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# Seizing Fourth Amendment Rights

## *Florida v. Bostick*<sup>1</sup>

### I. INTRODUCTION

Protections for criminal defendants and suspects have undergone a steady erosion with the increasing conservatism of the United States Supreme Court. A recent decision illustrates how this trend carries over to undermine the rights of all citizens. This Note focuses on the decision in *Florida v. Bostick*,<sup>2</sup> and its impact on Fourth Amendment rights. Part III of this Note contains a review of the current status of Fourth Amendment interpretation from the standpoint of both search and seizure. In Part IV, the majority opinion and the dissent are analyzed in turn. Finally, in Part V, the argument is put forward that decisions of the current Court may be highlighting the dangers inherent in the discretion allowed by the totality of the circumstances test.

### II. FACTS AND HOLDING

Terrance Bostick was travelling by bus from Miami to Atlanta.<sup>3</sup> During a scheduled stop in Fort Lauderdale, two armed,<sup>4</sup> uniformed,<sup>5</sup> police officers boarded the bus.<sup>6</sup> With no articulable suspicion, the officers singled out Bostick, approached him,<sup>7</sup> and asked to see his ticket and identification.<sup>8</sup> One of the officers was standing so that Bostick's exit was partially blocked.<sup>9</sup> The ticket and identification matched and were returned to Bostick.<sup>10</sup>

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1. 111 S. Ct. 2382 (1991).

2. *Id.*

3. *Id.* at 2384.

4. *Id.* One of the officers was carrying a zippered pouch containing a pistol. Bostick testified that the officer had his hand in the pouch. *Bostick v. State*, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

5. *Bostick*, 111 S. Ct. at 2384. The officers were wearing clearly marked raid jackets identifying them as sheriff's officers. *Bostick*, 554 So. 2d at 1157.

6. *Bostick*, 111 S. Ct. at 2384. The two officers were with the Broward County Sheriff's Department. It is the routine of the department to board buses during stopovers and ask passengers to consent to luggage searches. *Id.*

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

8. *Bostick*, 111 S. Ct. at 2384-85.

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

10. *Bostick*, 111 S. Ct. at 2385.

The officers continued the contact, explained that they were narcotics agents, and asked Bostick's consent to search his luggage.<sup>11</sup> The officers advised Bostick of his right to refuse consent, and Bostick consented to the search.<sup>12</sup> Narcotics were found in Bostick's luggage, and he was arrested for trafficking in cocaine.<sup>13</sup>

Bostick entered a guilty plea after the trial court denied his motion to suppress the evidence of the cocaine on the grounds that his Fourth Amendment rights had been violated.<sup>14</sup> The District Court of Appeal of Florida affirmed the conviction, but certified the question to the Supreme Court of Florida.<sup>15</sup>

The Supreme Court of Florida rephrased the question<sup>16</sup> and found Bostick had been seized<sup>17</sup> unjustifiably,<sup>18</sup> and, therefore, that his consent to search was invalid.<sup>19</sup> The supreme court quashed the opinion of the district court and remanded the case.<sup>20</sup> The United States Supreme Court granted certiorari,<sup>21</sup> and found that such an encounter would not necessarily be a seizure vitiating the consent to search.<sup>22</sup> The Court retained the totality of the circumstances test.<sup>23</sup> It held that in evaluating whether a seizure has taken place, a court must look to all of the surrounding circumstances to decide whether, given the police conduct, a reasonable person would feel free

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11. *Id.*

12. *Id.* Bostick contested whether he was advised of his right to refuse consent and whether his consent extended to the second bag in which the narcotics were found, but the trial court resolved these fact questions in the state's favor. *Id.*

13. *Id.*

14. *Id.*

15. *Bostick v. State*, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987), *opinion quashed*, 554 So. 2d 1153 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991). The question certified was: "May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?" *Id.*

16. *Bostick*, 554 So. 2d at 1154. The rephrased question became: "Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?" *Id.*

17. *Id.* at 1157.

18. *Id.* at 1158.

19. *Id.*

20. *Id.* at 1159.

21. *Bostick*, 111 S. Ct. at 2385.

22. *Id.* at 2386.

23. *Id.*

to end the encounter through declining the officers' requests, disregarding the police, or other means short of acquiescence.<sup>24</sup>

### III. LEGAL BACKGROUND

#### A. Search

The Fourth Amendment forbids both unreasonable searches and unreasonable seizures.<sup>25</sup> The factors involved in analyzing each are overlapping and intertwined, but a cogent analysis requires separate consideration of search and seizure.

