

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 84-755

**TITLE** UNITED STATES, Petitioner V. ROSA ELVIRA MONTOYA  
DE HERNANDEZ

**PLACE** Washington, D. C.

**DATE** April 24, 1985

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1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -x  
3   UNITED STATES,                   :  
4                                    Petitioner                   :  
5                   v.                   :   No. 84-755  
6   ROSA ELVIRA MONTOYA           :  
7    DE HERNANDEZ                   :  
8   - - - - -x

9                                   Washington, D.C.

10                                  Wednesday, April 24, 1985

11           The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States  
13   at 10:03 a.m.

14   APPEARANCES:

15   ANDREW LEWIS FREY, ESQ., Deputy Solicitor General,  
16    Department of Justice, Washington, D.C.; on behalf of  
17    the Petitioner.

18   PETER MARVIN HORSTMAN, ESQ., Los Angeles, California;  
19    on behalf of the Respondent.  
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1  
2 P R O C E E D I N G S

3 CHIEF JUSTICE BURGER: We will hear arguments  
4 first this morning in United States against de Hernandez.

5 Mr. Frey, you may proceed whenever you're  
6 ready.

7 ORAL ARGUMENT OF ANDREW LEWIS FREY, ESQ.,

8 ON BEHALF OF THE PETITIONER

9 MR. FREY: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 The issue in this case is whether Customs  
12 inspectors who possess a reasonable suspicion that a  
13 traveler at the border is carrying contraband in her  
14 alimentary canal must nevertheless allow that person and  
15 whatever she may be carrying to enter the United States  
16 if she is unwilling to consent to be X-rayed and if the  
17 facts known to the officers do not provide what the  
18 Ninth Circuit calls a clear indication or plain  
19 suggestion; that is, more than reasonable suspicion of  
20 smuggling.

21 Now, when respondent presented herself to  
22 Customs as part of the process for entering the United  
23 States, examination of her documents and questioning  
24 revealed a number of facts that caused the officers to  
25 suspect her of alimentary canal smuggling. These  
included the following.

0000 3



1 Respondent was coming from Colombia, a  
2 notorious source country for illicit drugs. She had  
3 recently made a number of short trips to Miami and Los  
4 Angeles. She spoke no English, had no family or friends  
5 in the United States, had no hotel reservations. Her  
6 ticket had been purchased with cash. She should not  
7 recall the circumstances of its purchase. She was  
8 carrying \$5,000 in cash on her person and a relatively  
9 small amount of luggage. Finally, when questioned about  
10 the purpose of her trip, she said she was coming to buy  
11 merchandise for her husband's store in Colombia, which  
12 she proposed to do simply by taking a taxicab around to  
13 such retail stores as K-Mark and J.C. Penney's and  
14 buying goods off the shelf as it were.

15 Now, undestandably suspicious, the examining  
16 inspector arranged for a patdown and strip search of  
17 respondent which, while disclosing an unusual  
18 arrangement of undergarments, provided no direct  
19 evidence of alimentary canal smuggling.

20 Respondent was then asked if she would consent  
21 to an abdominal X-ray to verify or dispel the  
22 suspicions, and while she initially consented, she  
23 thereafter withdrew her consent.

24 At this point the inspectors requested Customs  
25 Agent Windes permission to seek a court order for the

1 X-ray. He declined to do so, and he instead instructed  
2 the inspectors to offer respondent the options of  
3 returning to Colombia on the next available flight,  
4 consenting to an X-ray, or being detained until her body  
5 wastes could be examined. She opted to return to  
6 Colombia, but as the next flight was many hours away,  
7 she was detained in a room at the airport under constant  
8 observation of the Customs officers while awaiting her  
9 flight.

10 QUESTION: Mr. Frey, your brief I think  
11 suggests that there may have been a flight to Mexico  
12 that was cancelled or something?

13 MR. FREY: There was an effort made to put her  
14 on a LAXA flight which would have involved a connection  
15 in Mexico City, but because she didn't have a visa --

16 QUESTION: That evening?

17 MR. FREY: Sometime during the period of  
18 detention. I'm not -- I don't know that the record  
19 indicates when it was.

20 I should make it clear that these instructions  
21 from the agent that she should be allowed to return were  
22 not consistent with Customs policy, and that it is the  
23 policy of Customs not to allow such people, if they're  
24 reasonably suspected of drug smuggling, to return before  
25 that suspicion can be checked out.

1 QUESTION: By the time of these inquiries and  
2 discussions she was in the jurisdiction of the United  
3 States, was she not?

4 MR. FREY: Well, she had not technically  
5 entered the United States. She was at the border,  
6 during the entire time of this incident prior to the --

7 QUESTION: On whose physical territory were  
8 her feet resting?

9 MR. FREY: It was part of the United States,  
10 but for Immigration or Customs purposes she had not, in  
11 our view, yet entered.

12 QUESTION: Not completed an entry.

13 MR. FREY: But she was in the United States.  
14 She --

15 QUESTION: She was within the borders of the  
16 United States.

17 MR. FREY: That's correct. And if she had  
18 drugs in her person -- on her, in her body, she was  
19 guilty of a criminal offense as well as a civil  
20 violation of the Customs laws.

21 In any event, over the next 15 hours or so  
22 respondent refused to eat or drink, would not go to the  
23 bathroom, and exhibited what the court of appeals  
24 majority subsequently described as, and I quote,  
25 "symptoms of discomfort suspected to arise out of or at

1 least consistent with heroic efforts to resist the usual  
2 calls of nature."

3 At this point, based on what was known before  
4 together with respondent's behavior during the period of  
5 detention, it was decided to seek a court order  
6 authorizing medical personnel to conduct an X-ray or  
7 body cavity examination to determine whether respondent  
8 was carrying drugs, and a court order was eventually  
9 issued.

10 And I'm going to call the Court's attention to  
11 a caveat that was contained in the order. Respondent  
12 had asserted that she was pregnant. The order said that  
13 the X-ray and body cavity search is to be conducted only  
14 after a medical doctor has approved the use of the X-ray  
15 and body cavity search as appropriate.

16 QUESTION: What page is that?

17 MR. FREY: This is page 45 of the Joint  
18 Appendix. As appropriate for the defendant and only  
19 after a doctor has considered the defendant's claim that  
20 she was pregnant.

21 After the order issued, respondent was taken  
22 to a hospital and there a rectal examination disclosed a  
23 balloon containing cocaine. She was then arrested, and  
24 over the next few days she excreted 88 balloons  
25 containing more than one-half a kilogram of cocaine.



1           Respondent moved in district court to suppress  
2 the cocaine on the ground that at the time the initial  
3 examination and strip search were completed, Customs did  
4 not possess a clear indication or plain suggestion of  
5 alimentary canal smuggling --

6           QUESTION: Mr. Frey, is this clear indication  
7 or plain indication, is that somewhere between  
8 reasonable suspicion and probable cause?

