



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this one is on the Fourth Amendment. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on [BarExamToolbox.com](#), and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast. Today we're going to be discussing the Fourth Amendment to the United States Constitution. In law school the Fourth Amendment is covered in Criminal Procedure class. For the bar exam, criminal procedure shows up on the MBE and the essays – for California and the UBE. Also, this is an incredibly important and practical part of the law to know.

Lee Burgess: We'll start first with a simple rule statement. The Fourth Amendment prohibits unlawful searches and seizures by government agents. To conduct a search, the police officer, or government agent, must have a valid search warrant. Where there is no warrant, the search is presumptively unreasonable, unless an exception to the warrant requirement applies. Today, we're going to be discussing when the Fourth Amendment applies and how to determine if an unlawful search has occurred. We won't get into the exceptions in this episode, and instead limit our discussion to determining when warrantless, unlawful search has occurred.

Lee Burgess: To guide your analysis, you should ask the following three questions:

1. Did a government agent conduct the search?
2. Does the individual have standing to challenge the search?
3. Did the actions of the government agent constitute a search?

Lee Burgess: If there is an affirmative answer to all three of these questions, the Fourth Amendment was likely violated. There may be some exceptions, but that is a topic for another day. So, let's walk through these three questions now, and then apply them to some hypotheticals.

Lee Burgess: First, we must determine if a government agent executed the search. The Fourth Amendment applies specifically to unlawful government searches. If your



neighbor, who is an accountant who doesn't work for the government at all, comes to your house and looks at your bank statements, the Fourth Amendment does not apply. However, if your neighbor was a police officer, the Fourth Amendment would apply. Your police officer neighbor is a government agent.

Lee Burgess: Now, this seems simple enough, but it is a common step that people miss on essay answers. When the essay states that a police officer was conducting the search, exam takers often jump right into the legality of the search. Take a second to state that the search was conducted by a government agent – it will earn some simple but important points on the essay. Also, remember that this isn't just about police officers. School administrators work for the government in a public school setting. Can you take a few moments to think of other "government actors", other than police officers? Airport TSA agents, the postal service? Yeah. What about UPS, FedEx, and a bouncer at a club? Typically no, unless they are acting on behalf of the government in some way.

Lee Burgess: The second question is whether or not the individual has standing to challenge the government's search. An individual's personal privacy rights must be invaded to have standing. This is satisfied if the person's own home was searched, or if they are an overnight guest in a house. However, an individual will not have standing if they are on the property for business purposes, or if one is a passenger in a car. Be careful of questions where multiple people are in an area and they are all challenging the government's conduct. This is often where standing questions arise. Think about where they are and what is being searched.

Lee Burgess: For example, let's say Alex and Betty are in Alex's house. Betty is visiting Alex for the afternoon to discuss a drug deal they are planning. The police come to the house and conduct a warrantless search, where they find drugs belonging to both Betty and Alex. In this scenario, only Alex has standing to challenge the search under the Fourth Amendment. Betty is a business visitor at Alex's house, and therefore her individual privacy rights were not invaded.

Lee Burgess: The third and final question, after determining that the search was conducted by a government agent and the individual has standing, is whether or not a search occurred. The government can conduct a search in one of two ways: by physically trespassing on a person's protected space, or by violating a person's reasonable expectation of privacy in a protected space. When analyzing a person's reasonable expectation of privacy, courts look to both the subjective and objective expectations of privacy. This means that the individual must



actually have an expectation of privacy in the space, and the expectation of privacy is one that society would deem reasonable.

Lee Burgess: So, let's use an example here to explain this further. Alex is on the phone with a friend when he walks by a police officer. He loudly states that he just bought drugs from a drug dealer down the street. The police officer hears Alex and wants to use this information to arrest Alex. Alex can't argue that his Fourth Amendment rights were violated, because there is no reasonable expectation of privacy for phone conversations on public streets. Courts have even held that there is no expectation of privacy for conversations in general, even if Alex were in his own home. However, if the police used wiretapping technology to overhear Alex's phone conversation, then Alex could claim that his Fourth Amendment rights have been violated. There is a reasonable expectation of privacy within a phone call itself, and the police's use of technology to overhear this conversation would violate Alex's reasonable expectation of privacy within the phone call. See how it can start to get a little complicated?

