FIFTH EDITION

THE GLANNON GUIDE TO CRIMINAL PROCEDURE

Learning Criminal Procedure Through
Multiple-Choice Questions and Analysis

John Kip Cornwell, *Seton Hall University School of Law*

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A Very Short Introduction

This Glannon Guide reviews the Fourth, Fifth, Sixth, and Fourteenth Amendment cases and principles typically covered in law school criminal procedure classes. The format is similar to that of other books in the series, in which carefully designed multiple-choice questions help students apply, reinforce, and ultimately master each concept. Each section of each chapter provides a brief summary of the governing U.S. Supreme Court case law necessary to understand the concept at issue and to answer the question that follows. In responding to the questions, students choose from among four or five proposed answers. Each choice is then discussed, explaining why one is correct and the others, wrong. A final question, called a "closer," incorporates all issues presented in that chapter. In the book's last chapter, each of twenty "closing closers" combines principles from a number of chapters, allowing students to test their understanding of all aspects of constitutional criminal procedure.

The book begins with the Fourth Amendment, the single largest topic in criminal procedure courses due to the wealth of U.S. Supreme Court case law interpreting its provisions. The text of the Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Reading the language of the Amendment, you can understand why its provisions have been so susceptible to interpretive controversy. For example, while the Framers make reference to warrants, they do not clearly delineate the circumstances in which warrants are necessary to justify a search. Are they always necessary, or merely presumptively necessary, or necessary only in certain circumstances? This ambiguity has produced a wide range of opinion from the justices, particularly in the latter half of the twentieth century, as an

increasingly conservative Court recognized an ever greater number of exceptions to the warrant requirement. In the view of the Court's more liberal members, this philosophical realignment of the Fourth Amendment has eviscerated the spirit, if not the letter, of constitutional protections against unreasonable searches and seizures by law enforcement officers.

The Amendment's ambiguity is not limited to the need for a warrant. The Framers also failed to define with precision the standards governing searches. While they clearly require "probable cause" for the issuance of a warrant, that standard is left undefined, as is the further requirement of particularity in the description of the place to be searched and the items to be seized. Moreover, if a warrant is deemed unnecessary, does the probable cause standard continue to inform the reasonableness of the search, or is that level of proof relevant only for warranted searches?

We begin with important threshold issues, such as the Fourth Amendment's analytical framework and the areas in which one may reasonably expect constitutional protection in his or her person, houses, papers, or effects. After addressing the Amendment's scope, we will focus next on the need for a warrant, including the meaning of the procedural requirements of probable cause and particularity. The chapters that follow change gears, identifying those circumstances in which obtaining a warrant is not necessary to validate a search under the Fourth Amendment. You will notice that this topic occupies much more space than all other Fourth Amendment issues. There is a simple reason for this: In the last twenty to thirty years, the U.S. Supreme Court has devoted far more attention to addressing and refining the exceptions to the warrant requirement than to the warrant clause itself. We will be analyzing each exception, starting with exigent circumstances. Remember, when answering a question implicating a warrant clause exception, *always* be sure to identify the underlying rationale for the exception, the showing necessary to rely on it, and its scope and corresponding limitations.

After completing this section, you will understand when the Fourth Amendment applies to a search or seizure and, if it does, whether a warrant is necessary to satisfy constitutional requirements. We must now turn to the ways in which a defendant who believes that his or her constitutional rights have been violated through an unlawful search or seizure may have the illegally obtained evidence excluded from criminal prosecution. As we will see, the admissibility of "tainted" evidence is an issue separate from the determination of unconstitutional conduct by government officials.

We begin this inquiry by examining the origins of the "exclusionary rule," its parameters, and how a defendant gains "standing" to invoke it in a given case. We will then apply the rule in the context of defective search warrants, with attention to the applicable standards and the relevance of an officer's "good faith" in avoiding evidentiary exclusion. As we will see, officer "good faith" is not the only tool in the prosecution's arsenal; we next explore three additional doctrines — independent source, inevitable discovery, and

attenuation — that also serve to limit the availability to criminal defendants of the exclusionary rule.

Our discussion of evidentiary exclusion finishes with the defense of entrapment and related doctrines. In pleading entrapment, a defendant seeks to exclude evidence based on the government's allegedly overzealous involvement in the criminal enterprise in question, typically through a "sting" operation. While not constitutionally based, the entrapment defense is available by statute or case law in all fifty states, as well as under the federal criminal code.

After the Fourth Amendment, confessions are the next most important topic in constitutional criminal procedure, and they are the focus of most of the remaining chapters of this book. There are three constitutional provisions that criminal defendants can invoke when seeking to exclude incriminating statements: the Due Process Clause of the Fourteenth Amendment, the Fifth Amendment *Miranda* doctrine, and the Sixth Amendment right to counsel. We address each in turn, beginning with the due process standard and its focus on voluntariness — that is, whether the police have compromised a suspect's free will.

The Due Process Clause remained the sole constitutional avenue available to defendants charged with violating state law until the mid-1960s. When the Court issued its watershed decision in *Miranda v. Arizona,* 384 U.S. 436 (1966), the Fifth Amendment privilege against self-incrimination became the primary vehicle used by defendants to challenge the admissibility of incriminating statements made prior to the formal initiation of adversarial proceedings. While subsequent case law has diminished the force of the *Miranda* doctrine in certain respects, it remains the principal constitutional basis for testimonial exclusion.

Miranda responded to abuses in custodial interrogation that led defendants to incriminate themselves. We begin this section by identifying the specific protections provided by *Miranda* and when they apply. What, for example, is the meaning of "custody" and "interrogation" in the context of *Miranda*? If *Miranda* applies, an officer can interrogate a suspect only after obtaining a valid waiver; therefore, we next evaluate the standard for a valid *Miranda* waiver. Of course, a suspect may instead "invoke" his or her *Miranda* rights by refusing to speak to the police or by asking for a lawyer. We next identify the rules that govern both the defendant's assertion of these rights and the response of law enforcement to the assertion.

Our review of the Fourth Amendment addressed the exclusionary rule as applied to searches and seizures. We now turn to the additional restrictions on exclusion that apply to evidence obtained in violation of *Miranda.* As we will see, these exceptions to the exclusionary rule may concern testimonial evidence, such as confessions obtained in violation of *Miranda*, or *physical* evidence discovered through statements that fail to comport with the doctrine's requirements.