9           MR. FREY: That is how the court of appeals  
10 has described it, as less than probable cause.

11          QUESTION: So it's a third standard really.

12          MR. FREY: It's an intermediate level of  
13 suspicion in between. Although in reading the Ninth  
14 Circuit's cases they seem to suggest that certain kinds  
15 of evidence are necessary for a clear indication or  
16 plain suggestion; that is, not just a wildly implausible  
17 story and the various other what you might call profile  
18 indicia, but something such as an unusual gait or  
19 possession of lubricants or laxatives or other --

20          QUESTION: The words came from Schmerber,  
21 didn't they?

22          MR. FREY: The words came from Schmerber, but  
23 as we explain, and as I think you made clear in your  
24 opinion for the Court in Winston against Lee, they were  
25 not referring there to some intermediate level of

1 suspicion between reasonable suspicion and probable  
2 cause. They were used in the context of rejecting the  
3 argument that the blood search in Schmerber could be  
4 incident to arrest, and indicating that there had to be  
5 a clear indication that the blood itself would produce --

6 QUESTION: And the Ninth Circuit didn't have  
7 Winston and Lee when they decided this case.

8 MR. FREY: It did not, and --

9 QUESTION: Mr. Frey, does any other court to  
10 your knowledge follow the clear indication standard?

11 MR. FREY: No other to my knowledge. Indeed,  
12 the Fifth and Eleventh Circuits have both indicated that  
13 for X-ray searches, reasonable suspicion is the standard.

14 QUESTION: Do you think the same standard  
15 should govern in the border detention issues for  
16 citizens as should govern the standard for aliens?

17 MR. FREY: Well, we think that what was done  
18 here could permissibly be done either to a citizen or an  
19 alien, but we are quite clear that the Fourth Amendment  
20 vests no right in aliens to gain admission into the  
21 country if the statutes and regulations on that subject  
22 bar their admission under particular circumstances.

23 QUESTION: But you're not arguing the case on  
24 the basis of the Haitian refugee type approach that  
25 would just let the Attorney General detain an alien

1 under that kind of an argument. You're asking us, I  
2 take it, to decide the case on the basis of a standard  
3 that would be equally applicable to citizens; is that  
4 right?

5 MR. FREY: That is our initial submission.  
6 However, if on the basis of that standard you're unable  
7 to agree with our submission, then we are asking you to  
8 hold -- it's different from the Haitian case, because  
9 we're not talking here about indefinite detention.  
10 We're talking here about a limited detention in  
11 connection with potential exclusion of the person as an  
12 excludable alien, and in this case they would be sent  
13 back if there were no evidence or if the matter were not  
14 expeditiously resolved. This is not a matter of holding  
15 people for months or --

16 QUESTION: Do you think that the government is  
17 required to offer the alternative of an X-ray to someone  
18 as a means of avoiding such lengthy detention in these  
19 cases?

20 MR. FREY: Well, if you were dealing with a  
21 citizen, you would have to look at the reasonableness of  
22 the way in which the government proceeded; and I think a  
23 court could conclude that the detention was not  
24 reasonable if the X-ray was not offered. But it is our  
25 standard practice to offer an X-ray and to give the

1 individual a choice. In fact, I think there's some  
2 preference for an X-ray because it's more --

3 QUESTION: Do you think that makes it more  
4 reasonable, that the choice is offered?

5 MR. FREY: I think it makes it -- I think it  
6 would be reasonable anyway. I think it makes it a lot  
7 more reasonable, yes.

8 Now, I was saying that in the district court  
9 respondent's argument was that reasonable suspicion is  
10 not enough. You need this clear indication or plain  
11 suggestion. And that since that developed only during  
12 the period of detention subsequent to the time of the  
13 strip search, that additional information could not be  
14 considered, and the ultimate search was a fruit of the  
15 illegal detention.

16 The district court denied the suppression  
17 motion, finding that the officers had what it called a  
18 very substantial suspicion that respondent was smuggling  
19 narcotics and that the detention was justified.

20 The court of appeals reversed. Now, it  
21 acknowledged that the officers had a strong suspicion,  
22 and I'm quoting, of body smuggling. They said that  
23 respondent "possessed almost all of the indicators" used  
24 to identify drug couriers. But it held that  
25 nevertheless, she had to be allowed to enter the country



1 in the absence of evidence satisfying the higher  
2 standard.

3           So as far as the court of appeals was  
4 concerned, they didn't have enough evidence, even though  
5 she was an alien, which was not an issue that the court  
6 of appeals addressed, they had to just let her into the  
7 country under the Fourth Amendment.

8           Now, let me begin the legal discussion by  
9 mentioning a couple of matters that are not in issue  
10 here. First of all, I don't understand respondent to  
11 dispute that at the time the court order was obtained, a  
12 valid basis existed for an X-ray or body cavity search,  
13 nor do I understand her to dispute that reasonable  
14 suspicion would suffice to support an examination of her  
15 body wastes. Her argument rather is solely that  
16 information crucial to support the ultimate search was a  
17 product of an illegal detention.

18           We, on the other hand, do not suggest that an  
19 X-ray or a detention of this duration would be  
20 permissible away from the border on less than probable  
21 cause. This case involves the border. It does not  
22 involve general principles that apply within the United  
23 States.

24           So the issue is whether it is reasonable for  
25 Customs to say to a reasonably suspected alimentary

1 canal smuggler we will not let you into the country  
2 until our suspicion is confirmed or dispelled. You have  
3 the choice of an X-ray or being detained until we are  
4 able to examine your body wastes. According to  
5 respondent and the court of appeals, the Fourth  
6 Amendment prohibits such action even though reasonable  
7 suspicion exists.

8 Now, the limited application of the Fourth  
9 Amendment at the border is too well settled to require  
10 much elaboration. The Court summed it up in the Ramsey  
11 case where it said that "Searches made at the border  
12 pursuant to the longstanding right of a sovereign to  
13 protect itself by stopping and examining persons and  
14 property crossing into the country are reasonable simply  
15 by virtue of the fact that they occur at the border,  
16 should by now require no extended demonstration."

17 The Court had a footnote in Ramsey that  
18 suggested that maybe the manner of carrying out a  
19 particular search would have to be reasonable under the  
20 Fourth Amendment. So it's clear at least that no  
21 warrant is required, no probable cause is required for  
22 searches at the border. It's also clear that the  
23 statutory structure, going back to the earliest days of  
24 the Republic, authorizes detentions as well as seizures  
25 and searches at the border.

1           Now, the courts of appeals, however, in recent  
2 years have developed a doctrine in the particular area  
3 of searches of the body of a traveler arriving at the  
4 border. They have held that certain types of searches  
5 are sufficiently intrusive into personal dignity or  
6 privacy that they should not be based solely on a random  
7 basis or purely subjective suspicion, because they  
8 require a reasonable suspicion of smuggling in order to  
9 be justified.

10           Now, we don't quarrel here with the general  
11 proposition that reasonable suspicion is required,  
12 because of course we contend and both courts below held  
13 that there clearly was reasonable suspicion in this  
14 case. Our problem is with the Ninth Circuit's  
15 additional requirement in the case of X-ray searches,  
16 and as here a detention in lieu of an X-ray search, for  
17 something more than reasonable suspicion.

