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Florida v. Bostick: "Swapping-off Point for Fourth Amendment Protections?"

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Florida v. Bostick[1]: "Swapping-off Point for Fourth Amendment Protections?"

> [T]he right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.[2]

I. INTRODUCTION

In no other time in our nation's history has the United States faced such an endless battle as it has with the problem of drug trafficking and abuse. The criminal conduct often coupled with substance abuse has led to such a nationwide effort that this country has essentially declared a "war on drugs." Soldiers in this war include the media, educational institutions, drug enforcement agencies, the legislative and executive branches of government and the United States Supreme Court.

To increase the effectiveness of law enforcement efforts in this "war,"[3] the Supreme Court, in its most recent decisions, has broadened the freedom of law enforcement agents to intrude into people's lives, effectively reducing our society's expectation of privacy.[4] These decisions diminish the Fourth Amendment's probable cause[5] standard required to justify the government's detention of its citizens. This is extremely significant to all people since it is the Fourth Amendment which safeguards the privacy and security of individuals against arbitrary government invasions.[6]

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

2. Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) (Brandeis, J., dissenting).

3. This is illustrated by one of Justice Burger's dissenting opinions where he states: "[T]he Court's holding operates as but a further hindrance on the already difficult effort to police the narcotics traffic which takes such a terrible toll on human beings." Ybarra v. Illinois, 444 U.S. 85, 97, 100 S. Ct. 338, 345 (1979) (Burger, C.J., dissenting).

4. Benner, Diminishing Expectations of Privacy in the Rehnquist Court, 22 J. Marshall L. Rev. 825, 826 (1989).

5. See infra note 23.

6. U.S. Const. amend. IV. The amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

One such case where the United States Supreme Court decided to expand the freedom of law enforcement at the expense of individual Fourth Amendment protections is *Florida v. Bostick*.[7] There, the Court reversed a state supreme court's attempt to adhere to historical Fourth Amendment standards apparently in order to give way to the government's greater interest in fighting the nation's drug problem.[8] This article will first briefly present the Supreme Court decision, then review a line of Fourth Amendment jurisprudence dealing with similar issues. Next, the article will address the Florida court's decision followed by an analysis of why the Supreme Court reversed the state decision. Finally, the article will explore some potential repurcussions from these decisions.

II. *FLORIDA V. BOSTICK*

In Miami, Florida, Terrence Bostick boarded a bus which was en route to Atlanta, Georgia.[9] He positioned himself in the rearmost seat and sat on his luggage bag.[10] During a scheduled stopover in Fort Lauderdale, Florida, two Broward County sheriff's officers boarded the bus. Each officer wore badges and insignia; one of them held a recognizable zipper pouch containing a pistol. Eyeing the passengers, the officers, admittedly without articulable suspicion, picked out Bostick and requested his bus ticket and identification.[11] Meanwhile one of the officers positioned himself so that he partially blocked the aisle.[12] Since the ticket matched the identification, both were returned to Bostick as unremarkable. The officers then explained their presence as narcotics agents on the look-out for drugs. Accordingly, they requested Bostick's consent to search his luggage.[13] The subsequent search resulted in the discovery of cocaine and the arrest of the defendant. Bostick moved to suppress the evidence from admissibility at trial on the grounds that it was seized without probable cause thereby violating his Fourth Amendment rights. The trial court denied the motion but made no factual

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7. 111 S. Ct. 2382 (1991).
8. Id. at 2389.
9. Id. at 2384.
10. Bostick v. State, 554 So. 2d 1153 (Fla. 1989).
11. *Bostick*, 111 S. Ct. at 2384-85.
12. *Bostick*, 554 So. 2d at 1157.
13. The Florida appellate court unsurprisingly found a conflict in the evidence regarding whether Bostick consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. The conflict was resolved in favor of the state as being a question of fact decided by the trial judge. 554 So. 2d at 1154-55, quoting 510 So. 2d at 321, 322 (Fla. 4th Dist. Ct. App. 1987) (Letts, J., dissenting in part).

findings.[14] Bostick subsequently entered a plea of guilty, but reserved the right to appeal the denial of the motion to suppress.[15]

The Florida District Court of Appeal affirmed the lower court's denial, but considered the issue sufficiently important that it certified a question to the Florida Supreme Court.[16]

After rephrasing the question presented[17] by the appellate court, the Florida Supreme Court held "an impermissible seizure result[s] when[ever] the 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."[18] Consequently, the court found that Bostick's subsequent consent[19] to the search of his luggage did not overcome the taint of the illegal police conduct.[20] In other words, the Florida Supreme Court believed the officers' actions to be tantamount to seizing Bostick without probable cause, long regarded as unconstitutional under the Fourth Amendment. Regardless of whether Bostick consented to the search, the consent could not legitimize the unlawful police action; therefore, items seized during the search were to be suppressed. This ruling appeared to be consistent with those handed down by the United States Supreme Court over the past two decades; however, the State's petition for certiorari to the United States Supreme Court was granted.[21]

Before exploring the Supreme Court's decision it is helpful to examine a few of the significant cases which developed the judicial standards for determining whether an individual has been seized within the meaning of the Fourth Amendment. This determination is highly relevant since evidence obtained from a seizure made without probable cause is inadmissible irrespective of any consent obtained thereafter, and because

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

15. Id.

16. Bostick v. State, 510 So. 2d 321, 321-322 (Fla. 4th Dist. Ct. App. 1987). The majority of the district court below issued a per curiam affirmance, but agreed to certify the question.

17. The district court certified the question as follows:

> 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. at 322. The supreme court rephrased the question as follows:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?

Bostick, 554 So. 2d at 1154.

