisle.

2 There was still sufficient room for Mr. Bostick  
3 to have gotten up and left the bus, had he so chosen. But  
4 the State would urge that that is not the test, that --

5 QUESTION: And then the bus would go off?

6 MS. FOWLER: That is correct. That is possible  
7 that that would happen. But I believe that a more correct  
8 test under these circumstances is whether or not Mr.  
9 Bostick was free to terminate the encounter, whether or  
10 not he could have merely told the officers that he was not  
11 interested in talking to them.

12 If he had done so, that would have been the end  
13 of the matter and the officers would have gone on, either  
14 to other passengers or gotten off the bus if they did not  
15 get any cooperation from any other passengers.

16 QUESTION: Does that beg the question? Because  
17 you say he could have ended the encounter. He could have  
18 ended the conversation to the extent that it was a two-  
19 way conversation, but the question is whether there is a  
20 detention. And the police officer would still be there  
21 and unless he wanted to get off the bus and be left  
22 behind, he would still be there.

23 So isn't the question not whether an encounter  
24 could be, in the sense of the conversation could be ended,  
25 but whether there was a detention and whether that could



1 be ended?

2 MS. FOWLER: Justice Souter, I think the answer  
3 to that question is that, it is whether or not there was a  
4 restraint of Mr. Bostick's liberties, so as to rise to the  
5 level of a seizure.

6 QUESTION: And that isn't, the answer to that  
7 question is not synonymous with the answer to the question  
8 whether the conversation, the verbal interaction between  
9 them could have been ended, is it?

10 MS. FOWLER: If the verbal conversation had  
11 ended, the officers would have moved on. If they had not  
12 moved on then -- if Mr. Bostick had said, Officer Nutt, I  
13 do not want to talk to you, I want to go to sleep, and  
14 then Officer Nutt had gone further, then that probably  
15 would have given rise to a seizure.

16 But if he had said, no, and the officers had  
17 moved on, that is what we assume would have occurred.

18 QUESTION: Well, yes, if. I mean, that is the  
19 assumption that we have to make for your argument to work.  
20 Isn't it?

21 MS. FOWLER: Yes.

22 QUESTION: And we don't have anything to go on  
23 but assumption, do we?

24 MS. FOWLER: We have, I believe, the officer's  
25 testimony which is that he would have moved on.

1                   QUESTION: Why do you say it would have been a  
2 seizure if the officer continued to question him? I mean,  
3 let's assume I am walking down the street and an officer  
4 comes up to me and just walks alongside and he starts  
5 asking me questions.

6                   And I say, officer, you know, I would really  
7 rather not talk to you. He just keeps walking along side  
8 and keeps asking the questions, and I don't answer. I  
9 have been seized?

10                  MS. FOWLER: At some point that may have given  
11 rise to a seizure. It depends upon the totality of the  
12 circumstances.

13                  QUESTION: I mean, I can see how maybe, you  
14 know, he would be guilty of harassment or something, but  
15 how it is a seizure?

16                  MS. FOWLER: I am not --

17                  QUESTION: He just talks to me when I don't want  
18 to be talked to. A lot of people do that to me sometimes,  
19 I never think --

20                  (Laughter.)

21                  QUESTION: I never think I have been seized. I  
22 really don't.

23                  MS. FOWLER: No. It depends upon the nature of  
24 the encounter and the totality of the circumstances.

25                  If you have turned around to an officer and

1 said, you know, leave me alone. Absolutely, I do not want  
2 to talk to you.

3 QUESTION: And he says, I don't want to leave  
4 you alone. He just keeps walking along side. But he is  
5 not stopping me. He just keeps talking in my ear.

6 MS. FOWLER: If you are free to go about your  
7 business, you haven't been seized. And in this case, Mr.  
8 Bostick --

9 QUESTION: I mean, I have been annoyed, but I  
10 haven't been seized.

11 MS. FOWLER: Right. And in this case, Mr.  
12 Bostick's business was staying on his bus and going to his  
13 final destination.

14 So the question here is whether or not the  
15 officers prevented him from doing exactly that. And all  
16 he had to do was literally say no to the officers, and if  
17 he had said no, then that would have been the end of the  
18 encounter.

19 QUESTION: How do we know that? How does he  
20 know what would have happened at the next bus stop?

21 MS. FOWLER: We don't know for certain what  
22 would happen. But we can only assume.

23 QUESTION: Would the fact that he said no in Ft.  
24 Lauderdale give probable, reasonable suspicion to an  
25 officer in Palm Beach to say, I would like to ask you the



1 same questions --

2 MS. FOWLER: I don't believe so, Your Honor. I  
3 think that it is an isolated incident. What occurred --

4 QUESTION: There is no communication between  
5 different branches of the different police departments?

6 MS. FOWLER: There is nothing in this record,  
7 and there is nothing to my knowledge.

8 QUESTION: I thought one of the opinions  
9 referred to something like that.

10 MS. FOWLER: There is some language in one of  
11 the D.C. opinions that says that the officer had said  
12 that. But the opinion also goes on to say that they treat  
13 that as irrelevant: what the subjective thoughts of the  
14 officer were. They do not use that as part of their  
15 holding.

16 And in this case, we need to decide what a  
17 reasonable person in Mr. Bostick's circumstances would  
18 have thought when two people in plain clothes came,  
19 actually one person came up to talk to him, the other  
20 officer was further up in the bus.

21 QUESTION: Have we ever said in our cases that  
22 the exercise of your rights is grounds for additional  
23 suspicion on the part of officers?

24 MS. FOWLER: No, we have not. Pardon me, no,  
25 you have not. This Court has not so held.

1                   And we are not saying that here today. What we  
2                   are saying is that --

3                   QUESTION: Well, you are not. Because you  
4                   responded to Justice Stevens, that this would not be  
5                   grounds for giving added suspicion to either these police  
6                   or to police in another jurisdiction.

7                   So I think that is consistent with your answer.

8                   MS. FOWLER: Yes, sir.

9                   QUESTION: Would it be consistent with your  
10                  position for the police to call ahead to the next city  
11                  where the bus comes in, and suggest to them that without  
12                  basing any reasonable suspicion, that they just  
13                  reinterrogate the same person?

14                  Would there be anything wrong with that?

15                  MS. FOWLER: I am not sure that they would have  
16                  a basis for doing that.

17                  QUESTION: Well, the fact that he -- unlike so  
18                  many thousands of people who are willing to let their bags  
19                  be searched, unlike so many, he just wouldn't let them  
20                  search his bag.

21                  I gather from the history of this, that most  
22                  people are willing to allow their bags to be searched.

