

MONTEREY COLLEGE OF LAW & HYBRID  
FINAL EXAMINATION  
SPRING 2021  
**CRIMINAL PROCEDURE**  
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Instructions

1. This examination consists of three sections of equal value. There is a four (4) hour time limit to complete the exam.
2. There are three essay questions. Make sure that you read each essay question carefully before answering. Attempt to organize your answer before you start writing. You may print the essays to make notes and mark key words as you review each essay before starting to write.
3. The essay questions test your ability to apply the law to the facts. After stating the issue, provide a succinct statement of the relevant legal principles, followed by a detailed analysis of how these legal principles apply to the facts, and a conclusion.
4. There are multiple issues to address in the essay questions. Some issues may be fairly straightforward and do not require detailed analysis. Other issues may be more complicated; those issues merit more extended discussion.

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### Question 1

Late at night, Officer Jones observed a red sports car with one headlight out, a violation of a traffic law. Jones stopped the car, approached the driver to issue a citation and, following standard police procedure, asked the driver for his license and registration. The license identified the driver as Dan Deft. As Deft handed the license and registration to Jones, Deft said that he "could make life very unpleasant" for Jones if she "messed" with him.

As Jones was writing a citation, she heard a police all points bulletin to be on the alert for a red sports car driven by a male, about five-foot-eight inches tall, one hundred fifty pounds, clean-shaven, with dark hair, and wearing glasses, dark pants with a pink puffed-sleeved shirt unbuttoned down to the navel. This person was wanted for robbery of Smith, whose purse had just been taken. Deft was actually five-foot-nine-inches tall, one hundred sixty pounds,

clean-shaven, with dark hair, and wore glasses, blue trousers and a rose-colored, puff-sleeved shirt buttoned up to the neck.

Jones placed Deft under arrest for robbery and read him *Miranda* warnings. Deft invoked his rights to remain silent and to counsel. Jones turned Deft over to other police officers who had arrived at the scene. She then searched Deft's car and discovered a purse under the seat.

One hour after Deft was arrested, Smith identified Deft as the robber in a one-on-one confrontation at the police station. She said that she was positive in her identification. She also identified the purse found in Deft's car as hers. Deft was again given *Miranda* warnings. This time he waived his rights and confessed to the robbery. Deft was then formally charged with robbery and is awaiting trial.

1. How should the court rule on Deft's pretrial motions, all based on the United States Constitution, to exclude the following evidence at trial:
  - a. His statement to Officer Jones at the scene of the arrest, a motion based on asserted violations of his rights under the Fourth, Fifth and Sixth Amendments? Discuss.
  - b. The purse seized from Deft's car, a motion based upon asserted violations of his rights under the Fourth Amendment? Discuss.
  - c. The identification of Deft by Smith at the police station, a motion based on asserted violations of Deft's rights under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment? Discuss.
  - d. His confession at the police station, a motion based on asserted violations of Deft's rights under the Fifth Amendment? Discuss.
2. If Deft's confession is ruled inadmissible at trial because of a violation of the Fifth Amendment, and he testifies at trial, will the Fifth Amendment violation preclude use of the confession to impeach the testimony that Deft gave on either direct or cross-examination? Discuss.

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QUESTION 2

Deft saw Oscar, a uniformed police officer, attempting to arrest Friend, who was resisting arrest. Deft stuck Oscar in an effort to aid Friend. Both Friend and Deft fled.

Later that day, as a result of Oscar's precise description of Deft, Paula, another police officer, found Deft on the street, arrested him for assault and battery on a peace officer, and searched him, finding cocaine in his pocket. After Paula gave proper *Miranda* warnings, Deft said he wanted to talk to a lawyer before answering any questions. Paula did not interrogate him. However, before an attorney could be appointed to represent Deft, Paula placed him in a lineup with 5 other men with similar physical characteristics and attire. Without any suggestive statements or questioning, Oscar immediately pointed at Deft and said, "That's him, I'm 100% certain." Deft was booked into the county jail.

The next day, the district attorney charged Deft with assault and battery of a police officer and possession of cocaine. That same day, the court arraigned him on the charges. Later that day, Paula gave Deft proper *Miranda* warnings. After asking him if he understood his rights, she started questioning him. The first question was, "Why did you hit the police officer arresting your friend?" He responded, "That's why, he was arresting my friend who didn't deserve to be busted."

How should the judge rule on the following motions made by Deft at trial:

1. To suppress the cocaine. Discuss.
2. To suppress Oscar's identification during the lineup. Discuss.
3. To suppress Deft's admission that he struck Oscar. Discuss.

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QUESTION 3

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 with a drug- detection dog and waited until she left.

Owen first walked the drug-detection dog around Dora's house. At his direction, the dog jumped up on the porch, sniffed the front door, and indicated the presence of methamphetamine.

Owen then 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.

Owen went back to his car, saw Dora return home, and then walked back to the front of the house and crouched under an open window. He soon overheard Dora telling a telephone caller, "I can sell you several ounces of methamphetamine."

Dora was arrested and charged with attempting to sell methamphetamine.

Dora has moved to suppress evidence of (1) the drug-detection dog's reaction, (2) the small box, and (3) the overheard conversation, under the Fourth Amendment to the United States Constitution.

How should the court rule on each point? Discuss

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Excellent job! You identified all the major issues, thoroughly analyzed them, and organized your thoughts very coherently.

Will the Court rule that Deft's statement to Officer Jones that he "could make life very unpleasant" for her if she "messed" with him be excluded at trial due to an asserted violation of his rights under the Fourth Amendment?

No. A police officer may stop a vehicle and briefly detain the motorist where the officer has an articulable and reasonable suspicion that the driver has violated the law including motor vehicle infractions. Here, Officer Jones pulled Deft over because one of his vehicle headlights were out. There was no violation of Deft's Fourth Amendment right at the time he made the above statement.

Will the Court rule that Deft's statement to Officer Jones that he "could make life very unpleasant" for her if she "messed" with him be excluded at trial due to an asserted violation of his rights under the Fifth Amendment?

No. The Fifth Amendment prohibits compelled self-incrimination. Once a person is in custody, he must be read his Miranda rights prior to any interrogation. A person is in custody if he does not reasonably feel free to leave. However, a person stopped for a traffic violation is not initially in custody thus requiring Miranda rights to be given. At the moment that Deft made the above statement, he was not in custody. Furthermore his above statement was not the product of any police coercion and voluntarily made thus not violating his Fourteenth Amendment right.

Will the Court rule that Deft's statement to Officer Jones that he "could make life very unpleasant" for her if she "messed" with him be excluded at trial due to an asserted violation of his rights under the Sixth Amendment?

Great analysis and organization when discussing the lawfulness of the traffic stop.

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No. In order for a violation of a person's Sixth Amendment rights to occur, there must first be an initiation of some adversary judicial criminal proceedings such as an indictment. As this was purely a traffic stop at this point, Deft was not entitled to the right of counsel.

Will the Court rule that the purse seized from Deft's car be excluded as evidence from his trial based upon a violation of his Fourth Amendment rights?