18           Now, it's important to understand the  
19 devastating effect of the Ninth Circuit's rule on the  
20 ability of the Customs Service to prevent alimentary  
21 canal smuggling. This kind of smuggling gives no  
22 external signs, unlike what's called body cavity  
23 smuggling where there will often be an awkward gait or  
24 where a strip search will actually reveal some physical  
25 indication of smuggling in the body cavities. An

1 alimentary canal smuggler looks to all outward  
2 appearances perfectly normal.

3           So the basis on which Customs can develop a  
4 suspicion has to be the kind of thing that was present  
5 here, and the fact of the matter is that because  
6 alimentary canal smuggling is so -- it's potentially  
7 fatal if these balloons rupture, it is a very dangerous  
8 undertaking, and ordinarily the people who are recruited  
9 to do it are poor farmers for whom the money is an  
10 irresistible appeal, and that does make it somewhat  
11 easier to detect them than if you had an American  
12 businessman, let's say, engaging in that kind of  
13 smuggling.

14           Now, because there are no external signs and  
15 because you only have the kind of suspicion that you can  
16 develop from questioning and looking at the  
17 circumstances of the travel, it is not clear whether we  
18 could ever satisfy the Ninth Circuit's requirement of  
19 clear indication or plain suggestion in the vast  
20 majority of alimentary canal smuggling cases. So that  
21 when we have a suspicion based on factors like this,  
22 Customs has the choices of having an X-ray, which will  
23 ordinarily reveal the truth of the matter, or examining  
24 body wastes.

25           Now, normally people are not forced to have



1 X-rays. In the Ninth Circuit subsequent to the cases  
2 that required clear indication of X-rays -- and at this  
3 time it was the practice of Customs to apply for a court  
4 order before doing an X-ray, as the Ninth Circuit had  
5 encouraged, and only to do so where they had these  
6 additional factors. So if you don't take an X-ray, your  
7 alternative is to hold the person, and you can't examine  
8 the body wastes until they're released; and that is  
9 largely in the control of the individual, and therefore,  
10 the detention can be, as it was in this case, fairly  
11 extended.

12 Now, you will doubtless hear from my friend  
13 about the long hours of humiliating discomfort that  
14 respondent suffered as a result of the detention in this  
15 case, and certainly it was regrettable that that  
16 happened. But our point is that this was largely her  
17 doing and largely a matter within her control. She  
18 could have agreed to an X-ray, or she could at least  
19 have refrained from her heroic efforts that the Ninth  
20 Circuit described.

21 In addition, generic in this detention  
22 situation is that the longer the detention goes on, the  
23 more the suspicion builds where the person refuses food  
24 and drink, refuses to go to the bathroom and so on. So  
25 during this entire period, obviously the Customs agents

1 were becoming increasingly suspicious of respondent and  
2 having an increasing basis for believing that she was an  
3 alimentary canal smuggler.

4         So given the limited liberty and privacy  
5 interests that a traveler at the border has, we submit  
6 that it's entirely reasonable under the Fourth Amendment  
7 to require a reasonably suspected alimentary canal  
8 smuggler to make the choice to which respondent was put.

9         What is entirely unreasonable, in our view, is  
10 the Ninth Circuit's holding that we had to release such  
11 a person into the country before we were able to  
12 determine whether we were also allowing illegal drugs  
13 into the country at the same time.

14         Now, if I can come back for just a minute to  
15 the point that Justice O'Connor asked me about earlier.  
16 Whatever you may think about my argument so far in the  
17 context of a citizen or even a resident alien seeking to  
18 return to his home in the United States, the Ninth  
19 Circuit's restriction on the detention of a nonresident  
20 alien at the border is completely untenable, because  
21 such people have greatly reduced rights of both privacy  
22 and liberty at the border in terms of entry into the  
23 country.

24         Now, there are a number of statutes that you  
25 can look at in defining, because after all, what we are

1 talking about here is balancing the governmental  
2 regulatory interest against the expectations of privacy  
3 and liberty that society accords people in the border  
4 context. And in the border context, for aliens coming  
5 on a visitor's visa, the expectations are greatly  
6 reduced. In fact, Section 1225(b) of Title 8 says that  
7 every alien who may not appear to the examining officer  
8 to be clearly and beyond a doubt entitled to enter shall  
9 be detained for further inquiry.

10 Moreover, such an alien must be excluded from  
11 the country if Immigration officials know or have reason  
12 to believe that the alien is an illicit trafficker of  
13 narcotics.

14 Finally, they pointed out that there are  
15 statutes providing for the medical examination of aliens  
16 at the border. Now, I don't think that statute was  
17 enacted with this particular exclusion, the 823  
18 exclusion for narcotics trafficking, in mind.

19 The point that we are making principally about  
20 this complex of statutes is that the Ninth Circuit can't  
21 be right in saying that the Fourth Amendment confers  
22 upon an alien at the border the right to be admitted  
23 into the United States.

24 QUESTION: Mr. Frey, can I ask you one  
25 question? To what extent is there an established

1 procedure of which an incoming traveler might possibly  
2 have notice that there may be a request to submit to an  
3 X-ray examination in a case of this kind? Has it been  
4 publicized sufficiently so that one could say that it's  
5 something that a traveler might --

6 MR. FREY: Well, I don't -- I doubt that we  
7 publicize it very much in Colombia. I mean we --

8 QUESTION: Or even in the federal regulation.  
9 How long has the procedure been followed? Maybe I  
10 should ask it that way.

11 MR. FREY: Well, as far as I am aware, the  
12 instructions for dealing with the X-ray situation are  
13 contained in manuals that are not published, that are  
14 issued to Customs agents in the various regions. And,  
15 in fact, these manuals vary in what they instruct the  
16 agents to do depending on the region and the law. The  
17 manuals are different in the Ninth Circuit from what  
18 they are in the Eleventh Circuit.

19 QUESTION: Has there ever been any objection  
20 to the intrusiveness of the X-ray procedure itself other  
21 than the possible risk to a pregnant person? I mean is  
22 it just an external X-ray? You don't have to put in an  
23 dye or anything of that kind to make it --

24 MR. FREY: That is my belief, that it is just  
25 a normal abdominal X-ray of the kind that you would



1 have. I don't think that the record shows that kind of  
2 an X-ray it is.

3 QUESTION: Because there are X-rays and X-rays.

4 MR. FREY: I understand, but I don't --

5 QUESTION: As far as the record shows, it's  
6 just a matter of someone standing up against a camera  
7 and having a picture taken.

8 MR. FREY: As far as I know.

9 I think it is -- while I believe there is some  
10 theoretical or possible health hazard that is absent in  
11 the case of drawing blood; that is, over a large  
12 population, all of whom get X-rays, a very small  
13 proportion of that population may develop cancer at some  
14 point in their life as a result of the X-ray.