23                  MS. FOWLER: Right. What we have learned is  
24                  that most people feel a moral compulsion to cooperate with  
25                  police officers, especially when they are informed about

1 the problems that we have with drugs. I just --

2 QUESTION: Problems they are not aware of until  
3 the officer has confronted them on the bus, I suppose.

4 MS. FOWLER: Or they may well be aware of them  
5 because it is all over the media. It is all over, you  
6 know, people have -- they know of people in the community  
7 that have problems.

8 I mean, it is common knowledge that drugs are a  
9 very serious problem in this country. So I don't think  
10 that most people, when they are approached by officers,  
11 that that is the first time that they have heard about a  
12 drug problem, but that might give rise to why they are  
13 more likely to cooperate.

14 I really can't give you a yes or no answer as to  
15 whether or not calling ahead would be proper.

16 QUESTION: Why would it then -- are you urging a  
17 "no harm in asking" rule? I mean, do you need probable  
18 cause or anything just to come up and say, do you mind if  
19 I search your bag?

20 MS. FOWLER: No. You don't need probable  
21 cause.

22 QUESTION: So why would there be --

23 MS. FOWLER: That is merely a citizen encounter.

24 QUESTION: Why would there be any question about  
25 calling ahead? If you say that there is no violation of



1 the law involved in simply asking somebody.

2 MS. FOWLER: Right. I just have a concern that  
3 if you do this, you know, 25 times, that might be a  
4 problem. And that that question is not --

5 QUESTION: Well, that could be police  
6 harassment, but it has nothing to do with whether it is a  
7 violation of the Fourth Amendment, I would assume.

8 MS. FOWLER: Okay. That is correct.

9 QUESTION: I mean, consistently, with the rest  
10 of your case.

11 MS. FOWLER: Correct. Thank you, Your Honor.

12 What we need to look here, is to whether or not  
13 the actions of the officers, the totality of their actions  
14 were reasonable and whether or not they caused a restraint  
15 of liberty of Mr. Bostick.

16 Florida asserts that there was no restraint of  
17 his liberty. There was no show of force. There was no  
18 display of a weapon. There was no display of authority.  
19 In any --

20 QUESTION: Was there any showing that the bus  
21 departure was delayed?

22 MS. FOWLER: In the bus driver's deposition he  
23 stated that they left 20 minutes late. However, it is  
24 unclear as to whether that was a direct result of Mr.  
25 Bostick's arrest.

1           QUESTION: Suppose the police did delay the bus  
2 20 minutes in order to conduct this sort of investigation,  
3 would that have any bearing on the case or would it change  
4 the case?

5           MS. FOWLER: I don't think it would. I think  
6 that that would be between the bus company and the police  
7 officers, as long as --

8           QUESTION: Well, suppose the police delay the  
9 bus for an hour and a half, that has nothing to do with  
10 whether there is a seizure?

11          MS. FOWLER: I think you have to look to what  
12 they are doing with each individual person on the bus.

13          QUESTION: Well, suppose they are conducting  
14 this investigation that was conducted here, but it took  
15 them an hour and a half? And they ask the bus to please  
16 cooperate, the driver to please cooperate by waiting until  
17 they got there and they took their time to get there.

18          They delay it for an hour and a half for this  
19 investigation.

20          MS. FOWLER: Are you saying this investigation  
21 with Mr. Bostick alone or with everyone on the bus?

22          QUESTION: Well, it is the same facts as you  
23 have here.

24          MS. FOWLER: I think that that is a factor that  
25 should be considered, but it does not necessarily give

1 rise to a seizure.

2 What we are saying here, and where we are saying  
3 the Supreme Court of Florida has erred is in not  
4 considering the totality of the circumstances.

5 QUESTION: Supposing, Ms. Fowler, that the bus  
6 has an accident on the highway between Ft. Lauderdale and  
7 Palm Beach and the sheriff comes and says, I want to  
8 investigate the accident. Please hold up the bus for an  
9 hour while we -- I want to interview the driver. I want  
10 to take some photographs.

11 Do you think the people on the bus are seized  
12 because of that?

13 MS. FOWLER: No, because that is regular police  
14 business. I don't think there is any problem at all with  
15 that. And I am not saying that they were seized under the  
16 other scenario.

17 I am saying it is a factor to be considered.  
18 And if there is an accident, clearly the police are within  
19 their rights to do whatever investigation is required.

20 QUESTION: Ms. Fowler, backing up a little, why  
21 did they go straight to the back of the bus?

22 MS. FOWLER: What we have learned from the  
23 officers is that they try to approach as many people on  
24 the bus as they can within the time allotted to them. And  
25 so it is easier --



1 QUESTION: Well, why didn't they start in the  
2 front?

3 MS. FOWLER: Their practice is to start in the  
4 back because then when they get to the front they can exit  
5 the vehicle.

6 QUESTION: They had some reason, didn't they?

7 MS. FOWLER: Pardon me?

8 QUESTION: Wouldn't it appear that they had a  
9 reason, to start at the back instead of the front?

10 MS. FOWLER: I think that the reason, the only  
11 reason that I have been given is that it is just their  
12 standard practice because they do exit the vehicle when  
13 they get to the front of the bus.

14 Otherwise, they would go to the front, to the  
15 back and then have to leave again. Also, there is  
16 evidence, not in this record, but in other cases, that  
17 drug dealers prefer to be in the back of the bus because  
18 they have more -- they are more concealed.

19 And that is something that --

20 QUESTION: How do you know what the drug dealers  
21 do?

22 MS. FOWLER: That is something that police  
23 officers have told me. But that is not clear in this  
24 record.

25 QUESTION: And it is always interesting to me

1 that all of the drug pushers, when you ask to search them,  
2 they say, oh, come on. If looks like usual people don't  
3 do that. Why is it that the guys who plead guilty -- why  
4 do dope pushers plead guilty?

5 MS. FOWLER: Because they are guilty. If you  
6 are asking why they plead guilty after they have been,  
7 after there is probable cause for arrest --

8 QUESTION: No, no. I mean, when I have got dope  
9 on me, and I say search me, am I not pleading guilty?

10 MS. FOWLER: You are cooperating with the police  
11 officers.

12 QUESTION: That is right. Why? Can you give me  
13 a reason why?

14 MS. FOWLER: I think a reasonable person would  
15 do it --

16 QUESTION: They are just good people.

17 MS. FOWLER: Because they are trying to be  
18 cooperative.

19 QUESTION: They are just good people?

20 MS. FOWLER: Yes.

21 QUESTION: It is the reasonable dope dealer we  
22 are talking about.

23 (Laughter.)

24 MS. FOWLER: But the test that we need to be  
25 looking at is that of a reasonable citizen. What would a

1 reasonable citizen --

2 QUESTION: But as Justice Marshall points out,  
3 the cases always are people who are not reasonable  
4 citizens.

5 May I just ask on the standard practice. Is it  
6 standard practice to search as many bags as possible  
7 during the stop at the --

8 MS. FOWLER: It is standard practice to approach  
9 as many people and request consent for the search of the  
10 bags as possible.