No. The Fourth Amendment protects citizens against unreasonable searches and seizures. There must be both government conduct and a reasonable expectation of privacy in order for a Fourth Amendment violation to occur. In order to establish government conduct, Deft must show that a government agent was involved in the search of his car and seizure of the purse under his car seat. Both these conditions are satisfied as it was Officer Jones who conducted both the search and seizure. Next, Deft must show that he had a reasonable expectation of privacy with respect to his vehicle. This condition is also satisfied as Deft was driving the vehicle and had a possessor interest with it. Because Deft can both show government conduct and a reasonable expectation of privacy, he has standing to assert a Fourth Amendment challenge to Officer Jones's search of his vehicle and seizure of the purse.

A warrant is required for a government agent to conduct a search or seizure absent a legal exception. Here, there are two exceptions to the warrant requirement. The automobile exception to the warrant requirement allows police with probable cause to believe that a vehicle contains evidence of a crime to search the whole vehicle and any container that might reasonably contain the item which they had probable cause to search. As Officer Jones was writing Deft a traffic citation, she heard a police all points bulletin for a car similar to Deft's driven by a male fitting Deft's description. This individual was wanted for robbery and based upon probable cause, Officer Jones placed Deft under arrest. Probable cause is defined as that quantity of facts and circumstances within the police officer's

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knowledge that would warrant a reasonable person to conclude that the individual in question has committed a crime (in case of an arrest) or that specific items related to criminal activity will be found at the particular place (in case of a search). Here, based on the similarities provided from the all points bulletin and Deft's physical appearance and automobile match, Officer Jones had probable cause to both arrest Deft and search his vehicle under the automobile exception. Another key fact in supporting Officer Jones's probable cause to arrest Deft and search his vehicle under the automobile exception is that the purse robbery had just taken place and it would be reasonable to conclude that the purse would be inside the vehicle from which the robber was seen driving in.

*Great analysis and articulation of the rule*

Additionally, Officer Jones may assert the warrant exception of search incident to a lawful arrest. Upon a lawful arrest based upon probable cause, the police may contemporaneously search a person and areas within his reach. However, once a suspect is handcuffed or removed far away enough from the reach area, the arresting officer doesn't have a basis of searching that area unless he has probable cause to believe that fruits of the crime are located there. Here, Deft was turned over to other police officers before Officer Jones searched his vehicle. As Jones was lawfully searching for fruits of the robbery based upon probable cause, she was permitted to search under Deft's seat pursuant to the search incident to a lawful arrest as well.

Will the Court rule that the identification of Deft by Smith at the police station be excluded from evidence at his trial based upon an asserted violation of Deft's Sixth Amendment rights and the Due Process Clause of the Fourteenth Amendment?

No to both. The Sixth Amendment provides that the accused shall have the right to counsel. It is triggered once there is a formal charge. The right to counsel applies at any post-indictment identification procedure where the suspect is displayed live. Here, as Deft had not been formally charged at the time of the one-on-one confrontation in which the

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victim Smith identified him as her assailant, Deft's Sixth Amendment right was not violated.

Deft may have a better argument that his right to due process under the Fourteenth Amendment was violated. Any identification procedure whether conducted before or after the initiation of formal charges must conform to due process standards of fundamental fairness. The Court must utilize a totality-of-the-circumstances approach to determine if Deft's one-on-one confrontation with victim Smith at the police station was unnecessarily suggestive and likely to lead to a mistaken identification. However, identification evidence, even resulting from unnecessarily suggestive procedures such as a one-on-one confrontation, may nonetheless be admissible if it possesses certain indicia of reliability that reduces the possibility of mistaken identification. Some factors the Court will consider whether to exclude victim Smith's identification of Deft are: 1. Her opportunity to view the perpetrator at the time of the crime. 2. Her degree of attention. 3. Her accuracy of her prior description of the perpetrator. 4. Her level of certainty demonstrated at the confrontation. 5. The elapsed time between the crime and the confrontation. Smith was fairly accurate in describing both her assailant and the car he was driving, and was positive in both her identification of Deft as the robber and in reclaiming her purse. The robbery happened earlier in the day and thus her identification of Deft will likely be admitted into evidence at Deft's trial.

Will the Court admit Deft's confession at the police station?

*Great analysis of the factors for a due process violation during a lineup.*

No. As Deft clearly and unambiguously invoked both his Miranda rights to remain silent and speak with an attorney after Jones arrested him for robbery, the police were not allowed to interrogate Deft again until he either spoke with an attorney or voluntarily initiated further proceedings with the police. When a suspect invokes his right to counsel, a valid waiver cannot be established merely by showing that he received additional warnings and then responded to further police initiated custodial interrogation. Deft was

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not be questioned further until counsel had been made available to him or he initiated further conversations with the police. It does appear that Deft was ever given the opportunity to speak with counsel nor does it appear that he initiated further conversations with the police.

If Deft's confession is ruled inadmissible at trial because of a violation of the Fifth Amendment, and he testifies at trial, will the Fifth Amendment violation preclude use of the confession to impeach the testimony that Deft gave on either direct or cross-examination?

No. As stated above, Deft's confession was obtained in violation of his Fifth Amendment right as he had not been provided an opportunity to speak with counsel after invoking his Miranda rights. This means that while his confession may not be admitted into the prosecutor's case-in-chief, should Deft decide to testify on his own behalf at trial and provide conflicting testimony with his confession, his confession may be introduced as evidence to impeach Deft's credibility.

**END OF EXAM**

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Excellent job! You thoroughly and accurately analyzed all the legal issues.

Cocaine

Did Oscar's description amount to PC for arrest?

Anonymous tips and confidential informants are presumed to be unreliable and do not amount to PC unless the tip is corroborated (test - deemed to be reliable and verifiable under the totality of circumstances under Spinelli). However, tips from law enforcement or citizens are presumed to be reliable and can be justifiably relied upon.

An arrest is a formal arrest or its functional equivalent. Arrest requires PC that the suspect committed a crime, not merely reasonable suspicion. PC is a fair probability or substantial chance that a particular person is guilty of a crime (test - a common sense evaluation based on the totality of the circumstances (Gates). If police have PC, they may arrest a suspect in public without a warrant.

Here, Oscar who is a police officer provides the "precise description" of D that catalyzes his fellow officer Paula's arrest of D. As stated, it is permissible for Paula to rely on a fellow officer's identification of the suspect and act in accordance with it. Corroboration is not required for citizen or police officer tips to amount to adequate PC. Based on this PC, Paula found D on the street and effected a legal arrest. She did not need an arrest warrant because the arrest occurred in public.

- Great statement of the rules and analysis

Did a 4A search occur?

4A prohibits unreasonable government searches and seizures (applies to states as well through 14A). A 4A search occurs when the (1) government or an agent thereof (2) (a) intrudes into a realm of life in which there is an objectively reasonable expectation of privacy (Katz) or (b) physically intrudes on constitutionally protected private property to

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obtain information (Jones) and (3) D has an REP in the thing searched or seized (standing).

After placing D under arrest, several officers conducted a warrantless search of D's person. A search of one's person, by the language of 4A, is unreasonable and tresspassory in nature. As such, the two above tests are easily met and a 4A search occurred when Paula searched D's pocket. - Good statements of the rules and analysis

Was there an exception to the warrant requirement?

