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Opinion No. 09-97

Applicability of constitutional protections against unreasonable search and seizure to foreign terrorists

QUESTION

Whether the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution apply to foreign terrorists operating on United States soil.

OPINION

The constitutional protections against unreasonable search and seizure extend to "the people," understood as 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." Because lawfully admitted aliens voluntarily assume the benefits and burdens of American law, they are generally held to enjoy the protections of the Fourth Amendment. The applicability of the Amendment to aliens whose presence in the United States is unlawful turns on a fact-specific inquiry into the substantiality of their connections with this country. Aliens who cannot demonstrate a substantial connection to the United States may not invoke the shelter of the Fourth Amendment or, by extension, Article I, section 7.

ANALYSIS

In Op. Tenn. Att'y Gen. 09-51 (Apr. 8, 2009), this Office opined that proposed legislation, House Bill 1961, specifying that a search warrant may issue on reasonable suspicion of an act of terrorism by any person, would violate the Warrants Clause of the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution.

We have been asked to discuss whether these constitutional protections extend to foreign terrorists—and, in particular, to illegal alien terrorists—operating on United States soil. In *United States v. Verdugo-Urquidez*, the United States Supreme Court considered whether the Fourth Amendment applied to the search and seizure by United States agents of property that was owned by a nonresident alien and located in a foreign country. *Verdugo-Urquidez*, 494 U.S. 259, 261 (1990). Concluding that it did not, a five-Justice majority of the Court observed that the text of the Fourth Amendment extends its reach only to "the people." *Id.* at 265. The Court explained:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and

> established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, 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 Court acknowledged that "the people" extends beyond the citizenry; prior decisions of the Court established that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271. At another juncture, the Court indicated that an alien's presence in the United States must be "voluntary" and that the alien must have "accepted some societal obligations . . . ." *Id.* at 273. The *Verdugo* decision left open the question how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States. *Id.* at 272.

One member of the majority, Justice Kennedy, filed a separate concurring opinion. *See id.* at 275-78. In it, he stated that he could not "place any weight on the reference to 'the people' in the Fourth Amendment as a source restricting its protections." *Id.* at 276. Accordingly, Justice Kennedy remarked, "If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply." *Id.* at 278.

The "substantial connection" test announced in *Verdugo* has engendered an understandable diversity of opinion in the lower courts. Because *Verdugo* concerned an extraterritorial search—and because Justice Kennedy's separate concurrence suggests that the test did not command the approbation of a majority of the Court's members—some lower courts have characterized the formulation as a dictum, as a mere plurality viewpoint, or as both. *See, e.g., United States v. Guitterez*, 983 F. Supp. 905, 915 (N.D. Cal. 1998), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. Dec. 7, 1999) (unpublished opinion); *United States v. Iribe*, 806 F. Supp. 917, 919 (D. Colo. 1992), *rev'd in part on other grounds*, 11 F.3d 1553 (10th Cir. 1993). Two federal district court decisions, albeit of questionable precedential value, have flatly declined to apply the "substantial connection" test on this basis. *See Guitterez*, 983 F. Supp. at 915 (stating that *Verdugo* left open the question whether an illegal alien must demonstrate a "connection" with this country as a prerequisite to asserting the shelter of the Fourth Amendment, and concluding that "no such obligation exists"); *Iribe*, 806 F. Supp. at 919 ("This court rejects the notion that Denver police officers are not restrained from conducting unreasonable searches and seizures of the person and property of an alien in Colorado.").

The greater weight of authority, however, either accepts the precedential force of *Verdugo* or proceeds to the merits after having assumed the validity of the "substantial connection" test. *See, e.g., Martinez-Aguero v. Gonzales*, 459 F.3d 618, 625 (5th Cir. 2006) ("We need not decide whether *Verdugo-Urquidez* is controlling, because even under the more demanding test, Martinez Aguero has 'developed substantial connections with the country' and