11 QUESTION: I see.

12 QUESTION: How many did they search?

13 MS. FOWLER: On this bag, excuse me, on this bus  
14 they never got past Mr. Bostick. Because once they  
15 arrested him it was time for the bus to move on.

16 I think, Justice Marshall, in response to your  
17 question, I am sure there are a lot of drug dealers who do  
18 say no, and we just never see those cases.

19 So it is not as if every drug dealer is saying,  
20 is agreeing to this for some reason.

21 If there are no further questions --

22 QUESTION: They may not be a very bright bunch  
23 of people perhaps.

24 MS. FOWLER: Yes, that is probably very true.

25 QUESTION: Which is a good thing, I suppose.

1 MS. FOWLER: I would like to save the rest of my  
2 time for rebuttal.

3 QUESTION: Very well.

4 General Starr, we will hear now from you.

5 ORAL ARGUMENT OF KENNETH W. STARR

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

8 MR. STARR: Mr. Chief Justice, and may it please  
9 the Court:

10 The drug interdiction procedure that is at issue  
11 here is a natural outgrowth of airline interdiction  
12 programs, airport interdiction programs, that this Court  
13 has had before it in several cases: in Mendenhall, in  
14 Florida against Royer, and in Florida against Rodriguez.

15 As law enforcement efforts at airports have  
16 borne fruit, not surprisingly, drugs have been  
17 transported, in the experience of law enforcement  
18 officials in other ways, including by trains and by bus.

19 This tool, which was employed in Broward County  
20 is a tool that is employed increasingly across the  
21 country. It is used here in the District of Columbia and  
22 in other jurisdictions.

23 It is carried out in a reasonable and  
24 professional and non-intimidating way.

25 QUESTION: General Starr, would you comment, in



1 view of that argument, on the statement in the brief  
2 amicus for the Americans for Effective Law Enforcement,  
3 Professor Envow's group, which has uniformly supported the  
4 Government in all of these cases.

5 It says, "Amicus, with more than 16 years  
6 experience in police training and education, view the  
7 confrontation and search procedure used here as highly  
8 unusual, it not unique."

9 Do you think he is wrong?

10 MR. STARR: It is only unusual in the sense that  
11 it is relatively new. Broward County began implementing  
12 this in the early 1980's.

13 This jurisdiction began implementing it 3 years  
14 ago. All Federal courts of appeals that have now been  
15 confronted with the legality of this have unanimously  
16 sustained it. No dissents whatever.

17 The Fourth Circuit's opinion in Flowers, in  
18 particular, speaking the Fourth Circuit speaking through  
19 Judge Wilkinson made, I think, a pivotal point. This  
20 program is not only valuable in assuring the interdiction  
21 of drugs; but it is also valuable in terms of depriving  
22 individuals of dangerous weapons.

23 That is one aspect of this program. And the  
24 results in Broward County are quite consistent with those  
25 in the District of Columbia and elsewhere. Not only are

1 drugs seized, but weapons are seized as well; 45 dangerous  
2 weapons were seized by Broward County in the space of a  
3 year and a half.

4 In terms of the procedures that are employed,  
5 no, I don't think that they are intimidating, and I think  
6 that for this reason. All these police officers engaged  
7 in this program are trained. They have read this Court's  
8 cases.

9 They know that they cannot be confrontational.  
10 They know they cannot demand cooperation. They know,  
11 however, under this Court's cases, they can go to a  
12 citizen and ask for that citizen's cooperation.

13 QUESTION: General Starr?

14 MR. STARR: Yes.

15 QUESTION: If there had been a shooting match on  
16 that bus, there would have been a whole lot of people  
17 killed, wouldn't there?

18 MR. STARR: There certainly might have been.

19 QUESTION: And who would have been responsible  
20 for it?

21 MR. STARR: Those who began the firing, I would  
22 think.

23 Justice Marshall, let me give you this  
24 assurance: not only is this record barren of any  
25 indication of such a problem, it is our experience that

1     there is no such problem.

2             There have been no such incidents to our  
3     knowledge of shoot-outs on buses.  Individuals cooperate.  
4     And why do they cooperate?

5             This Court, by the way, has in Schneckloth and  
6     in Mendenhall and in Delgado, said, it is irrelevant  
7     whether you have been told whether you are free to  
8     cooperate or not.

9             The point is, this is a free society.  You have  
10    the right to say no.  This Court has had cases before it  
11    in which individuals have asserted that right.  They have  
12    said no.

13            Brown against Texas, the police offices come to  
14    the individual and he says, I am not going to cooperate.  
15    At that point, the police officers in this program are  
16    trained to back off.

17            Whether they must, in response to Justice  
18    Scalia's question, is a different matter in terms of  
19    Fourth Amendment analysis, because the critical Fourth  
20    Amendment inquiry is whether, as General Fowler put it,  
21    under the totality of the circumstances, there has been a  
22    show of force, a display of force or a show of authority  
23    so as to restrain the individual.

24            I have no problem at all with the concept that  
25    Justice Souter suggested of detention.  The police

1 officers station themselves in this kind of encounter so  
2 that there is no detention. The person is physically free  
3 to get up and absent himself, not necessarily to --

4 QUESTION: Well, General Starr, is the cramped  
5 setting of a bus that is about to leave a factor to be  
6 considered in the totality of the circumstances?

7 MR. STARR: Yes, it is, Justice O'Connor.

8 But because of the cramped setting, law  
9 enforcement officers are trained not to block the  
10 individual's right of access to the aisle or wherever the  
11 individual wants to go.

12 The individual need not leave the bus. The  
13 individual can simply say no, and remain precisely where  
14 he is or he can simply move to another seat. He can vote  
15 with his feet, but he does not have to take the  
16 extraordinary action --

17 QUESTION: Whether the consent it tainted, it  
18 isn't a question of whether he can leave, is it? Or isn't  
19 it whether or not he --

20 MR. STARR: I agree, Justice White, if I may.

21 I don't think that question is presented in this  
22 case. Because as I read this record, Florida has not  
23 preserved that point. Has not preserved the point of  
24 whether there is in fact a diminution of the taint so that  
25 this is not fruit of the poisonous tree.



1 QUESTION: -- whether his will was overborne by  
2 this show of authority when he consented?

3 MR. STARR: I think in the ordinary case, that  
4 would be presented. The way this case has come narrowly  
5 to the Court is whether the very act of approaching a  
6 citizen on a bus and asking for the individual's  
7 identification, bus ticket and the like, constitutes a  
8 seizure.