Subject to several exceptions, a search or seizure is generally illegal if there was no valid warrant. A valid search or arrest warrant requires a showing of PC that seizable evidence will be found in a place searched. Prior to issuance, officers must submit an affidavit to a detached and neutral magistrate setting forth circumstances enabling the magistrate to make an impartial determination of PC. A warrant is not valid unless it describes with particularity the place to be searched, items or person to be seized, and time constraints.

The government has the burden to demonstrate the legality of a warrantless search. There are several exceptions to the requirement including exigent circumstances, automobile search, search incident to lawful arrest, plain view, consent, etc. Prior to arrest based on valid PC, police may search the arrestee and any area in his immediate control (including containers), which Chimmell defines as the arrestee's wingspan, for weapons he could gain access to and evidence of the crime for which he was arrested. However, if the arrestee is already restrained, no SILA privilege exists (maybe inevitable discovery though).

Here, Paula was effecting an arrest for the assault and battery on Oscar. The search resulted in cocaine which was in D's pocket. Although the facts aren't specific, it seems the search took place right before arrest. As the crimes for which D was being arrested demonstrate that D is a violent person, it was reasonable for Paula to check D's pockets

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as a protective measure for any weapons. D had a history of resisting and fighting police officers, so Paula's protective measures were reasonable pursuant to SILA. Even if the search was suspect, the cocaine would have likely been found on the inventory search during booking (inevitable discovery). Based on the foregoing, the cocaine will likely be admissible.

- Good job → you should explicitly mention this qualifies as a valid search incident to arrest.

### Admission

#### Was D in Miranda custody?

As a prophylactic procedural rule designed to safeguard 5A rights, Miranda mandates the issuance of certain warnings prior to interrogation of a suspect held in custody. All incriminating statements made by a suspect during custodial interrogation are presumed coercive and are thus inadmissible unless they are made after a valid Miranda warning and subsequent valid waiver by D.

As D was put under formal arrest, D was in custody. Shortly thereafter, Paula mirandized D.

#### Implications of D's Invocation?

After warnings are given, D a suspect can either expressly or implicitly waive these rights or invoke them (must be clear and unambiguous). If D invokes, interrogation must end and cannot commence until counsel is present or the suspect re-initiates contact with the police under Edwards.

Here, Deft states he "wants to talk to a lawyer before answering any questions". This statement is a classic invocation as it is both clear and unambiguous in its attempt to

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communicate to Paula that he wishes to stop talking. Acting appropriately, Paula did not interrogate him. *Correct*

Did 6A attach before the admission?

6A guarantees the right to effective counsel during all critical stages of a criminal proceeding. There are two ways it can be violated: (1) ineffective counsel and (2) after the initiation of adversarial judicial proceedings, the government cannot deliberately elicit incriminating information from D in the absence of counsel (Massiah). 6A attaches by way of formal charge, arraignment, post-charge lineups, etc. 6A is offense-specific which means police can inquire about other crimes for which 6A has not attached. Once attached, D can waive 6A rights and submit to questioning so long as the waiver is voluntary, knowing, and intelligent under *Montejo*. Miranda warnings sufficiently advise D of 6A rights so police may question D after a valid Miranda and waiver under *Patterson v. IL*.

Here, D is arraigned on his charges. Upon arraignment, 6A attaches (*Brewer v. Williams*). Now that 6A has attached, any intentional creation of a situation likely to induce D to make incriminating statements is a 6A violation under *US v. Henry*. Later that day, Paula re-interviews D after re-mirandizing him. This would appear to be a 6A violation because express questioning is likely to elicit incriminating statement. However, as discussed above, the prosecution will raise *Montejo* which holds that a valid 5A Miranda warning and waiver is sufficient to advise D of his 6A rights. D will counter by arguing that a *Massiah* waiver needs to be expressly given and cannot be implied from the fact D answered Paula's questioning. Under 5A Miranda, a waiver can be implied or expressed, but this has not been decided in the context of 6A. Here, the facts state that Paula initiates the first question after re-mirandizing when she asks D why he hit the police officer. On its face this may seem like a 6A violation, but in contrast to the 5A rule, police are free to contact D to seek a 6A waiver under *Michigan v. Jackson*. Upon consideration of all these

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rules, a court likely determine that D's 6A rights were not violated because of the Miranda warnings and ability for Paula to seek a waiver. However, there was no fourteen day break in custody (infra) which is a violation of 5A Miranda.

If the court holds the questioning and subsequent confession violates 6A, will it be excluded?

Primary evidence obtained from a 6A violation is always inadmissible, derivative evidence is inadmissible unless attenuation exception applies, and the evidence will be admissible for impeachment. As such, the confession that D hit the officer will be inadmissible if the court finds D's 6A rights were violated.

Was the questioning after a 5A violation as there was no fourteen day break in custody?

After warnings are given, D a suspect can either expressly or implicitly waive these rights or invoke them (must be clear and unambiguous). If D invokes, interrogation must end and cannot commence until counsel is present or the suspect re-initiates contact with the police under Edwards.

D invoked his Miranda rights after his initial arrest. The facts state that only one day later, Paula re-approached him for a re-interview. This is a clear violation as there needs to be a fourteen break in custody before police re-initiate contact with a suspect who has previously invoked. Any evidence obtained upon a re-interview will be inadmissible. As such, even if D's 6A rights were not violated (supra), the D's confession in which stated he hit the officer will be inadmissible.

*Excellent statement of the rules and analysis of the facts.*

Lineup

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Had 6A attached?

As discussed supra, pre-charge lineups do not fall within the scope of 6A because no adversarial proceeding has been initiated. At the time of the lineup, D had not yet been arraigned or formally charged. Therefore, 6A does not apply here. - Correct

Was the pre-charge ID legal or was it suggestible?

When police orchestrate an identification process that is unnecessarily suggestive, there is a 5A violation. To determine if an identification is sufficiently reliable, the court will assess the totality of the circumstances, including: (1) witness' opportunity to view criminal at time of crime; (2) witness' degree of attention; (3) accuracy of witness' prior description; (4) level of certainty demonstrated by witness at confrontation; and (5) length of time between crime and confrontation (Manson v. Braithwaite).

Because the lineup likely does not violate 6A, it will be admissible as long as it was not a suggestible lineup. Here, Paula placed D in a lineup with five other men that look similar to D (same clothes and characteristics). In other words, he did not stick out like a sore thumb. Without any suggestive statement or questioning, Oscar immediately and decisively pointed at D and stated he was "100% certain". There had only been a day or two break between the crime and confrontation. As such, the identification is admissible under the Manson factors. Excellent statement of the applicable rules and analysis.

**END OF EXAM**

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95 Excellent job!

### Drug Dog Reaction

Did a 4A search occur?

4A prohibits unreasonable government searches and seizures (applies to states as well through 14A). A 4A search occurs when the (1) government or an agent thereof (2) (a) intrudes into a realm of life in which there is an objectively reasonable expectation of privacy (Katz) or (b) physically intrudes on constitutionally protected private property to obtain information (Jones) and (3) D has an REP in the thing searched or seized (standing).

Here, Owen a police officer (a government agent) conducted the search using a drug dog.

