

### **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 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.

## QUESTION 3: SELECTED ANSWER A

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 unreasonable unless 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" (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 (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 REOP theory of the 4th amendment. A search occurs where state actors intrude on one's reasonable expectation of privacy. AN REOP exists where the person holds a subjective expectation of privacy and the expectation is objectively reasonable. There is always an REOP in one's own home. Here, the home belonged to Dora. Thus, Dora could argue that a person has an REOP in her front door in regards to drug-sniffing dogs.

The government would point out that the front door is a place where we have no REOP. This was not a search of the home per se. However, even if this is true, Owen also took the dog into the curtilage, where Dora does have an 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 an REOP to exist there. Areas that are not curtilage are considered "open fields" and there is no REOP in open fields.

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

### Sensory Enhancing Technology

However, even in the 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 violated Dora's 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" - 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.

### 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 back yard, but he was also peering into the second story window. 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. 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 in the curtilage of her home. 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 proper. The officer needed a warrant to come this close to the house. 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 been inevitably 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 REOP in a conversation held in public. There is also no 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 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 an REOP that persons are not listening in on phone calls. Generally there is no REOP in people overhearing conversations.

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. Thus, the court will find that Dora had no REOP in her conversation that was overheard outside.

## Curtilage

Dora will again argue that this was a search because Owen was in the curtilage. However, the court has held that merely being on another's property is not curtilage. The area under the window in the front yard is probably not sufficiently connected to the intimate activities of the home to constitute curtilage (compared to peeping in the back,



second-story window, for example). We routinely allow officers to walk around the home.

Here, Owen was merely in the front yard and under an open window. We allow officers to make reasonable inquiries around the home. This will likely not be found to be curtilage. Thus, the court will find that Owen was only in the open fields, not the curtilage.

### 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 there is no reasonable expectation of privacy in one's conversations overheard in public, the court will find that there was no search here and therefore the 4th Amendment was not implicated. Evidence of the conversation should not be suppressed. However, the court may find that it should be suppressed as fruit of the earlier unconstitutional use of the drug-sniffing dog.

## **QUESTION 3: SELECTED ANSWER B**

Dora ("D") was arrested and charged with attempting to sell methamphetamine following several questionable search tactics implemented by police officer, Owen ("O"). D has moved to suppress the evidence under the Fourth Amendment to the United States Constitution. Despite Dora's involvement in rather exploratory drugs (meth), it appears she will prevail in the suppression of all evidence obtained against her by Owen.

### **FOURTH AMENDMENT RULES**

The Fourth Amendment protects against unreasonable searches and seizures, and is incorporated against the states pursuant to the 14th Amendment due process clause. Here, the drug dog's reaction, the small box spotted with binoculars, and the conversation heard through the window all trigger issues with respect to unreasonable searches and the exclusionary rule.

#### Expectation of Privacy in the Home

A "search" occurs anytime that a police officer or state actor invades an area that a person has a reasonable expectation of privacy (e.g. home, automobile, or a bag in one's possession). The Supreme Court has long held that persons retain their expectation of privacy in their home; it is a sacred place. Conversely, the government's authority to conduct searches is at its zenith at the border. Here, the facts indicate that O conducted several searches at D's house in the country. Thus, Dora's expectation of privacy is very high in the areas search.

#### Unreasonable Searches and Seizures and the Exclusionary Rule

As a general rule, a search is unreasonable absent the existence of a warrant and probable cause. However, several exceptions to the warrant requirement exist (e.g. contraband items in plain view; persons committing a crime in plain view). If an exception applies, a search may be reasonable even absent a warrant. However, where no exception applies, any evidence discovered pursuant to an illegal and

unreasonable search should be excluded from evidence under the exclusionary rule. Finally, where an illegal search reveals subsequent incriminating evidence, that subsequent evidence discovered may also be excluded as evidence that is "fruit of the poisonous tree" - i.e., evidence that would not have been discovered but for the initial 4th Amendment violation. The only way such subsequent evidence may be admitted is if there is an independent source for that evidence (independent of the illegal search), or the evidence would have been inevitably discovered (despite the illegal search).

The aforementioned rules are applied below, but not restated.

### **(1) Suppressing Evidence of the Drug-Detection Dog's Reaction**

#### No Warrant

Unless exigent circumstances arise (hot pursuit of a criminal; destruction of evidence), police need a warrant to conduct a home search. The warrant must clearly state facts on which the requesting officer has made a determination of probable cause, and approved by a neutral magistrate. Here, the facts do not indicate that O obtained a warrant before investigating D's house. Thus, the searches are presumptively unreasonable and violate the fourth amendment.

#### Probable Cause

The facts indicate that O drove to Dora's on a "hunch" that D might be selling methamphetamine, and further that O brought his drug-detection dog. The Supreme Court has held that probable cause, while need not be definitive, must be "more than a hunch." Instead, probable cause must be based on some "reasonable articulable suspicion" that criminal activity is likely afoot. Since no facts indicate what O's hunch was based on (and none are provided in a warrant application), the requirement for probable cause is not met.

### Impermissible Dog Search

As stated above, a search occurs whenever police invade an area where a person has a constitutional expectation of privacy. The use of a drug-detection dog has been found to constitute a search by the Supreme Court, which has held that persons have an expectation of privacy both in their home and the surrounding curtilage. Thus, while dog searches are permissible in the automobile context (assuming no unreasonable delay), such searches are not permissible in the context of a home search without a warrant or probable cause.