9 Because Florida, I think is --

10 QUESTION: Rather that whether that constitutes  
11 such a threat that his consent should be held invalid. I  
12 thought the whole thing was that the consent was invalid?

13 MR. STARR: By virtue of what the Florida  
14 Supreme Court has determined, erroneously in our judgment,  
15 to have been an illegal seizure, we believe there was not  
16 a Fourth Amendment event here, but virtue of the  
17 cooperation of this individual --

18 QUESTION: The consent was invalid because it  
19 was a product of an illegal seizure, is that correct?

20 MR. STARR: That was the theory of the Florida  
21 Supreme Court. And what Florida has presented to this  
22 Court in the question presented is the proposition that  
23 there was no seizure here, and we think that that is  
24 exactly right, as three court of appeals have now  
25 unanimously concluded.

1           QUESTION: General Starr, if I understand your  
2 argument, you think it is irrelevant to this case that  
3 Officer -- not irrelevant, but unnecessary at least to the  
4 case, that Officer Rubino advised Mr. Bostick that you  
5 have the right to refuse?

6           As far as you are concerned, he didn't have to  
7 say that?

8           MR. STARR: Absolutely right. This Court has  
9 said so in Schneckloth v. Bustamonte. It said it in  
10 Mendenhall and it said it in Delgado. I think that is  
11 settled law.

12          I thank the Court.

13          QUESTION: Thank you, General Starr.

14          Mr. Ayer, we will hear now from you.

15                   ORAL ARGUMENT OF DONALD B. AYER

16                   ON BEHALF OF THE RESPONDENT

17          MR. AYER: Thank you, Mr. Chief Justice, and may  
18 it please the Court:

19           I would like to note that there is nothing in  
20 the record of this case that indicates anything about the  
21 training of the officers or the procedures that they were  
22 instructed to follow.

23           There is material in later cases, indeed cases  
24 out of Broward County indicating in later years, not in  
25 1985, when this case occurred, but in later years

1 following this case and others, that they did in fact  
2 adopt certain procedures which included standing behind  
3 the seat rather than in front of it; not displaying  
4 weapons; and a number of other safeguards which indeed are  
5 not present here.

6 So I think it is important, number one, to  
7 decide this case on the facts of this case. And I would  
8 like very briefly to review those facts, because I must  
9 say my view of them does not in every particular, accord  
10 with what the Court has just heard.

11 Briefly, on the morning of August 27th, these  
12 two officers boarded this Greyhound bus, at roughly 8:00  
13 or so in the morning. As they got on, the driver got off  
14 and went inside, closing the door of the bus behind him.

15 The officers had no suspicion of anyone of the  
16 bus that morning. Nonetheless, they both wore raid  
17 jackets that had the words sheriff's office, not only  
18 across the back, but across the front of the jacket.

19 We haven't heard anything yet today about the  
20 gun, not so much as one word. But there was a gun  
21 indisputably in the record. Indeed, on page five of  
22 Florida's brief, they concede that the gun in Officer  
23 Nutt's hand, in a pouch was recognizable as a gun.

24 And that, I think, is a very critical point.  
25 That a gun --

1 QUESTION: Why is that critical? Most police  
2 officers I see are bearing sidearms. I don't know why you  
3 think that that is so extraordinary.

4 MR. AYER: Justice Scalia, it is one thing, I  
5 think, to have a gun concealed. It is another to choose  
6 to display it in a way that brings to mind to the person  
7 you are talking to that you are indeed armed, and you are  
8 prepared to deal with force if necessary.

9 QUESTION: The gun was in a pouch, as I  
10 understand it.

11 MR. AYER: It was in a pouch, and the testimony  
12 is ambiguous, as to whether or not at some point during  
13 the encounter, Officer Nutt put his hand into the zippered  
14 pouch and put it on the gun.

15 QUESTION: But how else would he have carried  
16 the gun? I mean, he wasn't in uniform, so he didn't have  
17 a holster on his side. You usually don't see them when  
18 they are wearing these jackets with a Sam Brown belt on  
19 it.

20 MR. AYER: You can wear a shoulder holster.  
21 There are a number of ways to do it. Officer Rubino had  
22 his gun concealed, that is to say, not out where it could  
23 be seen.

24 So the fact that this gun was there, and  
25 Bostick's testimony was that the hand was at times inside



1 the zipper on the gun.

2 The testimony of Officer Nutt was not contrary.

3 It was that sometimes he does put his hand on the gun  
4 inside the zipper, and he doesn't remember whether on this  
5 particular day he did or not.

6 In any event, as I said --

7 QUESTION: Would it be objectionable, Mr. Ayer,  
8 if on a uniformed police with a gun in his shoulder  
9 holster or side holster did the same thing?

10 MR. AYER: Mr. Chief Justice, the point is not,  
11 that I am trying to make is not that it is, per se,  
12 objectionable. None of these items are, per se,  
13 objectionable.

14 We are dealing with what a reasonable person  
15 concludes from all the circumstances. And what I am  
16 trying to do is present the full picture of the  
17 circumstances so as to make my argument --

18 QUESTION: You think a reasonable person might  
19 have concluded that if he didn't consent, the officer  
20 would shoot him. Is that what you are trying to say?

21 MR. AYER: No. I don't think that that is a  
22 likely conclusion. But --

23 QUESTION: Well, what is a likely conclusion  
24 then?

25 MR. AYER: Well, I think you have to look at all

1 of the circumstances, and then I think if I can have a  
2 moment, I will try to explain how I think they fit  
3 together.

4 In any event, the officers did go to the back of  
5 the bus. As was indicated, Mr. Bostick was reclining on  
6 the last seat on the bus. Whether he was asleep or not is  
7 disputed and there are, of course, no fact-findings here,  
8 so we don't know what the court found.

9 But, he was clearly lying down, attempting to  
10 get some rest, and was roused, either by being touched on  
11 the foot, which was his testimony, Mr. Bostick's  
12 testimony; or by simply being talked to, which was the  
13 officer's testimony.

14 That occurred at a time when Officer Nutt was  
15 standing, I think by the undisputed testimony, half in and  
16 half out of the aisle in front of Mr. Bostick. That is to  
17 say, half in and half out of an aisle which is about 15  
18 inches wide according to fact-finding in U.S. v. Chandler  
19 here in the District of Columbia that is relating to a  
20 Greyhound bus.

21 Officer Rubino, it is not quite clear where he  
22 was, but he was apparently in the row also directly in  
23 front of Mr. Bostick. So the two of them were confronting  
24 Mr. Bostick very directly.

25 And then you had the conversations that took

1 place. The officers identifying themselves. It is not  
2 clear what more they said than that. They asked where Mr.  
3 Bostick where he was traveling to. He said Atlanta.