The home has the highest REP in the context of 4A. For purposes of 4A, a property owner's dwelling includes the curtilage (i.e. the area immediately surrounding and associated with the home). Per Jones, a trespass in D's curtilage occurs when the government's purpose and conduct exceeds the implicit license for visitors in the curtilage. Furthermore, Florida v. Jardines held that a drug dog's sniff of D's front porch of a home where the dog ultimately alerts is a 4A search. Here, the court would likely find that Jardines controls and the drug dog sniff of the front door significantly exceeded the reasonable expectations of the homeowner. The same analysis is true for the Katz test. Reasonable people do not want the government approaching their front doors and initiating drug dog sniffs; the intrusion isn't egregious, but a society would frown upon it.

good discussion  
of implicit  
license

Standing is established if the disputed search has infringed an interest of D which 4A was designed to protect. One who lawfully owns, possesses, or controls property will in all

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likelihood have REP in that property. The facts state that the search occurred in D's house so standing is established.

Was there an exception to the warrant requirement?

Subject to several exceptions, a search or seizure is generally illegal if there was no valid warrant. A valid search or arrest warrant requires a showing of PC that seizable evidence will be found in a place searched. Prior to issuance, officers must submit an affidavit to a detached and neutral magistrate setting forth circumstances enabling the magistrate to make an impartial determination of PC. A warrant is not valid unless it describes with particularity the place to be searched, items or person to be seized, and time constraints.

The government has the burden to demonstrate the legality of a warrantless search. Here, Owen conducted the dog search without a warrant. There is no sign of exigency or any other exception. In conclusion, the dog's reaction will be inadmissible as fruit of an illegal search. At this moment, all that exists is the officer's "hunch" that the homeowner is selling drugs.

**Small Box**

Did a 4A search occur?

4A prohibits unreasonable government searches and seizures (applies to states as well through 14A). A 4A search occurs when the (1) government or an agent thereof (2) (a) intrudes into a realm of life in which there is an objectively reasonable expectation of privacy (Katz) or (b) physically intrudes on constitutionally protected private property to obtain information (Jones) and (3) D has an REP in the thing searched or seized (standing).

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Here, Owen a police officer (a government agent) conducted the search by propping a ladder on the back of D's house and peering into D's window.

The home has the highest REP in the context of 4A. For purposes of 4A, a property owner's dwelling includes the curtilage (i.e. the area immediately surrounding and associated with the home). By climbing on top of D's roof without a warrant, Owen was committing an actionable trespass. This trespass was instrumental in his discovery of the box with ingredients for manufacturing meth. As such, per Jones, a 4A search occurred.

*not sure  
in this  
fact the  
pattern*

Standing is established if the disputed search has infringed an interest of D which 4A was designed to protect. One who lawfully owns, possesses, or controls property will in all likelihood have REP in that property. The facts state that the search occurred in D's house so standing is established.

Was there an exception to the warrant requirement?

Subject to several exceptions, a search or seizure is generally illegal if there was no valid warrant. A valid search or arrest warrant requires a showing of PC that seizable evidence will be found in a place searched. Prior to issuance, officers must submit an affidavit to a detached and neutral magistrate setting forth circumstances enabling the magistrate to make an impartial determination of PC. A warrant is not valid unless it describes with particularity the place to be searched, items or person to be seized, and time constraints.

The government has the burden to demonstrate the legality of a warrantless search. The plain view doctrine holds that there is no 4A search if evidence is in plain view. Furthermore, police may make a warrantless seizure if they are legally on the premises, the object is in plain view, its criminal nature is apparent, and PC exists that the object is evidence or fruits of a crime or contraband. *Coolidge v. New Hampshire*. However, If there is an extensive search or manipulation of the object in question, 4A applies. Use of

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technology to enhance what is already in plain view is permissible, especially when the sense enhancing technology is in general use.

Here, Owen used a latter to trespass onto D's roof to peer into his window. Owen's use of binoculars to enhance his sight and read the labeling on the box is permissible. D will argue that the plain view doctrine requires the searching officer to be legally on the premises. Because he did not have a warrant, Owen was not legally on the premises so his observation of the box was unlawful. In conclusion, the fact that Owen's initial and illegal trespass was instrumental to gather the evidence in plain view should defeat any argument proffered by the prosecution that the box should be admissible via the plain view doctrine.

*— again, I don't think this is in the fact pattern*

### Exclusionary Rule

Unless an exception applies, evidence obtained in violation of D's constitutionally protected rights is inadmissible under Mapp v Ohio. The fruit of the poisonous tree doctrine holds that, in addition to the primary evidence, any evidence derived from exploitation thereof (derivative evidence) must be excluded as well unless the evidence was discovered by means sufficiently distinguishable from the primary illegality (Wong Sun v. US). For a 4A violation, both primary evidence and derivative evidence is inadmissible (unless an exception applies), but it may be admissible for impeachment purposes.

Here, the drug dog reaction and the small box were both fruits of an illegal search and are thus inadmissible unless an exception applies. As the connection between Owen's illegal conduct and the evidence is not attenuated or interrupted by an intervening circumstance, the attenuation exception does not apply. In addition, the good faith

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exception does not apply because in order to, the searching officer must have a reasonable belief that he was not violating constitutional rights or his conduct only involves mere negligence (Davis v. US). Owen's initiation of a clear 4A violation without a search warrant is demonstrative of flagrantly unreasonable and inappropriate conduct. In conclusion, there is no exception to vitiating the evidence, and the box and sniff will be inadmissible except for impeachment purposes.

### Conversation

#### Did a 4A search occur?

See rules supra.

Only new rule: Dunn test - Four factors to assess whether area under the window is curtilage: (1) distance between home and area claimed to be curtilage; (2) whether questioned area is within fence or enclosure; (3) whether uses within area correspond to intimate activities of a home; and (4) steps taken to hide area from view of public.

Here, Owen a police officer (a government agent) conducted the purported search. After his flagrantly illegal conduct, Owen decided to return to his car. Shortly thereafter, he observed D returning home. He approached the home again and crouched under a window to listen. Whether the area under the window is curtilage, and thus protected by 4A, will be determined by the Dunn factors listed above. #1 and #3 indicate that the area below is probably curtilage, and D has a REP therein. The facts do not state whether a fence or other structure hides the area from public access or view (#2 and #4).

Prosecution will raise Katz and suggest that Owen was merely acting as a listening post. D will counter that, applying Katz test logic, society is not prepared to recognize an officer snooping under windows as reasonable and un-intrusive. The court's determination will

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probably turn on whether Owen trespassed to access the area under the window. Considering the configuration of most residential properties, a court will likely determine that the area is indeed curtilage and 4A is triggered.

Standing is established if the disputed search has infringed an interest of D which 4A was designed to protect. One who lawfully owns, possesses, or controls property will in all likelihood have REP in that property. The facts state that the search occurred in D's house so standing is established.

### Third-Party Doctrine

This is a cousin of the plain view doctrine discussed supra. This doctrine states a person does not have an REP in information they voluntarily divulge to a third party or the public. This includes conversations, pen registers, trash left in public, and objects exposed in the curtilage of the home.

When Owen was under the window, he heard D solicit a sale for methamphetamine. The prosecution may argue that this doctrine holds that overhearing a conversation is not a search. However, admissibility will likely turn on whether Owen was legally or illegally on D's property when he overheard the information.

In conclusion, it is likely the conversation will be inadmissible under exclusionary remedy discussed supra.

**END OF EXAM**

## QUESTION 1 - SAMPLE ANSWER

### 1. Court's Rulings on Pretrial Motions

The issue is how the court should rule on each of Deft's pretrial motions based on U.S. Constitution.