A violation of the Sixth Amendment right to counsel is the third, and final, constitutional means by which a defendant may suppress incriminating

testimony. While in many respects a more powerful right to counsel than that provided by *Miranda*, the Sixth Amendment has its own rules and restrictions. Thus, we begin our discussion by defining when indigent persons are entitled to counsel and at what stage(s) of the criminal process the Amendment's protections are available. As with *Miranda*, terms such as "interrogation" have their own specific meaning in the Sixth Amendment context. We turn to this issue next, with special attention to the covert, pretrial interrogation of jailed defendants by government informants.

Pretrial identifications — line-ups, "show-ups," and photo arrays — are our final topic. In identifications cases, defendants have two goals: to preclude the introduction at trial of an unconstitutional pretrial identification *and* to prevent the witness who made that identification from making an in-court identification. We will address the scope of the protection provided in the identifications context by the Self-Incrimination Clause of the Fifth Amendment, the Sixth Amendment right to counsel, and the Due Process Clause of the Fourteenth Amendment.

2

The Analytical Framework of the Fourth Amendment

CHAPTER OVERVIEW

A. The Traditional Approach: Trespass

Historically, courts looked to property law to frame Fourth Amendment principles. Thus, in the 1928 case of *Olmstead v. United States*, 277 U.S. 438 (1928), the U.S. Supreme Court held that wiretapping from outside a building did not constitute a search because there was no physical invasion of the building and, hence, no trespass upon a protected location. Had the device been placed inside the building, an unlawful trespass would have occurred. Likewise, trespass would have resulted if a law enforcement officer had entered the building, or any part of it not commonly accessed by tenants, to place the listening device.

Later cases followed *Olmstead*'s reasoning. For example, in *Goldman v. United States*, 316 U.S. 129 (1942), the U.S. Supreme Court found that the Fourth Amendment was not implicated where government agents placed a "detectaphone" against an outer wall of a building to listen to conversations occurring within. In *On Lee v. United States,* 343 U.S. 747 (1952), the justices found that the electronic transmission of statements from an informant to a nearby law enforcement officer did not constitute a search because the speaker's consent to the presence of the informant precluded a trespass.

QUESTION 1. Private ears. Ashley lives in a ground-floor apartment in a large apartment building. Her phone is located next to a window that looks out onto the street. Officer Rick, believing Ashley is using her apartment to sell drugs, places an electronic listening device just underneath Ashley's window on the outside of the building to enable him to eavesdrop on her conversations. Through the listening device, Ashley is heard arranging a sale of cocaine to Sally.

To collect further information, Rick places the apartment building under surveillance. Whenever he sees Ashley enter the foyer, Rick enters the foyer in plainclothes and hides behind a large plant located next to Ashley's mailbox in the hope of overhearing conversations with potential buyers. On one such occasion, Rick hears Erin arranging to purchase some "stash" from Ashley.

Would Rick's conduct implicate the Fourth Amendment under the standards used in *Olmstead* and its progeny?

A. Yes, as to Ashley's conversations with both Sally and Erin.
B. Yes, but only as to Ashley's conversation with Sally.
C. Yes, but only as to Ashley's conversation with Erin.
D. No, as to both conversations.

ANALYSIS. Under *Olmstead* and its progeny, Fourth Amendment analysis revolves around the property-based concept of trespass. In this problem, Rick gathers incriminating information in two ways: first, by listening through an electronic device placed underneath a window to a conversation between Ashley and Sally concerning the sale of cocaine; and, second, by eavesdropping on a conversation between Ashley and Erin in the foyer of Ashley's apartment building concerning additional drug transactions. Turning first to the conversation between Ashley and Sally, we must determine whether the placement of the listening device underneath Ashley's window is trespassory.

Ashley undoubtedly has a property interest in her home that would be invaded by an unwarranted police entry. The facts do not indicate, however, that any such entry occurred. Because the listening device was placed on the outside of the building, Rick did not cross the "threshold" of Ashley's apartment. He was in a common area, open to all. Since no trespass occurred, the Fourth Amendment was not offended under the standard of *Olmstead v. United States*.

The second conversation took place in the foyer of the building in the vicinity of Ashley's mailbox. While Rick was not a tenant of the building, his entry into this area cannot be considered a trespass. Nothing in the facts indicates that the foyer is a restricted area. Rick readily accessed it from the street, and, in doing so, he did not violate any posted sign or warning suggesting that

he was not authorized to enter. Indeed, the area was likely accessed daily by mail carriers and others doing business in the building. It is irrelevant that Rick was dressed in plainclothes and was hiding behind a plant when he overheard the conversation. This clandestine conduct does not convert a lawful entry into a trespass. Therefore, the conversation he overheard did not violate the two women's constitutional rights.

For the foregoing reasons, all of the evidence gathered by Rick would be admissible at trial against Ashley, Sally, and Erin under the *Olmstead* standard. The correct answer is **D**.

B. The *Katz* Revolution

By the 1960s, however, the justices began questioning *Olmstead*'s reliance on trespass as the touchstone of the Fourth Amendment analysis. For example, in 1961, the justices found a Fourth Amendment violation where law enforcement officers inserted a "spike mike" into a "party wall" to pick up conversations through the heating ducts, even though the device did not effect a technical trespass. *Silverman v. United States,* 365 U.S. 505 (1961). Six years later, the U.S. Supreme Court accelerated the retreat from property-based principles in the seminal case of *Katz v. United States*, 389 U.S. 347 (1967), and, in so doing, fundamentally altered our understanding of the Fourth Amendment protections.

In *Katz*, the law enforcement officials placed a listening device on the outside of a phone booth to record conversations occurring inside. Relying on *Olmstead*, the government claimed that the Fourth Amendment did not require a warrant, since the device did not physically invade any protected space. The Court disagreed, noting that the Fourth Amendment protects people, not places. Because the listening device infringed the caller's reasonable expectation of privacy in the phone booth, the device violated the Fourth Amendment, whether it was placed inside or outside the booth.

In his concurrence, Justice Harlan refined the majority's privacy analysis, arguing that, in evaluating a Fourth Amendment claim on this basis, courts should use a two-prong test. Part one asks whether the search in question violated the defendant's subjective, or actual, expectation of privacy. If it did, courts must next determine whether that expectation of privacy is one that society would consider to be reasonable. Applying this test to the case at hand, Justice Harlan concluded that the government's actions violated the Fourth Amendment. "The point is not," he stated, "that the booth is 'accessible to the public' at other times, but that it is a temporary private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable."

