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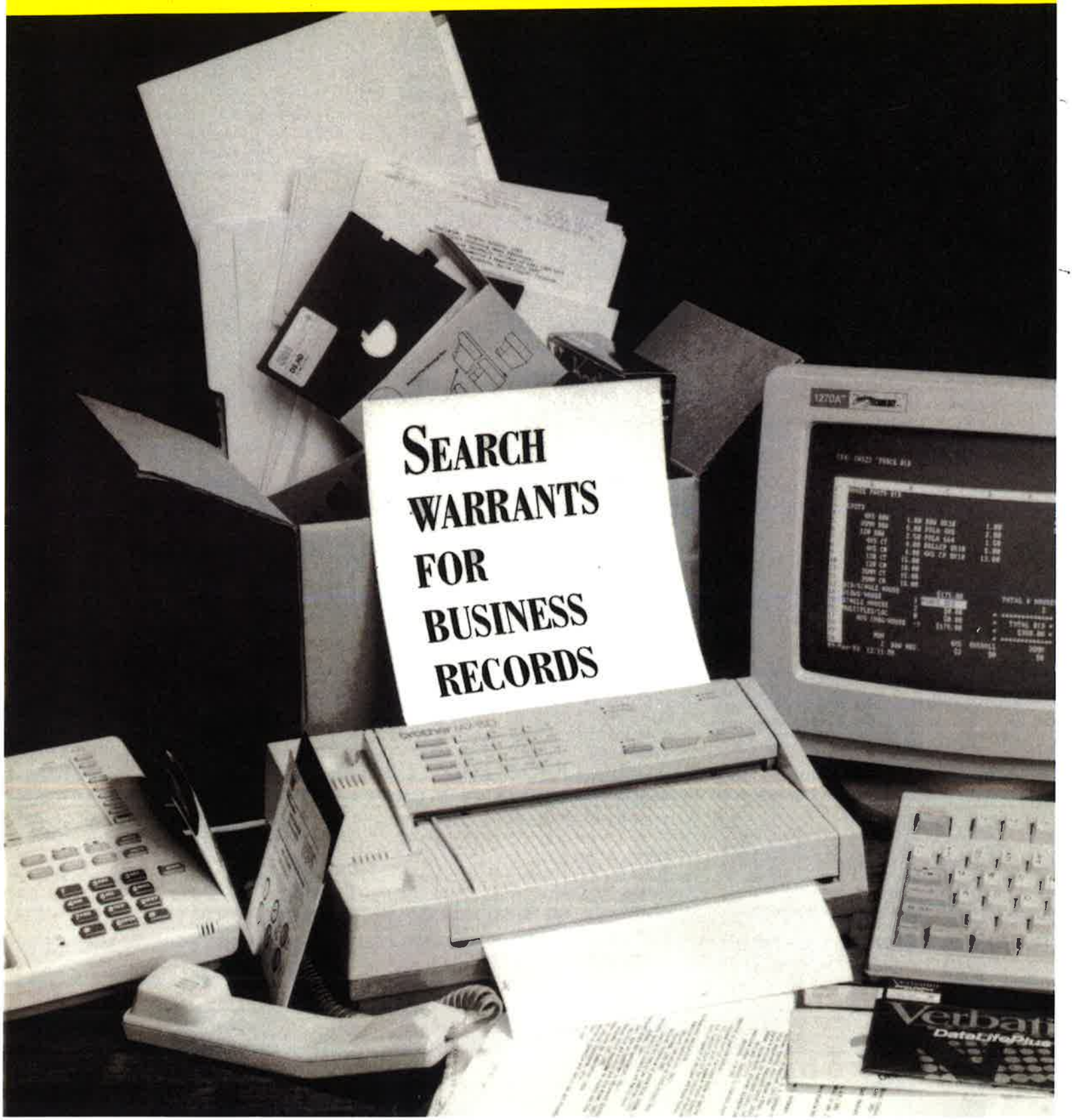

FOURTH AMENDMENT FORUM

The Emancipating Constipation Proclamation: Detention Of Suspected Swallowers At The Border

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Your international flight lands on schedule. You gather your belongings from the overhead compartment and deplane. Your passport checks out so its on to Customs. There, you are greeted by two Customs inspectors who look at you with their collective suspicious eye. To them, you appear nervous. Your itinerary for what was to be a two-week excursion back-packing through a foreign land does not quite add up. After thoroughly searching your baggage, you are "invited" into a small room. In view of the two Customs officers, you are asked to disrobe. At first glance, nothing is detected. So you are instructed to bend at the waist so that their suspicious, and now probing, eyes can visually inspect that portion of your anatomy where the sun does not ordinarily shine. You gather your garments (and whatever personal dignity you can muster) and dress yourself. But the ordeal is not over. You are told that unless you consent to radiography of your abdominal area, you shall be detained, shackled to a bed, until nature calls. And when it does, Customs inspectors will watch as you assume the position over a make-shift "porta-potty," ordinarily a wastepaper basket lined with a garbage bag.