The general rule is that for a search by police to be in compliance with Fourth Amendment requirements, a valid warrant based on probable cause is required.<sup>26</sup> The Supreme Court, however, has recognized several exceptions to this general rule.

One exception to this rule is a search conducted with the consent of the individual searched.<sup>27</sup> For the consent to search to be valid, it must be "freely and voluntarily given"<sup>28</sup> and not the result of duress or coercion.<sup>29</sup> The burden is on the prosecution to show that the consent was voluntary, and this burden is not met by showing mere acquiescence to a claim of lawful authority.<sup>30</sup> The question of whether the consent was voluntary is a fact question based on the totality of the circumstances.<sup>31</sup>

Factors that have been considered in applying the totality of the circumstances test include: whether the individual is in custody,<sup>32</sup> whether the police wore uniforms or displayed weapons,<sup>33</sup> the coerciveness of police questioning,<sup>34</sup> the setting or location of questioning,<sup>35</sup> and whether the individual had knowledge of the right to refuse consent.<sup>36</sup> The fact that an

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24. *Id.* at 2388.

25. U.S. CONST. amend. IV.

26. *E.g.*, *Katz v. United States*, 389 U.S. 347, 357 (1967).

27. *E.g.*, *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

28. *Florida v. Royer*, 460 U.S. 491, 497 (1983).

29. *E.g.*, *Bustamonte*, 412 U.S. at 227.

30. *E.g.*, *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

31. *E.g.*, *Bustamonte*, 412 U.S. at 227.

32. *See United States v. Watson*, 423 U.S. 411, 423 (1976).

33. *See United States v. Mendenhall*, 446 U.S. 544, 555 (1980).

34. *See Bustamonte*, 412 U.S. at 229.

35. *See Mendenhall*, 446 U.S. at 555.

36. *See Bustamonte*, 412 U.S. at 227. This last factor is not dispositive; the police are not required to inform the individual who consents of the right to refuse consent to search. *Id.* at 227, 231.

individual is in custody is not sufficient by itself to indicate the consent to search was coerced and not voluntary.<sup>37</sup> If an individual is seized illegally, however, the subsequent consent to search is invalid.<sup>38</sup>

### B. Seizure

Whether an individual is in custody or seized is not only a factor in the previous totality of the circumstances test, it is also a fact question subject to its own closely related totality of the circumstances test.<sup>39</sup> This latter test has hinged on whether, considering all of the circumstances, a person would have felt free to leave.<sup>40</sup> It has evolved to whether individuals would feel free to ignore the police presence and go about their business.<sup>41</sup> Circumstances that might support a finding of a seizure include the threatening presence of several officers, the display of a weapon by the police, touching the individual, or conveying by language or tone of voice that compliance might be compelled.<sup>42</sup>

To meet Fourth Amendment requirements a seizure must be reasonable.<sup>43</sup> A weighing of the public interest against the individual's liberty interest is necessary to determine the reasonableness of a seizure that is short of a traditional arrest.<sup>44</sup> Such a seizure requires an individualized, reasonable, articulable suspicion, or the seizure must be accomplished through a plan containing specific, neutral restraints on the actions of the police officer.<sup>45</sup> The goal of these requirements is to prevent arbitrary interference with personal liberties at the discretion of individual officers.<sup>46</sup>

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37. *E.g.*, *United States v. Watson*, 423 U.S. 411, 424 (1976).

38. *E.g.*, *Florida v. Royer*, 460 U.S. 491, 507-08 (1983).

39. *E.g.*, *Mendenhall*, 446 U.S. at 554.

40. *Id.*

41. *See California v. Hodari D.*, 111 S. Ct. 1547, 1552 (1991); *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988).

42. *E.g.*, *Mendenhall*, 446 U.S. at 554.

43. *E.g.*, *Brown v. Texas*, 443 U.S. 47, 50 (1979).

44. *E.g.*, *id.* at 50-51.

45. *E.g.*, *id.* at 51. Instances in which seizures with no basis of individualized suspicion have been upheld have involved an overriding governmental interest. These situations have generally involved fixed locations for such things as immigration or sobriety checkpoints with an initial screening of everyone passing through the checkpoint to temper arbitrariness. *See Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481, 2483-84 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-46 (1976).