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

19. See supra note 13.

20. Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989).

21. Florida v. Bostick, 111 S. Ct 241 (1990).

the Florida Supreme Court relied on these cases in finding that Bostick's Fourth Amendment rights had been violated.

III. Historical Background

A. *Probable Cause Requirement*

The Fourth Amendment mandates the existence of probable cause prior to any search by government agents of a particular person or place.[22] Probable cause[23] is present where the facts and circumstances are trustworthy and warrant a person of reasonable caution to conclude that evidence associated with the crime may be located in a particular place.[24] Although the Fourth Amendment does not literally compel such a conclusion, the prohibition against "unreasonable" searches and seizures in its preceding clause has been construed to require those searches and seizures permissibly conducted without a warrant to be subject to the probable cause standard.[25]

The line of Fourth Amendment jurisprudence relating to search and seizure is long and distinguished. The following cases outline the United States Supreme Court's historical application of the Fourth Amendment protections to issues of search and seizure.

B. *Fourth Amendment Jurisprudence*

1. Terry v. Ohio

In 1968, the Supreme Court in *Terry v. Ohio*[26] addressed the application of the Fourth Amendment to brief police detentions of indi-

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22. See supra note 6.

23. Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 342 (1979). The Court stated: "Where the standard is probable cause, the search or seizure of a person must be supported by probable cause particularized with respect to that person."

24. Carroll v. United States, 267 U.S. 132, 161, 45 S. Ct. 280, 288 (1925). The Court defining probable cause stated: "If the facts and circumstances before the officers are such as to warrant a man of prudence and caution in believing that the offense has been committed, [probable cause] is sufficient."

25. Wayne R. Lafave, Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew), 74 J. Crim. L. & Criminology 1171, 1186 (1983). Professor Lafave explains quoting from Wong Sun v. United States, 371 U.S. 471, 479-80, 83 S. Ct. 407, 413 (1963):

> [T]he requirements of reliability and particularity of the information on which an officer may act . . . surely cannot be less stringent [when an arrest is made without a warrant] than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.

26. 392 U.S. 1, 88 S. Ct. 1868 (1968).

viduals. In *Terry* an officer observed three men "casing" a store for a robbery.[27] The officer grabbed, spun around, and frisked one of the suspects; he discovered a pistol.[28] Upon frisking the other two suspects, the officer discovered another gun.[29] The state ultimately convicted two of the individuals for possession of a concealed weapon.[30] They appealed, challenging the use of the weapons as incriminating evidence.[31]

The Supreme Court held that the search of the suspects was reasonable despite the absence of probable cause since the officer had reasonable grounds to believe that the suspects were armed and dangerous.[32] Crucial to this holding was the officer's ability to point to specific articulable facts which reasonably warranted the intrusion on the individuals.[33] Thus, *Terry* stands for the proposition that police are authorized to *briefly* detain and search a person with less than probable cause if the officers reasonably believe that public safety as well as their own personal safety are in danger.[34] Additionally, it is important to note *Terry* recognized that a "seizure," for Fourth Amendment purposes, occurs whenever a police officer accosts an individual and restrains his freedom to walk away.[35] Conceding that not every personal encounter between law enforement officials and citizens involves a "seizure," the Court focused on whether there was such a display of force or show of authority as to restrain the person's liberty. Only then would a conclusion that a "seizure" had occurred be warranted.[36] Ten years later, the Supreme Court used this analysis to create a test to determine whether a "seizure" occurs within the meaning of the Fourth Amendment.

2. United States v. Mendenhall

In *United States v. Mendenhall*,[37] two justices of the Court employed a narrower definition of seizure than that spelled out in *Terry*.[38] In *Mendenhall*, DEA agents stopped a young woman upon her arrival at

27. Id. at 5-6, 88 S. Ct. at 1871-72.
28. Id. at 7, 88 S. Ct at 1872.
29. Id., 88 S. Ct. at 1872.
30. Id. at 4-5, 88 S. Ct. at 1871.
31. Terry v. Ohio, 392 U.S. 1, 5, 88 S. Ct. 1868, 1871 (1968) (appellants' challenge was predicated on the absence of probable cause for the officer to detain the suspects).
32. Id. at 30-31, 88 S. Ct. at 1884-85.
33. Id. at 21, 88 S. Ct. at 1880.
34. The court did not address the constitutional propriety of a seizure "upon less than probable cause for purposes of 'detention' and/or interrogation." Id. at 19, 88 S. Ct. at 1879 n.16.
35. Id. at 16, 88 S. Ct. at 1877.
36. Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877 (1968).
37. 446 U.S. 544, 100 S. Ct. 1870 (1980).
38. Id. at 553-54, 100 S. Ct. at 1877.

the Detroit Metropolitan Airport on a commercial airline flight from Los Angeles because she fit the pattern of a drug courier profile.[39] After examining and returning Mendenhall's airline ticket and identification, an agent asked her to accompany him to the airport DEA office for further questions.[40] Although Mendenhall did not verbally respond to the agent's request, she did follow him to the office.[41] There, she consented to a search resulting in an arrest and conviction for possession of heroin.[42] On these facts, the Supreme Court held that no seizure had taken place during the initial confrontation with the DEA agents.[43] In their view, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[44] Justice Stewart emphasized that the airport was a public place; the agents were in plain clothes and displayed no weapons; a "request" versus a "demand" was made to examine her airline ticket and identification; and, the agents did not summon Mendenhall to their presence but approached her. Accordingly, the Court reasoned that Mendenhall had no objective reason to believe she was not free to terminate the questioning and proceed on her way.[45] As a result, the Fourth Amendment protections requiring probable cause had not been triggered because there was found to be no seizure; thus, her subsequent consent to the search was valid, and the evidence obtained from that search was therefore admissible. Curiously, in deciding this case in favor of the government, Justice Stewart did acknowledge in a footnote that the question of whether Mendenhall felt free to "walk away" when

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39. Id. at 547, 100 S. Ct. at 1873. A drug courier profile is a compilation of characteristics common to drug couriers developed by the Drug Enforcement Agency in the early 1970's. Morgan Cloud, Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas, 65 B.U.L. Rev. 843, 844 (1985).