QUESTION 2. Go ask Alice. Before non-personnel enter public buildings in the State of Setonia, security officers routinely require them to walk through a metal detector. In addition, all bags, including women's purses, are subject to an external scan designed to detect the presence of weapons. Concerned that the scan is not sufficiently sensitive to detect a well-hidden weapon, security officers in many buildings have taken to removing the contents of all bags as part of the screening process. After numerous complaints from women objecting to the public exposure of private items in their purses, the Setonia legislature enacted a law permitting an invasive search of bags only where the initial scan suggested the presence of a weapon.

The month after the law went into effect, Alice went to the state courthouse in the hope of watching a high-profile trial taking place that day. When she entered, security officers scanned her purse and, after doing so, required her to empty its contents for further inspection. "Why?" Alice asked. "Did you see something suspicious on the scan?" "No," the guard replied. "We just thought you looked kinda shifty." "No problem," Alice replied. "People look through my purse all the time. I don't care. There is nothing personal in there. Knock yourself out." The guards then searched the purse thoroughly, finding a razor blade in a side pocket. They seized it and charged Alice with attempting to carry a concealed weapon into a public building. Did the guards' search violate the Fourth Amendment under *Katz*?

A. Yes, because the guards did not believe that the purse contained a weapon.
B. Yes, because the legislature has recognized women's privacy rights in their purses.
C. No, because the guards found a razor blade inside the purse.
D. No, because Alice did not care if the guards searched her purse.

ANALYSIS. This problem not only applies the *Katz* test, it underscores the importance of reading the facts of each question carefully. While women clearly have a privacy right in their purses, they surrender some of that right in the interest of security when they enter public space. Here, the legislature has clearly defined the scope of that privacy interest by passing a law allowing security officers to perform an invasive search, *provided* they have reason to suspect from an initial screening that the purse contains a weapon. Because the scan did not suggest the presence of a weapon in Alice's purse, the officers lacked the authority to search it. However, this statutory violation does not necessarily implicate the Fourth Amendment. The misconduct rises to the constitutional level only if it infringes Alice's subjective and objectively reasonable expectation of privacy.

Answer **C** can be eliminated since it does not comport with the language of the Setonia law. That the officers actually found a weapon cannot justify an otherwise illegal search. Were this so, the finding of contraband would effectively "cure" constitutional defects and reduce Fourth Amendment protection to a nullity. Thus, the officers' failure to suspect that Alice was carrying a weapon precludes their ability to search further, irrespective of what they subsequently find.

Answers **A** and **B** are better than **C**, inasmuch as both are accurate statements of law. The legislature did recognize privacy rights in women's purses, and the guards did not believe that Alice's purse contained a weapon before searching it. However, as discussed above, the fact that the guards contravened Setonia law is relevant to the Fourth Amendment *only* if their actions violated Alice's expectation of privacy. Alice's invitation to the officers to look through her purse, coupled with her comments that it contained nothing personal and that people routinely look through it, indicate that she lacked a subjective expectation of privacy in the purse's contents. As such, she fails to satisfy the first prong of the *Katz* test.

It is important to remember that both parts of the *Katz* test must be satisfied to implicate the Fourth Amendment in a search or seizure. It is not enough, therefore, that law enforcement officials unlawfully searched an item that society would regard as private. The defendant herself must also have a sincere expectation of privacy. If, as here, she does not, there is no Fourth Amendment violation under *Katz*.

Answer **D** is correct.

C. The Return of Trespass

In the years following the Supreme Court's 1967 decision in *Katz*, Justice Harlan's test gained broad acceptance as the proper framework for analyzing Fourth Amendment claims on both the state and federal level. Recently, however, the Court breathed new life into trespass. In *United States v. Jones*, 565 U.S. 400 (2012), a five-justice majority held that the government's attachment of a Global-Positioning-System (GPS) tracking device on an individual's vehicle and the subsequent monitoring of that vehicle's movements for 28 days was a Fourth Amendment search, since the device physically intruded on a protected area (the car) for the purpose of obtaining information.

The majority found it unnecessary to determine whether the government unreasonably violated the defendant's expectation of privacy, noting that Jones's constitutional rights "do not rise or fall with the *Katz* formulation." That is, the expectation-of-privacy test simply "enlarged" the Fourth Amendment's analytical framework; it did not replace it. Thus, if designed to obtain information, either a trespass or a "*Katz* invasion of privacy" is a Fourth Amendment search.

Concurring in the judgment, four justices agreed that monitoring the defendant's movements for an extended period of time constituted a Fourth Amendment "search," reasoning that such intrusive government surveillance violated the defendant's reasonable expectation of privacy. Writing for all four justices, Justice Alito sharply criticized the majority's reliance on trespass, an analytical approach he believed the Court had abandoned in *Katz*. The majority's decision to rely on "18th century tort law," Alito opined, is "highly artificial" and "has little if any support in current Fourth Amendment case law."

Notwithstanding these objections, the Court reaffirmed the vitality of trespass the following year in *Florida v. Jardines,* 569 U.S. 1 (2013). In that case, a police officer brought a drug-sniffing dog to the front porch of a homeowner's residence. Because this conduct constituted a physical intrusion on a constitutionally protected area for evidence-gathering purposes, the majority deemed it a Fourth Amendment search. Likewise, in *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), the Court found that subjecting recidivist sex offenders to satellite-based monitoring implicated the Fourth Amendment; forcing offenders to wear a tracking device at all times physically intruded on their bodies in order to obtain information about their movements.

QUESTION 3. A sticky situation. Mary was being questioned at the police station by Detective Dave about the murder of her roommate. One hour into the interrogation, Mary asked to use the restroom and Dave consented. While she was gone, Dave decided to get rid of his chewing gum but, after wrapping the gum in a napkin, Dave discovered that there was no trash can in the room. Eager to dispose of the gum, Dave noticed Mary's backpack on the table and decided to deposit the gum inside it. He unzipped the outside pouch of the backpack, placed the gum inside and zipped it back up.

