

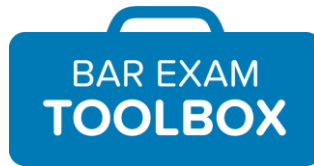
Lee Burgess: Welcome back to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Criminal Procedure – specifically, exceptions to the warrant requirement. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the 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: Today, we’re going to be talking more about the Fourth Amendment. Now, before we dive into any of the exceptions, let’s review the general attack plan for a Criminal Procedure question. The first question we want to ask whenever a Fourth Amendment criminal procedure issue might be present in a fact pattern is whether there was a search or seizure. If there was an incident where someone was searched or something was seized, then you know a Fourth Amendment criminal procedure issue is highly likely going to be something you’ll address in your answer.

Lee Burgess: If there was a search or seizure, the next question you want to determine is if the Fourth Amendment protection against unreasonable searches and seizures could be used as a basis for suppressing any incriminating evidence obtained in the search or seizure – which can be thought of as standing. In order to have standing for a Fourth Amendment claim, the individual needs to show, (1) there was a government action – that is, the government (typically a police officer) was involved in the search or seizure; and (2) the individual had a reasonable expectation of privacy as to the place searched and/or the items seized. Individuals generally have a reasonable expectation of privacy for their own person and for the things they own or possess.

Lee Burgess: Once you’ve established standing, you’ll want to determine whether there was a valid warrant issued for the search or seizure. Sometimes the fact pattern will either say a warrant was issued, or describe a warrant being issued but having several flaws in which you’ll do analysis on the warrant itself. But in the scenario when the fact pattern doesn’t say anything about a warrant, you can assume that there was no warrant for the search or seizure.

Lee Burgess: In the common case that a warrant was not issued, the next big question you’ll want to ask is whether any exceptions to the search warrant requirement would



apply. As we learned in [another episode](#), stop and frisk is one type of exception to the search warrant requirement. And today we'll discuss three more, starting with plain view.

Lee Burgess: Remember what an exception to the warrant requirement means. If an exception applies, that means the search and seizure was constitutional and the evidence will not be suppressed – i.e., admitted at trial. If no exception applies, that means the search and seizure was unconstitutional – remember, because you need a warrant – and the evidence will likely be suppressed.

Lee Burgess: Under the plain view exception, a police officer may seize an item if the officer observes the item in plain view, the officer is on the premises for a lawful purpose – such as when executing a search warrant, and the incriminating nature of the item is immediately apparent – that is, the officer must have probable cause to believe that the item was evidence of a crime or contraband.

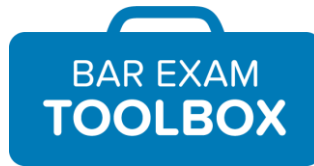
Lee Burgess: There are a number of specific rules to unpack under the search incident to a lawful arrest exception. Think of this as the exception that applies once an officer has made a lawful arrest of an individual, and there are a variety of scenarios where this may be the case that raises separate issues.

Lee Burgess: Generally, a search incident to a lawful arrest must be reasonable in scope and incident to a lawful arrest that is based on probable cause. There are two parts to this analysis: (1) the lawful arrest; and (2) whether the search was reasonable in scope.

Lee Burgess: The lawful arrest element requires that the arrest was made based on probable cause. This element really requires you to determine whether the officer had probable cause to arrest the individual, which is determined by the totality of the circumstances. It can also be supported by facts from police observations or information from reliable informants or unknown informants that can be independently verified.

Lee Burgess: The second element to analyze is whether the search was reasonable in scope, which the analysis may be different depending on where the individual is arrested and what the police are searching.

Lee Burgess: If the police are searching the individual's person, they may conduct a contemporaneous – that is, close to the same time they are arresting the individual – search of the arrestee and his immediate surrounding area, interpreted as within the wingspan of the individual. This may include the person's pockets and containers. If the police arrested the individual in a home,



they can search closets or other spaces adjoining the place of arrest in the home where an attack is likely. If the police arrested the individual from their car, they may search the glove compartment if the arrestee is within reaching distance or it is reasonable that evidence might be in the vehicle. This last exception is fairly straightforward. Under the automobile exception, if police have probable cause that an individual's car contains contraband or other evidence of a crime, they can search any part of the car, and this includes the trunk and glovebox.