You request to make a telephone call. Request denied. You ask to speak to an attorney. Denied. You explain that you prefer not to receive excessive dosages of radiation due to the health risk. Irrelevant. You are escorted to a local hospital facility, a medical van, or just another room, and, as promised, shackled to a bed. You are invited to drink quarts of a solution that tastes nothing like Kool-Aid. (You later find out that it was a liquid laxative). Perhaps they will let you sleep, but more often they won't. From that room you will not move until your bowels do. Twelve hours, 24 hours, 24 days (in one case) may elapse before anyone, other than the two Customs inspectors, learns of your predicament. Because so far as these Customs inspectors are concerned, their suspicions justify your continued detention. What country, you ask, allows Customs inspectors such unbridled discretion to treat international travelers with such disregard? Surely, you would not plan a vacation to that destination.

Home, Sweet Home

In *United States v. Montoya de Hernandez,* 105 S.Ct. 3304 (1985) the United States Supreme Court, by a seven to two vote, held that U.S. Customs inspectors who harbor a reasonable suspicion that an international traveler is a "mule" smuggling contraband in his or her alimentary canal may detain that traveler, presumably indefinitely, until a bowel movement dispels or confirms their suspicion. The court imposed no outer limit on the manner in which the detention could take place. In *Montoya de Hernandez,* the defendant was held incommunicado for 16 hours before a Customs inspector finally decided to consult a neutral magistrate.

Since *Montoya de Hernandez* was decided seven years ago, circuit and district courts have struggled with cases involving suspected alimentary canal smugglers and the harsh treatment they receive at the border. Although the practice of Customs inspectors varies somewhat from case to case, the general rule is that suspected body smugglers are chained to a bed, held incommunicado, deprived of food and sleep, and not released until they either consent to an x-ray or pass a clear stool.

What appeared to be a blanket license by the Supreme Court to detain suspected smugglers indefinitely (that is, until their bowels moved) has come under closer scrutiny in the wake of the Supreme Court's decision in *County of Riverside v. McLaughlin,* 111 S.Ct. 1661 (1991). *Riverside* held that a warrantless

arrestee's prompt judicial determination of probable cause (to which he is entitled under *Gerstein v. Pugh*) must occur within 48 hours of the arrest, otherwise the burden shifts to the government to justify the delay. *Riverside* made no mention of the *Montoya de Hernandez* case. Recognizing that it would be anomalous to allow for the indefinite detention of international travelers on reasonable suspicion alone while requiring a prompt judicial determination for criminal suspects arrested based on the higher probable cause standard, courts have crafted guidelines by which Customs inspectors must abide when deciding to detain a suspected body smuggler for an extended period of time.

One district court held that Customs inspectors had violated the Fourth Amendment rights of one traveler who was shackled to a bed in a "medical van" for 19 hours before his first bowel movement revealed foreign objects containing heroin. He was then placed under formal arrest, reshackled to the bed, and detained another 67 hours until all the foreign objects had passed. All the while, the traveler was denied access to a telephone. His request to speak to an attorney was denied. In all, the traveler was held incommunicado, shackled to a bed, for 78 hours without any review by a judicial officer. *United States v. Onyema,* 766 F.Supp. 76 (E.D.N.Y. 1991), *remanded,* 952 F.2d 393 (2d Cir. 1991) (unpublished).

Judge Korman's thoughtful opinion for the court canvased the several decisions which had come down since *Montoya de Hernandez,* distinguishing the Second Circuit's decision in *United States v. Odofin,* 929 F.2d 56 (2d Cir. 1991). Judge Korman reasoned that "the use of such extreme measures, combined with the fact that [the defendant] was held incommunicado for 78 hours, mandates the conclusion that his detention crossed the boundary of the authority granted to Customs inspectors to detain travelers without judicial authorization."

In *Odofin,* the Second Circuit had found no Fourth Amendment violation where Customs inspectors detained a suspected swallower for a "record breaking twenty-four days" until the suspect finally passed the first of several heroin containing balloons. But after the fifth day of detention an attorney for the suspected swallower appeared before a magistrate for a judicial determination of reasonable suspicion which the magistrate found to exist. The Second Circuit held that "based upon a reasonable interpretation of *United States v. Montoya de Hernandez,* the Customs inspectors had a good faith belief that under the circumstances, they need not present the [matter] to a magistrate during the first five days of detention." 929 F.2d at 60 n.9. The court left open the question of whether a judicial determination should occur sometime before five days.

In a later case, the Second Circuit set forth strict guidelines to curtail what the court termed "an unwarranted degree of callousness" on the part of Customs inspectors in their treatment of swallowers. *United States v. Esieke,* 940 F.2d 29, 36 (2d Cir. 1991). Observing that Customs inspectors "may have lost sight of the fact that the persons they detain are merely suspects who have not yet been—and may never be—charged with a crime," the court imposed a new rule by which Customs inspectors must inform the local United States Attorney's Office within 24 hours of its decision to detain a suspected alimentary canal smuggler. In turn, the United States Attorney's Office must immediately notify a magistrate judge and the detainees lawyer of the ongoing detention. The court's decision in this regard, however, was predicated not on a finding of a Fourth Amendment violation. Indeed, the court rejected the detainees Fourth Amendment challenge, concluding that the use of handcuffs and leg irons to detain a suspected swallower incommunicado for days on end did not rise to a Fourth Amendment violation.