15 Still, I think some of the literature that we  
16 cited showed it's a very routine procedure, and one of  
17 the articles said that in 1970 129 million people in the  
18 United States had X-rays of one kind or another. So it  
19 is our belief that this is the kind of thing that  
20 Schmerber described as a routine procedure which if  
21 done, as we always do it, by competent medical personnel  
22 in a hospital setting, not done by the Customs agents --

23 QUESTION: But there's considerable opposition  
24 in the medical profession of taking too many X-rays.

25 MR. FREY: Well, there is some concern about --

1 QUESTION: I mean I wouldn't stretch the point  
2 too far.

3 MR. FREY: Well, I don't know that I'm  
4 stretching the point too far. I'm not suggesting that --

5 QUESTION: Well, you say that it's a  
6 commonplace thing.

7 MR. FREY: It is.

8 QUESTION: Well, I've read articles that say  
9 please don't make it a commonplace thing.

10 MR. FREY: Well, I think there --

11 QUESTION: How many X-rays would have been  
12 called for here?

13 MR. FREY: I don't know the answer to that.  
14 She never was in fact X-rayed here.

15 QUESTION: But one X-ray, it would disclose  
16 whatever it was there --

17 MR. FREY: I can't vouch for that.

18 QUESTION: -- I would assume.

19 MR. FREY: I just don't know.

20 QUESTION: Well, Mr. Frey, you aren't asking  
21 us to decide the standard by which the government can  
22 force someone to have an X-ray, are you? Aren't you  
23 asking us to decide the reasonableness of a detention?

24 MR. FREY: Of a detention in lieu of an X-ray.

25 QUESTION: In lieu of an X-ray?

1 MR. FREY: That is what the issue is in this  
2 case. But the way X-rays come into the case is that in  
3 order to consider -- that is, we've made the argument  
4 that in determining the reasonableness of a detention of  
5 the kind that occurred here, you look at the  
6 alternatives that are made available. And, of course,  
7 my brother here will suggest to you that an X-ray is a  
8 dose of poison and the fact that people can have X-rays  
9 can't help the government's case here. And I suggest  
10 that the fact that X-rays are relatively routine and  
11 that I think we know from common experience that most  
12 people prefer them, or many people would prefer them  
13 does bear on the reasonableness of the detention.

14 QUESTION: Mr. Frey --

15 QUESTION: Here she didn't give any reason at  
16 all. She said she didn't want to take it.

17 MR. FREY: Well, the reason that she gave was  
18 that she didn't want to be handcuffed going to the  
19 hospital.

20 QUESTION: Well, I mean that's --

21 MR. FREY: And she also -- she said she was  
22 pregnant, which was false, and of course, she would not  
23 have been X-rayed before a pregnancy test was done. In  
24 this particular test they did the pregnancy test, but  
25 before the results came back they did the rectal

1 examination and produced the first evidence.

2 QUESTION: Mr. Frey, is there anything in  
3 these articles that discloses the frequency rate of  
4 contraband when X-rays are taken? Is it 1 out of 100?

5 MR. FREY: Well, the articles that we referred  
6 to in our brief in opposition to Vega-Barvo are medical  
7 articles addressing the general subject of X-rays rather  
8 than to alimentary canal smuggling X-rays. I'm aware of  
9 no published data with regard to the frequency with  
10 which people who are X-rayed turn out to have  
11 contraband. We have gotten some information from  
12 Customs, but it's not in the record and it's not public.

13 I think rather than addressing respondent's  
14 argument that there was no reasonable suspicion here,  
15 which I hope I addressed in the course of the statement  
16 of facts, I will save the balance of my time for  
17 rebuttal.

18 QUESTION: Mr. Frey, do you know where Ms. de  
19 Hernandez is presently?

20 MR. FREY: I understand she's back in Colombia.

21 QUESTION: Thank you.

22 CHIEF JUSTICE BURGER: Mr. Horstman.

23 ORAL ARGUMENT OF PETER MARVIN HORSTMAN, ESQ.,

24 ON BEHALF OF THE RESPONDENT

25 MR. HORSTMAN: Mr. Chief Justice, and may it



1 please the Court:

2           Petitioner states on page 18 of the petition  
3 that the decision below has resulted in application of  
4 different rules governing Customs procedures in the  
5 Eleventh and Ninth Circuits, and the decision of the  
6 Ninth Circuit virtually invites alimentary canal  
7 smugglers to shift their operations to the Ninth Circuit  
8 where -- now I'm paraphrasing -- the higher clear  
9 indication standard basically ties the hands of Customs  
10 officers and would invariably cause the release of  
11 alimentary canal smugglers into the country. And by  
12 that language the implication would be that this Court  
13 needs to overrule that decision in order to quash  
14 basically a runaway circuit, which would be the Ninth  
15 Circuit in this case, in terms of the clear indication  
16 standard.

17           The language and the rhetoric used by  
18 petitioner is compelling and even alarming, but we  
19 submit that it is simply not true. And if you carefully  
20 read the facts and the holdings of the reported cases in  
21 both the Ninth, the Fifth and the Eleventh Circuits, a  
22 careful and close reading of the facts and holdings of  
23 those cases show that the rules applied by the three  
24 circuits are exactly the same. Only the labels differ.

25           In other words, in the Fifth and Eleventh

1 Circuits those circuits recognize the hierarchy of  
2 intrusiveness in border searches, and a flexible,  
3 reasonable suspicion standard. So that, for instance, a  
4 body cavity search would require a higher level of  
5 flexible, reasonable suspicion than would a frisk or a  
6 strip search, and --

7 QUESTION: Then instead of it being an  
8 intermediate standard, in your view, Mr. Horstman, it's  
9 just really a multitude of standards.

10 MR. HORSTMAN: That's correct. If you're in  
11 the Ninth Circuit and if you look at, for instance, the  
12 facts of Mosquera-Ramirez, which petitioner cites as the  
13 case that shows why the Ninth Circuit needs to be  
14 reversed, if you look at the facts of Mosquera-Ramirez,  
15 there is in fact what would have been held to be clear  
16 indication in the Ninth Circuit. If you look at the  
17 many Ninth Circuit cases which I cite in footnote 30  
18 that have upheld lengthy detentions and X-rays based on  
19 clear indication evidence, you'll see the facts in those  
20 cases correspond very closely to the Fifth and Eleventh  
21 Circuit cases using the flexible, reasonable suspicion  
22 standard.

23 QUESTION: But reasonable suspicion is at  
24 least something that our Terry cases have talked about  
25 fairly regularly. If the Ninth Circuit really means

1 reasonable suspicion, why does it use the term "clear  
2 indication?"

3 MR. HORSTMAN: I cannot answer that. I do not  
4 know. And -- but respondent submits that this Court  
5 need not approve the Ninth Circuit standard or  
6 disapprove the Ninth Circuit standard. All that you  
7 need to do in this case to affirm the Ninth Circuit  
8 opinion is to use your common sense based on human  
9 experience to know that the detention in this case was  
10 unreasonably intrusive given the totality of the  
11 circumstances.

12 QUESTION: You mean the length of it, the  
13 duration?

14 MR. HORSTMAN: That's only one prong of the  
15 intrusiveness here. The length alone, we submit, is  
16 unreasonably intrusive. And keep in mind now we're not  
17 talking about 16 hours, if you accept the Solicitor  
18 General's theory of this case. The Solicitor General's  
19 theory of this case is that the Ninth Circuit rule  
20 relying on a court order is frivolous at least.  
21 Therefore, given the Solicitor General's theory of this  
22 case, we have a 27-hour detention before anything  
23 incriminating that would have supported an arrest is  
24 found.