Lee Burgess: Now, don't forget the exclusionary rule! If no exceptions to the warrant requirement apply, then the evidence was obtained in violation of the Fourth Amendment and is subject to the exclusionary rule. Under the exclusionary rule, any evidence obtained in violation of the Fourth Amendment is inadmissible, as well as any "fruit of the poisonous tree", which is any evidence that derived from the illegal government action, unless an exception to the exclusionary rule applies.

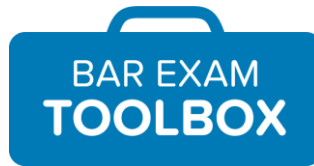
Lee Burgess: Don't forget the exceptions to the exclusionary rule either! Here's a quick review: If the evidence was discovered by an independent source unrelated to the taint, then it is admissible. If the evidence would have been discovered through a legal means, despite the illegal action, the evidence will be admissible. If sufficient time has passed in between the illegal action and discovery of the evidence, the evidence may be admissible. If the police execute a warrant believing it is valid in good faith and find evidence, but the warrant is later found to be defective, the evidence is nonetheless admissible.

Lee Burgess: Okay, let's try a few practice problems. Hypo number 1:

Lee Burgess: "After a bank robbery where the robber brandished a shotgun, the police received a telephone call from an anonymous caller who described a man standing at a particular corner in the downtown business district and said the man was carrying a sawed-off shotgun in a briefcase. Within minutes, a police officer who had been informed about the robbery and the telephone call observed Dave holding a briefcase at that location. Dave fit the description given by the anonymous caller.

Lee Burgess: The officer approached Dave with his service revolver drawn and pointed at the ground. He explained the reason for his approach, handcuffed Dave, and opened the briefcase. The briefcase contained only the marked currency taken in the bank robbery.

Lee Burgess: At trial, how should the court rule on Dave's motion to exclude from evidence the money found in the briefcase?"



Lee Burgess: Okay, let's go through our attack plan together. First, was there a search or seizure? Yes, after Dave was handcuffed, the officer opened the briefcase he was holding and searched it, finding marked currency taken in the bank robbery.

Lee Burgess: Two, does Dave have standing to bring a Fourth Amendment claim to suppress the money from being introduced into evidence at trial? Yes, there was a state action here because Dave was searched by a police officer, and Dave had a reasonable expectation of privacy because the officer searched Dave's briefcase, which was in his possession.

Lee Burgess: Three, was there a valid warrant issued? There was no mention of a warrant.

Lee Burgess: And four, does an exception to the search warrant requirement apply? Yes! Search incident to a lawful arrest is the obvious one, because Dave was searched after he was arrested.

Lee Burgess: Now, a search incident to a lawful arrest must be reasonable in scope and incident to a lawful arrest based upon probable cause. So, first, was there a lawful arrest? The officer arrested Dave after receiving a phone call from an anonymous caller stating a man fitting Dave's description was carrying a sawed-off shotgun in a briefcase. So long as the officer can independently verify the anonymous tip, the tip can be used as a basis for establishing probable cause. Here, the officer knew that a bank was robbed by a man who had a shotgun, and the officer received a tip that a man was standing at a corner with a sawed-off shotgun in a briefcase. The combination of the call, the fact that the officer observed the man standing at the location with a briefcase who fit the description, and the circumstances surrounding the bank robbery, are sufficient to give the officer probable cause to arrest Dave in public without a warrant.

Lee Burgess: Second, was the search reasonable in scope? Here, the scope of the search was confined to Dave's person, and so in such a scenario the police may conduct a contemporaneous search of the arrestee and his immediate surrounding area, such as pockets and containers. The officer conducted a search of the briefcase that Dave was holding immediately after he arrested Dave. Therefore, the search was likely reasonable in scope. Given the analysis, the search incident to arrest exception likely applies, and the money found during the search can be admitted.

