

**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](http://www.txmilitarylaw.com)  
Email: [lawofcmg@gmail.com](mailto:lawofcmg@gmail.com)**

**2023 Robert O. Dawson Conference on Criminal Appeals  
Austin, Texas  
May 10-12, 2023**

**GROSS & ESPARZA, P.L.L.C.**  
**1524 North Alamo Street**  
**San Antonio, Texas 78215**  
[lawofcmg@gmail.com](mailto:lawofcmg@gmail.com)  
[www.txmilitarylaw.com](http://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

## TABLE OF CONTENTS

|     |                                                                       |    |
|-----|-----------------------------------------------------------------------|----|
| I.  | The Fourth Amendment in General . . . . .                             | 1  |
| A.  | The Fourth Amendment compared to the Fifth Amendment . . . . .        | 1  |
| B.  | Searches outside the United States . . . . .                          | 1  |
| C.  | Aliens and the Fourth Amendment . . . . .                             | 1  |
| II. | Searches . . . . .                                                    | 2  |
| A.  | Reasonable expectation of privacy . . . . .                           | 2  |
| B.  | Warrantless searches . . . . .                                        | 3  |
| 1.  | Homes . . . . .                                                       | 3  |
| 2.  | Vehicles . . . . .                                                    | 5  |
| 3.  | Exigency (and blood draws) . . . . .                                  | 6  |
| 4.  | Plain view . . . . .                                                  | 7  |
| 5.  | Inevitable discovery . . . . .                                        | 7  |
| 6.  | Open fields . . . . .                                                 | 7  |
| 7.  | Independent source . . . . .                                          | 8  |
| 8.  | Community caretaker function . . . . .                                | 8  |
| 9.  | Dog sniffs . . . . .                                                  | 8  |
| 10. | Police error . . . . .                                                | 9  |
| C.  | Consent to search . . . . .                                           | 9  |
| 1.  | In general . . . . .                                                  | 9  |
| 2.  | Home in which occupant consents . . . . .                             | 10 |
| D.  | Impoundment and inventory searches . . . . .                          | 11 |
| E.  | Cell phone searches and cell towers . . . . .                         | 12 |
| F.  | GPS devices and body tracking . . . . .                               | 12 |
| G.  | Administrative searches . . . . .                                     | 13 |
| H.  | Booking searches . . . . .                                            | 14 |
| I.  | Jail visual inspections of detainees . . . . .                        | 14 |
| J.  | Search warrants . . . . .                                             | 15 |
| 1.  | Probable cause . . . . .                                              | 15 |
| 2.  | Contents . . . . .                                                    | 15 |
| 3.  | Particularity and review . . . . .                                    | 15 |
| 4.  | Computers . . . . .                                                   | 18 |
| 5.  | Blood draws . . . . .                                                 | 19 |
| 6.  | Detaining people beyond the premises covered by the warrant . . . . . | 20 |
| K.  | Effect of illegal search . . . . .                                    | 21 |
| 1.  | Suppression . . . . .                                                 | 21 |
| 2.  | Attenuation of the taint . . . . .                                    | 21 |
| 3.  | Inevitable discovery and independent source . . . . .                 | 21 |
| 4.  | Good faith . . . . .                                                  | 22 |
| 5.  | Exclusionary rule and exigent circumstances . . . . .                 | 22 |

|       |                                                                            |    |
|-------|----------------------------------------------------------------------------|----|
| III.  | Seizures . . . . .                                                         | 23 |
| A.    | Defined . . . . .                                                          | 23 |
| B.    | When seizures are justified . . . . .                                      | 24 |
| C.    | Seizure of property . . . . .                                              | 24 |
| IV.   | Detentions and Arrests . . . . .                                           | 24 |
| A.    | Basis for an investigative detention . . . . .                             | 24 |
| B.    | When the duration of the detention is unreasonable . . . . .               | 26 |
| C.    | An investigative detention compared to an arrest . . . . .                 | 26 |
| D.    | Basis for an arrest . . . . .                                              | 27 |
| E.    | An arrest warrant compared to a capias . . . . .                           | 28 |
| F.    | Warrantless arrests in Texas . . . . .                                     | 29 |
| 1.    | Geographic jurisdiction and warrant exceptions . . . . .                   | 29 |
| 2.    | Article 14.03(a)(1) - suspicious place and guilty of some felony . . . . . | 30 |
| 3.    | Article 14.04 - commit felony and about to escape . . . . .                | 30 |
| G.    | Entering private property to make an arrest . . . . .                      | 31 |
| H.    | Effect of illegal arrest . . . . .                                         | 31 |
| 1.    | In general . . . . .                                                       | 31 |
| 2.    | Police errors . . . . .                                                    | 32 |
| 3.    | Judicial errors . . . . .                                                  | 32 |
| V.    | Traffic Stops . . . . .                                                    | 32 |
| A.    | Basis for a stop of a vehicle . . . . .                                    | 32 |
| B.    | 911 calls . . . . .                                                        | 33 |
| C.    | Arrest or detention . . . . .                                              | 34 |
| D.    | Drivers v. passengers . . . . .                                            | 34 |
| E.    | Dog sniffs . . . . .                                                       | 35 |
| VI.   | The Border . . . . .                                                       | 36 |
| VII.  | Informants . . . . .                                                       | 37 |
| VIII. | Suppression Hearings . . . . .                                             | 39 |
| A.    | Burden of proof regarding searches and seizures . . . . .                  | 39 |
| B.    | Burden of proof regarding arrests . . . . .                                | 40 |
| C.    | <u>Ford v. State</u> . . . . .                                             | 40 |
| D.    | Article 28.01 pretrial hearings . . . . .                                  | 41 |
| 1.    | Contents of a motion to suppress . . . . .                                 | 41 |
| 2.    | Timeliness of a motion to suppress . . . . .                               | 42 |
| IX.   | Appellate Review of Suppression Issues . . . . .                           | 42 |
| A.    | Preservation and Standard of review . . . . .                              | 42 |
| B.    | Consideration of trial evidence . . . . .                                  | 42 |

## **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

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Practical Suppression Issues on Appeal

First appeared as part of the conference materials for the  
2023 Robert O. Dawson Conference on Criminal Appeals session  
"Practical Suppression Issues on Appeal"