The detectives were suspicious of Mendenhall because (1) Los Angeles is believed to be a place of origin for much of the heroin brought to Detroit; (2) Mendenhall was the last person to leave the plane, appeared excessively nervous, and completely scanned the entire area where the agents were standing; (3) Mendenhall claimed no luggage after leaving the plane; and (4) Mendenhall changed airlines for her flight out of Detroit. *Mendenhall*, 446 U.S. at 547 n.1, 100 S. Ct. at 1873 n.1.

40. Id. at 548, 100 S. Ct. at 1874.

41. Id., 100 S. Ct. at 1874.

42. United States v. Mendenhall, 446 U.S. 544, 548-49, 100 S. Ct. 1870, 1874 (1980).

43. Id. at 558, 100 S. Ct. at 1879. Four members of the Court sought to remand the case for an evidentiary hearing on whether a seizure occurred. Id. at 570-71, 100 S. Ct. at 1885-86. (White, J. dissenting). Three justices were comfortable assuming that the stop constituted a seizure because they believed the agents had reasonable suspicion that Mendenhall was engaged in criminal activity thereby rendering constitutional the detention for routine questioning. Id. at 560, 100 S. Ct. at 1880.

44. Id. at 554, 100 S. Ct. at 1877.

45. Id. at 555, 100 S. Ct. at 1878.

asked by two Government agents for her identification and ticket was an extremely close one.[46]

3. Florida v. Royer

Three years later, the Court employed the *Mendenhall* "free to leave" test[47] in *Florida v. Royer*.[48] There, detectives stopped Royer at the Miami International Airport after observing that his behavior matched a drug courier profile.[49] The detectives requested Royer's airline ticket and identification and asked him to accompany them to an office. Without consent or agreement, one of the detectives, using Royer's luggage tag, obtained the luggage from the airline. After Royer unlocked the suitcase, the detective opened it without obtaining further assent from Royer. This occurred *after* the agents informed Royer that they were narcotics agents and suspected him of transporting drugs.[50] The search led to the discovery of marijuana. Royer contested its admissibility, arguing the discovery resulted from an unlawful seizure occurring when the agents restrained his freedom to leave by obtaining his tickets, identification, and luggage.[51] Royer asserted that the detectives lacked probable cause to seize him at the time they took his belongings and accompanied him to an isolated room, thereby precluding the admissibility of any evidence obtained as a result of the seizure.[52] Even if he had consented, the illegal seizure would make the consent irrelevant.

On these facts, the Court held that the detectives had seized the suspect, thereby exceeding the limits of a *Terry*-type stop.[53] Consequently, Royer's detention was a more serious intrusion on his personal liberty than is allowable on a mere suspicion of criminal activity.[54] Probable cause was required, and, because the detention was without any, the evidence obtained as a result was inadmissible.

In its reasoning, the Court found *Royer* different from *Mendenhall* because the officers in *Royer* requested and retained Royer's ticket[55]

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46. "For me, the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two Government agents for her driver's license and ticket is extremely close." Id. at 560 n.1, 100 S. Ct. at 1880 n.1.

47. United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). See supra notes 37-46 and accompanying text.

48. 460 U.S. 491, 103 S. Ct. 1319 (1983).

49. Id. at 493, 103 S. Ct. at 1321-22. Particularly, the detectives observed that Royer had been carrying heavily laden luggage, appeared extremely nervous, was young, paid cash for his ticket from a large roll of bills, and only transcribed a name and destination on his luggage tag. Id. at 494 n.2, 103 S. Ct. at 1322 n.2.

50. Id. at 494, 103 S. Ct. at 1322.

51. Id. at 496, 103 S. Ct. at 1323.

52. Id., 103 S. Ct. at 1323.

53. Id. at 501-02, 103 S. Ct. at 1326, 1328.

54. Id. at 502, 103 S. Ct. at 1326-27.

55. Id. at 503-04 n.9, 103 S. Ct. at 1327 n.9.

and identification before asking him to accompany them to the DEA office.[56] Thus, Royer was effectively seized within the meaning of the Fourth Amendment because there was a show of authority such that a reasonable person would not have believed he was free to leave.[57]

4. I.N.S. v. Delgado

One year later, the Supreme Court again embraced the "free to leave" test in *Immigration and Naturalization Service v. Delgado*.[58] The facts involved federal officers who conducted a "factory survey" of a workplace for illegal aliens. The workers sought an injunction against the survey, alleging such official action unconstitutional under the Fourth Amendment.[59] The agents, acting pursuant to a warrant, approached employees, identified themselves, and asked the employees questions regarding their citizenship.[60] The warrants were issued on a showing of probable cause by the INS that several illegal aliens were employed at a certain factory although neither of the search warrants identified any particular aliens by name.[61] During the time INS agents moved systematically through the factory questioning employees, other agents positioned themselves near the factory exits. All agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon drawn.[62]

Justice Rehnquist's opinion for the Court concluded that no seizure took place.[63] The questioning of the individual workers did not amount to a seizure within the meaning of the Fourth Amendment; therefore, probable cause was not required, and any evidence obtained would be admissible. In its reasoning, the Court acknowledged that the workers may not have been free to leave their worksite, but explained that this was not the result of the agents' actions: "Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the worker's voluntary obligations to their employers."[64]

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56. Id. at 503-04, 103 S. Ct. at 1327.