4 They asked to see his ticket and his  
5 identification. He presented them. They were in order  
6 and the names matched so they were given back. And  
7 immediately thereafter, apparently, Mr. Bostick was asked  
8 if he would consent to a search of the red bag which  
9 didn't belong to him, and then subsequently would consent  
10 to a search of the blue bag which did.

11 QUESTION: But he was told that he need not  
12 consent?

13 MR. AYER: Well, again, it depends upon this  
14 Court's fact-finding on this record. And Officer Nutt  
15 does say at page 20 of the Joint Appendix, on cross-  
16 examination, he does not say it on his direct testimony;  
17 but on cross-examination, he says that he told him he had  
18 a right to refuse consent.

19 On the other hand, there are several other  
20 accounts of the conversation by the officers, and the  
21 officers indicate in those conversations nothing about  
22 that particular --

23 QUESTION: Wasn't there any finding at all?

24 MR. AYER: There is no fact-finding, Justice  
25 White, whatsoever, by the trial court except the ruling on

1 the motion.

2 QUESTION: Well, in Judge Lett's dissenting  
3 opinion in the district court of appeals, he says that  
4 there is conflict in the evidence about whether the  
5 defendant consented to the search of the second bag, and  
6 whether he was informed of his right to refuse consent.

7 However, any conflict must be resolved in favor  
8 of the State, it being a question of fact, decided by the  
9 trial judge.

10 MR. AYER: I think certainly on the issue of  
11 consent, that is true because that fact, even though there  
12 were no fact-findings, that fact was necessarily decided  
13 by the trial judge.

14 You would not have any basis for this search  
15 absent consent. Thereby, by denying the suppression  
16 motion, it is necessarily implicit that there was consent.

17 Now whether or not the other statement, the  
18 warning or whatever, that you have a right not to consent  
19 was made, I think doesn't follow necessarily --

20 QUESTION: Well, wouldn't it be fair to say that  
21 the Florida Supreme Court assumed for the sake of argument  
22 that he was advised of his right to refuse consent?

23 MR. AYER: They did not make anything of the  
24 contrary. The only point I would make is that they did  
25 change the question presented.



1           The question as it was presented by the  
2       intermediate Florida court included the premise that he  
3       had in fact been advised.

4           If you look at page --

5           QUESTION: B1 --

6           MR. AYER: Page B1 of the -- I am sorry. Yes,  
7       page B1 of the Joint Appendix and B2, the question as  
8       presented there says at the end, has the right, and they  
9       advise the passenger that he has the right to refuse  
10      consent to search.

11          The Florida Supreme Court, for unstated reasons,  
12      changed the question presented over on A1 of the Appendix  
13      to the Petition for Certiorari, to omit that premise. So  
14      it is not at all clear to me that the Florida Supreme  
15      Court assumed that that consent had been given.

16          QUESTION: In their theory, whether he was  
17      advised or not was irrelevant.

18          MR. AYER: Well, I don't seek to make a great  
19      deal of whether he was advised or not either. Because,  
20      frankly, I don't think it is terribly important.

21          The issue here is whether Mr. Bostick was seized  
22      under the Fourth Amendment. And I would state the legal  
23      test roughly as follows, trying to incorporate this  
24      Court's thinking in a series of cases: Mendenhall and  
25      Delgado.

1 But also in the more recent opinion in Inyo v.  
2 Brower County, it seems to me the question is something  
3 like this: Whether intentional police conduct, in the  
4 setting in which it plainly is occurring, that is on a  
5 bus, communicated to a reasonable person, by which I mean  
6 an innocent person, that he is not free to leave the  
7 presence of the officer, assuming that he would want to  
8 leave the presence of the officer.

9 And I would argue, based on the facts that I  
10 just reviewed that a reasonable person here would plainly  
11 feel that he had been and was being temporarily detained  
12 for the purpose of being questioned by these officers.

13 QUESTION: But isn't the fact is, the reason he  
14 didn't want to leave is he didn't want to get off the bus,  
15 not because he didn't want to talk to the officers  
16 necessarily.

17 MR. AYER: Well, I don't think we know that,  
18 Justice Kennedy. I think there is nothing in the record  
19 that indicates --

20 QUESTION: Well, the reason we don't know it is  
21 because your client didn't exercise his rights. If he  
22 had, then we would have found out the answer.

23 MR. AYER: Well, if you assume, if you assume  
24 that everyone who is on a bus that is laying over  
25 temporarily in an intermediate city does not want to get

1 off that bus, I think as an initial matter, you can  
2 probably say, yes, that is right.

3 That is, you don't want to get off because you  
4 have a ticket to Atlanta and we are in Ft. Lauderdale, and  
5 I don't want to go to Ft. Lauderdale. I want to go to  
6 Atlanta.

7 That doesn't mean that events can't occur on  
8 that bus that can cause you to say, you know, I would just  
9 as soon get off in Ft. Lauderdale. I would just as soon  
10 not be here being questioned by officer so and so, and I  
11 have changed my mind. I would like to leave.

12 I don't think that this Court is in a position,  
13 or would want to make the judgment, that because someone  
14 had bought a through ticket, that they had lost the right  
15 to decide to get off the bus at an intermediate point, if  
16 indeed they decide that that is what they want to do.

17 And that is why, in stating the tests that I  
18 have stated, I have put it in terms of the intentional  
19 police conduct and its effect, in the setting, on a  
20 person, assuming the person decides he wants to leave.

21 So I think what you have to look at is the  
22 overall set of factors that would restrict one, apart from  
23 the fact that you generally start with a preference not to  
24 get off the bus.

25 QUESTION: Well, now, wait. Not all the factors

1 that would restrict one. I assume when you say that the  
2 reasonable person would think he is not free to leave, you  
3 mean, he is not free to leave because of the assertion of  
4 State authority against him, right, either force or the  
5 threat of restraint?

6 MR. AYER: That is correct.

7 QUESTION: So the mere fact that it is a lot of  
8 trouble to leave, that he would have to take his baggage  
9 out of the baggage compartment of the bus; that he would  
10 have to chuck away half of his ticket, all of that is  
11 irrelevant to whether he thought that force was being  
12 applied against him to prevent his leaving?

13 You acknowledge that those circumstances are  
14 irrelevant?

15 MR. AYER: We agree. They are irrelevant to the  
16 question of whether he is free to leave.

17 Nonetheless, well, let me come back to the  
18 question of whether they are relevant at all to the Fourth  
19 Amendment issue here.

20 But specifically, the confinement that results  
21 here, I think results from three different sort of  
22 collections of factors. And I would enumerate them as  
23 follows:

24 First of all, obvious physical confinement  
25 within the bus, that is to say, the bus itself is a very



1 small area. There are very few ways to move about on a  
2 bus. You don't have just much room to get around.