46. *See Brown*, 443 U.S. at 51; *Martinez-Fuerte*, 428 U.S. at 554.

## IV. THE INSTANT DECISION

A. *The Majority Opinion*<sup>47</sup>

The Court began framing its analysis by pointing out that a consensual encounter between the police and a citizen raises no Fourth Amendment questions.<sup>48</sup> The Court further stated that a seizure does not take place merely because an officer approaches an individual, even without individualized suspicion, to ask questions, including asking to examine identification and asking for consent to search luggage, so long as the individual would not feel compelled to comply.<sup>49</sup> If the encounter between Bostick and the police had taken place off the bus, the Court unequivocally believed that there would not have been a seizure.<sup>50</sup>

The Florida Supreme Court erred, according to the majority, in focusing on the fact that the encounter took place on a bus and in adopting a *per se* rule against such encounters.<sup>51</sup> The majority emphasized that the state court applied the test of whether an individual felt "free to leave" too literally, and stated that the more "appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."<sup>52</sup> The Court conceded that where an encounter takes place can be a factor in determining whether an individual has been seized, but it is only one factor to be considered in the totality of the circumstances test retained by the Court.<sup>53</sup>

The Court likewise conceded that an individual's consent to search was not valid if predicated on an illegal seizure,<sup>54</sup> but it emphasized there was no seizure where the contact was consensual.<sup>55</sup> The Court analyzed the facts in the present case that would be weighed to make a determination of whether Bostick had been seized prior to his consent to search, and whether his consent was valid.<sup>56</sup>

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47. The majority opinion was written by Justice O'Connor, and was joined by Chief Justice Rehnquist along with Justices White, Scalia, Kennedy, and Souter. *Florida v. Bostick*, 111 S. Ct. 2382, 2384 (1991).

48. *Id.* at 2386.

49. *Id.*

50. *Id.*

51. *Id.* at 2387.

52. *Id.*

53. *Id.*

54. *Id.* at 2388.

55. *Id.* at 2386.

56. *Id.* at 2385-88.

In analyzing whether Bostick was in custody or had been seized prior to giving consent for a search of his luggage, the Court emphasized the consensual nature of the encounter.<sup>57</sup> The Court found that the officers had crossed no line by walking up to Bostick, asking questions, asking to see his identification, and asking for consent to search his bags.<sup>58</sup>

Turning next to the presence of weapons and uniforms, the majority noted that at no time did the officers point a gun at Bostick.<sup>59</sup> Although the officers had badges and insignia identifying them as sheriff's officers,<sup>60</sup> and one officer was carrying a zippered pouch containing a pistol, the Court emphasized that at no time was Bostick threatened with a gun.<sup>61</sup> The Court's analysis of the intensity of the questioning closely parallels the custody analysis.<sup>62</sup> The Court stressed the consensual and non-threatening nature of the situation.<sup>63</sup>

As was indicated earlier, the Court stated that had the encounter between Bostick and the police taken place somewhere other than a bus, there would have been no seizure.<sup>64</sup> Therefore, setting is a very important factor in the case.<sup>65</sup> The Court acknowledged that Bostick's movement might very well have been confined on the bus, and he might not have felt free to leave, but the Court pointed out that any restriction on Bostick's movement was a result of his own choice to take the bus and not of any police conduct.<sup>66</sup> The Court also reiterated that while setting is a factor to be considered, it is only one factor.<sup>67</sup>

The question of Bostick's knowledge of the right to refuse consent to search also received the attention of the Court.<sup>68</sup> The Court took special note of the fact that the officers had advised Bostick of his right to refuse consent.<sup>69</sup> The Court also referenced the Solicitor General's *amicus curiae* brief to stress that an individual may decline a request for consent to search without a fear of prosecution.<sup>70</sup>

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57. *Id.* at 2388.

58. *Id.*

59. *Id.*

60. *Id.* at 2384.

61. *Id.* at 2385.

62. *See supra* notes 37-43 and accompanying text.

63. *Id.* at 2386, 2388.

64. *Id.* at 2386.

65. *See id.* at 2386-87.

66. *Id.* at 2387.

67. *Id.*

68. *Id.* at 2385.

69. *Id.* at 2385, 2388.

70. *Id.* at 2387.