57. Id. at 502, 103 S. Ct. at 1326. The court noted that the initial stop was justified by reasonable suspicion and that had the officer used less intrusive means to investigate these suspicions, i.e., use of a narcotics detector canine to detect the presence of drugs, there would have been probable cause to detain and arrest Royer. Id. at 504-06, 103 S. Ct. at 1328 n.10.

58. 466 U.S. 210, 104 S. Ct. 1758 (1984).

59. Id. at 212-13, 104 S. Ct. at 1760-61.

60. Id., 104 S. Ct. at 1760-61.

61. Id., 104 S. Ct. at 1760-61.

62. Id., 104 S. Ct. at 1760-61.

63. Id. at 219, 104 S. Ct. at 1764.

64. Id. at 218, 104 S. Ct. at 1763.

In a concurring opinion, Justice Powell stated that he was not as comfortable as his fellow justices that a reasonable factory worker in this position would have felt free to refuse the INS agents' questions and to leave the factory.[65] However, since he found this case analagous to constitutionally upheld warrantless border searches for illegal aliens,[66] there was, in his opinion, no reason to decide the "seizure" question.[67]

5. Michigan v. Chesternut

In 1988, the Supreme Court once again applied *Mendenhall*'s "free to leave" test in *Michigan v. Chesternut*.[68] After observing the approach of a police car on routine patrol, Chesternut began to run.[69] The police followed him in order to determine where he was going and, after catching up with him, drove alongside of him for a short distance. During this time, the officers observed him discarding a number of packets later determined to contain codeine.[70] After Chesternut was charged with drug offenses, a magistrate held that he had been unlawfully seized during the chase.[71] This was affirmed at the appellate level under previous state decisions rendering any police pursuit a "seizure."[72] As no probable cause existed when the police undertook pursuit of Chesternut, their seizure of him was unreasonable; therefore, the drugs subsequently obtained were inadmissible and the charges were dismissed.[73]

The Supreme Court unanimously reversed. Justice Blackmun rejected the lower court's position that any police pursuit constituted a seizure. Instead, he indicated that the Court would adhere to the traditional approach that a person is seized "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."[74] Under this approach, the Court held that no seizure occurred before Chesternut discarded the packets:

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65. Id. at 221, 104 S. Ct. at 1765 (Powell, J., concurring).

66. United States v. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074 (1976).

67. *Delgado*, 466 U.S. at 221, 104 S. Ct. at 1765.

68. 486 U.S. 567, 108 S. Ct. 1975 (1988).

69. Id. at 569, 108 S. Ct. at 1977.

70. Id., 108 S. Ct. at 1977. The police also found other illegal drugs and paraphernalia on Chesternut's person.

71. Id. at 570, 108 S. Ct. at 1977-78. The magistrate ruled that the "chase" implicated Fourth Amendment protections and was not justified merely because Chesternut ran at the sight of police.

72. Id., 108 S. Ct. at 1977-78. The Michigan Court of Appeals rested its holding on People v. Terrell, 77 Mich. App. 676, 259 N.W.2d 1987 (1977) and People v. Shabaz, 424 Mich. 42, 378 N.W.2d 451 (1985). *Chesternut*, 486 U.S. at 571 n.3, 108 S. Ct. at 1970 n.3.

73. *Chesternut*, 486 U.S. at 571, 108 S. Ct. at 1978.

74. Id. at 573, 108 S. Ct. at 1979 (quoting from U.S. v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870 (1980)).

> [T]he police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [the person's] freedom of movement. The record does not reflect that the police activated a siren or flashers; or that they commanded [Chesternut] to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block [Chesternut's] course or otherwise control the direction or speed of his movement. While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure.[75]

Consequently, the requirement of probable cause was held unnecessary because the fact that the police were driving alongside of Chesternut was not so intimidating as to cause him to reasonably believe he was not free to ignore the police presence and go about his business.[76] Accordingly, the discarded packets were properly obtained, and the Court ruled that the charges against the defendant were improperly dismissed.[77]

C. *Summary of Jurisprudence Prior to* Bostick

Over the past two decades, *Terry*, *Mendenhall*, *Royer*, *Delgado*, and *Chesternut*, served to provide a test for guiding federal and state courts in rendering decisions on whether an individual has been seized, thereby invoking the protections afforded by the Fourth Amendment. These cases, construed together, lead to the conclusion that a seizure occurs when, in light of all surrounding circumstances, a reasonable person would have believed he was not free to leave the presence of the authorities or otherwise terminate the encounter.

This "free to leave" test seems a practical and sensible standard when one considers its objectives. The Fourth Amendment protects a person's freedom from unlawful governmental intrusions, and the scope of this protection extends to a person's freedom from unwarranted seizures. This is clearly a protection that every American appreciates. In ordering their daily affairs, Americans need not account for the possibility that they may be seized or detained at a moment's notice, unless there is probable cause for officials to believe that they are engaged in or involved with unlawful conduct. Thus, one who is seized without probable cause is protected, since any evidence obtained from the seizure or detention is inadmissible in court. To determine if this Fourth Amendment protection is triggered, the courts must be able to point to particular facts and circumstances to determine if a person has been seized.

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75. Id. at 575, 108 S. Ct. at 1980.
76. Id. at 576, 108 S. Ct. at 1981.
77. Id., 108 S. Ct. at 1981.