earned the protection of the Fourth Amendment."); *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) ("We choose, however, not to reach the question [whether defendants had demonstrated sufficient connection with this country] because even if they were entitled to invoke the Fourth Amendment, their effort would be unsuccessful."). In its application, the "substantial connection" test yields a spectrum of results turning on the specific facts of the alien defendant's presence in the United States. Aliens who have been lawfully admitted to the United States are typically held to enjoy the protections of the Fourth Amendment on the theory that they have voluntarily assumed the benefits and burdens of the same law that is imposed on the citizenry. *See Riechmann v. Florida*, 581 So.2d 133, 138 (Fla. 1991) (holding that German citizen and resident admitted to the United States "did have a voluntary attachment to the United States and thus had greater entitlement to fourth amendment protection, having assumed the benefits and burdens of American law when he chose to come to this country."); *see also Barona*, 56 F.3d at 1094 (stating that lawful resident aliens are among "the people" of the United States); *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1267 (D. Utah 2003). ("Tourists from overseas and legally resident aliens would appear to be prime candidates for inclusion under a sufficient connection test."), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004). By contrast, previously deported alien felons have been held to be categorically excluded from Fourth Amendment coverage. *Esparza-Mendoza*, 265 F. Supp. 2d at 1271 ("[A]n individual previously deported [as an] alien felon is not free to argue that, in his particular case, he possesses a sufficient connection to this country to receive Fourth Amendment coverage (unless, of course, he could prove he was in this country lawfully)."); *see United States v. Gutierrez-Casada*, 553 F. Supp. 2d 1259, 1272 (D. Kan. 2008) ("[T]he court is examining the Fourth Amendment rights of a previously deported, aggravated felonious illegal alien who chose to reenter the United States knowing that the sovereign country, by due process of law, had recently ordered him to leave and stay out of the country. Simply put, such persons are not entitled to the same Fourth Amendment protections as are ordinary citizens.").

Other aliens whose presence in the United States is unlawful occupy a middle ground. In one instance, an "excludable" alien, *i.e.*, one who had been denied entry to the country, was held to have developed substantial connections with the United States by virtue of earlier monthly visits on a valid border-crossing card to accompany a relation to retrieve Social Security checks. *Martinez-Aguero*, 459 F.3d at 625 ("There may be cases in which an alien's connection with the United States is so tenuous that he cannot reasonably expect the protection of its constitutional guarantees; the nature and duration of Martinez-Aguero's contacts with the United States, however, are sufficient to confer Fourth Amendment rights."). That ruling would suggest that the "substantial connection" test does not pose a particularly high bar. At least one magistrate judge has indicated that an alien who has never gained lawful admission to the country cannot demonstrate entitlement to Fourth Amendment protection because "it is only upon 'lawfully' entering the United States that an alien may begin to establish the substantial connections necessary . . . ." *United States v. Ullah*, No. 04-CR-30A(F), 2005 WL 629487, at *30 (W.D.N.Y. Mar. 17, 2005), *aff'd but not adopted by* 2006 WL 1994678, at *3 n.2 (W.D.N.Y. July 14, 2006) . In *United States v. Atienzo*, however, the same court that had ruled that previously deported alien felons are categorically excluded from qualifying for the protections of the Fourth Amendment held that a previously removed non-felon who thereafter illegally re-entered the country was not so barred. *United States v. Atienzo*, No. 2:04-CR-00534,

2005 WL 3334758, at *5 (D. Utah Dec. 7, 2005). The defendant in that case had continuously resided in the United States for a period of years, gained employment, paid taxes, and had family living in the country. *Id.* In the district court's view, these ties arguably sufficed to establish a substantial connection with the United States for Fourth Amendment purposes. *Id.*; *cf. Torres v. Texas*, 818 S.W.2d 141, 143 n.1 (Tex. Ct. App. 1991) (noting that illegal alien who had come to the United States on tourist visa that had since expired "demonstrated no meaningful ties to the community" during his two years in the United States, and hence was not entitled to Fourth Amendment protection), *vacated on other grounds by* 825 S.W.2d 142 (Tex. Crim. App. 1992).

Neither the courts of this State nor the courts of the federal Sixth Circuit have addressed a Fourth Amendment claim pressed by an alien defendant under the auspices of *Verdugo*. As a result, we are unable to offer assurances as to the reception of such a claim in Tennessee. Nonetheless, in view of prevailing decisions from other jurisdictions, it is our sense that the "substantial connection" test articulated in *Verdugo* would be greeted, at least, as persuasive authority, and that aliens who had been lawfully admitted to the United States would be deemed to satisfy it. Similarly, because Article I, section 7 of Tennessee Constitution "is identical in intent and purpose with the Fourth Amendment," *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001), *Verdugo* likely would inform analysis under the state constitution as well.

On such a standard, the applicability of the constitutional guarantees to aliens unlawfully in the United States would hinge on a fact-intensive inquiry into the nature of their connections with this country. An alien who had never been lawfully admitted to the United States, and whose illegal entry was effected for the purpose of carrying out an act of terrorism, would be unlikely to be considered part of the national community. A court would more likely allow an alien who long resided in Tennessee, albeit illegally, and who had developed meaningful professional and familial ties here, to avail herself of the protections of the state and federal constitutions if she subsequently came under suspicion of planning a terrorist event. *See Atienzo*, 2005 WL 3334758, at *5. As a practical matter, law enforcement may encounter difficulty in ascertaining the substantiality of a suspect's connections with the United States prior to determining what showing to make in support of a search warrant or whether a warrant is required at all.

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