Lee Burgess: Now, under the exclusionary rule, any evidence obtained in violation of the Fourth Amendment is inadmissible, as well as any "fruits of the poisonous tree". Here, because the search incident to arrest exception to the warrant



requirement applies, the evidence found during the search can be admitted. Given this analysis, the court should deny Dave's motion to exclude from evidence the money found in the briefcase.

Lee Burgess: Okay, let's do one more hypo:

Lee Burgess: "Owen, a police officer, had a hunch that Dora might be selling methamphetamine from her house in the country. To learn more, Owen drove to Dora's house, propped a ladder on the back of the house, climbed to the top, and peered into a second-story bedroom window. He saw a small box on a 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 methamphetamine.

Lee Burgess: Owen went back to his car, saw Dora return home, and arrested and charged her with attempting to sell methamphetamine.

Lee Burgess: How should the court rule on Dora's motion to suppress evidence of the small box?"

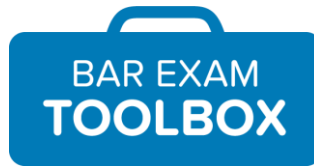
Lee Burgess: Okay, the call of the question on this one is similar to the last – we want to know how a court should rule on Dora's motion to suppress evidence of the small box. So, what's the first question we want to answer based on our attack plan?

Lee Burgess: First, was there a search or seizure? Yes. Officer Owen peered into Dora's second-story bedroom window. Such action constitutes a search.

Lee Burgess: Second, does Dora have standing to bring a Fourth Amendment claim to suppress the small box from being introduced into evidence at trial? Likely yes. Here, there was government action because Owen is a police officer employed by a government entity, and Dora had a reasonable expectation of privacy for the small box because it's something she owned that was not just inside her house, but on the second floor of her house.

Lee Burgess: Three, was there a valid warrant issued? No mention of a warrant either, so likely no.

Lee Burgess: And four, does an exception to the search warrant requirement apply? Yes! Let's take a look at "plain view".



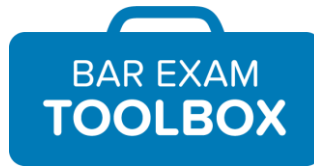
Lee Burgess: An officer may seize an item if the officer observes the item in plain view, the officer is on the premises for a lawful purpose, and the incriminating nature of the item is immediately apparent. First, did the officer observe the item in plain view? Well, likely no. In order to see the small box, Owen had to prop a ladder on the back of the house and climb to the top of that ladder before being able to see the small box in a second-story bedroom window. Such actions suggest that the small box was not in “plain view”.

Lee Burgess: Now, was the officer on the premises for a lawful purpose? The facts indicate that Owen merely had a hunch that Dora might be selling methamphetamine. Even if the officer had more than a hunch, there are only very minimal circumstances by which Owen would be able to come this close to Dora’s house without a search warrant – none of which are present here, and certainly not for him to prop a ladder and climb up to peer into the second-story window. Therefore, there was likely no lawful purpose for which Owen was on the premises.

Lee Burgess: Three, was the incriminating nature of the item immediately apparent? If Owen were there lawfully, then the incriminating nature of the evidence must be immediately apparent. Here, the box could not be read from the window where Owen saw it. Indeed, he needed binoculars to see that the box contained possible ingredients for methamphetamine. But even then, the fact that it had ingredients alone may not make it incriminating, unless those ingredients themselves are illegal. No facts indicate that this is the case. It is unlikely the court would find that the incriminating nature of the box was immediately apparent. Given this analysis, it is unlikely that the plain view exception would apply.

Lee Burgess: Now, under the exclusionary rule, any evidence obtained in violation of the Fourth Amendment is inadmissible, as well as any “fruits of the poisonous tree”. Here, because Owen did not see the small box in plain view, had no lawful purpose to be at Dora’s house, and the incriminating nature of the small box was not immediately apparent, the plain view exception to the search warrant requirement does not apply. Therefore, the small box should be suppressed. And there are no facts to suggest that any exceptions to the exclusionary rule would apply. Given this analysis, the court should grant Dora’s motion to suppress the evidence of the small box.

Lee Burgess: And with that, we’re out of time! 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. We’d really appreciate it. And be sure to subscribe so you don’t miss anything. If you have any questions or comments, please don’t



hesitate to reach out to myself or 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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