One possible standard is that a person is seized only when the police have accomplished a literal physical apprehension of the individual. Admittedly, this standard is simple and precise. It is also inflexible. This characteristic most likely influenced the Supreme Court's creation of the flexible "free to leave" standard. In *Chesternut*, the Court stated,

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.[78]

In order to measure the extent of police coercion, it makes good sense that the mental state of the suspect be considered. If a person *reasonably believes* himself seized or detained, he will likely respond to police in a submissive fashion regardless of whether actual detention has occurred. This results in a greater liklihood that police will extract information or possessions which reveal criminal conduct. This in turn encourages police to use such situations to their advantage.

For example, if an inflexible standard of actual physical apprehension were employed to determine whether a seizure occured, police would feel encouraged to create intimidating surroundings for those they wish to question, probe or otherwise accost. To avoid constitutional problems, officials would need only to refrain from physically detaining the suspect. Any evidence obtained from the suspect would be admissible. Alternatively, if the surroundings and circumstances created by the police were so intimidating that the individual *reasonably believed* he had been detained, police would be required to have probable cause or reasonable suspicion for their conduct, since the absence of such justification renders inadmissible any fruits from their efforts.

That is precisely what the "free to leave" test accomplishes. After considering all surrounding circumstances, the court determines whether an average reasonable person would believe he would be seized or detained upon his attempt to leave. The test's objective standard allows the police to predetermine whether the conduct comtemplated gives rise to Fourth Amendment considerations. This "reasonable person" standard also ensures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular person being approached.[79]

In 1989, the Florida Supreme Court took the opportunity to apply the foregoing line of jurisprudence, its thematical "free to leave" test, and its underlying rationale in determining whether a seizure occurred in *Bostick v. State*.

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78. Michigan v. Chesternut, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979 (1988).
79. Id. at 574 , 108 S. Ct. at 1980.

IV. *BOSTICK v. STATE*[80]

Under the facts of *Bostick*,[81] and in light of prior Supreme Court jurisprudence, the Florida Supreme Court decided that Bostick was "seized" by the officers without "reasonable suspicion" or probable cause, and that any consent he gave thereafter to search his luggage was tainted by the illegal detention.[82] The court found that the sheriff's department's standard procedure of "working the buses" was an investigative practice implicating Fourth Amendment protections against unreasonable seizures of the person.[83] The court, attempting to apply the standard which was spelled out in *Mendenhall* and its progeny, considered the crucial question to be whether, under all the circumstances, a reasonable person would have believed he was not free to leave.[84]

Applying this standard to the facts, the court articulated that under the circumstances, a reasonable traveler would not have felt that he was "free to leave" or that he was "free to disregard the questions and walk away."[85] Further, the court found, there was no place to which a reasonable bus traveler during a momentary layover might leave and no place to which he might walk away. The fact that the officers partially blocked the aisle, and that one appeared to carry a gun only underscored this conclusion.[86]

Having determined that Bostick was detained or seized within the meaning of the Fourth Amendment, the Florida court addressed the propriety of such a detention. It noted that broad principles of federal law, as well as the specific requirements of Florida law, require that the police at a *minimum* have had a reasonable articulable suspicion before detaining Bostick.[87] After considering the State's concession that it lacked any basis for suspicion, the court held that Bostick's detention was unlawful and unjustified.[88]

This left only the issue of whether the defendant's consent purged the taint of the illegal police conduct. The Florida court adhered to language used in an earlier state supreme court decision:

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80. 554 So. 2d 1153 (Fla. 1989).

81. Police officers, without probable cause, approached a bus passenger during a momentary layover and requested him to produce identification and indicate his destination. This resulted in the discovery of illegal drugs and the passenger's arrest. See supra text at section II for a detailed discussion of the facts of *Bostick*.

82. 554 So. 2d at 1157, 1158.

83. Id. at 1156.

84. Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989).

85. Id.

86. Id.

87. Id. at 1157-58. In this context, the Florida requirement of reasonable suspicion is tantamount to the probable cause requirement as defined at supra note 23.

88. Id. at 1158.

> [W]hen consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. *The consent will be held voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior illegal action.*[89]

Consequently, the court found that the entire situation was intimidating, and that such an environment could not have broken the chain of illegality to validate the consent. The government had therefore interfered with the privacy of an individual citizen who was not even suspected of any criminal wrongdoing.[90]

This holding, as the Florida Supreme Court intended, is apparently consistent with prior United States Supreme Court and Florida jurisprudence.[91] That is, the court examined the totality of the circumstances with which Bostick was presented and questioned whether he reasonably believed he could refuse the questions and terminate the encounter. Their answer was no. The United States Supreme Court, in an opinion by Justice O'Connor disagreed with the Florida court's interpretation of the "free to leave" test and, consequently, with the lower court's answer to that test.

V. UNITED STATES SUPREME COURT HOLDING

In Justice O'Connor's opinion for the Court, the issue is initially stated as whether the encounter on the bus necessarily constituted a "seizure" within the meaning of the Fourth Amendment.[92] The Court accepted the concession that no reasonable suspicion existed for the officers to "seize" Bostick, and that, if a seizure took place, the drugs found must be suppressed.[93] However, the ultimate holding of the case does not address whether Bostick was seized at all.[94]

In a 6-3 decision, the United States Supreme Court held that the Florida Supreme Court had wrongfully adopted a per se rule that every encounter on a bus constitutes a seizure, thereby failing to evaluate the

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89. Id. at 1158, quoting Norman v. State, 379 So. 2d 643, 646-47 (Fla. 1980).

90. Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989).

91. Alvarez v. State, 515 So. 2d 286 (Fla. 4th Dist. Ct. App. 1987) (holding that the same practices on Amtrak trains by the Sheriff's Department was the functional equivalent of a detention).

92. Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991). The Court, in defining the issue, stated:

> The sole issue presented for our review is whether a police encounter on a bus of the type described above necessarily constitutes a "seizure" within the meaning of the Fourth Amendment.

93. Id. at 2386.

94. Id. at 2388.

seizure question under the correct legal standard.[95] Consequently, the Court remanded the seizure issue to the lower court but not without guidance as to the "proper" standard to be employed.[96]

In articulating its holding that the Florida Supreme Court had wrongfully decided that the police conduct was unconstitutional per se, the Supreme Court reasoned that the Florida court's decision was predicated on a single fact—that the encounter had occurred on a bus—rather than on the totality of circumstances.[97] Although it was acknowledged that the Florida court used the "free to leave" standard spelled out in *Mendenhall*, the Court found this focus misplaced. Instead, Justice O'Connor's opinion emphasized the "principle that those words were intended to capture."[98] Consequently, the Court said the proper test, when deciding whether an officer's request to search a bus passenger's luggage was so coercive as to constitute a seizure, is not whether a reasonable person would feel free to leave, but "whether [he] would feel free to decline the officers' requests or otherwise terminate the encounter."[99] Applying *this* standard to the case, the Court stated:

> [T]he mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were "confined" in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.[100]

The Supreme Court anchors its decision on *Bostick*'s analytically indistinguishable likeness to *Delgado* in that Bostick's freedom of movement was restricted by a factor independent of police conduct, i.e., his being a passenger on a bus.[101] Remember that in the *Delgado* decision a factory worker's obligation to his employer served as the source of restriction of freedom rather than the presence of armed INS agents at the exits. Since the Court found the "free to leave" analysis was basically inapplicable in its *Delgado* decision, it accordingly held the analysis inapplicable to *Bostick*.[102] Focusing instead on whether the police conveyed to Bostick the message that compliance with their requests was

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95. Id. at 2385-88.
96. Id. at 2385-89.
97. Id.
98. Id. at 2387.
99. Id.
100. Id.
101. See supra note 81.
102. 111 S. Ct. at 2387.

required, the Court examined whether Bostick's cooperation was truly voluntary.[103]

In addressing this issue the Court first dealt with Justice Marshall's dissenting opinion which characterized the holding as permitting police to board buses and demand voluntary cooperation through an intimidating show of authority.[104] Denying this characterization, Justice O'Connor acknowledged that consent which is the product of official intimidation or harassment is not consent at all.[105] She further stated that Bostick's decision to cooperate would authorize a warrantless search only if made voluntarily. Without resolving this voluntariness issue, the Court apparently found significant the fact the police never pointed the guns at Bostick nor did they otherwise threaten him.[106]

VI. ANALYSIS

A. The Supreme Court Holding

In deciding *Florida v. Bostick*, the Supreme Court could not ignore its prior decisions on when a "seizure" occurs within the meaning of the Fourth Amendment. Thus, the "free to leave" standard articulated in *Mendenhall* had to be addressed. In doing so, the Court used the facts in *Bostick* to justify an unadmitted departure from its traditional standard.

In an apparent attempt to distinguish *Mendenhall*, *Royer*, and *Chesternut* on its facts, Justice O'Connor stated:

> [W]hen police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel free that he or she could leave is not an accurate measure of the coercive effect of the encounter.[107]

Bostick's approach seems inconsistent with the rationale behind *Mendenhall*, *Royer*, and *Chesternut* since that line of cases supports the approach that *all* circumstances in each case must be considered when determining whether police conduct amounted to a seizure. It seems logical that the very location where the activity occurs would carry weight as to any coercive effect of the encounter. It is not difficult to

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103. Id. at 2388.
104. Id.
105. Id.
106. Id.
107. Id. at 2387.

imagine that a reasonable person aboard an airplane at 30,000 feet would lack a desire to leave the plane even absent an encounter such as Bostick's. But one could hardly say that this fact would not factor into a decision of whether coercion was present if the officials had boarded a plane and after take-off engaged in similar conduct. Indeed, it would seem that such an encounter would be much more intimidating to a person in this setting for he would be stationed temporarily at a point short of his destination and would have no means at all to evade the officials' questioning.[108] Yet the Court in Bostick appears to urge that riding a bus should not be a factor weighted heavily, if at all, in its determination, since the suspect chose the bus as his source of transportation.[109] The Court further finds that a person, once having chosen to ride a bus, would not feel free to depart it even absent police involvement.[110]

Another reason that the *Bostick* opinion is questionable is the Court's reliance on *Delgado*. As previously mentioned, the Supreme Court supported its *Bostick* decision with an analogy to *Delgado*. Had the Court wished to loosen reigns on the Fourth Amendment protections, it might have taken the opportunity to review the *Delgado* rationale more closely, for it is questionable. Although it is virtually true that employees do not "come and go" as they please during work hours, it seems a stretch to assert that an employee, absent armed guards at exits, would not have felt free to leave the workplace. Certainly if an employee wished to immediately terminate his employment, he might do so and leave. Most employees feel free to do so but choose otherwise. However, armed agents at the door could influence a person to postpone his exercise of this choice.

This same rationale can be applied to Bostick's situation on the bus. Typically, bus passengers do not depart a bus during a temporary

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108. This can also be illustrated with situations less extreme than a person being above ground. For example, a person on a cruise ship in the Atlantic Ocean, encountered with a suspicionless police search such as that in *Bostick*, may reasonably feel coerced into cooperation with the officials. Such confines would not leave a reasonable person to believe he could avoid or terminate the encounter by leaving the presence of the police. There would simply be no place to go but the ocean.