The following day, police found the murder weapon inside a backpack thrown in a dumpster down the block from Mary's apartment. While the backpack looked very similar to Mary's, she claimed it was not hers. Upon closer inspection, officers discovered the napkin-wrapped chewing gum with Dave's DNA. Arrested for her roommate's murder, Mary moves to suppress the gum, claiming that its placement in her backpack violated her Fourth Amendment rights. Her claim will likely:

A. Succeed, because Dave violated Mary's expectation of privacy in her backpack.
B. Succeed, because Dave's placement of the gum in Mary's backpack constituted an unlawful trespass.
C. Succeed, if Dave's placement of the gum in Mary's backpack violated her expectation of privacy *and* constituted an unlawful trespass.
D. Fail.

ANALYSIS. This problem gauges the impact of the Supreme Court's recent decisions in *Jones, Jardines,* and *Grady* on Fourth Amendment analysis. Detective Dave is questioning Mary at the police station regarding the murder of her roommate. When Mary steps out of the room to "powder her nose," Dave discards his chewing gum in her backpack upon discovering that the interrogation room has no trash can. The following day, the police find the murder weapon inside a backpack and use the presence of the gum inside it to link the backpack — and, thus, the murder weapon — to Mary. We must evaluate Mary's claim that the placement of the gum in her backpack, an "effect" protected under the Fourth Amendment, was unlawful.

Jones, Jardines, and *Grady* specify that, for the Fourth Amendment to apply to a search or seizure, government agents must *either* physically intrude on a protected area *or* otherwise frustrate an individual's reasonable expectation of privacy in that area. Because a defendant does not need to satisfy both standards, **C** is incorrect.

Addressing the trespass standard, the installation of a tracking device on the defendant's car in *Jones* and the defendant's person in *Grady* constituted a physical intrusion on a constitutionally protected areas, as did the presence of the "K-9" officer on the homeowner's property in *Jardines*. These trespasses were insufficient in and of themselves, however, to vindicate the defendants' claims. To implicate the Fourth Amendment, the Court required that the physical intrusions be "conjoined with . . . an attempt to find something or obtain information," which the tracking devices and drug-sniffing dog clearly were. In our problem, by contrast, Detective Dave did not place the gum in Mary's backpack for informational purposes; he was simply using the backpack as a waste receptacle, since there was no garbage can in the room. Because this trespass did not satisfy the Fourth Amendment standard of *Jones, Jardines*, and *Gray*, **B** is wrong.

The majority in *Jones* noted that this informational requirement applied in the privacy context as well. That is, to implicate the Fourth Amendment, a government agent must have invaded an individual's reasonable expectation of privacy for the purpose of obtaining information. To the extent that Detective Dave violated Mary's expectation of privacy in her backpack, his purpose was not to obtain information, as discussed above. Thus, **A** is incorrect.

The correct answer is **D**.

D. The Closer

QUESTION 4. The constant gardener. Lucinda has noticed that her neighbor, Rob, is constantly carrying gardening tools and supplies, such as soil and fertilizer, into a shed located inside a fence in his back yard adjacent to Lucinda's property line. After disappearing inside the shed for

a period of time, Rob emerges. Curious as to why Rob would be growing plants inside a shed, Lucinda asks him what he's cultivating. "Can't tell you," Rob replied, winking. "It might get me into trouble." Alarmed, Lucinda called the police to tell them that she believed that her neighbor was growing marijuana inside a shed in his back yard. Officer Larry took the call and drove to Lucinda's house. If Larry does not have a warrant to search Rob's property, which of the following is an unlawful means of gathering information about the contents of the shed?

A. Climbing a tree in Lucinda's yard to peer into shed.
B. While standing in Lucinda's yard, opening the window to the shed to peer inside.
C. Looking into the shed from Lucinda's bedroom window.
D. Sending Lucinda to Rob's house to ask questions about the shed while wearing a listening device that transmits Rob's responses to Larry.

ANALYSIS. This question addresses the two analytical approaches of the Fourth Amendment: the trespass-based standard of *Olmstead/Jones/Jardines/Gray* and the expectation-of-privacy test introduced by *Katz* and used pervasively by state and federal courts ever since.

The trespass standard focuses on physical intrusion on protected areas for information-gathering purposes. Because Larry did not have a warrant, any invasion of Rob's property without consent, either actual or implied, would violate the Fourth Amendment. *Katz*, by contrast, asks whether the conduct in question invades the defendant's subjective and objectively reasonable expectation of privacy.

We can first eliminate **D**. While Rob was unaware that Lucinda was wearing a recording device that transmitted their conversation to Larry, the U.S. Supreme Court held in *On Lee* that this practice does not violate the Fourth Amendment. As in *On Lee*, there is no trespass because Rob welcomed Lucinda onto his property, notwithstanding his lack of knowledge of her cooperation with the police in an effort to incriminate him. Lucinda's conduct is also permissible under the *Katz* test, since her consent to the recording of the conversation eliminates any reasonable privacy expectation Rob may have in it. The consent of only one party to the conversation eliminates Fourth Amendment protection for *both* in the content of the communication. See Chapter 5, part B, *infra*.

A and **C** are similar. In both, Larry views the shed from somewhere on Lucinda's property. In **A**, he climbs a tree in Lucinda's yard; in **C**, he looks out of her bedroom window. Neither action compromises Fourth Amendment principles under trespass principles because neither requires physical invasion of Rob's property to visually access the shed and its contents. Rob cannot, moreover, have a reasonable expectation of privacy in whatever Lucinda can plainly see from her bedroom window. Climbing a tree to obtain visual access

is more likely to invade a protected privacy interest, but courts that have considered this are split on the issue.

B is different. While Larry's feet are planted in Lucinda's yard, he reaches into the shed, located on Rob's property, and opens the window. Because part of Larry's body enters Rob's property, Larry physically intrudes on a protected area and does so for the purpose of obtaining incriminating evidence against Rob. Thus, Larry violated Rob's Fourth Amendment rights under the Supreme Court's modern trespass cases. It would likewise violate *Katz*, since Rob has a reasonable expectation of privacy in the contents of the shed that cannot be seen through the closed window.[1]

B is the correct answer.

Cornwell's Picks

1. Private ears	**D**
2. Go ask Alice	**D**
3. A sticky situation	**D**
4. The constant gardener	**B**

1. If a court finds a government agent's search physically intrudes on a protected area to obtain information, the Fourth Amendment applies. Therefore, as in *Jones, Jardines*, and *Grady*, it does not need to address the alternative, expectation-of-privacy test.