Nevertheless, the court was "seriously troubled by the government's practice of detaining suspects for fairly extensive periods of time without judicial authorization." In an exercise of "judicial oversight" and in "the interests of justice," the court imposed the 24-hour rule, specifically superseding the government's "standard policy" of notifying the United States Attorney within 72 hours.

The Fifth Circuit has followed suit by similarly imposing upon government agents the obligation to notify the local United States Attorney's Office within 24 hours of detaining a suspected smuggler, and in turn, requiring that the United States Attorney notify a district or magistrate judge and the detainee's attorney (or local public defender) of the circumstances. *See United States v. Adekunle,* 980 F.2d 985, 990 (5th Cir. 1992).

Although the 24-hour rule sounds a victory for international travelers and civil libertarians, it was too little too late for Mr. Onyema. When Judge Korman's decision in *Onyema* made its way up to the Second Circuit, shortly after *Esieke* was decided, the court remanded the case to the district court for reconsideration. 952 F.2d 393 (2d Cir. 1991) (unpublished). According to Onyema's defense counsel, Richard Levitt, Judge Korman vacated the post-trial order suppressing the evidence and reinstated the jury's guilty verdict. Judge Korman found himself constrained by the Second Circuit's decision in *Esieke,* and correctly so.

Take Me Home

Defense counsel should seize upon Judge Korman's insightful opinion when arguing that the detention of a suspected "mule" has exceeded permissible bounds. Circumstances which counsel should highlight include:

- The length of the detention. As the detention approaches 48 hours without solid evidence that the suspect is carrying the contraband internally—that is, if the traveler has refused the x-ray and has not passed any of the balloons within 48 hours of the initial detention—the stronger the argument will be that the detention amounts to a *de facto* arrest requiring a judicial determination of reasonableness under *Riverside. But see Adekunle,* 980 F.2d 985, 989 (5th Cir. 1992).
- Whether the suspect is detained *incommunicado*. The Supreme Court has found no Fourth Amendment violation in detaining the traveler incommunicado for 16 hours because, as the Court put it, such detention is "necessary to either verify or dispel the suspicion." *Montoya de Hernandez* 105 S.Ct. at 3312. Judge Korman noted in *Onyema,* however, that "lengthy incommunicado detention effectively suspend[s] for [the traveler] the 'privilege of the Writ of Habeas Corpus,' U.S. Const. art. I, § 9, by preventing him from seeking judicial review of the grounds upon which he [is] being held." *Onyema,* 766 F.Supp. at 83 n.3. Cut off from the outside world, a detained traveler cannot seek the assistance of family members, friends, and acquaintances who can confirm the traveler's seemingly implausible explanation. The traveler thus stands little chance to dispel the suspicions of the Customs inspectors unless the inspectors themselves undertake the task. They rarely do. *See Ekpo v. United States,* 1992 WL 117121 (N.D.Ill. May 22, 1992) (although

Customs inspectors had reasonable suspicion to detain the traveler initially, court concluded that their suspicion should have been dispelled by other factors including the fact that the traveler's employment was "easily verifiable"). Naturally, if the traveler has consented to an x-ray and it reveals the presence of foreign objects in the digestive tract, the inspectors' suspicion is thereby confirmed, assuming, of course, that the x-ray is properly administered and reviewed. *See Velez v. United States,* 693 F. Supp. 51, 53-54 (S.D.N.Y. 1988) (traveler not timely released because exculpating x-rays were not promptly presented to radiologist for review).

• Factors substantiating the Customs inspectors' suspicions. The use of profiles to detain travelers has come under recent attack by one district court. Judge Garrity of the District Court of Massachusetts, in a civil rights case brought against the government, observed that "when suspicious factors prove to be consistent with innocent behavior within the context of the entire circumstances, they lose their predictive value and should not be given substantial weight as a basis foe reasonable suspicion." *Adedeji v. United States,* 782 F.Supp. 688, 698 (D.Mass. Jan. 23, 1992). Of particular interest to Judge Garrity were statistics demonstrating that "approximately three quarters of the passengers whose body cavities were searched were found not to have concealed anything in them," *Id.* at 695 n.19, and evidence that inspectors were promoted based on the number of successful searches—regardless of the number of innocent travelers searched. *Id.* at 699 n.25. *See also Adekunle,* 980 F.2d at 988 (5th Cir. 1992) (evidence that only one out of 800 strip searches were positive). *But see United States v. Oba,* 978 F.2d 1123 (9th Cir. 1992) (finding reasonable suspicion); *United States v. Ibekwe,* 760 F.Supp. 1546 (M.D.Fla. 1991) (same).

One final point. Professor LaFave has observed that *Montoya de Hernandez* "does not appear to settle the outcome in somewhat different cases, such as where the suspect's failure to "verify or dispel the suspicion" is possibly attributable to constipation," as opposed to "heroic" efforts on the part of the traveler to resist the call of nature. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment,* Vol. 3, § 10.5(b), page 725 (2d ed. 1987). Keep that in mind when representing the anal retentive traveler. ■