Similarly, trains typically make several intermediate stops while en route. Should police choose these stopping points to conduct intimidating suspicionless "sweeps", passengers are forced to choose between submission and exiting the train to terminate the encounter. It is easy to imagine that many passengers would want to avoid being stranded at a train station in an unfamiliar location.

109. Florida v. Bostick, 111 S. Ct. 2382, 2387 (1991). In all fairness, Justice O'Connor never expressly states that the location of a police encounter is irrelevant. The Court expressed that it is but one factor to consider. However, the Court seems to allocate only nominal weight to this factor when the suspect has *chosen* to travel by bus.

110. Id.

layover at a location short of the intended destination. However, should a passenger, for whatever reason, *choose* to do so, he certainly would feel free to act accordingly. Psychologically, there are no external factors interfering with the decision to exit or to remain on the bus aside from whether the intermediate location is convenient for the passenger. This is likely to change with the presence of armed officials surrounding the passenger during a period of inquisition. The passengers' decision to leave or terminate the encounter is now influenced by the officers' show of authority and any freedom to leave he may have felt is more likely to be impaired.

Nevertheless, the Supreme Court is not likely to overrule a rationale employed only seven years ago. However, the Supreme Court could have distinguished *Delgado* rather easily without addressing the rationale behind it. Specifically, the agents in *Delgado* were acting pursuant to a *warrant* of which issuance was based on probable cause.[111] In *Bostick*, the officers admitted that they had no articulable suspicion much less a warrant. It seems that this fact would have provided the court with a "hook to hang its hat on." Interestingly though, Justice O'Connor makes no mention of this difference in her assertion that *Bostick* is analytically indistinguishable from *Delgado*.

Another questionable aspect of the *Bostick* decision is the Court's unyielding determination that the Florida Supreme Court adopted a *per se* rule that a suspicionless search is unconstitutional under the Fourth Amendment.[112] Such a determination implies that the Florida court neglected to properly apply the *Mendenhall* test, for its application requires an examination of all surrounding facts and circumstances to determine if an individual would have reasonably believed he was free to leave.[113] Justice O'Connor expressly states in her opinion that the Florida Supreme Court rested its decision on a single fact—that the encounter took place on a bus—rather than on the totality of the circumstances.[114] However, the Court's majority opinion *itself* states several facts which the Court acknowledges to be salient to the lower court's opinion. Particularly, the Florida court considered that two officers complete with badges and insignia boarded a bus; there was one officer carrying a pistol; there was no articulable suspicion when the officers picked out Bostick; the officers persisted in questioning after the initial requests revealed nothing remarkable; and they requested Bostick's consent to search his luggage.[115]

From this set of facts, it seems difficult to credibly assert that the lower court rested its entire decision only on the fact that a bus was

111. See supra note 60 and accompanying text.
112. See supra note 98 and accompanying text.
113. See supra note 44 and accompanying text.
114. *Bostick*, 111 S. Ct. at 2388.
115. Id. at 2384-85.

involved. It appears more accurate that the bus was only one of the lower court's considerations in determining whether Bostick indeed felt "free to leave." However, the Florida court did place great weight on this factor because Bostick had only the confines of a bus (soon to depart) to move about had he felt the officers would let him do so.[116] Nevertheless, the Supreme Court's ultimate holding in *Florida v. Bostick* is that random consensual searches such as those practiced by Broward County's Sheriff's Department are not per se unconstitutional.[117] One can almost hear the Florida Supreme Court Justices asking themselves, "Who ever said they were?"

B. Potential Repurcussions

Although the Supreme Court rendered no decision as to whether the police conduct in *Bostick* constituted a seizure, it did substantially alter a long-employed standard. It seems now that the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests *or* otherwise terminate the encounter.[118] Additionally, the location of the encounter, although a consideration, will evidently be weighed heavily in considering the totality of the circumstances when the individual has chosen to place himself in a location that is naturally restrictive.

Standing alone, the *Bostick* decision is interesting in that it illustrates a conservative Supreme Court's willingness to alter traditional standards as to what events trigger Fourth Amendment protections. Indeed, this willingness had already been displayed one month earlier than the *Bostick* decision in another Supreme Court decision which, like *Bostick*, altered the standard for determining when a seizure occurs.

In *California v. Hodari D.*,[119] a group of youths ran away at the approach of a police car. The prosecution conceded that the officers had no probable cause to believe the youths were committing or had committed a crime. However, the police began chasing the youths. After noticing the defendant, Hodari, toss down a small rock, later determined to be crack cocaine, one of the officers proceeded to tackle him and restrain him.[120] The California Court of Appeal held that the crack cocaine must be suppressed because Hodari was effectively seized without

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116. Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989).

117. Florida v. Bostick, 111 S. Ct. 2382, 2389 (1991).

118. Id. at 2387.

119. 111 S. Ct. 1547 (1991). For an in-depth discussion and analysis of this decision see Randolph Alexander Piedrahita, Note, A Conservative Court Says "Goodbye to All That" and Forges a New Order in the Law of Seizure—California v. Hodari D., 52 La. L. Rev. ____(1992).

120. 111 S. Ct. at 1549.

probable cause when he realized the police were chasing him.[121] Again, this determination of seizure was consistent with the traditional "free to leave" standard and seemed inconspicuous. The United States Supreme Court, however, reversed.

Justice Scalia, in the majority opinion, held that the defendant was not seized until the police physically grabbed him:

> The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not . . . . In sum, assuming that [the police] pursuit in the present case constituted a "show of authority" enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled.[122]

This holding seems to abandon the "free to leave" standard of *Mendenhall* and to adopt a standard of whether physical force was applied as to result in a submission to authority. Only then will a seizure occur and Fourth Amendment protections apply. Consequently, since the drugs were discovered prior to Hodari being tackled and seized, their use as evidence was admissible notwithstanding the absence of probable cause before the chase ensued.