25 QUESTION: Could she not have terminated that

1 any time she wanted to?

2 MR. HORSTMAN: That certainly is the Solicitor  
3 General's theory that --

4 QUESTION: Well, I'm just asking you to  
5 respond to that question.

6 MR. HORSTMAN: But --

7 QUESTION: Could she not have terminated the  
8 detention at any time?

9 MR. HORSTMAN: Well, she could have terminated  
10 it by confessing, or she could have terminated it by  
11 waiving her Fourth Amendment rights to avoid an X-ray  
12 search. But the case is -- this Court's cases all the  
13 way back to Simmons had said that the state cannot  
14 unfairly burden the exercise of a constitutional right.

15 QUESTION: Well, how much of Simmons is left  
16 after Magatha?

17 MR. HORSTMAN: The basic import of Simmons is  
18 still valid, Your Honor, and to give you an example of  
19 how and why it is, if a policeman comes to Mr. Frey's  
20 door without a search warrant and asks Mr. Frey, may I  
21 come in and search, and Mr. Frey may freely say no, that  
22 police officer may not then use the fact that he  
23 declined the officer to come in and search his home as  
24 further suspicion allowing him to get a warrant, nor may  
25 he use that as exigent circumstances allowing him to



1 knock down the door.

2 QUESTION: You don't need Simmons -- you don't  
3 need Simmons for that proposition.

4 MR. HORSTMAN: Possibly not. But the point is  
5 here the government cannot argue that by not consenting  
6 to allow an invasion of her Fourth Amendment rights, she  
7 therefore consented to the even more intrusive procedure.

8 QUESTION: Well, but there is a certain  
9 resemblance to civil contempt here where you have the  
10 feeling that the respondent carried the keys in her  
11 pocket, so to speak, if she had simply ceased her heroic  
12 efforts.

13 MR. HORSTMAN: Well, Your Honor, the evidence  
14 on that last point is extremely ambiguous, and let me  
15 give you an example of that. There is language in the  
16 Ninth Circuit's opinion that says apparently heroic  
17 efforts, but just before that language it says their  
18 suspicions were that she was using heroic efforts.

19 What if an innocent traveler just because they  
20 have had a long flight was unable to excrete and found  
21 themselves in a position where a border agent said well,  
22 we wish you to excrete command so that we will be sure  
23 that you're not carrying anything internally. An  
24 innocent person might be unable to do that on command,  
25 and it wouldn't be heroic efforts in that case.

1 QUESTION: Well, perhaps it wouldn't be heroic  
2 efforts on command, but for 16 hours --

3 (Laughter.)

4 MR. HORSTMAN: It's certainly possible that a  
5 person who is nervous or afraid anyway because they are  
6 being confined would be unable to excrete for a lengthy  
7 period of time, but that wouldn't necessarily mean  
8 evidence of guilt.

9 In any event, we think and we submit to you  
10 that the Solicitor General's statements about the Ninth  
11 Circuit's additional requirement, and to quote directly,  
12 "the devastating effect that the Ninth Circuit clear  
13 indication standard is a red herring here," there are  
14 many legitimate issues that the government is raising  
15 that are present in this case. One of them is not the  
16 problem of the Ninth Circuit having erected an  
17 unreasonably high standard that is above the standards  
18 in the other circuits. The facts and holdings of those  
19 cases are not -- do not bear that out.

20 Mosquera-Ramirez would have been decided  
21 exactly the same way in the Ninth Circuit, along with Ek  
22 and Couch and Aman and Irwin and Shreve, and the other  
23 cases cited in our footnote number 30. And I should  
24 also point out that in the Joint Appendix there is an  
25 indication that one of the Customs agents in this case

1 -- I believe at page 47 -- had 30, had seized 30  
2 alimentary canal smugglers. Certainly the law is in  
3 fact working in the Ninth Circuit. Just because they  
4 use a form of words that's different or a different  
5 label is not the determinative difference in this case.

6 Mr. Chief Justice asked whether the length  
7 alone was the intrusiveness. It wasn't just the length  
8 alone. It was the length and the circumstances of the  
9 detention. She was placed in a room with three law  
10 enforcement officers, which in Royer this Court held to  
11 be the essence of imprisonment.

12 The government's statement that she was simply  
13 being held until the next available flight is refuted by  
14 the facts of what the government did. If they really  
15 had meant to deport her, which incidentally, Customs has  
16 no statutory or regulatory authority to do, they would  
17 have simply turned her back over to Immigration where  
18 she would have had the rights that Justice O'Connor  
19 enumerated recently in Placensia, and Immigration would  
20 have had to follow her procedural due process rights.

21 I submit to you, Justices, that the government  
22 knew she was not deportable, and therefore, this  
23 language about holding her for the next available flight  
24 is nothing more than a charade and a subterfuge.

25 How do I know that? I know that because of

1 what they did. They didn't just put her in a room.  
2 They observed her. Their intention at that time was to  
3 obtain additional incriminating evidence that would  
4 support a court order -- the very thing that this Court  
5 has held in Dunaway, Davis and Hayes is improper,  
6 because the essence of a police state is to arrest  
7 someone without probable cause, hold them in custody  
8 incommunicado, and attempt to elicit incriminating  
9 information. And that is precisely what happened in  
10 this case.

11 QUESTION: Mr. Horstman, do we know here  
12 whether Ms. de Hernandez had effected an entry into the  
13 United States?

14 MR. HORSTMAN: Yes, Your Honor, we do.

15 QUESTION: And how do we know that?

16 MR. HORSTMAN: I'm glad you asked that  
17 question. The government, if they have their way, the  
18 Solicitor General would love to blur the distinction  
19 between the functions of Customs agents and the function  
20 of Immigration agents. They have a totally unsupported  
21 statement in their reply brief that the functions are  
22 interchangeable. It is not true. If it were true,  
23 there would be some support for that statement, you can  
24 bet on it, from the Solicitor General.

25 The point is that it's -- we will concede that



1 after her passport and visa were stamped, admitted, she  
2 may not have been admitted into this country for all  
3 purposes because she hadn't passed through Customs, but  
4 she had been admitted for Immigration purposes. And if  
5 you search, as I'm sure the Solicitor General has, you  
6 may search those Customs laws and regulations, but you  
7 will not find a word or a phrase in there that allows  
8 Customs agents to treat aliens differently than citizens  
9 or provides for special treatment for aliens.

10 QUESTION: Well, why does it allow in her  
11 mouth to challenge the distribution of functions between  
12 the Customs and the Immigration Service? This is the  
13 government here.

14 MR. HORSTMAN: Right. In other words, how  
15 would she know that her expectation of privacy increased  
16 after she'd got through with Immigration. The answer to  
17 that is it is not totally a subjective expectation of  
18 privacy. Therefore, what an illiterate alien knew is  
19 not the determinative thing. It's a reasonable  
20 expectation of privacy, an expectation that society is  
21 preparing to recognize.

22 QUESTION: Are you saying that if Immigration  
23 makes a mistake in permitting her to enter and some  
24 other branch of the government discovers the mistake,  
25 they can't rectify it?