3

The Sanctity of the Home

CHAPTER OVERVIEW

While conservative and liberal justices on the U.S. Supreme Court have disagreed sharply over many Fourth Amendment issues, all believe that an individual's home merits strong constitutional protection. This reverence for home-based privacy has its roots in American colonial history and events that influenced the Framers' adoption of the Fourth Amendment.

In the latter half of the eighteenth century, customs agents of the English government obtained "writs of assistance" authorizing them to search colonists' homes for taxable goods, without specifying the areas to be searched or the items to be seized. These writs were enforceable indefinitely and would expire only upon the death of the king. Outraged citizens challenged the king's authority to issue these writs, arguing that they violated the sanctity of the home. In one now-famous case, attorney James Otis contended unsuccessfully that the writs annihilated individual liberty by allowing government officials unfettered entry into citizens' homes without cause:

> [W]e are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.[1]

1. 2 *Legal Papers of John Adams* 113, 142 (L. Wroth and H. Zobel eds., 1965).

While frustration over the general failure of efforts to nullify these writs contributed to the decision to include "houses" expressly in the text of the Fourth Amendment, the Framers could not have anticipated the challenges posed by the noncorporeal invasion of private spaces through modern technology. Nor did their concerns focus on areas adjacent to but outside the interior of the home. Such issues have engaged, and divided, the justices over the last several decades as shifting majorities have searched for principled ways in which to draw constitutional lines.

A. The Meaning of "Houses"

While the Framers inserted the word "house" into the text of the Fourth Amendment, the U.S. Supreme Court has not understood that term to be limited to the small residential structures that predominated in colonial America. For example, apartments have been considered "houses," a result that seems compelled by fairness and logic, lest only those who choose, or are able, to live in freestanding houses be able to claim Fourth Amendment protections. Temporary residences also qualify. Guests may claim privacy protection in their hotel rooms, and overnight guests may challenge government searches of private residences where they are staying temporarily whether or not they have complete control of the premises.

The justices have also subsumed within "houses" a variety of buildings that are used for nonresidential purposes. For example, in *Taylor v. United States,* 286 U.S. 1 (1932), the U.S. Supreme Court required a warrant to search a garage adjacent to the defendant's home, noting that "[t]he two houses are part of the same residential premises." Commercial buildings have also merited Fourth Amendment protection. Accordingly, the Court has invalidated warrantless searches of stores, offices, and warehouses. "The businessman," the justices commented, "like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle*, 387 U.S. 541 (1967).

The scope of Fourth Amendment protection available to social guests and those engaging in commercial activity in private residences is not without limits, however. In *Minnesota v. Carter*, 525 U.S. 83 (1998), the defendants challenged the warrantless search of an apartment into which they had been invited for the purpose of bagging cocaine for a two- to three-hour period. In rejecting their claim, the U.S. Supreme Court pointed to three factors: the purely commercial nature of the transaction; the relatively short period of time on the premises; and the lack of a close personal relationship between the defendants and the householder.

QUESTION 1. Lines through the blinds. Sue is vice president for marketing for a large computer software company. Her best friend, Ramona, is the vice president for finance and occupies the office next door. Sue knows that Ramona leaves the office every day at 2:00 P.M. for one hour to exercise at the company fitness center. Sue asks Ramona if she can use her office during that time to "lie down," since Ramona has a sofa. Ramona agrees. Actually, Sue is not using the office merely to rest. She is also using it to snort cocaine and, on occasion, to sell drugs to other office employees. Al is curious when he sees Marty exit the office one day when Sue is inside. He peeks through the slats in the blinds and sees Sue snorting some "lines." He calls the police who burst into the office and seize Sue's stash of cocaine. Sue claims that the entry into the office and subsequent seizure of the cocaine violated her Fourth Amendment rights. Which of the following is LEAST relevant in evaluating her claim?

A. She used the office every day.
B. Ramona gave her permission to use the office.
C. She closed the blinds after entering the office.
D. She sometimes sold drugs in the office.
E. She lied to Ramona about her activities in the office.

ANALYSIS. In answering this question, you must focus on the key analytical question: Did Sue have a legitimate expectation of privacy in Ramona's office? We know that offices do merit Fourth Amendment protection and that social guests can claim a constitutional right to privacy in protected areas owned or occupied by others. Sue's entitlement is not, however, as clear as that of an overnight guest, nor is it as illegitimate as that of the defendants in *Carter* who were using the apartment of a relative stranger for purely business purposes. Remember, though, we do not need to resolve this ambiguity in answering the question; we must merely identify the factor that is least relevant among the four choices in evaluating Sue's privacy claim.

Answer **A** focuses on the frequency of Sue's use of Ramona's office. This is clearly relevant, since the amount and regularity of time Sue spent in the office informs both her subjective expectation of privacy and its objective reasonableness. Moreover, in *Carter*, the U.S. Supreme Court expressly referenced the limited nature of the defendants' contact with a third-party residence in rejecting their privacy claims.

Ramona's grant of permission to Sue to use the office is likewise important since it affirms the legitimacy of her privacy expectation there. If Sue had used a passkey to enter without first obtaining consent, she might subjectively consider the space to be private, but her misconduct would erode the reasonableness of this belief. Lying to Ramona to obtain permission to use the

office is relevant for similar reasons. It is questionable, at the very least, that society would regard a privacy expectation in the protected area of a third party to be reasonable where an individual lied to gain access in the first place. **B** and **E** are wrong.

Answer **C** states that Sue closes the blinds when she enters the office. This conduct is significant because it demonstrates efforts made by Sue to create privacy in the space. The degree to which outsiders could see inside the office through the slats may also be relevant in evaluating the strength of the privacy claim; this fact does not, however, negate the importance of Sue's actions in establishing a Fourth Amendment right to privacy as a threshold matter.

We are left, therefore, with **D**. At first blush, you might conclude that it must be relevant since illegal activity is involved and people cannot have a legitimate privacy expectation in unlawful conduct. However, the question is not whether there is a privacy right in dealing drugs but, rather, whether Sue may reasonably expect privacy in the protected space of a third party that she uses to deal drugs. In *Carter*, the Court opined that the defendants' unlawful commercial activity was relevant since it was the *only* activity the defendants conducted in the apartment. Here, Sue uses the office principally for non-commercial, private activity. The fact that, on occasion, she deals drugs in the office does not negate this. Thus, **D** is the least relevant factor in evaluating Sue's claim.