3 There is one exit. It is at the front of the  
4 bus. And in this case, the officer was half in the aisle  
5 which is 15 inches wide.

6 The door to the bus is closed, and there is  
7 another officer standing, right, practically in his face.  
8 So you have, number one, these factors of physical  
9 confinement.

10 Number two, you have police officers who are  
11 making apparent, that is to say they are communicating by  
12 their actions, their ability to use force if they need to  
13 do it or believe it is appropriate to do it.

14 That is to say, they are displaying in a visible  
15 form, not to say, out of its purse, but nonetheless in a  
16 visible form, they are making observers aware that they  
17 have a weapon handy if they need it.

18 And they are wearing raid jackets, which I think  
19 most people are familiar with from watching television, as  
20 garments that are worn by law enforcement officers when  
21 the officers are most typically engaged in arresting  
22 people and carrying out somewhat urgent law enforcement  
23 activities.

24 So they have the garb and the outward dress of  
25 readiness for action, that is the second factor.

1           And the third, which I think may be perhaps the  
2 most important of all is the apparent purposefulness of  
3 their behavior by virtue of several specific aspects of  
4 what went on.

5           A couple of them are minor, I think, sounding,  
6 but when you put them together, become more significant.  
7 The touching on the foot, a sort of an indication, you  
8 know, if you spell it out -- you may want to rest, but we  
9 want to talk to you.

10           QUESTION: But what if a person is asleep? Is  
11 there some one way, according to you, that the officers  
12 could constitutionally get his attention?

13           MR. AYER: No, Mr. Chief Justice. And I am not  
14 suggesting that touching someone on the foot is, per se,  
15 unconstitutional, by any means.

16           I am simply suggesting that it is one of the  
17 factors, as this Court indicated in Mendenhall, a physical  
18 touching is one thing that may sometimes indicate or tend  
19 to indicate a seizure. So it is one factor.

20           QUESTION: Well, would it have been preferable  
21 for Fourth Amendment purposes in your view if the police  
22 had simply admonished him to wake up in a loud voice?

23           MR. AYER: I don't know if it would be or not. I  
24 think that would raise another of the Mendenhall factors.

25           QUESTION: Well, then how -- then in your view,

1     how, consistently with the Fourth Amendment, should a  
2     police officer who wishes to interrogate a sleeping  
3     passenger on a bus go about it?

4             MR. AYER: Well, I guess I think that there, if  
5     you have no reasonable suspicion of someone and he is  
6     asleep --

7             QUESTION: You can't --

8             MR. AYER: I would certainly not say that there  
9     is a, per se, bar on doing it at all.

10            QUESTION: You say a lot about things that are  
11    not a per se bar, but apparently a lot of things are  
12    factored in.

13            But when we get down to brass tacks on this, I  
14    get the impression you think there really is no way that  
15    they can properly wake him up without having it counted  
16    against him in this calculus that you are putting  
17    together?

18            MR. AYER: Well, I think that it tends to make  
19    the encounter feel more like a command performance. That  
20    is, that one is directed by the police; and if one is  
21    directed, and one in fact has the right to decline, I  
22    think there is a bit of a tension there.

23            I think that is something that --

24            QUESTION: But you can't say, would you agree to  
25    wake up? The person can't say no. If you wake him, you

1 wake him up.

2 MR. AYER: I will put it this way, I think  
3 certainly if they had tapped him on the foot, and they had  
4 said, we have a couple of questions we would like to ask  
5 you. You don't have to talk to us, and you are free to  
6 leave.

7 Certainly, that would have ended any question  
8 whatsoever. I mean not saying that again, that that is  
9 required. But that would certainly be a way of addressing  
10 that problem.

11 QUESTION: But, Mr. Ayer, correct me if I am  
12 wrong, we don't know in this case that he was asleep.

13 MR. AYER: No, we don't.

14 QUESTION: And we don't know that he was touched  
15 on the foot.

16 MR. AYER: That is true. We have a record that  
17 is unclear on both of those points. What we have, we  
18 have him --

19 QUESTION: Well, what are we talking about it  
20 for?

21 MR. AYER: We are talking about it because --

22 QUESTION: I mean, it is a factor that we don't  
23 know existed in this case. So how can we factor it in  
24 when we are not sure it was there.

25 MR. AYER: The Court is going to have to make a



1 determination as to what facts it believes occur in order  
2 to decide whether the situation is a Fourth Amendment  
3 violation.

4 QUESTION: We are going to determine whether he  
5 was touched on the foot?

6 MR. AYER: Not necessarily, only if you think  
7 you have to in order to decide the case. And I would  
8 suggest you probably don't.

9 A second thing that I think, well, two other  
10 things I think are worth mentioning with regard to the  
11 purposefulness. One is the request for documents. That  
12 is to say, focusing attention specifically on Mr. Bostick.

13 And the most important one I think has to do  
14 really with where this is taking place. I think we in  
15 this country are lucky, very lucky to be able to take for  
16 granted some, what you could sort of call quasi-public,  
17 quasi-private places, places like restaurants, churches,  
18 where you can't say that they are private in the sense  
19 that police officers or other people may never go in  
20 there.

21 Of course, they can go in there, and you can't  
22 object to that. On the other hand, they are places where  
23 people typically expect that they are going to be allowed  
24 to go about their business unless there is some  
25 significant reason for interruption.

1           And what that bears upon is not the notion that  
2   it is, a per se, or any other kind of violation, simply to  
3   go on a bus. It rather bears upon how a reasonable person  
4   would interrupt it.

5           If you were sitting in a restaurant and an  
6   officer came into the restaurant in uniform, which he  
7   obviously would have a perfect right to do, and he came  
8   directly to your table, and he addressed you and asked you  
9   for your driver's license, the assumption that I think  
10  most people would make would be that the officer was there  
11  in order to carry out some specific, purposeful mission  
12  that the officer needed to carry out.

13          One wouldn't be, I think, necessarily totally  
14  pleased because one might have the impression that one had  
15  become some sort of a target of inquiry. And I think that  
16  same kind of reasoning transfers over here, where you are  
17  talking about, say a bus or an airplane or a train, a  
18  situation where I think most people generally expect that  
19  they are not going to be approached.

20          If they are going to be approached, I will put  
21  it this way, it is going to be for some reason. Now  
22  again, that doesn't mean that the officers can't ever do  
23  it, and I don't argue that.

24          I am simply arguing now, what would a reasonable  
25  person conclude from this event occurring? And my

1 suggestion is that a reasonable person would conclude that  
2 the officer was about some business, very purposeful  
3 business; and the officer in this case, both blocking the  
4 way out, displaying force and an ability to use force,  
5 communicates a sense of an intention to accomplish the  
6 mission that he was about.