1 MR. HORSTMAN: Well, I'm saying something much  
2 more limited than that. I'm saying that in terms of the  
3 government's argument that because it's well known that  
4 Immigration regulations sometimes allow detentions and  
5 searches and seizures before a person is admitted, her  
6 reasonable expectation of privacy was lower.

7 Whatever the merits of that in another case,  
8 it has no applicability to the facts of this case,  
9 because the reasonable expectation of privacy of an  
10 alien and a citizen before Customs by virtue of statute  
11 and regulatory authority is equal.

12 As we admit in your brief, Your Honor, if  
13 evidence of drug activity had been discovered during  
14 routine immigration procedures and inspection, this  
15 would be a much more difficult case for us. But that is  
16 not the facts of this case.

17 QUESTION: I suppose you agree that alimentary  
18 canal smuggling is a major problem for the country now?

19 MR. HORSTMAN: Your Honor, we could not agree  
20 more, Justice Blackmun, with you and Justice Powell in  
21 the words that you wrote in Mendenhall, that drug  
22 smuggling is perhaps one of the foremost problems of  
23 this country, and that the detection of illegally  
24 concealed drugs, the problems in detecting those are  
25 perhaps unmatched in any other area of law enforcement.

1 We agree and concede that.

2 Our point is this --

3 QUESTION: What do you suggest, then, that the  
4 government do to meet this rather offensive problem?

5 MR. HORSTMAN: That's a very difficult  
6 question, Your Honor.

7 QUESTION: I take it on your theory here all  
8 of these smugglers like your client would be permitted  
9 to come in and be released.

10 MR. HORSTMAN: We submit that if you look at  
11 the facts in the reported cases, that is not happening.  
12 What happened in de Hernandez is not the cause of the  
13 drug problem in this country. You can look at the many,  
14 many cases decided both in the Ninth and Eleventh  
15 Circuits where there is articulable suspicion.

16 Our point is there was no articulable  
17 suspicion in this case. Our point --

18 QUESTION: Well, it was certainly  
19 articulable. What the court, the Ninth Circuit wanted  
20 was something more than that. It wanted evidence that  
21 she was carrying a laxative or other things that are  
22 above and beyond an articulable, reasonable suspicion  
23 that would meet a Terry stop standard.

24 MR. HORSTMAN: Well, Your Honor, the Solicitor  
25 General said, the Deputy Solicitor General, that they

1 felt that it was uncontested a few minutes ago that  
2 there was in fact reasonable suspicion here.

3 It's important to point out that reasonable  
4 suspicion was never addressed below, and there was --

5 QUESTION: Well, do you agree that there was?

6 MR. HORSTMAN: We -- our position is that  
7 there was no reasonable suspicion to conduct the strip  
8 search, the first strip search; that all that they had  
9 at that time were vague profile characteristics. They  
10 were -- they could conduct a routine Customs search and  
11 seizure, but once they began a more intrusive search --  
12 that is, that first strip search -- they had to have  
13 something more than she did not speak English --

14 QUESTION: More than the profile.

15 MR. HORSTMAN: More than the profile.

16 QUESTION: The knowledge of what she was  
17 carrying in her luggage and her statements.

18 MR. HORSTMAN: Yes. As a matter of fact, Your  
19 Honor, if you look closely at the facts, Rosa Elvira  
20 Montoya de Hernandez --

21 QUESTION: Do you think that our cases support  
22 your statement that there wasn't reasonable suspicion?

23 MR. HORSTMAN: Yes, Your Honor. We believe  
24 that this case is the different case. In other words,  
25 this case is not the routine case. If you look at the



1 facts of this case, she had -- perhaps she was very  
2 cunning and clever, but there just wasn't reasonable  
3 suspicion. Everything she said rang true. She said she  
4 was here to buy things for her husband's --

5 QUESTION: Do you mean that it was true that  
6 she was going to J.C. Penney to spend \$5,000 to buy  
7 stuff to take to her husband?

8 MR. HORSTMAN: Well, Your Honor, in fact she  
9 was lying, and in fact she was guilty, and --

10 QUESTION: Well, does lying, in your mind, get  
11 very close to suspicion?

12 MR. HORSTMAN: Well, but the question is what  
13 did the Customs officers know at that time.

14 QUESTION: That she's lying.

15 (Laughter.)

16 MR. HORSTMAN: They may have had a suspicion  
17 that she was lying, but it was nothing more than --

18 QUESTION: I thought you said they knew she  
19 was lying?

20 MR. HORSTMAN: No, I don't believe I said  
21 that, Your Honor.

22 QUESTION: Well, don't you know now say it?

23 MR. HORSTMAN: Well, we now know that she was  
24 in fact lying, but it seems to me that it's not  
25 productive to look at the decisions they made, and the

1 choices she was given, and the reasonableness of their  
2 conduct in light of what we have subsequently discovered  
3 concerning her guilt.

4 Obviously, it would have been a travesty on  
5 justice to release her, but the Fourth Amendment can  
6 only protect all our rights. If we look back at what  
7 they knew and the reasonable inferences they could make  
8 from what they knew then, and it just doesn't support  
9 the way in which they intruded upon her privacy.

10 QUESTION: Are you aware of any statistics  
11 that demonstrate how often someone detained at the  
12 border for -- on suspicion of alimentary canal smuggling  
13 is in fact found to have been smuggling?

14 MR. HORSTMAN: Yes, Your Honor. If you have  
15 my brief, if you'd refer to footnote number 88 for a  
16 moment.

17 The statistics, I certainly would concede,  
18 have not been done with the conscientiousness that  
19 perhaps they could and should have, but if you look at  
20 footnote 88, the statistics available at least in the  
21 reported cases indicate that innocent persons are swept  
22 with alarming regularity into these very intrusive body  
23 cavity and strip searches at the border.

24 For instance, in the study that was done in  
25 Guadalupe Garzo, only 29 percent of the people at the

1 border subjected to strip searches were found to contain  
2 narcotics.

3 QUESTION: Well, that was back in 1968.

4 MR. HORSTMAN: Yes.

5 QUESTION: That's pretty old, isn't it?

6 MR. HORSTMAN: It is.

7 QUESTION: I wonder if with all the experience  
8 the government has had in the intervening years with  
9 increasing drug traffic if there isn't a little more  
10 skill in detection today.

11 MR. HORSTMAN: I don't know, Your Honor, and I  
12 don't know of any more recent statistics. But we would  
13 submit that the burden is on the government to show  
14 statistics that show that innocent persons are not being  
15 brought in and subjected to these very intrusive  
16 searches. As this Court held in Royer at page 500, the  
17 burden is on the government.

18 QUESTION: Well, you say 29 percent recovery  
19 rate is unreasonable. Now, surely you don't want a  
20 hundred percent recovery rate before you say it's  
21 permissible, do you?