Lee Burgess: To determine whether or not an individual has a reasonable expectation of privacy, it is important to consider not just where the search occurred – like on the street, in their home, etc., but also what the police used to conduct the search. Certain tools or technologies, when used by police, can violate an individual's reasonable expectation of privacy and therefore constitute a search.

Lee Burgess: Now, if you've determined that an unlawful search occurred, the final piece of the puzzle is the remedy. Evidence seized in violation of the Fourth Amendment will be suppressed at trial. This is called the exclusionary rule. So, if the police violate someone's Fourth Amendment rights in collecting evidence, and no exceptions apply, the government cannot use that evidence against the individual during trial.

Lee Burgess: So now we've established the general rule – that the Fourth Amendment protects individuals from unlawful searches and seizures – and we've determined how to analyze whether a search violates the Fourth Amendment. Let's apply this analysis to a shortened hypothetical adapted from the [California bar exam from July 2019](#):

Lee Burgess: "Denise entered a coin shop. She pulled out a toy gun that appeared real and pointed it at the owner, Owen. Owen handed her a set of valuable coins and Denise fled. Later, the police received an anonymous email stating: 'Denise is your coin robber. She is trying to sell the stolen coins.' Detective Polly followed Denise and saw her using a payphone in a public alley. The payphone was not in a phone booth. Detective Polly walked past Denise and heard her softly say that



she had a set of Roman coins for sale. Later, Denise is arrested for robbery. She files a motion to suppress her statement on the payphone as a violation of her Fourth Amendment rights. How should the court rule?”

Lee Burgess: First, let’s start with the general rule: The Fourth Amendment prohibits unlawful searches and seizures by government actors. The Fourth Amendment is incorporated to the states through the Fourteenth Amendment. Remember that the Bill of Rights originally only applied to federal cases, until the Fourteenth Amendment. This is important to include, and another way to get a quick extra point.

Lee Burgess: Searches are presumptively unlawful without a valid search warrant. We know that Polly did not have a warrant, so if this is a search, it is presumptively unlawful.

Lee Burgess: So, let’s turn to our questions to analyze whether or not a search occurred. Was the alleged search conducted by a government agent? Yeah. We’re told that the police received an anonymous email and that Detective Polly overheard Denise’s statements. Detective Polly is a police officer – therefore, the search was conducted by a government agent. But wait! You might be wondering with all this telephone talk if telephone calls are actually analyzed under the Fourth Amendment. How is that a search and seizure? In *Katz v. United States*, the court held that listening to a phone call can qualify as a search and seizure under the Fourth Amendment – well, because the phone wasn’t even invented at the time they wrote the Fourth Amendment.

Lee Burgess: Okay, second we need to analyze standing. Does Denise have standing to challenge the search? The important fact here is that Detective Polly overheard Denise’s statements. Because they are her own words that she is trying to suppress, Denise has standing. This feels pretty straightforward, but is important to include. Let’s say that Denise was talking to someone named Ben. Ben would not have standing to suppress Denise’s statements in his trial, because his Fourth Amendment rights were not violated by a search, or overhearing, of Denise.

Lee Burgess: Lastly, we need to analyze whether an unlawful search occurred. Both Denise and Detective Polly were on a public street, so there was no trespass that took place. Instead, we must determine whether Denise had a reasonable expectation of privacy in the space where she made the statements. This must be a subjective and objective reasonable expectation of privacy. Denise will surely argue that she had a subjective expectation of privacy and she would likely point to her hushed tone on the phone.