7 That is to say, to identify the defendant, look  
8 at his papers and then to go about searching his luggage.

9 QUESTION: Why shouldn't we be satisfied or why  
10 shouldn't you be satisfied with our deciding this case on  
11 the basis of the facts which the Supreme Court of Florida  
12 recited as being the facts of the case?

13 MR. AYER: I think that would be fine, Your  
14 Honor. I think that would be quite reasonable.

15 QUESTION: So we don't know whether he -- on A2  
16 they say the facts in this case are succinctly stated by  
17 Judge Letts in his dissenting opinion. Is that good enough  
18 for you?

19 MR. AYER: Yes. I think those are -- I think  
20 that is a fair statement of the facts that are really  
21 quite clear on the record.

22 QUESTION: And so the evidence disputed about  
23 whether the defendant consented or whether he was informed  
24 of his right, but the conflict must be resolved in favor  
25 of the State --

1 MR. AYER: Well, I --

2 QUESTION: That we don't know whether -- on  
3 these facts, you don't know whether they touched the man  
4 at all.

5 MR. AYER: That is correct. And under this  
6 brief statement, we do not.

7 QUESTION: Mr. Ayer, the problem is even worse  
8 than that. As I understand the Supreme Court of Florida  
9 opinion, all of those facts were ultimately irrelevant.  
10 It answered, it rephrased the certified question which was  
11 very general and contained no facts in it.

12 And I gather the basis for its ruling was on A1  
13 of your appendix: "Does an impermissible seizure result  
14 when police mount a drug search on buses during scheduled  
15 stops and question boarded passengers without articulable  
16 reasons for doing so, thereby obtaining consent to search  
17 the passenger's luggage."

18 There are no details in that at all. I take  
19 that to be the basis for the Supreme Court of Florida's  
20 holding.

21 MR. AYER: I would -- I haven't looked into this  
22 too far, but I would suggest that perhaps it raises a  
23 question to simply ignore the facts of this case, or for  
24 this Court to simply decide the case, ignoring the facts  
25 of this case, simply on the basis of a very brief



1 statement of a question, certified in the Florida Supreme  
2 Court.

3 QUESTION: Well, I gather that it was irrelevant  
4 to the Florida Supreme Court what the facts were, so long  
5 as the situation came within that rephrased question, they  
6 were going to find for the defendant.

7 MR. AYER: I would not reach that conclusion,  
8 Justice Scalia, based on what follows on page A2, the  
9 discussion quoting directly from the dissent in the  
10 district court of appeals.

11 QUESTION: At the end of the opinion they refer  
12 back again, the very last paragraph: "For the foregoing  
13 reasons, we answer the certified question, as rephrased,  
14 in the affirmative." They decided this on the basis of a  
15 rule of law that you can't have bus searches.

16 MR. AYER: Well, we are certainly not asking  
17 this Court for a rule of law that you can't have bus  
18 searches. It seems to us perfectly clear that the  
19 judgment must be made on the basis of all the  
20 circumstances.

21 And the circumstances here I think really do  
22 break into two categories. There are the peculiar,  
23 aggravating circumstances that I think fairly can be said  
24 are unmatched in any of the later cases that you find  
25 either in the Federal courts or the State courts.

1           The factors relating to the display of this gun,  
2   in the pouch visible and recognizable as a gun; the  
3   blocking of the aisle that is half way in, half way out of  
4   the aisle; the fact that the door to the bus is closed  
5   throughout this encounter. How would a person get off the  
6   bus if he wanted to?

7           Those are unique facts here. I think everything  
8   I have just said is utterly undisputed on the record.  
9   There is no dispute that those are the facts of this case.  
10   And on those facts, it seems to me, it is very hard to say  
11   that there was not a confinement, especially when you look  
12   at the second category of facts which I would describe as  
13   the generic facts, the generic bus search facts, which I  
14   think frankly raise very serious problems, questions about  
15   whether there is a seizure.

16           But by no means, is every bus search without  
17   reasonable suspicion, going to involve a seizure.

18           Again, just to repeat that generic set of facts  
19   includes, as Justice Kennedy noted, it includes the fact  
20   that you have got a busload of passengers who basically  
21   don't want to get off, and the police are taking advantage  
22   of that desire.

23           Maybe they have their luggage under the bus in  
24   the storage. Maybe they have given up their ticket.  
25   Maybe they can't afford to stay overnight in Ft.

1     Lauderdale, lots of reasons they don't want to get off and  
2     the police are saying, we have sort of a captive audience.  
3     I think that is a problem.

4             But the bigger problem is the fact that people  
5     on a bus, like people on an airplane, like people in  
6     church, like people in a restaurant, think if an officer  
7     comes on board or comes into the restaurant and comes up  
8     to them and focuses on them and doesn't say, this is just  
9     routine or you don't have to talk to me or something that  
10    contradicts the inference of the situation, something that  
11    says, relax, we are not after you. This is just a routine  
12    conversation we are having.

13            When you focus in on somebody in those settings,  
14    the normal person is going to say --

15            QUESTION: Then, Mr. Ayer, how do you square  
16    your argument with what this Court held in the Delgado  
17    case, where the immigration officers had basically closed  
18    off the doors to the work area and the employees were not  
19    free to leave and they were being questioned?

20            It seems to me, faced with that case, that you  
21    have kind of an uphill battle here.

22            MR. AYER: Well, I think Delgado is  
23    distinguishable on the ground that the setting is entirely  
24    different in the sense of confinement. The bus,  
25    obviously, there is simply no where to go. There is not a

1 foot or two hardly to move in.

2 In the factory, the opinion for the Court made  
3 clear that there is an opportunity to move around the  
4 factory.

5 QUESTION: But they weren't free to leave it,  
6 were they?

7 MR. AYER: No. But I think the question is,  
8 would a reasonable person feel that they were put in a  
9 situation where they were detained, that is to say, their  
10 physical freedom, to move about and to move out of the  
11 presence of the officer had been restricted.

12 And I think where you have an entire factory to  
13 move around in, it is a far different circumstance than  
14 where you simply have no where to go at all to get away  
15 from the presence of the officer, and you are relying  
16 entirely, as the other side has argued in their brief is  
17 enough, you are relying entirely on the willingness of the  
18 officer to walk away from you because you can't go  
19 anywhere.

20 I think it is a very, very different  
21 circumstance.

22 QUESTION: Mr. Ayer, I thought you said earlier,  
23 I thought you acknowledged earlier that it is not the  
24 confinement; it is only the confinement by reason of  
25 authority, so that the mere fact that you are on a bus or



1     anymore than the fact that you are on an elevator doesn't  
2     make it an arrest.

3             So to be sure, he may only be able to move three  
4     seats away, but so long as he can move three seats away  
5     and there is no force or threat of force that prevents him  
6     from moving that distance or further, I don't see why it  
7     is an arrest, why it is a seizure.