#### a. Motion to Suppress Statement Made During Traffic Stop

The issue is whether the admission of Deft's statement made upon his arrest violates his rights under the Fourth, Fifth or Sixth Amendments.

#### Fourth Amendment

The Fourth Amendment requires that a police officer must have reasonable suspicion that a person is involved in criminal activity before detaining a suspect. However, the police may stop a vehicle if they reasonably believe the stopped car violated a traffic law. Officer Jones observed one of the headlights out on the car Deft was driving, which is a traffic violation. Thus, Jones had reasonable grounds to detain Deft for a traffic violation and no Fourth Amendment violation occurred. Thus, Deft's statement made during the detention was not the fruit of an illegal detention.

#### Fifth Amendment

The Fifth Amendment requires that a suspect be advised of his constitutional rights before being subjected to custodial interrogation. Custodial interrogation occurs where police interrogate a suspect in custody and know or should know that such questioning is likely to elicit an incriminating response. Deft was not in custody when he made the statement to Jones. The Supreme Court has held that a traffic detention does not entitle a detainee to *Miranda* warnings, because a traffic stop is non-custodial in nature. Also, Deft's threatening statements were made spontaneously and not in response to questioning by the police officer. A police request for license and registration would not elicit an incriminating response from a motorist. Thus, no Fifth Amendment violation occurred.

#### Sixth Amendment

The Sixth Amendment requires that a defendant not be questioned by police after he is formally charged with an offense. Because Deft had not been formally charged with any

offense at the time he made the statement to Officer Jones, no Sixth Amendment violation occurred.

Thus, Deft's statement to Officer Jones does not violate the Fourth, Fifth or Sixth Amendments and is admissible.

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b. Seizure of the Purse

Fourth Amendment

The issue is whether seizure of the purse from Deft's car violated the Fourth Amendment, which applies to the states under the Fourteenth Amendment.

The Fourth Amendment protects against governmental conduct and not searches by private persons. This requirement is met because Officer Jones is a police officer.

In order to allege a Fourth Amendment violation, Deft must demonstrate that he has standing, which requires a reasonable expectation of privacy in the thing seized or area searched. The car belonged to Deft, who was driving the car, and thus Deft had a reasonable expectation of privacy in its contents, including the area under the passenger seat. Thus, this requirement is met.

A search or seizure must be made by warrant unless an exception to the warrant requirement applies. The seizure of the purse occurred without a search warrant. Thus, the search is invalid unless one of the exceptions to the warrant requirement applies.

Search incident to a lawful arrest

A search incident to a lawful arrest is a permissible warrantless search where the defendant's arrest is supported by probable cause, and the officer's search is limited to areas within the arrestee's reach (grabbable space). Probable cause exists when a reasonable person would deduce a crime occurred and that the defendant committed it.

Here, Officer Jones was aware that a recent robbery had occurred and that a person with similar height, weight, facial description, hair, and clothing to Deft committed it. The clothing description of the robbery suspect was nearly identical and the vehicle description, a red sports car, matched exactly. Thus, the officer had probable cause to arrest Deft for robbery.

Once a valid arrest is established, this exception permits a search of areas within the reach of the arrestee. However, after arresting the occupant of an automobile, the police may only search the interior of the automobile incident to arrest if the arrestee is unsecured and still may gain access to the interior of the vehicle; or the police reasonably believe that evidence of the offense for which the person was arrested may be found in the vehicle.

Although the purse was recovered from under the seat after Deft was arrested and turned over to other police officers, the purse was evidence of the robbery for which Deft was arrested. Furthermore, the search of Deft's vehicle must be contemporaneous with his arrest. Here, Deft was turned over by Jones to two other officers who arrived at the scene. The facts do not state if Jones handcuffed Deft or not before turning him over to the two officers arriving after the arrest, but one can reasonably assume she did. The facts also do not state where Deft was after being turned over to the two officers, or how long after turning him over that she searched the car. If Deft was indeed handcuffed and delivered to two more officers, one can conclude reasonably that Deft was no longer within reach (the grabbable space) of the driver's area. If handcuffed and removed from reach of the driver's area, then the search would not be justified by search incident to lawful arrest. The court should grant the motion to suppress under this theory.

However, if the evidence showed Deft was still unrestrained and within reach at the time of the search, it would be lawful under "sila" and the court should deny a motion to suppress the purse under this theory.

### AUTOMOBILE SEARCH

Under the automobile exception, search of an automobile requires only the police have probable cause to believe that a vehicle contains evidence of a crime or that contraband will be found in the car. Similarly, police have probable cause to believe the vehicle itself is contraband, the vehicle may be seized from a public place without a warrant. The rationale for this exception is the car's mobility. It is unlikely that the car itself would be considered contraband. Not only did Deft's robbery not involve the use of his car, but the car was not used in connection with drug-related activity.

The search would be lawful even if Deft was restrained and removed from reach of the vehicle if Jones had a reasonable belief that evidence of the robbery would be in the vehicle. Here, the purse "had just been taken" in the robbery as reported in the bolo for the suspect and vehicle. She had probable cause to believe that Deft had just committed the robbery. Thus, it would be reasonable to believe the purse would be in the vehicle given the proximity in time to the robbery. Thus, the search did not violate the 4th am under this theory and the court should deny the motion.

### Plain view

The facts state the purse was found “under the seat,” suggesting it was not in plain view before looking under the seat from inside the car. Unless Jones could state the purse was in plain view from outside the vehicle, this exception would not apply even though Jones would be legitimately in a position to view inside the vehicle while outside it.

if the purse was in plain view, the search of the automobile and seizure of the purse did not violate the Fourth Amendment and the court should deny the motion to suppress under this theory as well.

### c. Identification of Deft by Smith at Police Station

The issue is whether Smith's identification of Deft at the police station violated the Sixth Amendment or the Fourteenth Amendment Due Process Clause.

#### Sixth Amendment

Under the Sixth Amendment, a suspect has a right to the presence of an attorney at any post-charge lineup or showup. Deft was subjected to a one-on-one showup at the police station after his arrest but before he was formally charged. Thus, Deft was not entitled to counsel at the showup and no Sixth Amendment violation occurred because the right does not attach until one is formally charged.

#### Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment prohibits an identification process that is unnecessarily suggestive and where there is a substantial likelihood of misidentification. This must be determined under the totality of the circumstances.

Smith was shown only Deft and no others. Showing one individual to a witness instead of a range of suspects creates a greater chance that the sole suspect will be selected. Additionally, conducting the process at the police station as opposed to an in-field lineup at the scene is a factor to determine whether it was unnecessarily suggestive and created a substantial likelihood of misidentification, leading to the issue as to whether the process was immediately required. had the process been done at the scene of the stop there would be a better argument for immediacy, especially if done before the arrest. there are no facts to show it was immediately required under the circumstances here. The lack of immediacy coupled with the fact the id was done in the police station in a one-on-one creates a serious question about the reliability of the identification here.