B. Moving Outside the House: Curtilage Versus Open Fields

While the foregoing suggests a fairly expansive view of "houses," it does not address the application of the Fourth Amendment to areas outside of, but adjacent to, the home. The U.S. Supreme Court has considered this area, referred to as the "curtilage," an extension of the house and, as such, meriting constitutional protection. Beyond the curtilage lie "open fields," to which the Fourth Amendment does not apply. In any given case, you may be called upon to determine where curtilage stops and the open fields begin.

Unlike open fields, the curtilage harbors "intimate activities associated with the sanctity of a man's home and the privacies of life." *Oliver v. United States,* 466 U.S. 170 (1984) (quoting *Boyd v. United States*, 116 U.S. 616 (1886)). In determining whether an area falls within the curtilage, courts must balance four factors: proximity to the home; whether the area in question is within an enclosure surrounding the home; the nature of the uses to which the area is put; and steps taken to protect the area from observation by passersby.

Applying these factors in *United States v. Dunn,* 480 U.S. 294 (1987), the U.S. Supreme Court's leading case on curtilage, the majority concluded that a barn used to manufacture methamphetamine was outside the curtilage of

the defendant's home. First, the barn was located a substantial distance (60 yards) from the home. Second, while a fence surrounded the defendant's home, the barn was outside this enclosure. Third, police surveillance of the barn and the area around it suggested that the structure was not being used for "intimate activities of the home." For example, officers witnessed a large truck whose contents were unloaded into the barn, coupled with sounds of motors running and the strong odor of phenylactic acid, an ingredient used to make methamphetamine. Finally, while a number of perimeter and interior fences enclosed the defendant's 198-acre property, including the barn, the fences were designed to corral livestock. They did little to shield the barn from the view of passersby.

QUESTION 2. Curious George. Police Officer George was walking down a dirt road looking for a stolen vehicle that he believed may have been hidden there. In the distance, he spotted a small shack standing alone in a field. He crossed over a barbed-wire fence and approached the shack, suspicious that it might be used to manufacture drugs. He entered the shack and did not find any drug paraphernalia, but he did find a box of coins with the name "McShane" on it. Remembering that Amber McShane had reported her collection of rare coins as stolen, George seized the box. On his way back to the station, George noticed that the barbed-wire fence also enclosed a house, located 50 yards away. Later that day, he arrested the occupants of the house and charged them with the theft of the coins. The occupants challenge the warrantless search of the shack, claiming it violated their Fourth Amendment rights. This claim:

A. Has merit, because the same fence enclosed both the shack and the house.
B. Has merit, if the owners did not expect anyone to enter whom they did not authorize to do so.
C. Has merit, because George trespassed onto private land.
D. Lacks merit, because the shack appeared to be in an unoccupied, undeveloped area.
E. Lacks merit, because George believed that the shack was being used for unlawful purposes.

ANALYSIS. This problem explores the line dividing curtilage from the open fields. In making this determination, we must reference the four factors listed above. The shack is not used for domestic activities of the home, and it is not in the home's immediate vicinity. In addition, there appears to be no effort to protect the shack from the observation of others; it is, however, within an enclosure surrounding the home. Is this enough to make the shack part of the curtilage? No. No single factor, or combination of factors, is dispositive. On balance, this falls short.

Prior precedent supports this conclusion. The shack is slightly closer (50 versus 60 yards) to the house than was the barn in *Dunn.* However, the shack does not appear to be used for domestic activities and is not enclosed by nearly as many fences as in *Dunn*. The one fence that does exist, moreover, is barbed wire, as was the livestock-corralling fence in *Dunn*.

In accordance with the foregoing, **A** and **B** are wrong. The fact that a fence enclosed both the shack and the house supports a curtilage theory, but it is not enough on its own. In addition, the shack's owners may have subjectively expected that no one would enter it, but this is not enough to occasion Fourth Amendment protection; under the *Katz* test, discussed in Chapter 2, the expectation must also be one that society considers reasonable.

C relies on trespass to invalidate the search. While the Court's recent decisions in *Jones* and *Jardines* reaffirmed this doctrine's vitality in the Fourth Amendment context, it requires physical intrusion on a "protected area." The fact that noncommercial land is privately owned does not mean that it is constitutionally protected; it merits Fourth Amendment protection only if it is located within the curtilage of someone's home.

E is also wrong. George's belief that illegal activity was afoot in the shack does not give him the unilateral right to enter it without a warrant. He may do so only if the building does not merit any constitutional protection.

D tracks the definition of an open field. In thinking about open fields, it is useful to remember that an area might be regarded as such, even if it does not conform to the traditional image of an open field. For example, courts have found a variety of disparate areas to be open fields, including beaches, reservoirs, woods, and lands fenced in with "No Trespassing" signs. As the U.S. Supreme Court noted in *Oliver v. United States*, open fields "may include any unoccupied or undeveloped area that is neither 'open' nor a 'field' as those terms are used in common speech."

D is the correct answer.

C. "Commercial" Curtilage

Constitutional protection of the curtilage derives from the privacy inherent in the home. Does the Fourth Amendment privacy also reach areas adjacent to commercial buildings in light of the U.S. Supreme Court's vindication of an individual's right "to go about his business free from unreasonable official entries upon his private commercial property"? *See v. City of Seattle, supra*. The U.S. Supreme Court addressed this notion of "commercial curtilage" in *Dow Chemical v. United States,* 476 U.S. 227 (1986), where law enforcement officers, without first obtaining a warrant, used an aerial mapping camera to take photographs of the defendant's business complex at altitudes ranging from 1,200 to 12,000 feet. The defendant claimed that the government had

violated its Fourth Amendment rights since the company had gone to tremendous lengths to ensure the privacy of its premises from all ground-level views.

In rejecting this claim, the Court differentiated the curtilage of a home from "outdoor areas or spaces between structures and buildings of a manufacturing plant." At the same time, the majority opined that the areas in question lie somewhere between curtilage and open fields; as such, Dow Chemical's position would have been different if the police had *physically entered* the premises, as opposed to photographing it from above. This conclusion, while technically dicta, imports that "commercial curtilage" merits some Fourth Amendment protection, though clearly less than that available in the context of a private residence.