22 MR. HORSTMAN: No. But, Your Honor --

23 QUESTION: What recovery rate would you settle  
24 for as being reasonable?

25 MR. HORSTMAN: A question I cannot answer.

1 All I can say is that in the balance of reasonableness,  
2 the extent to which any government procedure impinges on  
3 the rights of innocent persons belongs in that balance,  
4 and --

5 QUESTION: Well, but that really doesn't help  
6 decide the particular facts of this case, I don't think.

7 MR. HORSTMAN: I don't think this Court has to  
8 set a bright line standard in terms of the percentage  
9 that the government has to come up to in order to  
10 conduct these searches, but certainly the other 70  
11 percent of the innocent people who are perhaps in Ms. de  
12 Hernandez's position have their rights. And keep in  
13 mind, if Ms. de Hernandez --

14 QUESTION: Mr. Horstman --

15 MR. HORSTMAN: -- I know, Justice Marshall,  
16 she was lying and she was guilty, but had she been  
17 innocent, this case never would have come before this  
18 Court. She would have gone --

19 QUESTION: But, Mr. Horstman, may I interrupt  
20 with a question there? Even if you had a probable cause  
21 standard -- I don't know just what percentage of  
22 probability that means, but assume it's 50 percent --  
23 doesn't that by hypothesis assume that 50 percent of the  
24 people who are searched may well be innocent? You'll  
25 always have a significant probability of innocent people



1 being searched under whatever your standard is.

2 MR. HORSTMAN: That's correct, Your Honor, but  
3 in terms of the facts of this case, to give the Court's  
4 imprimatur to what was done in this case based upon  
5 their level of suspicion in this case would simply allow  
6 basically government agents at the border to conduct  
7 these very intrusive searches based on no more than an  
8 inchoate hunch and probably --

9 QUESTION: Well, this isn't an inchoate hunch  
10 here. I --

11 MR. HORSTMAN: I beg your pardon?

12 QUESTION: You're going to have trouble  
13 persuading me there wasn't a reasonable suspicion here.

14 MR. HORSTMAN: Well, Your Honor, I would like  
15 to address that. There was nothing that you will find  
16 in the other reported cases here -- for instance, there  
17 was no inconsistency in her passport or visa, no  
18 evidence of passport or visa tampering. She told that  
19 -- she had a perfectly logical and reasonable  
20 explanation for what she was doing. She offered them a  
21 phone number to call where they could corroborate her  
22 story, which they declined to do. She had a book of  
23 receipts.

24 In Mosquera-Ramirez, for instance, his  
25 passport showed two prior trips to Miami, and when the

1 agents confronted him with this, he became "very evasive  
2 and very nervous." When they noticed that Ms. de  
3 Hernandez had previous short trips to the United States,  
4 she showed them Exhibit 102, which was a book of  
5 receipts showing that on prior occasions which matched  
6 the entries in her passports she had actual receipts  
7 from the kinds of places she told the government that  
8 she was going to visit. She had corroborating  
9 circumstances for what she was doing. She had money  
10 that was sufficient for her purposes. For instance, in  
11 Mosquera-Ramirez, the Eleventh Circuit case, the man had  
12 \$1,295 which the agents figured out on the spot was  
13 insufficient to make the purchases he said he wanted to  
14 make. He had an inherently incredible story. He worked  
15 in a pool hall, and yet he said he was here to buy  
16 stereo components.

17 QUESTION: Well, suppose we limit it to the  
18 facts in this case. That wouldn't be enough? Whereas  
19 she couldn't speak English, she had no family or friends  
20 in the United States --

21 MR. HORSTMAN: Yes.

22 QUESTION: -- She was coming to buy  
23 merchandise and clothes from various stores.

24 MR. HORSTMAN: That would --

25 QUESTION: She had no plans to stay. She was

1 just going to ride around in taxicabs. She had one pair  
2 of shoes and no toilet articles of any kind, and she  
3 carried a billfold with over \$5,000 in it. She was  
4 going to ride a whole lot of taxis.

5 (Laughter.)

6 QUESTION: Do purchasers from other countries  
7 coming here to buy merchandise to resell in their own  
8 countries ordinarily purchase it from retail stores, or  
9 do they go to wholesalers?

10 MR. HORSTMAN: I don't know the answer to  
11 that, Your Honor, but --

12 QUESTION: Well, logically as a matter of  
13 economics, what would be the answer to it?

14 MR. HORSTMAN: Uh, logic --

15 QUESTION: Would it not alert you if you were  
16 a Customs agent that there was something odd about  
17 someone, a buyer for a store in another country buying  
18 at retail in this country?

19 MR. HORSTMAN: No, Your Honor. As a matter of  
20 fact, Ms. de Hernandez was not here as a representative  
21 of a large concern. She apparently -- she and her  
22 husband had basically what we would call a mom and pop  
23 store, and perhaps she didn't have any --

24 QUESTION: Well, it still must make a profit  
25 in order to justify itself.

1 MR. HORSTMAN: Certainly, but --

2 QUESTION: Mom and pop stores buy from  
3 wholesalers, not from retailers.

4 MR. HORSTMAN: Maybe not. Maybe she didn't  
5 have enough -- maybe the wholesalers would not sell in a  
6 small enough quantity. Maybe she didn't have a big  
7 enough capital to buy from a wholesaler. Again --

8 QUESTION: Five thousand is quite a piece of  
9 merchandise for a wholesaler. Wouldn't that be enough,  
10 reasonably, to alert any intelligent person that there  
11 was something odd about this trip?

12 MR. HORSTMAN: No, Your Honor, not in terms of  
13 the intrusive procedures that they intended to impose.  
14 The fact that she arrived with cash to make purchases  
15 from J.C. Penney and K-Mart certainly isn't the kind of  
16 suspicious circumstances that would authorize the kinds  
17 of intrusive procedures employed here. Again, it's a  
18 balancing. The more intrusive procedure, the stronger  
19 level of suspicion that's needed. And if you compare  
20 the facts of this case with Mosquera-Ramirez or any of  
21 the other Ninth, Eleventh or Fifth Circuit cases, the  
22 evidence just wasn't here.

23 The final point I would like to make in terms  
24 of the suspicion that they had, the government makes at  
25 this point before this Court a great -- gives great



1 significance to the fact that she wore two pairs of  
2 undergarments; but it's important to point out that that  
3 fact was not a fact that was deemed suspicious by the  
4 agents in the field who this Court has again and again  
5 said their trained eyes can often detect things and  
6 suspicious circumstances that wouldn't appear suspicious  
7 to the untrained person.

8           As a matter of fact, the Solicitor General  
9 even in their petition for cert had this to say about  
10 that first strip search: "The search failed to produce  
11 any evidence of contraband." It's only in the Solicitor  
12 General's brief on the merits that they begin to say  
13 that the fact that she wore two pairs of undergarments  
14 with a paper towel in the crotch was suspicious. And I  
15 submit to you the reason they're doing that is because  
16 the Solicitor General is desperate in this case for  
17 reasonable suspicion.

18           It was given no significance by the Customs  
19 agents, no significance by the matron who searched her,  
20 who wrote it down as being consistent with her having  
21 some type of vaginal discharge. Only before this Court  
22 does the Solicitor General now say that was extremely  
23 suspicious.

24           Unless the Court has further questions, I have  
25 nothing.

1 QUESTION: What actually happened to Ms. de  
2 Hernandez in terms of any criminal prosecution, and  
3 where is she presently?