The new standards adopted in *Bostick* and *Hodari D.* invite police forces to utilize investigative techniques previously thought to have been constitutionally suspect. Indeed, even citizens without legal education have historically understood (and perhaps taken for granted) that police officers are not free to accost, question, and search them without a justifiable reason to do so. However, the holdings in *Bostick* and *Hodari D.* appear to indicate to law enforcement agents throughout this country that such tactics are now permissible.

For example, police officers seeking to randomly search citizens with hopes of discovering drugs or other illegal contraband might interpret the Court's recent decision as an invitation to seek out citizens in naturally confining locations and, while being careful not to physically apprehend them, coerce their consent through intimidating methods of inquisition. Because the "suspect" has chosen to be present in such a location which signicantly confines his freedom to leave, any police exploitation of this decision will not result in a "seizure" within the scope of the Fourth Amendment. Thus, probable cause is not required of the police, and any evidence obtained from the encounter will be admissible.

Taken to its logical extension, the new standard as applied by the Supreme Court would seemingly permit armed police officers, lacking

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121. Id.
122. Id. at 1550, 1552.

probable cause, to enter an office building, block off the exits and begin employing intimidating measures to extract from office employees information or possessions revealing criminal conduct. Under *Bostick* and *Hodari D.*, absent any physical apprehension of the employees, a court could find that the employees were not "seized." The rationale for such a decision could read as follows:

> Although under the traditional standard of *Mendenhall*, the employees may not have felt free to leave, this confinement was not a result of police conduct. Rather, the confinement was inherent in the employees presence at their workplace. Even absent any police actions taken, the employees would not have felt free to leave work and go about their business. Consequently, the employees were not seized for purposes of the Fourth Amendment thereby making the requirement of probable cause unnecessary, and rendering any discovered evidence admissible.

Although such a ruling may seem harsh on its face, it would not be inconsistent with a literal reading of the recent Supreme Court decisions governing Fourth Amendment seizures.

Another consideration of the *Bostick* decision is its potential effect on one of many American's favorite pasttimes—travel. It is not inconceivable that, under *Bostick*, Americans could very well find themselves in a position where encounters with police officers, who desire to subject them to random searches and seizures, will be an expense of traveling in this country. When one considers the number of people who incorporate travel across this country into their recreational and work activities, the effects of this police freedom could be felt by all.

Perhaps the most interesting effects of *Bostick* and *Hodari D.* would arise out of a future Supreme Court decision that flight from police, with nothing more, is sufficient to justify a seizure and search. One legal commentator, exploring this possibility, states:

> The only way to avoid an interrogation and search may be to stand up to an armed police officer and declare, "I will not leave your presence, but I will not consent to be questioned, seized or searched." One wonders how many people would have the courage to take such a stand. One also wonders just how suspicious Justice Scalia would consider such behavior.[123]

VII. CONCLUSION

The United States Constitution was constructed as a safeguard against intrusions on individual rights. Specifically, the Fourth Amendment protects us all from arbitrary intrusions by our government.

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123. Ira Mickenberg, Criminal Rulings Granted the States Broad New Power, Nat'l L.J., August 19, 1991, at S11, S14.

It is perhaps unfortunate that judicial decisions resolving Fourth Amendment issues are rendered in the context of criminal prosecutions, many of which involve drug trafficking.[124] In such cases, it is difficult to sympathize with a defendant who is transporting drugs into or across the country. Instead, the courts find it easier to forge exceptions to general rules which serve to protect citizens where a significant number of drug offenders employ those very rules as a mechanism to evade prosecution or conviction. These court-created exceptions make it easier for law enforcement officials to successfully combat the drug problem. However, judicial decisions which seemingly erode Fourth Amendment protections in order to facilitate effective drug enforcement simultaneously invite police to abuse their power to search and seize. Specifically, it encourages avoidance of the often time consuming warrant process in favor of warrantless searches and seizures.

No one denies that the drug problem is a concern to the American government and its citizens. Drug trafficking needs to be stopped. But at what price? And by what means? Perhaps the Florida Supreme Court was attempting to ask these very questions when it stated:

> Without doubt the inherently transient nature of drug courier activity presents difficult law enforcement problems. Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate such crime in this state. Nazi Germany, Soviet Russia, and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods. Yet we are not a state that subscribes to the notion that ends justify means. History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means have a disturbing tendency to *become* the end result.[125]

Maybe the fastest means to ensure victory in the country's "war on drugs" is to sacrifice fundamental protections traditionally afforded to all of us. And perhaps many citizens are willing to subject themselves to excessive forces of government to further this end. However, an ultimate victory in the short run at such great an expense might one day, in retrospect, seem extremely hollow. As another Florida judge has already noted:

> Occasionally the price we must pay to make innocent persons secure from unreasonable search and seizure of their persons or property is to let an offender go. Those who suffered harassment

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124. Eulis Simien, Jr., The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches, 41 Ark. L. Rev. 487, 488 (1988).

125. Bostick v. State, 554 So. 2d 1153, 1158-59 (Fla. 1989).

> from King George III's forces would say that is not a great price to pay. So would residents of the numerous totalitarian and authoritarian states of our day.[126]

The idea of people departing from the United States to escape governmental harrassment in search of greater individual liberties might make for an interesting novel. But, it would make an even more interesting chapter of a future American history book.

Mark William Fry

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126. Snider v. State, 501 So. 2d 609, 610 (Fla. 4th Dist. Ct. App. 1986) (Glickstein, J., dissenting).