Lower court opinions have largely supported this interpretation of *Dow Chemical.* While mindful of the fact that the U.S. Supreme Court did not expressly decide the issue, they have recognized "industrial" curtilage claims where police have physically invaded the property surrounding a commercial building and the business entity had taken steps to enclose and protect the grounds from observation by passersby. For example, in *Commonwealth v. Lutz*, 516 A.2d 339 (Pa. 1986), the Pennsylvania Supreme Court distinguished *Dow Chemical* where the state Department of Environmental Resources physically intruded upon enclosed indoor and outdoor areas within the defendant's business premises that were not visible from any public area.

QUESTION 3. College savings plan. The Smiths own the Everbloom Flower shop, located in the middle of the block on Main Street, between Mary's Excellent Edibles and Terry's Sandwich Shoppe. While they generally buy their "cut" flowers from private vendors, they grow all the plants they sell in a greenhouse behind the store. Alarmed at the rising cost of college, Rita and Travis realize that they need to start saving quickly to pay tuition for their son, who is presently a high-school junior. They decide to build a second, smaller greenhouse near the main one and dedicate it entirely to the cultivation of marijuana. To access the second greenhouse, you need to exit through the back door of the first, walk 20 yards, and open its door, which they keep closed during business hours. A six-foot, opaque fence encloses the entire business premises, including both greenhouses.

Police Officer Brianna learns of the Smiths' illicit activities and decides to investigate. She enters the store and asks to see flowering plants. Mrs. Smith takes her into the main greenhouse where the plants are kept. When Mrs. Smith leaves to attend to another customer, Brianna runs out the back door to the small greenhouse. She finds the door locked but peers through the window and sees the marijuana plants. She then places the Smiths under arrest. Will the Smiths succeed in arguing that their Fourth Amendment rights have been violated?

A. Yes, because Brianna entered the larger greenhouse to access the smaller one.
B. Yes, because customers would have no reason to enter the area behind the store.
C. Yes, because the Smiths erected six-foot-high, opaque fences.
D. No, because the store is surrounded by other commercial buildings.
E. No, because Brianna did not enter the second greenhouse.

ANALYSIS. Answering this question correctly requires careful consideration of *Dow Chemical*. While it does not affirmatively embrace commercial curtilage, it allows for the possibility where businesses endeavor to conceal their premises from view *and* law enforcement officers physically invade the protected area.

Answer **A** posits that Brianna's use of the larger greenhouse as a pass-through to the smaller one violated the Smiths' Fourth Amendment rights. This is clearly wrong, since the larger facility was open to the public. The Smiths could not, therefore, have had a subjective or an objective expectation of privacy in it during regular business hours since customers routinely accessed the area.

Answer **B** states that customers would generally have no reason to enter the area behind the store. While true, this fact is not dispositive of the defendants' reasonable expectation of privacy in this area. Because it misses the analytical mark, it is wrong.

Answer **D** emphasizes the location of the flower shop, noting that it is surrounded by other commercial buildings. While this would no doubt make it more difficult for the Smiths to shield the area behind the store from the view of other merchants, it is not impossible to do so. While the facts provide no information indicating what efforts may have been taken in this regard, the fact that commercial buildings surround the flower shop is insufficient in and of itself to evaluate the Smiths' Fourth Amendment claim. **D** is wrong.

Answer **C** provides important information of the sort lacking in answer **D**. The presence of six-foot-high, opaque fences indicates that the Smiths have taken significant steps to gain privacy in the area behind the shop from neighboring commercial establishments and others who may otherwise be able to see into the area from the ground. The fences do little, however, to protect the area from the view of those, like Brianna, who enter from the store itself through the larger greenhouse.

Once behind the store, however, the locked, smaller greenhouse arguably retains Fourth Amendment protection as commercial curtilage. As such, Brianna may not enter it without a warrant. She does not, however, do so.

E is, therefore, the correct answer.

D. The Closer

QUESTION 4. Shedding problems. Despite their numerous protests to town officials, Thomas and Arlene were unsuccessful in their efforts to prevent a dry-cleaning business, owned by Jake, from moving into the building next door. One month after Thomas and Arlene arrived, Jake noticed that clothes were disappearing from his store. Suspicious, Jake set up security cameras that showed two adults breaking into the store, grabbing clothes and carrying them toward a shed located 100 feet from Jake's store on property owned by Thomas and Arlene and situated 100 feet from their home. Jake sent the tape to the police.

After viewing it, Officer Carl approached the shed from the area behind Jake's store. Carl moved a large rock hindering access to the door and then entered the shed, seizing clothes taken from Jake's store. As he left the property, Carl passed by a second shed, located adjacent to Jake's store. Finding it locked, Carl peered inside and saw containers of dry-cleaning solvent, forbidden under state environmental laws. He used this information to obtain a warrant to seize the solvents. Arlene and Thomas challenge the first search and Jake, the second. Which of the following is TRUE?

A. Carl's entry into the shed violated Thomas and Arlene's Fourth Amendment rights in the curtilage of their residence because the shed was located 100 feet from their home.

B. Carl's entry into the shed violated Thomas and Arlene's Fourth Amendment rights in the curtilage of their residence because the shed was located 100 feet from their home and a rock hindered access to the shed door.

C. Carl's actions with respect to the second shed did not implicate Jake's constitutional rights because dry-cleaning stores are not "houses" under the Fourth Amendment.

D. Carl's actions with respect to the second shed did not violate Jake's constitutional rights because Carl merely peered into the shed.

E. Carl's actions with respect to the second shed violated Jake's Fourth Amendment rights.

ANALYSIS. In focusing on home-based privacy protections, this chapter considered three topics: the meaning of "houses" under the Fourth Amendment, the concept of "curtilage" as an extension of the home, and the availability of curtilage protection in commercial areas. This closer question contains aspects of each.

Concerned that Thomas and Arlene are stealing from his business, Jake sends Carl a videotape that confirms that two adults are taking clothes from his store and are absconding with them in the direction of a nearby shed. Carl's subsequent entry into the shed implicates Thomas and Arlene's constitutional rights only if the shed is within the curtilage of their home. We are told that it is located 100 feet from the residence and that a large rock impedes entry into it. These details are relevant under the *Dunn* curtilage factors, which include proximity to the home and steps taken to shield the shed from outside observation.

One hundred feet is some distance from the residence, a problem compounded by the lack of any fence enclosing the house and shed. As such, anyone may access the shed from neighboring properties, as Carl and the clothes thieves did. Moreover, while the rock makes entry more difficult, it is not equivalent to a lock, which frustrates entry more completely and clearly indicates a desire for privacy. The heavy rock may be designed merely to keep the door closed. We also have no indication that the shed is being used for "intimate activities of the home." On balance, the curtilage argument is weak.