After analyzing the various factors involved, the Court refrained from deciding whether Bostick had been seized.<sup>71</sup> Though the Court seemed to hint that it found the practice distasteful,<sup>72</sup> it expressed doubt as to whether a seizure had occurred.<sup>73</sup> The Supreme Court left it up to the state courts on remand to answer the question using the correct legal standard<sup>74</sup> of considering all of the surrounding circumstances to determine whether a reasonable person would have felt free to disregard the police, decline police requests, or conclude the encounter without consequences.<sup>75</sup>

### B. *The Dissent*<sup>76</sup>

The dissent began with a condemnation of the "working the buses" technique used by police in this case.<sup>77</sup> It was pointed out that the effectiveness of a method is not a measure of its constitutionality,<sup>78</sup> and even the effectiveness of the technique was called into question.<sup>79</sup> The dissent went on to say that these increasingly routine sweeps were neither based on a reasonable suspicion<sup>80</sup> nor were they random, with individuals being approached based on such factors as age, race, and gender.<sup>81</sup>

The technique was found to be "inconvenient, intrusive, and intimidating" by the dissent,<sup>82</sup> which joined lower courts in finding that the idea of American citizens being asked to show travel papers was repugnant and "evoked images of other days, under other flags."<sup>83</sup> The dissent felt that the logical extension of such a policy would be random knocks on citizens' doors asking consent to search.<sup>84</sup>

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71. *Id.* at 2388.

72. *See id.* at 2389.

73. *Id.* at 2388.

74. *Id.*

75. *Id.* at 2389.

76. Justice Marshall wrote the dissenting opinion and was joined by Justice Blackmun and Justice Stevens. *Id.*

77. *Id.* at 2389-91 (Marshall, J., dissenting).

78. *Id.* at 2389.

79. *Id.* at 2390.

80. *Id.* at 2389.

81. *Id.* at 2390 n.1.

82. *Id.* at 2390 (citing *United States v. Chandler*, 744 F. Supp. 333, 335 (D.D.C. 1990)).

83. *Id.* at 2391 (citing *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1989) (quoting *State v. Kerwick*, 512 So. 2d 347, 348-49 (Fla. Dist. Ct. App. 1987))).

84. *Id.* (citing *United States v. Lewis*, 728 F. Supp. 784, 788-89, *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990)).

The dissent stressed that it agreed with the test used by the majority, but that it could not understand how the suggestion could be made that there was no seizure.<sup>85</sup> The dissent asserted that the Florida Supreme Court properly applied the test by looking at all the circumstances,<sup>86</sup> and regardless, the Court could have applied the test to the facts in the present case and decided for itself whether Bostick had been seized.<sup>87</sup> The dissent proceeded to analyze the factors in the totality of the circumstances test to answer the question of whether there had been a seizure that invalidated Bostick's consent.<sup>88</sup>

The dissent reiterated that if an individual has been illegally seized, a subsequent consent to search is invalid.<sup>89</sup> The question of whether Bostick would have felt free to terminate the encounter in light of all the circumstances was then asked and answered in the negative.<sup>90</sup> The dissent points out that Bostick's two choices to terminate the encounter were to remain seated and refuse to respond to the officers or to get up and leave.<sup>91</sup> Neither of these choices would be made by a reasonable person in the eyes of the dissent.<sup>92</sup> A reasonable person, according to the dissent, might think a refusal to respond would heighten the suspicions of the police and would have no reason to know the refusal could not be used by the police.<sup>93</sup> Likewise, the dissent felt that a reasonable person would not choose to squeeze past the armed police officer blocking the aisle to leave the bus and abandon personal possessions causing the person to be stranded at an intermediate point on the journey.<sup>94</sup>

Turning to the factor of the presence of uniforms or weapons, the dissent restated that the police were wearing raid jackets identifying them as sheriff's officers and that one was carrying a pistol in a recognizable weapons pouch that combined to create an intimidating show of authority.<sup>95</sup> In answer to the majority, the dissent took little comfort in the fact that the police had not pointed a gun at Bostick or threatened him with one.<sup>96</sup> The dissent asserted that it was not necessary for a citizen to be in immediate apprehension of

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85. *Id.*

86. *Id.* at 2392.

87. *Id.*

88. *See id.* at 2392-94.

89. *Id.* at 2393.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 2392.