4 MR. HORSTMAN: Okay. What happened was she  
5 was given a two-year sentence by Judge Gray. She served  
6 out her sentence. Shortly after the Ninth Circuit -- at  
7 about the same time the Ninth Circuit reversed the  
8 conviction, she was released after doing approximately  
9 17 months of the sentence. She was then immediately  
10 deported and is apparently now back in Colombia,  
11 although we do not have an address or a telephone number  
12 for her. We have not heard anything from her since she  
13 was deported. And, in fact, as far as we know, she does  
14 not even know that this Court granted cert or that the  
15 case is here today.

16 CHIEF JUSTICE BURGER: Do you have anything  
17 further, Mr. Frey?

18 ORAL ARGUMENT OF ANDREW LEWIS FREY, ESQ.,

19 ON BEHALF OF THE PETITIONER -- REBUTTAL

20 MR. FREY: Just a couple of things.

21 First, I want to plead not guilty to  
22 desperation, and I hope the Court doesn't have even a  
23 reasonable suspicion otherwise.

24 I will agree with Mr. Horstman that the facts  
25 in the Eleventh Circuit cases which we've addressed in

1 our cert oppositions to some of those cases where  
2 petitions were filed were stronger than this case.  
3 Indeed, in our view in most of those cases they amounted  
4 to probable cause.

5 But I think as the questioning of the Court  
6 made clear, all Mr. Horstman has really been able to  
7 establish is that it's possible that his client was  
8 telling the truth and was not an alimentary canal  
9 smuggler but a legitimate business traveler. Obviously,  
10 that possibility is not enough to defeat a reasonable  
11 suspicion.

12 And with regard to this Customs-Immigration  
13 question, there is a general practice of  
14 cross-designating Customs and Immigration agents.  
15 There's no evidence in the record in this case as to  
16 whether or not they were cross-designated. Where they  
17 are cross-designated, which is usually true at ports of  
18 entry -- I'm talking about the inspectors within the  
19 secure area -- they -- Immigration inspectors can  
20 perform Customs functions and vice versa.

21 Now, even if the Customs officer were not  
22 cross-designated, however, it's perfectly clear that if  
23 he gained information that the person had a forged visa  
24 or was otherwise ineligible for entry under the  
25 immigration laws, you should have no doubt in your mind

1 that he would take the person back to Immigration.

2 Now, in this case what happened and what often  
3 happens at the border -- for instance, people swimming  
4 across the Rio Grande when they are caught, are normally  
5 if they are willing to just turn around and swim back to  
6 the other side or be driven back to the other side,  
7 there is just an informal allowance of them to leave.  
8 Only if they say they want to say would they be subject  
9 to a formal exclusion proceeding.

10 Even if, as respondent contends, she had  
11 entered the country for immigration purposes after her  
12 passport was stamped, however, that would mean nothing  
13 more than that under these circumstances there would be  
14 a deportation proceeding rather than an exclusion  
15 proceeding, and of course, she would be detained for  
16 purposes of the deportation proceeding anyway. So no  
17 matter how you slice it, she does not have a right to  
18 come in.

19 The Placensia case deals with resident aliens  
20 who live in the United States, and I don't have the case  
21 with me, but I think the language --

22 QUESTION: Well, Mr. Frey, if it were a  
23 citizen coming back into this country or a permanent  
24 resident alien coming back into the country, do I  
25 understand you to say that the government policy would



1 be to detain someone under the circumstances of this  
2 case and not allow them to leave and go back to wherever  
3 they were coming from; for example, if it were an entry  
4 at Juarez to go back into Mexico?

5 MR. FREY: That would be -- definitely would  
6 be the policy, and that indeed would be the policy with  
7 respect to non-resident aliens, visitors. We would not  
8 simply let them go back. I mean obviously --

9 QUESTION: But I'm asking for a citizen. You  
10 wouldn't let the citizen leave and go back to Mexico.

11 MR. FREY: We would not, not as long as we had  
12 a reasonable suspicion. We would hold them until we  
13 could -- and if we had a citizen who we thought was --  
14 who Immigration thought might be wanted by foreign  
15 police who presented himself at the border, we might  
16 detain him equally for purposes of checking that out if  
17 it could be done within a reasonable period of time.

18 QUESTION: Mr. Frey, can I ask you this one  
19 question? I know that the people at the border decided  
20 not to seek a court approval of an X-ray. In your view  
21 or in the government's view after having studied the  
22 case, do you think there was sufficient evidence so that  
23 an order compelling an X-ray could have been obtained  
24 properly?

25 MR. FREY: Well, are you asking whether I

1 think the clear indication standard was satisfied or  
2 whether --

3 QUESTION: Whatever standard you think is the  
4 one we should apply. Do you think -- see, your case, as  
5 I understand it, rests in part on the notion that it was  
6 not unreasonable because you gave her the choice to  
7 consent to an X-ray. And I'm wondering if you think you  
8 could have compelled her to submit to an X-ray based on  
9 the information --

10 MR. FREY: I don't want to suggest that we had  
11 to give her that choice, but we think that's a fact --

12 QUESTION: But you rely rather heavily on it,  
13 I think.

14 MR. FREY: We believe we could have compelled  
15 her in the sense of ordering her --

16 QUESTION: Assuming no health hazard is  
17 demonstrated.

18 MR. FREY: And a question would arise only if  
19 we had to use physical force; that is, if there were  
20 physical resistance.

21 QUESTION: Well, but you used physical force  
22 here. I don't see why that's different.

23 MR. FREY: No, we did not use -- no, we did  
24 not use -- I mean when we got the court order --

25 QUESTION: Well, she wasn't free to go.

1 MR. FREY: Oh, no, but you have to  
2 distinguish, I think, between a voluntary consent in the  
3 sense of a free choice of the individual as to what to  
4 do and a nonforceable but not voluntary. That is, we  
5 could say to somebody you're coming with us for an  
6 X-ray, take them to the hospital, give them to the  
7 doctor and say if it's okay, take an X-ray. If they  
8 submit to that, that would not be a voluntary consent to  
9 the X-ray, but it would not be a physically forced X-ray  
10 in the sense that in Roshen against California he was --  
11 the emetics were forced down his throat.

12 QUESTION: Are you -- I just want to be sure I  
13 don't -- I understand your position.

14 MR. FREY: But --

15 QUESTION: Are you saying that you could or  
16 could not, assuming you followed all the procedures that  
17 might be appropriate, would there have been a  
18 constitutional objection to your obtaining an X-ray  
19 against her will?

20 MR. FREY: No. Our position is that we could  
21 do that on reasonable suspicion.

22 QUESTION: Well, on the facts of this case,  
23 whatever --

24 MR. FREY: Definitely. That is definitely our  
25 position.

1 Thank you.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen.

3 The case is submitted.

4 We'll hear arguments next in Russell against  
5 the United States.

6 (Whereupon, at 11:02 a.m., the case in the  
7 above-entitled matter was submitted.)

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CERTIFICATION.

Person Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-755 - UNITED STATES, Petitioner V. ROSA ELVIRA MONTOYA DE HERNANDEZ

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Paul A. Richardson

(REPORTER)

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