- Lee Burgess: But is there an objective reasonable expectation of privacy in a conversation on the phone held on a public street? We're told that the payphone was not a phone booth, so we know that Denise was out in the open. Courts have held that there is no expectation of privacy in public places. Additionally, Detective Polly didn't use any type of special listening device to overhear Denise's conversation. She simply used her ears in a public place to hear Denise.
- Lee Burgess: These facts point to no subjective or objective reasonable expectation of privacy – therefore, a search did not take place. Denise's attempts to suppress the evidence as a violation of the Fourth Amendment would likely be denied.
- Lee Burgess: Now, this hypothetical was pretty simple, but it allowed you to see how to apply the analysis to determine if there was an unlawful search. So, let's dive into a more complicated hypothetical now. The following has been adapted from the [California bar exam from July 2015](#):
- Lee Burgess: "Paul, a police officer, had a hunch that Dan might be selling drugs from his house. Paul drove to Dan's house with a drug-detection dog and waited until Dan left the house. Paul walked the drug-detection dog around Dan's house. At his direction, the dog jumped on the porch, sniffed the front door, and indicated that there were drugs inside.
- Lee Burgess: Paul then propped a ladder on the back of the house, climbed to the top, and looked into the second-story bedroom window. He saw a small box on the bedside table, but could not read the label. He used binoculars to read the label, and saw that it listed ingredients that could be used to make meth.
- Lee Burgess: Paul went back to his car. Dan then returned home. Paul got out of his car and stood in Dan's front yard. Dan's front windows were all open. Paul overheard Dan on the phone saying, 'I can sell you several ounces of meth.'
- Lee Burgess: Dan was then arrested and charged with attempts to sell math. Dan moved to suppress the evidence of the drug-detection dog's reaction, the small box with the ingredients, and the overheard conversation on the phone. Dan argues that his Fourth Amendment rights were violated in collection of all three pieces of evidence. How should the court rule?"
- Lee Burgess: Start out with the general Fourth Amendment rules here: The Fourth Amendment prohibits unlawful searches and seizures by government agents. The Fourth Amendment is incorporated to the states through the Fourteenth



Amendment. If evidence is collected in violation of the Fourth Amendment, that evidence must be suppressed and excluded from trial.

Lee Burgess: Here, we have three different pieces of evidence at issue: the dog’s reaction, the small box, and the statement on the phone. In writing your essay, you should use headings to split up your analysis and distinguish between issues. Here, our first heading would be “Drug-Sniffing Dog’s Reaction.”

Lee Burgess: Now, for this piece of evidence, you would start by determining whether or not the search was conducted by a government agent. Paul (and the dog) work for the police department and therefore are government agents. Again, this is simple, but important to include. Next, you must determine if Dan has standing to challenge this search. The search happened at his home. Therefore, Dan has standing to challenge the search. Lastly, and most importantly, you must determine if a search occurred. A search occurs when the government violates a person’s reasonable expectation of privacy in their protected space, or trespasses on a person’s protected space. We can analyze this search under both theories.

Lee Burgess: Paul and the dog physically entered Dan’s property for the purposes of collecting evidence. We’re told that Paul and the dog were walking around the house. Then, Paul explicitly ordered the dog to jump on to the front porch and sniff the front door. The Supreme Court has held that the use of a drug-sniffing dog for the purposes of searching for drugs on someone’s front porch is a search that violates the Fourth Amendment. The facts here clearly align and we have established that this was a search.

Lee Burgess: Now, Paul could try and argue that because he and the dog were outside, not inside the home, that a search did not occur – but this isn’t a winning argument. The Supreme Court has held that individuals still have a reasonable expectation of privacy in their curtilage, which is the area immediately surrounding their home. Any time you see an essay with facts about a front or back porch, or immediately outside the home, you should be sure to bring this up. The curtilage is still a protected area, and a search occurred here.

Lee Burgess: The last step for this piece of evidence is to determine what must happen to the evidence now that we have established that an unlawful search occurred. Remember to apply the exclusionary rule here, unless there is some sort of exception to the warrant requirement. The evidence of the dog’s reaction should be excluded, or suppressed, at trial.