Most likely, the court will find it unreliable unless there are factors showing it was nonetheless reliable, including the opportunity of the victim to view the perpetrator at the scene; the degree of attention of the witness; the accuracy of the prior description (here it was reasonably accurate); the level of certainty at the confrontation (the victim was positive in her identification); and the time elapsed between the crime and the confrontation (within an hour

after the arrest here). Additional factors of reliability include the fact that the victim later identified her purse and other conditions of the process such as whether the police suggested Deft was the suspect or that her purse had been found in his car, was Deft handcuffed, in a jail cell, or still in the same clothes as when arrested. The fact that the victim was positive it was Deft, that his clothes and vehicle were reasonably consistent with her descriptions reported in the bolo, the confrontation occurred within an hour of the arrest and after the bolo was issued, and her identifying her purse stolen from her will likely lead to the court finding the identification was reasonably reliable.

### Admissibility Deft's Confession at Police Station

#### Fifth Amendment

As stated, failure to properly give a Miranda warning to a suspect who is subject to custodial interrogation is a violation of the Fifth Amendment. Deft was in custody and subject to interrogation when he invoked his right to remain silent and right to counsel, after Jones advised him of his Miranda rights at the scene. The issue is whether Deft's subsequent confession is admissible following the additional advisement in the police station.

Where a suspect first invokes his right to counsel, all questioning must cease until the accused is provided with counsel, unless the accused himself initiates resumption of questioning or there has been at least 14 days since the initial advisement--which is clearly not the case here. Here, the prosecution will argue Deft nonetheless subsequently waived his Miranda rights and then voluntarily confessed to the robbery. However, Deft had no counsel present. He was in custody at the police station and had not been released not long after his arrest and initially invoking his rights, including to have counsel present. Further, there is no indication that Deft sought to initiate further questioning by police. Therefore, the resulting confession is inadmissible.

#### 2. Use of Deft's Confession to Impeach Deft

A confession obtained in violation of an accused's Miranda rights may be used to impeach the accused's testimony if he takes the stand at trial, even though such a confession is inadmissible in the state's case-in-chief as evidence of guilt. However, where the accused's confession was preceded by an invocation of his right to counsel, the court must find that the defendant voluntarily and intelligently waived his right to counsel. If Deft waives his Amendment right not to incriminate himself and testifies, his testimony on direct or cross-examination may be impeached by evidence of his confession. Thus, if Deft testifies he did not commit the robbery, or attempts to establish an alibi, his testimony may be impeached, so long as the court finds that Deft's waiver of his right to counsel was voluntary and intelligent.

SAMPLE ANSWER- Question 2

### **General Exclusionary Rule**

Under the exclusionary rule, evidence obtained in violation of a defendant's Fourth, Fifth, or Sixth Amendment rights generally will be excluded from evidence in the prosecution's case chief. Moreover, under the fruit of the poisonous tree doctrine, most evidence derived from unconstitutionally obtained evidence will also be excluded. Suppression is not required if the taint of the unconstitutional action can be attenuated, *e.g.*, by an intervening act.

#### **1. Deft's motion to suppress the cocaine**

In determining whether to suppress evidence obtained by the police, the court will look to see if the police had probable cause to search and a valid warrant or if an exception to the warrant requirement applies.

#### Fourth Amendment: Search/Seizure of Deft

The Fourth Amendment protects citizens against unreasonable searches and seizures. The Fourth Amendment is applicable to the states via the Due Process Clause of the Fourteenth Amendment.

#### Warrant Requirement

For a search and seizure to be valid, the government must have acted pursuant to a valid warrant. If the warrant is not valid, or if the police did not have a warrant, all the evidence will be deemed inadmissible unless an exception to the warrant requirement applies. Here, Paula did not have a warrant when she arrested Deft, searched his pockets, and found the cocaine. Therefore, all evidence is inadmissible unless an exception applies.

#### **Search Incident to Lawful Arrest**

At issue is whether Deft was lawfully arrested for committing a battery against a police officer, thereby

permitting a search incident to a lawful arrest.

During a search incident to a lawful arrest based on probable cause, the police may contemporaneously search a person and areas within his wingspan (*i.e.*, areas into which he might reach to obtain weapons or destroy evidence) even without a warrant. "Probable cause to arrest" is present when, at the time of the arrest, the officer knows of reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect has committed or is committing a crime. An arrest warrant is not required when the arrest is made in a public place.

The arresting officer does not need to witness the acts herself; knowledge can be obtained from a trustworthy informer. Here, the alleged illegal acts were against a police officer who was then able to give a precise description of his attacker. The officer's information would surely be found to be trustworthy.

Therefore, Paula had probable cause to arrest Deft. Since Paula found cocaine in a search immediately after Deft's arrest, it is admissible under the search incident to arrest exception to the warrant requirement.

#### Other Exceptions to Warrant Requirement

No other exceptions to the warrant requirement apply. Other exceptions to the warrant requirement include an investigatory ("*Terry*") stop, the hot pursuit exception, and an emergency-type exception to prevent the destruction of evidence. Here, the facts state that Deft was immediately arrested, so the stop was not "investigatory," it was an arrest. Additionally, Paula was not in hot pursuit of Deft, so that exception does not apply. Neither does the evidentiary exception, because there is no indication from the facts that Paula knew or suspected that Deft possessed cocaine.

### Conclusion

Given that there was probable cause for the arrest, Deft was searched incident to a lawful arrest, and the cocaine should not be suppressed.

However, if not construed a search incident to lawful arrest because of lack of probable cause the cocaine should be excluded, there being no other exception to the warrantless search,

#### 2. Deft's motion to suppress Oscar's identification during the lineup

When deciding whether to suppress an identification of the defendant during a lineup, the court will ensure, if the Sixth Amendment right to counsel has attached, that the defendant's attorney was present for the lineup and the lineup procedure did not violate the Due Process Clause of the Fourteenth Amendment.

A suspect has a Sixth Amendment right to be represented by private counsel, or to have counsel appointed for him by the state if he is indigent, at all critical stages of a criminal prosecution after formal proceedings have begun. A post-charge lineup is considered to be such a critical stage, whereas a pre-charge or investigative lineup is not a stage during which the right to counsel attaches.

In the instant case, and in response to a proper *Miranda* warning, Deft requested counsel before any questioning. Before counsel could be appointed and before arraignment, Deft was placed in a lineup and identified. Given that Deft had not yet been arraigned, he had no right to have counsel present. (In California, the filing of an accusatory pleading triggers the 6<sup>th</sup> Amendment right to counsel.) Thus, the ID should not be excluded.

Deft might argue that because he had asserted his right to counsel after the *Miranda* warning, the lineup should be suppressed for that reason. However, this will fail because a lineup is not interrogation, to which the *Miranda* rule applies. Again, the right to counsel does not apply until formally charged.

The Due Process Clause of the Fourteenth Amendment prohibits an identification process that is unnecessarily suggestive and where there is a substantial likelihood of misidentification. Here, Deft was placed in a lineup where Oscar identified him as his assailant with certainty. The lineup consisted of 5 other similarly appearing men and there is no indication the police did anything to suggest to Oscar that Deft was the suspect. Thus, a challenge based on due process will be rejected.

### 3. Deft's motion to suppress his statement that he hit Oscar

To ensure that Deft's statement is admissible, the police must give Deft *Miranda* warnings and must obtain a valid waiver of Deft's Fifth Amendment rights. The waiver and any confession must also be intelligently, knowingly and voluntarily made without coercion.