Here, O walked the dog "around Dora's house." If O stayed off Dora's property, there is likely no 4th Amendment violation. For instance, O could have the dog sniff Dora's trash that was set out on the curb. Further, since D's house is "in the country," O might even have some leighway to search any open fields surrounding D's property, since such fields do not carry the same privacy interests as a residence. However, the facts indicate that O directed the dog to jump up on the porch, at which point the dog sniffed the front door, and indicated the presence of methamphetamine.

This clearly constitutes a search under the 4th Amendment. O brought the dog in proximity to Dora's actual place of dwelling, and ordered the dog to jump on the porch (technically, a trespass - which the court recently found to be one means of determining a search in the GPS car case). Thus, by violating Dora's privacy interests and property interests, and conducting a search without a warrant or any identifiable probable cause, the drug dog's reaction constituted an unconstitutional search.

Under the exclusionary rule, the drug dog's reaction thus cannot be admitted as evidence.

### No Consent or Exceptions

It should be noted that warrant and a probable cause are not required where an officer obtains consent to search an area. Even then, any search is limited in scope by the degree of consent. Here, the facts clearly show that Owen "waited until [Dora] left"

before commencing the dog search. Thus, the absence of consent is apparent and does not apply. Similarly nothing in the facts indicates that O was in hot pursuit or that there was a risk of imminent destruction of evidence - to the contrary, it appears nobody was home when D left the house.

## (2) Suppressing Evidence of the Small Box

Owen propped a ladder on the back of D's house, climbed to the top, and peered into a second-story bedroom window. After seeing a small box on a bedside table with a label he could not read, O used binoculars to determine that the listed ingredients could be used to make methamphetamine.

### Unreasonable Warrantless Search

As discussed above, O had no probable cause or warrant and thus was not legally on the property. His action of using a ladder and placing it against the house is clearly a violation of Dora's property interest in her home (whether the ladder was his or Dora's) and by subsequently looking in her window, from the vantage point offered by the ladder, he effectively conducted a search. Similar to the facts discussed above, the fact that O did not physically enter D's house does not preclude the court finding an unreasonable search. Here, both Dora's property interest (to not have ladders placed against her home) and privacy interests (to not have cop's snooping in her second floor window from ladders they placed on her house) have been violated. Thus, the search was unconstitutional because, as discussed, no warrant or probable cause existed.

### Dog's Search Did Not Create Probable Cause or Exigent Circumstances

The Prosecution may argue that following the dog's bark, the officer had probable cause with respect to the house containing methamphetamine. Even so, no exception to the warrant requirement applies and thus the search remains constitutionally impermissible. As noted, Dora was not at the house and the facts do not indicate that anyone else was present in the home. Further still, Dora apparently does not know about officer's presence on her property (otherwise she likely would not be gabbing so loud about a

drug deal through an open window). Thus, even if the dog-sniff were not illegal, the absence of a warrant would preclude O from searching D's home, where her expectation of privacy is at its highest.

### Binocular Search

As a general rule, law enforcement's use of technology does not inherently transform police action into a search. However, police use of technology not widely available to the public may result in a search even where a person's physical interest in property was not violated (compare: thermal imaging vs. binoculars). Here, the officer used binoculars to look in D's window in order to read the ingredients of a small box on her bedside table. The use of binoculars in and of itself does not appear to be problematic - this is an item generally available to the public.

However, for the reasons stated above, O only got to a point where he could assess the need to look into the box in D's window by conducting an impermissible search (putting a ladder on the back of the house). Thus, O's "search" - vis-a-vis his use of binoculars to read the ingredients in the box - and the subsequent discovery of that information constituted either an illegal search, or the fruit of the initial illegal search. As such, this evidence should also be excluded.

NOTE: If Officer looked through Dora's window from a tree off of her property, police may have an argument that such a search was permissible and within "plain view." However, this is questionable given the reverence with which the Supreme Court has treated a person's expectation of privacy in his home.

### **(3) Suppressing Evidence of Overheard Conversation through Open Window**

#### Reasonable Expectation of Privacy in Phone Call In House Made While Window Open

After D returned home, O "walked back to the house and crouched under an open window." He subsequently heard D make incriminating statements to a caller that she

could sell several ounces of methamphetamine. This is the closest call with respect to the three pieces of evidence offered.

On the one hand, while Dora made the comment in her home, and thus retained an expectation of privacy, the facts also indicate (1) that she made the comment to someone else on the other line and (2) that her window was open. While police may not generally use wiretapping as a means to conduct a search without a warrant, persons are said to assume the risk whenever they disclose information to a third party. Thus, if the overheard conversation is introduced by obtaining the person on the other end as a witness, no constitutional issue would arise (except that O only knew about the call via a potentially illegal search, which would not have been discovered but for that search). In any event, the fact the statement was made to a third party slightly reduces Dora's expectation of privacy.

The second important fact is that Dora's window was open. Officer will argue that the window was open, and Dora likely assumed the risk of her conversation being overheard. Thus, Officer will contend that no impermissible search occurred. However, Dora will argue that she lives "in the country," where houses are presumably far apart and foot traffic is minimal. Thus, she would say her expectation of privacy is not altered by an open window. Further, Dora will argue that the officer intentionally "crouched under an open window" and thus conducted an illegal search by being physically on her property and concealing his presence. Finally, Dora will argue that officer would not have even returned to her house but for the illegal searches discussed in items 2 and 3.

Given the clear violations of the first two illegal searches and subsequent chicanery by officer, it is likely that Dora will once again be able to prevail in the exclusion of this evidence, both as the product of an illegal search or as fruit of the poisonous tree (even if no search occurred - O would not have returned to the window but for the initial illegal searches).