Lee Burgess: Now, before we finish this piece of evidence, make sure you are returning to the call of the question and clearly answering it. The question asks how the court should rule. Here, your conclusion should be that the court should grant Dan's motion as to the dog's reaction and suppress that piece of evidence.

Lee Burgess: Next, we'll move on to the small box. The government agent and standing questions are the same as for the dog's sniff. Paul is a police officer and therefore a government agent. The small box was in Dan's house and therefore he has standing. We can move right on to the third question: Was this an unlawful search?

Lee Burgess: Here, Paul used a ladder that he leaned against Dan's house to look into the window. Dan will argue that this was a physical trespass that constitutes a search, and he is likely correct. Dan could also point to Paul's use of binoculars as a search. However, this brings up to us an important nuance when analyzing whether or not a search has occurred. If a police officer uses a sensory enhancing device, even one that is available to the general public, the Supreme Court has held that this still constitutes a search. This would apply regardless of the physical location of the officer.

Lee Burgess: So, let's say that Paul was not on a ladder, but rather in a tree on a neighbor's property, and used binoculars to look into Dan's house. Would this be a search? There is no physical trespass, since Paul would not be on Dan's property. And, we likely couldn't establish that there was a reasonable expectation of privacy because binoculars are in general public use. Anyone could look into their neighbor's window using them. But courts typically find that if the cops use some sort of enhancement to see something inside that can't be seen with the naked eye, then it is a search. If the police officer could see the box without binoculars from the neighbor's tree, then it probably would not be a search.

Lee Burgess: Now, with our "Paul on a ladder" hypo above, we can conclude that a search did occur because of Paul's physical trespass, and probably his use of binoculars at Dan's home. Lastly, we'll analyze the statements Dan made on the phone while in his home.

Lee Burgess: Again, you can simply restate that the search was conducted by a government agent, because Paul is a police officer. Dan has standing to challenge this because he was in his home when the alleged search occurred. We can move on to the question of whether an unlawful search occurred.

Lee Burgess: We know that Paul was in Dan's front yard when he overheard Dan talking. Now, let's return to the curtilage rule we discussed earlier. Courts have been



specific about what exactly curtilage entails. While the front porch and area immediately around the house are protected as curtilage, someone's entire property is not. Merely being on an individual's property does not constitute an invasion of their curtilage that rises to the level of an unlawful search. Therefore, Paul's presence on his front yard is not a physical trespass for Fourth Amendment purposes.

Lee Burgess: Now, what about the reasonable expectation of privacy analysis? Remember that we need to establish both a subjective and objective reasonable expectation of privacy to determine that a search took place. Courts have routinely held that there is no reasonable expectation of privacy in a conversation. Overhearing someone's conversation does not constitute a search. Dan may try to argue that since he was in his home, he has a subjective expectation of privacy. But Dan left the window open and spoke loud enough that Paul could hear him outside. Furthermore, Paul heard Dan without the use of any technology – no wiretapping, no sensory enhancing devices, etc. Therefore, the court would likely rule that Dan did not have a reasonable expectation of privacy in his conversation, and a search did not occur. They could deny the motion to suppress this statement in trial.

Lee Burgess: So, to recap – the Fourth Amendment prohibits unlawful searches and seizures by government agents. To determine if an individual's Fourth Amendment rights have been violated, you must ask, one, was there a government agent; two, does the individual have standing; and three, did the action constitute a search? If all three are answered in the affirmative, and there was no warrant, then barring any exceptions – which we will cover in a future podcast – an unlawful search occurred. Remember, there is much more to the Fourth Amendment analysis in regards to exceptions for warrantless searches. But that, my friends, will be in a future podcast.

Lee Burgess: That's all the time we have for today! If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. And be sure to subscribe so you don't miss any future episodes. If you have any questions or comments, don't hesitate to reach out to myself and Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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