

PRACTICAL SUPPRESSION ISSUES ON APPEAL

MICHAEL C. GROSS

**Gross & Esparza, PLLC
1524 North Alamo Street
San Antonio, Texas 78215
(210) 354-1919
(210) 354-1920 Fax
Website: www.txmilitarylaw.com
Email: lawofcmg@gmail.com**

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1524 North Alamo Street
San Antonio, Texas 78215
lawofcmg@gmail.com
www.txmilitarylaw.com
(210) 354-1919

MICHAEL C. GROSS
CURRICULUM VITAE

EDUCATION

B.A., Trinity University, San Antonio, Texas, 1984
J.D., St. Mary's University, San Antonio, Texas, 1987

PROFESSIONAL ACTIVITIES AND RECOGNITIONS

Judge Advocate, U.S. Marine Corps, 1988-1992
Associate, Zimmermann & Lavine, P.C., Houston, Texas, 1992 - 1996
Law Office of Michael C. Gross, P.C., San Antonio, Texas, 1996 - 2012
Gross & Esparza, P.L.L.C., San Antonio, Texas, 2012 - Present
Board Certified, Criminal Trial Advocacy, National Board of Trial Advocacy, 1997
Board Certified, Criminal Law, Texas Board of Legal Specialization, 1995
Board Certified, Criminal Appellate Law, Texas Board of Legal Specialization, 2011
President, Texas Criminal Defense Lawyers Association, 2021-2022
President, San Antonio Criminal Defense Lawyers Association, 2011-2012
Defender of the Year, San Antonio Criminal Defense Lawyers Association, 2008
Defender of the Year, San Antonio Criminal Defense Lawyers Association, 2009
Named in Best Lawyers in America, 2005 - 2022
Named in Best Lawyers as San Antonio Non-White-Collar Lawyer of the Year - 2015, 2017
Named in Texas Super Lawyers in Texas Monthly Magazine, 2004 - 2022
Named Top 50 Texas Super Lawyers in Central and West Texas Region, 2010 - 2012, 2014
Named in Best Lawyers in San Antonio by Scene in San Antonio Magazine, 2004 - 2022
Named Top 10 Criminal Defense Attorneys in San Antonio by Scene Magazine - 2013
AV rated by Martindale Hubble

COURT ADMISSIONS

Supreme Court of the United States, 1991
Supreme Court of the State of Texas, 1987
United States Court of Appeals for the Armed Forces, 1990
United States Court of Appeals for the Fifth Circuit, 1990
United States Court of Appeals for the Tenth Circuit, 1998
United States District Court for the Northern District of Texas, 1990
United States District Court for the Southern District of Texas, 1991
United States District Court for the Eastern District of Texas, 1991
United States District Court for the Western District of Texas, 1992

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I. THE FOURTH AMENDMENT IN GENERAL

A. The Fourth Amendment compared to the Fifth Amendment

The Fourth Amendment operates in a different manner than the Fifth Amendment. United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). The Fifth Amendment privilege against self-incrimination is a fundamental trial right of criminal defendants. Id. Police conduct pretrial may impair that right, but the constitutional violation occurs only at trial. Id. The Fourth Amendment functions differently. Id. The Fourth Amendment prohibits unreasonable searches and seizures regardless of whether or not the evidence will be used in a criminal trial. Id. A violation of the Fourth Amendment occurs at the time of the unreasonable governmental intrusion. Id.

B. Searches outside the United States

Historical data regarding the Constitution reveals “that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.” United States v. Verdugo-Urquidez, *supra* 494 U.S. at 266. “There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.” Id., 494 U.S. at 267. In fact, “not every constitutional provision applies to

governmental activity even where the United States has sovereign power.” Id., 494 U.S. at 268.

Foreign officials violating the rights of American citizens in a foreign country are not subject to the Constitution unless the foreign officials are acting as agents for state or federal law enforcement. Alvarado v. State, 853 S.W.2d 17 (Tex. Crim. App. 1993).

C. Aliens and the Fourth Amendment

The Preamble declares that the Constitution is ordained and established by “the People of the United States.” Id., 494 U.S. at 265. The text of the Fourth Amendment, as opposed to the Fifth Amendment, extends its reach only to “the people.” Id. This suggests that “the people” protected by the Fourth Amendment “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” Id. The language of the Fourth Amendment “contrasts with the words ‘person’ and ‘accused’ used in the Fifth and Sixth Amendments regulating procedure in criminal cases.” Id.

Aliens within the United States “receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.” United States v. Verdugo-Urquidez, *supra* 494 U.S. at 271. The exclusionary rule of the Fourth Amendment applies to civil deportation proceedings. Id., 494 U.S. at 272. This does not mean that the Fourth Amendment automatically applies to aliens in this country. Id.

In Texas, a court has held that the Fourth Amendment and Article I, Section 9 of the Texas Constitution do not apply to illegal

aliens “unless they have developed sufficient connection with this country to be considered a part of the community.” Torres v. State, 818 S.W.2d 141, 143 n.1 (Tex. App. - Waco 1991), rev’d on other grounds, 825 S.W.2d 124 (Tex. Crim. App.).

Federal courts have held that aliens, illegal or not, are entitled to Fourth Amendment protections. United States v. Barbera, 514 F.2d 294 (2nd Cir. 1975); Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1975), modified, 548 F.2d 715 (7th Cir. 1977).

II. SEARCHES

A. Reasonable expectation of privacy

The Fourth Amendment states that, “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.”

Article I, § 9 of the Texas Constitution states that, “The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.”

The “capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” Minnesota v. Olson, 495 U.S. 91, 95, 110 S.Ct. 1684, 1687, 109 L.Ed.2d 85 (1990),

citing Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). A subjective expectation of privacy is legitimate if it is “one that society is prepared to recognize as ‘reasonable.’” Minnesota v. Olson, supra, 495 U.S. at 95-96, 110 S.Ct. at 1687, citing Rakas v. Illinois, supra, 439 U.S. at 143-144.

“[T]he Fourth Amendment protects people, not places’ . . . and provides sanctuary for citizens wherever they have a legitimate expectation of privacy.” Minnesota v. Olson, supra, 495 U.S. at 97, 110 S.Ct. at 1688, citing Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). An overnight guest has a legitimate expectation of privacy in the home of the host. Id. A person also has a reasonable expectation of privacy in their body and, as such, officials attaching a GPS monitoring device to an individual constitutes a search. Grady v. North Carolina, 575 U.S. 306, 135 S.Ct. 1368, 191 L.Ed.2d 459 (2015). However, A person’s expectation of privacy is not offended by the taking of a buccal (DNA) swab of his cheeks in the context of a valid arrest supported by probable cause. Maryland v. King, 569 U.S. 435, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013).

In Halili v. State, 430 S.W.3d 549 (Tex. App. - Houston [14th Dist.] 2014, no pet.), the court dealt with the situation where a peace officer was outside his jurisdiction when he entered a gaming establishment and used gambling machines therein, and later supplied this information in support of a warrant. The court held that the defendant lacked standing to invoke Tex. Code Crim. Proc. Ann. art. 38.23(a), the Texas exclusionary statute, because none of his rights were violated by the investigation. The court stated that had the officer acted in a purely private capacity, he could have observed the information reported in his

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