#### Fifth Amendment

The Fifth Amendment guarantees freedom against compelled self-incrimination. Under the Fifth Amendment, applicable to the states under the Fourteenth Amendment, a suspect must receive *Miranda* warnings prior to custodial interrogation by the police. A suspect is in custody when he is placed in a situation where a reasonable person would not feel free to leave and the environment is coercive, such as at a police station house. If the suspect invokes his right to remain silent, the police may reinitiate questioning (after providing another set of *Miranda* warnings) if they "scrupulously honor" the suspect's invocation of his right to remain silent. If the suspect requests an attorney via an unambiguous and specific request, questioning must stop and cannot be reinitiated, even with a fresh set of *Miranda* warnings, until at least 14 days after a "break in custody" (e.g., termination of the prior attempted custodial interrogation of Deft).

There were two advisements given by Paula, the first immediately after the arrest at which time Deft said he wanted a lawyer. Afterwards, no questions were asked of him that day. The second took place the next day.

### Advisement, waiver and invocation

Advisement: The Miranda warning must advise a suspect of these rights:

1. You have the right to remain silent;
2. Anything you say will be used against you;
3. You have the right to a lawyer present during questioning; and
4. If you cannot afford a lawyer one will be appointed to represent you at no cost.

Given that the facts state Deft was properly warned, each of these requirements appear to have been met. To constitute a valid waiver, one must intelligently, knowingly and voluntarily waive the rights.

### Invocation/Waiver

To invoke the Miranda rights, one must unequivocally assert the rights. After the first warning, Deft unequivocally asserted his right to an attorney, and by so doing it is highly likely that his request would be construed as a clear assertion of his right to remain silent as well—at least until he had counsel.

A waiver of Miranda rights may be done expressly or impliedly. A suspect may impliedly waive his Miranda rights by beginning to talk and answer questions after the advisement. However, the prosecution must still prove it was voluntary, knowing, and intelligent.

Clearly, there was no express or implied waiver on the first day. To the contrary, Deft said he wanted a lawyer. The advisement on the second day raises two questions: It appears he was still in custody, and in fact incarcerated which implicates the voluntariness of his statement. Second, whether Deft impliedly waive his rights.

The burden is on the prosecution to establish the voluntariness of Deft's statement under the totality of the circumstances. Coercive police conduct will generally show it was not voluntary. Because Paula returned to talk to Deft the very next day after Deft asked for a lawyer, after being placed in a lineup without counsel, arraigned, and apparently still incarcerated, Deft's argument that he was coerced into making his statement will likely succeed, leading to it being suppressed for that reason. However, the most persuasive argument that Deft has is that Paula reinitiated questioning before Deft had counsel as he requested and she had not waited 14 days to do so as required under these circumstances. Thus, Deft's waiver is not effective, and the statement should be suppressed from the prosecution's case in chief because it was not voluntary under these circumstances.

Any argument made by Deft that he did not knowingly waive his rights by simply responding to the question will fail because the Supreme Court has held that no express waiver is required as an implied waiver occurs where a suspect begins to talk after the advisement, or himself later approaches the police and voluntarily makes a statement. Deft did not approach Paula, but he did begin to talk and make his statement after the advisement.

## **CONCLUSION**

Deft's statement should be suppressed because Paula did not wait at least 14 days after Deft

first asserted his right to counsel and to remain silent, and it was involuntarily made. However, his statement may be used for impeachment purposes should he testify later.

### SAMPLE ANSWER

The Fourth Amendment of the US Constitution - incorporated to the states by the Due Process Clause of the 14th Amendment - protects citizens from unreasonable search and seizure. The touchstone of a search and seizure is reasonability. This means that to conduct a search, the police officer or agent of the state must have a valid search warrant. Where there is no warrant, the search will be presumed to be invalid or unreasonable unless at least one of the valid warrant exceptions exists.

#### Exclusion Rule - Suppression Remedy

Evidence seized in violation of the fourth amendment will be suppressed at trial. Further, under the **fruit of the poisonous tree** doctrine, all evidence gathered as a result of an unlawful search will be suppressed as well unless the government can show that the taint of the unconstitutional activity has been sufficiently attenuated.

#### State Action

A "search" requires government action. Here, Owen is a police officer; thus, this requirement is met.

#### "Search"

A search only occurs where the government physically intrudes on the person's person, property or effects, or when the government intrudes on a person's "reasonable expectation of privacy" (REP OR REOP).

Because there is no indication that Officer Owen had a warrant for any of the activity discussed below, his actions are unreasonable if they constitute a "search" and if no valid warrant exception applies.

#### **1. The Dog's Reaction**

The issue here is whether the use of the drug-sniffing dog at the front porch was a search.

#### Government Action

As discussed above, the fourth amendment is only triggered by state action. Action by a police officer is sufficient. Here, Owen is a police officer. Thus, there is state action.

### "Search"

A search exists where the government interferes with a reasonable expectation of privacy (REP OR REOP) or where there is a physical trespass into constitutionally protected space (persons, places or effects).

### Trespass Theory

The Supreme Court recently held that bringing a drug-sniffing dog to the front porch of a home for the purpose of searching for drugs is a "search" under the fourth amendment. Although the front door is typically held open under implied consent doctrine, the use of a drug-sniffing dog exceeds this consent and is therefore a trespass. (Note: this is unlike the case of using a drug-sniffing dog at a traffic stop, which is reasonable under the fourth amendment.)

Here, Owen brought the drug-sniffing dog to the porch for the purpose of checking for drugs. He did not have a warrant to do so. Because Dora did not consent to this, this is a search under the trespass theory of the 4th amendment.

### REOP

Dora could also argue this is a search under the rep/reop theory of the 4th amendment. A search occurs where state actors intrude on one's reasonable expectation of privacy. A rep/reop exists where the person holds a subjective expectation of privacy and the expectation is objectively reasonable. There is almost always a rep/reop in one's own home. Here, the home belonged to Dora. Thus, Dora could argue that a person has a rep/reop in her front door in regards to drug-sniffing dogs.

The government would point out that the front door is a place where one ordinarily has no rep/reop. This was not a search IN the home. However, even if this is true, Owen also took the dog onto the curtilage, where Dora does have a rep/reop.

### Curtilage vs. Open Fields

Curtilage is the area immediately around a home and is intimately tied with the activities of the home. The Court has found a rep/reop to exist there. Areas that are not curtilage are considered

"open fields" and there is no rep/reop in open fields.

The government will argue that the front door is not part of curtilage. The court will likely rule it is part of the curtilage. However, the dog also walked around the house immediately next to it. This is even more likely considered curtilage, where the court has found rep/reop.

### Sensory Enhancing Technology

Even in open fields, the government action is a "search" if they use "sensory enhancing technology" not available to the general public. Here, a drug-sniffing dog may meet this test (a plurality of the Supreme Court feels it does). Thus, even if the dog were kept in open fields, the use of a drug dog would still constitute a search.

### Conclusion

Because there was a trespass in a constitutionally protected area without a warrant, and alternatively, because the drug-sniffing dog at the front door and next to the house violated Dora's rep/reop, the court will find that a "search" occurred without a warrant and the evidence of the dog's reaction should be suppressed.

## **2. The Small Box**

The legality of this evidence will turn on whether a search occurred and whether there was a warrant exception.

### Government Action

There was government action (see rule statement above).