96. *Id.* at 2393.

being shot for a court to consider the coercive effect of a display of a weapon.<sup>97</sup>

The dissent also indicated that the manner of the questioning could support a finding that Bostick's consent was not voluntary.<sup>98</sup> The intrusiveness of the questioning was alluded to along with the intensity of the interrogation.<sup>99</sup>

Like the majority, the dissent focused heavily on the setting of the encounter.<sup>100</sup> The dissent mentioned the narrow aisle and referenced the confining nature and restrictions on options and movement of being on a bus.<sup>101</sup> The dissent shifted the responsibility for the location of the encounter from the passenger to the police by asserting that the police chose to have these encounters on buses precisely because of the restriction on the movement of the passengers.<sup>102</sup> It was felt the police were exploiting the fact that individuals had no real choice other than to cooperate.<sup>103</sup>

The dissent also took exception to the majority's analysis of Bostick's knowledge of his right to refuse consent.<sup>104</sup> The majority relied heavily on the fact that the police had advised Bostick of his right to refuse consent.<sup>105</sup> The dissent, however, pointed out that this advising of rights was for the defendant's right to refuse consent to search, not for the right to end the encounter and go about his business.<sup>106</sup> It was the contention of the dissent that Bostick was unlawfully seized when he was initially approached, and that his subsequent consent to search was therefore irrelevant and the search unlawful.<sup>107</sup>

The dissent found that the technique employed by the police in this case violated the Fourth Amendment.<sup>108</sup> Little solace was found in the majority's statements concerning the importance of protecting Fourth Amendment rights, the dissent believing that actions speak louder than words.<sup>109</sup>

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97. *Id.*

98. *Id.*

99. *See id.*

100. *See id.* at 2392-94.

101. *Id.*

102. *Id.* at 2394.

103. *Id.*

104. *Id.* at 2392-93.

105. *Id.*

106. *Id.*

107. *Id.* at 2393.

108. *Id.* at 2395.

109. *Id.*

## V. COMMENT

A. *A Hostile Attitude*

One does not have to read far into the majority opinion to get a taste of things to come for Mr. Bostick. In the opening paragraph, the Court referred to approaches of individuals by police in previous cases as random and considered them the same as the approach of Bostick.<sup>110</sup> In reality, the approaches by the police in the earlier cases were not random,<sup>111</sup> but, like the approach of Bostick,<sup>112</sup> were based on the type of vague suspicion to which the majority alluded and distinguished from randomness in its second paragraph.<sup>113</sup> This willingness to blur distinctions colors the entire majority opinion.

The Court criticized the Florida Supreme Court on the basis of the reformulated certified question,<sup>114</sup> stating that it showed that the Florida court rested its decision solely on the single factor of the setting of the confrontation.<sup>115</sup> The majority chose to disregard the state court's specific recognition of the totality of the circumstances test,<sup>116</sup> and its express application of the test.<sup>117</sup> If the same standard applied to the majority opinion's introductory passage in the present case, it would appear that only random approaches were implicated, and that the emphasis was on the understanding of the right to refuse consent to search more than the right to terminate the encounter.<sup>118</sup>

The holding of the majority—that the question of whether a seizure has occurred is based on weighing the surrounding circumstances to determine if a reasonable individual would have felt free to end the encounter<sup>119</sup>—is innocuous enough. The problem is in the application of the holding. The

110. *Id.* at 2384.

111. *See* United States v. Sokolow, 490 U.S. 1, 3-4 (1989); Florida v. Rodriguez, 469 U.S. 1, 3-4 (1984); United States v. Mendenhall, 446 U.S. 544, 547-48 (1980).

112. "Eyeing the passengers, the officers, admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification." *Bostick*, 111 S. Ct. at 2384-85 (quoting *Bostick v. State*, 554 So. 2d 1153, 1158-59 (Fla. 1989)).

113. *See id.* at 2384.

114. *See supra* note 16.

115. *Bostick*, 111 S. Ct. at 2385, 2388.

116. *See* *Bostick v. State*, 554 So. 2d 1153, 1155 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

117. *See id.* at 1157-58.

118. *Bostick*, 111 S. Ct. at 2384.

119. *Id.* at 2389.

exclusionary rule requires that any evidence that is the product of an illegal search or seizure must be excluded from trial.<sup>120</sup> This rigid rule hampers the discretion of the court, and thus the discretion is shifted to defining searches and seizures. The Supreme Court has condemned random or discretionary seizures,<sup>121</sup> but a court can avoid this impediment simply by declaring that it has considered the circumstances and found that an encounter was not a seizure, but rather an approach.<sup>122</sup>

The totality of the circumstances test is a workable test in the hands of a moderate or balanced court. Trouble arises when a court becomes overly lax or overly rigid in its application of the test, and the court starts using the test to find what it is looking for or to advance its own agenda. The problem is in determining what a reasonable person would do or think, and nine Supreme Court justices trained and immersed in the subtleties of the law may not be a proper gauge for society.