8             MR. AYER: Number one, I don't see how he could  
9     move even three seats away here. But in any event, if I  
10    understand the argument you are making, Justice Scalia, it  
11    would suggest that if there is a building that has for  
12    some reason a little nook that has three walls and  
13    somebody is leaning against the wall sunning himself and  
14    the nook is only 2 feet wide and an officer walks up to  
15    him and blocks the way out, and says, I want to talk to  
16    you --

17            QUESTION: Oh, no. If the officer is blocking  
18    the way out, that is restricting his movement by force or  
19    threat of force.

20            But if an officer in an elevator, the man  
21    standing in an elevator, the officer begins a conversation  
22    with him. Now he can't move very far in the elevator. Has  
23    he been seized?

24            I would think you would say no because it has to  
25    be -- the reason he can't move has to be the assertion of

1 authority over him.

2 MR. AYER: I would agree with that. I would  
3 agree that one would not be seized in that circumstance.

4 I think on the other hand -- on the other hand I  
5 think here, where the officers have boarded the bus, and  
6 they have approached someone who is in the back of the bus  
7 and they have acted in a way that they should know, and  
8 really must know, communicates a sense of their control,  
9 that they have to take responsibility for that. That they  
10 can't say, as is argued, you chose to put yourself on the  
11 bus.

12 QUESTION: That is a good point. I am not  
13 questioning that point of your argument. I am just  
14 questioning the part of your argument that says he  
15 couldn't go far, he could only move two or three seats  
16 away. That seems to me irrelevant.

17 MR. AYER: Our argument really is that here he  
18 had no where to go at all.

19 QUESTION: If we understood the Supreme Court of  
20 Florida as saying that in no case, under no circumstances  
21 may police board a bus and inquire from passengers about  
22 their luggage, you would not defend that rule?

23 MR. AYER: My view is that --

24 QUESTION: You say you are not asking for it?

25 MR. AYER: We are not asking for that rule --

1 QUESTION: And furthermore, would you defend it  
2 if we understood that to be the rule?

3 MR. AYER: I think that is broader than the rule  
4 should be. I think on the other hand that there are --

5 QUESTION: Well, give me the circumstances under  
6 which police may board the bus and ask a customer or a  
7 passenger, may we search your luggage?

8 MR. AYER: Well, I think if the police --

9 QUESTION: If a small person, that couldn't  
10 block the aisle --

11 MR. AYER: If the police go out of their way to  
12 negate what I believe to be the normal inference that a  
13 person would draw from the rather unusual, to most  
14 passengers, occurrence of an officer coming on a bus, that  
15 is to say, he is here for a reason --

16 QUESTION: So if they say, don't get us wrong,  
17 you are quite free to leave the bus. Of course, you may  
18 not get to Ft. Lauderdale, but you are quite free to  
19 leave.

20 MR. AYER: I think they shouldn't say that, but  
21 I think if they say, you are free to leave. This is  
22 routine questioning. You know, we have a real drug  
23 problem here and we would like to talk to you.

24 I think my view is that that would be  
25 acceptable, as long as they do nothing else --

1 QUESTION: And if the Florida Supreme Court  
2 would not accept that, you think it is wrong?

3 MR. AYER: I think that is going too far, Your  
4 Honor.

5 Thank you, Your Honor.

6 QUESTION: Thank you. Mr. Ayer.

7 Ms. Fowler, do you have rebuttal? You have 4  
8 minutes remaining.

9 REBUTTAL ARGUMENT OF JOAN FOWLER

10 ON BEHALF OF PETITIONER

11 MS. FOWLER: Thank you, Your Honor.

12 I would like to reemphasize the fact that these  
13 officers spoke to Mr. Bostick in normal conversational  
14 tones. They at no time raised their voices.

15 The gun was not drawn at any time. It was kept  
16 within the pouch. All people in America know that police  
17 officers carry weapons. They may not know where they are  
18 being holstered --

19 QUESTION: I take it, you think that the Florida  
20 Supreme Court based its ruling on the particular  
21 circumstances of this case: The fact of the gun, the fact  
22 of blocking the aisle.

23 Whereas, if those facts hadn't been present,  
24 they would have had a different view?

25 MS. FOWLER: No, Justice White.



1 I think that you are correct in saying that the  
2 Supreme Court of Florida has held a --

3 QUESTION: Justice Scalia, please.

4 MS. FOWLER: I am sorry, Justice Scalia. That  
5 there was the per se rule that under no circumstances can  
6 police go on buses to discuss with citizens, to ask their  
7 cooperation for a search for any type of contraband. And  
8 we are saying here today that that bright line rule, that  
9 test should not be the test.

10 Also, we are saying that under the specific  
11 facts of Bostick, that there was no show of authority  
12 sufficient to restrain his liberty, so as to implicate the  
13 Fourth Amendment.

14 The aisle was not blocked. Mr. Bostick's  
15 counsel has gotten up here and repeatedly said that the  
16 aisle was blocked. It was partially blocked. Mr. Bostick  
17 could still have gotten past --

18 QUESTION: We are a little bit in the dark about  
19 some of the facts, are we not, Ms. Fowler?

20 MS. FOWLER: Yes, we are.

21 QUESTION: In view of the -- the trial court did  
22 not make specific findings.

23 MS. FOWLER: That is correct. We would ask that  
24 this Court look at those facts that are set forth in the  
25 Supreme Court opinion which is in our petition for cert at

1 A2.

2 QUESTION: Which quotes from Judge Letts'  
3 dissent?

4 MS. FOWLER: Yes. Those facts are sufficient, I  
5 think for this Court to make a ruling.

6 Therefore, we don't have to get into any  
7 questions about whether or not he was sleeping, and there  
8 is evidence that he was not.

9 Just because the door to this bus was closed  
10 does not mean that the defendant could not have gotten off  
11 the bus. It could have still be opened. There is no  
12 evidence that it was locked. That would be a fire hazard  
13 or something.

14 QUESTION: Would you know how to open it?

15 MS. FOWLER: My understanding is, all you have  
16 to do is push it. There is no specific levers or anything  
17 like that. A mere pushing is sufficient.

18 And under Delgado, this Court has found that it  
19 is not a test of whether or not you are free to leave, it  
20 is whether or not you are free to go about your business.  
21 And Mr. Bostick's business was staying on the bus to  
22 continue his travels, and he did not have to talk to these  
23 officers if he did not want to.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Fowler.

1                   The case is submitted.  
2                   (Whereupon, at 11:03 a.m., the case in the  
3                   above-entitled matter was submitted.)  
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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that  
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*#89-1717 - FLORIDA, Petitioner V. TERRANCE BOSTICK*

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