### "Search" - REP/REOP

The government will argue that no search occurred because the officer was in the open fields and only used binoculars. Dora will argue that the officer's presence in her back yard was an intrusion in the curtilage, and that using a ladder to peer into a bedroom window with binoculars was an unlawful trespass as well as an invasion of her rep/reop.

### Open Fields vs. Curtilage

See rule statements above. Dora will argue that the officer was in the curtilage of her home

because the ladder was propped against her home and he peered into the window. Not only was he in the backyard, but he was also peering into the second story window of a bedroom with the use of a ladder. This is not open fields because we do not expect people to be propped on a ladder in our backyard. This is clearly curtilage instead of open fields.

### Sensory Enhancing Technology

Dora will also argue that the use of the binoculars constituted a search even if the government was properly in the window. The government will argue this was not a search because this technology is available to the public.

The Court has found that a search occurs where the government, even standing in open fields, uses sensory enhancing technology not available to the general public. This covers using heat-detecting technology, for example. Here, the officer used binoculars, which are available to the public. Because binoculars are readily available, the court will likely find that this, alone, will not transform this action into a search.

However, the court will likely find that a search occurred because of Owen's presence in the curtilage and use of a ladder to peer into a second story bedroom window. Because it was a search, the evidence should be suppressed unless a warrant exception applies.

### Plain View

The government will argue that even if a search occurred, a warrant was not required under the plain view exception. Plain View means that a warrant is not required when officers find evidence in "plain view". We do not require the police to close their eyes to incriminating activity (when walking by an open window, for example). For a search to fall within plain view, two elements must be met: (1) the officer must be lawfully in the place where he made the observation, and (2) the incriminating nature of the evidence must be readily apparent.

### Lawfully in the Place

Here, Dora will argue that the officer could not be on the curtilage of her home and also using a ladder to look into the bedroom--where we have the highest expectation of privacy unless we keep a window open where the public can see inside from a public place. The government may argue first that Owen was merely in the curtilage, and so his presence was lawful (see discussion

above). Additionally, the government could argue that the dog's reaction at the door provided probable cause for the officer to take a closer look at the house. The court will likely find that without a warrant, this presence in the window on the second story was not lawful. The officer needed a warrant to come this close to the house and to use a ladder to peer into the bedroom window. Thus, he was not here lawfully.

### Incriminating Nature of Evidence

If the officer is there lawfully, the criminal nature of the evidence must be readily apparent to qualify under plain view. Here, the box could not be read from the window where Owen saw it - he required binoculars to see that the box contained ingredients used for methamphetamine. However, because binoculars are generally available, the court may find that this meets the "apparent" requirement. On the other hand, the fact that it had ingredients alone may not make it incriminating, unless those ingredients themselves are illegal. The court could find there was nothing apparently incriminating about this evidence.

Thus, the plain view doctrine does not apply.

### Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine suppresses evidence seized as a result of an unlawful search, unless the taint of the illegality has been attenuated. Here, even if the plain view exception applies, Dora could argue that it should be suppressed because it was the result of the illegal use of the drug-sniffing dog at the front door. The government will argue that the taint has been attenuated.

### Attenuation

Fruit of the poisonous tree can be admitted if the government can show the taint of illegality has been attenuated. This is often shown where sufficient time has gone by between the illegality and the discovery of the evidence, or where there is an independent source for the evidence, or where it would have inevitably been discovered.

Here, very little time went by. Owen went straight from using the dog to going to the backyard. Further, there is no independent source or reason for inevitable discovery. Thus, the evidence cannot be saved by attenuation and should be suppressed as poisonous fruit.

### Conclusion

The court will find that the officer's activity constituted a search when he went into the curtilage of the home and that the plain view exception to the warrant requirement does not apply because the officer was not lawfully in the place where he made the observation and because even if he was, the incriminating nature of the evidence was not immediately apparent. Thus, the evidence of the small box should be suppressed.

### **3. The Overheard Conversation**

#### State Action

See rule statement above. There is state action here.

## "Search"

See rule statement above. Whether or not there was a search will turn on whether Dora had a reasonable expectation of privacy in her conversation with the window open.

## Eavesdropping

Generally, there is no rep/reop in a conversation held in public. There is also no rep/reop for conversations held in private with another person. The theory is that when one speaks to another person, you assume the risk that that person may be a police informant. Police may not use electronic methods to eavesdrop on phone calls, but that is because there is an reop that persons are not listening in on phone calls. Generally, there is no rep/reop in people overhearing conversations. The court has held that there was not a search where officers stuck their ear to a wall to eavesdrop on conversations overheard in the next apartment over. There would be a search, however, if the officers used sensory enhancing technology, or wiretapping to overhear these conversations. Police may not use electronic methods to eavesdrop on phone calls, however, but that is because there is a rep/reop that persons are not listening in on phone calls.

Here, the government will argue there was no search because the officer merely overheard the defendant making incriminating statements. She had her window open and made them loud enough for passers-by to hear. Even though the statements were made over the phone, the conversations were not overheard via electronic wiretapping. Nor was there sensory enhancing technology used. however, the argument will fail because the officer walked to the back of the house and crouched below a window there to overhear the conversation. the back yard of a residence is not usually a place where conversations can be overheard by the public. Thus, the court will find that Dora had a rep/reop in her conversation that was overheard outside and suppress the conversation.

## Curtilage

Dora will again argue that this was a search because Owen was on the curtilage and not in an open field. whether a search occurs depends on the justifiable privacy expectations which in turn are a function of the setting observed and the vantage point from which the observation is made or a conversation is heard. Walking onto the front yard of a home and then crouching beneath a window will likely be held to be an invasion of privacy because the home is where we have the

highest expectation of privacy, even though the expectation may be somewhat less in the curtilage in close proximity to it. Furthermore, if dora was not speaking in a voice loud enough to be heard from a public place such as a sidewalk in front of the home, her argument of rep will likely be held objectively and subjectively reasonable as homeowners do not expect people to walk onto their property right next to a window and crouch down to hear what is being said inside. However, there is a chance the court will disagree and find this was not a fenced yard preventing access in close proximity to the home and thus not part of the curtilage and allow the phone conversation to be admitted.

### Warrant Exception?

If the court were to find that a search had occurred, the government would have to argue that a warrant exception applied. No warrant exceptions apply.

### Fruit of the Poisonous Tree / Attenuation

Dora will argue this should be suppressed anyway as fruit of the poisonous tree. See rule statement above. The government may argue that even if the earlier search were unconstitutional, this evidence should not be suppressed because it was independently discovered by Owen overhearing in the front lawn. His overhearing had nothing to do with the drug-sniffing dog.

However, if the court finds that the earlier search was unconstitutional, and that Owen would not have been in front of the window but for that illegal search, then the criminality has not been sufficiently attenuated and should be suppressed.

### Conclusion

Because the front yard is likely part of the curtilage of the home, and a homeowner has a rep while speaking inside the house unless speaking loud enough to be heard from a public place such as a sidewalk, the court should exclude the conversation. while one may expect the public to walk up to their front door, a homeowner does not usually expect anyone to walk up to a window and crouch beneath it to overhear conversations inside. Additionally, the court may exclude the conversation as fruit of the earlier unconstitutional use of the dog as well as the unconstitutional search through the bedroom window.