The difficulty of applying the test can be seen by looking at the likely results if the two courts were to each determine whether a seizure took place when Bostick was approached. The Florida Supreme Court seems to have left little doubt that it would find that a seizure had occurred.<sup>123</sup> On the other hand, considering the same facts, the United States Supreme Court would likely find that no seizure took place.<sup>124</sup> There is no fixed target. What is a reasonable person to do?

### B. *The Circumstances*

The most important example of the Court's willingness to blur distinctions is in the failure of the Court to separate the question of the voluntariness of the consent from the analysis of whether there had been a seizure. This lack of a clear delineation allowed the Court to conduct one analysis applying the factors either to search<sup>125</sup> or to seizure,<sup>126</sup> but not both. Under this approach, the Court was able to dispense with the seizure analysis by labeling

120. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

121. *E.g.*, *Delaware v. Prouse*, 440 U.S. 648, 659, 663 (1979).

122. *Bostick*, 111 S. Ct. at 2384, 2386.

123. "[W]e find that under the circumstances presented here, government has exceeded its power to interfere with the privacy of an individual citizen who is not even suspected of any criminal wrongdoing." *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1990), *rev'd*, 111 S. Ct. 2382 (1991).

124. "The facts of this case, as described by the Florida Supreme Court, leave some doubt whether a seizure occurred." *Bostick*, 111 S. Ct. at 2387-88.

125. *See supra* text accompanying notes 65-67.

126. *See supra* text accompanying notes 61-64.

the encounter consensual<sup>127</sup> rather than finding that a seizure had occurred that would have ended the inquiry. Even with this approach, the circumstances seem contrary to the Court's decision that no seizure had occurred.

In analyzing the factors considered by the Court, little can be added to the dissent's discussion of whether Bostick had been seized when initially approached by the officers.<sup>128</sup> Another look at semantics can be instructive, however. The majority considered such an encounter to be the officers "merely approaching an individual."<sup>129</sup> A different light is cast on the situation if Bostick was "cornered at the back of the bus."<sup>130</sup> If this is considered a more accurate description of the encounter, it is much easier to characterize it as a seizure.

The majority, in referring to the weapon present in the case, described the weapons pouch as the equivalent of a holster,<sup>131</sup> but there is a distinction. We expect to see a pistol in a holster on the hip of an officer; it adds little coerciveness to the situation. But when the pistol is in a pouch in the officer's hands, it is much more prominent and more accessible. This is particularly so if the officer's hand is in the pouch,<sup>132</sup> in which case it can be brought instantly to bear.

A related circumstance is the fact that the officers were wearing raid jackets.<sup>133</sup> It would seem that there might be a more appropriate way for the officers to identify themselves in the Fort Lauderdale clime, unless the jackets were repositories for additional weaponry. It might reasonably be assumed that two officers entering the war on drugs would do so armed with more than a single handgun.

The intensity of the police questioning has been used as a factor in weighing whether one's cooperation was voluntary.<sup>134</sup> The majority characterized the exchange here as "mere police questioning,"<sup>135</sup> though the facts adopted indicate the "officers persisted" in their questioning after finding

127. See *supra* text accompanying notes 54-55.

128. *Bostick*, 111 S. Ct. at 2393-94 (Marshall, J., dissenting); see also *supra* text accompanying notes 86-91.

129. *Bostick*, 111 S. Ct. at 2386.

130. Bostick was in the rearmost seat. *Bostick v. State*, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

131. *Bostick*, 111 S. Ct. at 2385.

132. See *supra* note 4.

133. See *supra* note 5.

134. See *supra* text accompanying note 34.

135. *Bostick*, 111 S. Ct. at 2386.

the ticket and identification satisfactory.<sup>136</sup> This factor must be considered in conjunction with the others.<sup>137</sup>

The setting of the encounter is the primary circumstance for consideration in the present case for both the United States Supreme Court<sup>138</sup> and the Florida court.<sup>139</sup> While the setting is not the only factor for consideration,<sup>140</sup> there is no reason this one factor cannot override the other circumstances in a given situation. The majority is correct in pointing out that the restriction on Bostick's movement was in large part due to his decision to take the bus.<sup>141</sup> This restriction, however, was not felt before the police presence, and the dissent is equally correct in asserting that the police exploit this decision to heighten and intensify the confrontation.<sup>142</sup> In such a situation, the distinction between "free to leave" and "free to decline the officers' requests or otherwise terminate the encounter"<sup>143</sup> is lost. A reasonable person might not feel free to terminate the encounter with the police looming above precisely because the individual was not free to leave.

The majority compares the situation in the present case to similar encounters in airports that the Court has approved previously.<sup>144</sup> While acknowledging the increased restriction of movement on a bus,<sup>145</sup> the Court misses another crucial distinction in the cases. The acceptability of the airport approaches was due at least in part to the lower expectations of privacy due to anti-hijacking measures.<sup>146</sup> It is assumed there has been little problem with buses being diverted to Havana.

The final factor in the analysis, the individual's knowledge of the right to not cooperate,<sup>147</sup> also points to a blurring of distinctions. As the dissent pointed out, Bostick was advised of his right to refuse consent to search, not

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136. *Id.* at 2385 (quoting *Bostick v. State*, 554 So. 2d 1153, 1154 (Fla. 1989) (quoting *Bostick v. State*, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting in part))).

137. *See supra* text accompanying notes 28, 31.

138. "There is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure." *Bostick*, 111 S. Ct. at 2386.

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

140. *Bostick*, 111 S. Ct. at 2387.

141. *Id.*

142. *Id.* at 2394 (Marshall, J., dissenting).

143. *Id.* at 2387.

144. *Id.* at 2386.

145. *Id.* at 2387.

146. *See Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (quoting *Florida v. Royer*, 460 U.S. 491, 515 (1983) (Blackmun, J., dissenting)).

147. *See supra* text accompanying note 36.

of his right to terminate the encounter.<sup>148</sup> If Bostick had already been seized at that point, this advising of rights would have no effect.<sup>149</sup>

### C. *The Road Ahead*

The question of why the Court granted certiorari in this case arises. Because the Court made no finding as to whether a seizure occurred,<sup>150</sup> the Florida court will be free to find the same result on remand. Not only will the result likely be the same,<sup>151</sup> it is not at all clear that the Florida court used an incorrect analysis<sup>152</sup> despite the certified question.<sup>153</sup> Though, as the majority suggests,<sup>154</sup> the Florida Supreme Court may at times limit its analysis to one factor,<sup>155</sup> the issue is what was done in the present case.

The Court seems hostile to what is "routinely" done by the Florida Supreme Court,<sup>156</sup> but accepting of what is "routinely" done by the Broward County Sheriff's Department.<sup>157</sup> The Court is willing to find techniques employed by law enforcement "distasteful" without finding that those techniques would make one feel coerced or not free to go about one's business.<sup>158</sup> The dissent in the Florida court expressed similar views and espoused the idea that "society should accept some . . . minimal incursion on their rights" in the war on drugs.<sup>159</sup> It is not explained how citizens can voluntarily cooperate while their rights are being trammelled.

It is hoped that our highest court has not picked up this theme, but recent Supreme Court decisions have shown a willingness to restrict protections against illegal seizures<sup>160</sup> and coerced confessions.<sup>161</sup> By approving of such measures, the Court is curtailing the rights of not only criminal defendants and suspects, but of all citizens. What is the next step? The totality of the circumstances test may prove a disturbing instrument in the

148. *See supra* text accompanying note 104-06.

149. *See supra* text accompanying note 107.

150. *See supra* note 71.

151. *See supra* note 119.

152. *See supra* notes 114-15 and accompanying text.

153. *See supra* note 16.

154. *Bostick*, 111 S. Ct. at 2385 n.2.

155. *See Jones v. Florida*, 559 So. 2d 1096, 1097 (Fla. 1990).

156. *See Bostick*, 111 S. Ct. at 2385 n.2.

157. *See id.* at 2384.

158. *Id.* at 2389.

159. *Bostick v. State*, 554 So. 2d 1153, 1159 (Fla. 1989) (McDonald, J., dissenting), *rev'd*, 111 S. Ct. 2382 (1990).

160. *See California v. Hodari D.*, 111 S. Ct. 1547 (1991).

161. *See Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).

hands of courts that forget that "constitutional provisions for the security of person and property should be liberally construed."<sup>162</sup>

Excuse me, there is someone at the door . . . .

- KENT R. HOPPER

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162. *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