The second shed is, by contrast, located far closer to Jake's business, and it is locked. However, *Dow Chemical* recognized curtilage in the industrial context where the business entity had taken steps to enclose and protect the grounds from observation by passersby *and* police officers physically invaded the property surrounding a commercial building. Here, Carl did not enter the shed but merely peered inside. As such, he is similarly situated to the law enforcement agents in *Dunn* who only looked inside the barn with the aid of a flashlight. As the U.S. Supreme Court noted, this conduct does not implicate an individual's Fourth Amendment rights under a theory of commercial curtilage.

Based on the foregoing discussion, **A** and **B** incorrectly provide that Carl violated Thomas and Arlene's Fourth Amendment rights. Note, in addition, that **A** further misconstrues curtilage analysis by suggesting that proximity to the residence alone is dispositive. As *Dunn* makes clear, courts must use a multifactor analysis; no single factor is sufficient, standing alone, to convey curtilage protection.

Answer **C** states an incorrect principle of law. Commercial structures can constitute "houses" under the Fourth Amendment, as *Dow Chemical* indicates. **E** is likewise wrong, since Carl's conduct did not, in fact, violate Jake's Fourth Amendment rights.

The correct answer is **D**.

Cornwell's Picks

1. Lines through the blinds **D**
2. Curious George **D**
3. College savings plan **E**
4. Shedding problems **D**

4

Technological Incursions on Private Spaces

CHAPTER OVERVIEW

As the march of technology gives the government ever greater and more sophisticated means of surveillance, it challenges the Fourth Amendment by redefining the limits of privacy in a modern society. What privacy expectations are reasonable necessarily changes with the times; whereas the Framers may have legitimately expected privacy in any area that could not be visually accessed by the naked eye, mechanical enhancement of our natural senses suggests a different understanding today. At the same time, courts have struggled to identify the proper role of technology in evaluating Fourth Amendment claims, mindful of the potential to read its protections out of existence by linking societal expectations of privacy too closely to technological progress.

To understand the way in which technology has influenced the U.S. Supreme Court's understanding of privacy, it is useful to divide the inquiry into two pieces. We will begin with those cases analyzing intrusions on privacy from above, most notably from airplanes. We will then consider modern devices used by law enforcement on the ground.

A. The View from Above

The U.S. Supreme Court first addressed technology in *United States v. Lee*, 274 U.S. 559 (1927), where the Coast Guard seized contraband from a motorboat

sailing on the high seas. The defendant claimed, *inter alia*, that his Fourth Amendment rights were violated by the use of a searchlight to determine the contents of the boat. The Court rejected the challenge, reasoning that the searchlight was no different from "a marine glass or a field glass."

By the 1980s, searchlights had given way to airplanes, which law enforcement officers used to detect criminal activity occurring below. The U.S. Supreme Court was not troubled by the use of aerial surveillance in and of itself; in *Oliver v. United States*, 466 U.S. 170 (1984) (see Chapter 3, *supra*), the Court recognized that the police "lawfully may survey lands from the air." This conclusion does not, however, suggest that all uses of aerial surveillance pass constitutional muster.

In *California v. Ciraolo*, 476 U.S. 207 (1986), police officers received an anonymous tip that the defendant was growing marijuana in his back yard. Unable to observe the yard from the ground, the officers flew over the house in a helicopter. From an altitude of 1,000 feet, the officers identified and photographed marijuana plants, using a standard 35-millimeter camera. The U.S. Supreme Court found this warrantless search to be constitutional, reasoning that the officers were in public, navigable airspace; they did not physically intrude onto the defendant's property; and the plants were visible to the naked eye. The use of a camera to record their observations did not alter the Fourth Amendment analysis.

Three years later, the Court extended *Ciraolo* by rejecting a Fourth Amendment challenge to a warrantless search of a greenhouse in the defendant's back yard from a helicopter flying 400 feet above the residence. A four-justice plurality emphasized the fly-over's compliance with Federal Aviation Administration (FAA) regulations, adding that the lower court record did not indicate "that helicopters flying at 400 feet are sufficiently rare that respondent could have reasonably anticipated that his greenhouse would not be observed from that altitude." *Florida v. Riley*, 488 U.S. 445 (1989). Concurring in the judgment, Justice O'Connor disputed the plurality's focus on FAA regulations. Instead, she reasoned that, in light of evidence suggesting considerable public use of airspace at 400 feet, it was not reasonable for the defendants to expect privacy in areas that could be viewed from that altitude.

Finally, *Dow Chemical*, decided in 1987 and discussed in Chapter 3, addressed aerial surveillance through the use of a commercial camera more technologically advanced than the 35-millimeter model used by the officers in *Ciraolo*. The justices acknowledged that this device augmented human vision "somewhat," but did not find the enhancement to be constitutionally significant. Their conclusion might have been different, however, had the device enabled the police "to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets."

QUESTION 1. Shroom with a view. Andrew, a police officer in Setonia, is convinced John is growing hallucinogenic mushrooms in a greenhouse located adjacent to his home. The greenhouse is not visible from the road, by virtue of an eight-foot-high fence enclosing both it and John's residence. John has also placed a tarp over the top of the greenhouse. Luckily, Andrew finds out that people use a small mountain near John's property for hang gliding. Andrew takes lessons until, one day, he makes his first "flight," choosing to fly directly over John's property. Looking down through holes in the tarp, Andrew sees mushrooms growing below. Relying on this information, he obtains a warrant to seize them. Andrew's search of John's greenhouse is:

A. Lawful, if people routinely hang glide in and over the area where it is located.
B. Lawful, because it is illegal to grow hallucinogenic mushrooms.
C. Unlawful, because Andrew could not have seen into the greenhouse from a ground-level viewpoint.
D. Unlawful, because the greenhouse is adjacent to John's home.
E. Unlawful, if no other police officer in Setonia has ever engaged in hang gliding to obtain criminal information.

ANALYSIS. This problem explores the limits of the Fourth Amendment's protection of private areas from aerial surveillance. While John may reasonably expect privacy in a greenhouse positioned close to his home, the extent of the protection afforded by the Fourth Amendment is a function of the degree to which John has shielded the area from public view. The fence he has erected effectively precludes any ability to see into the greenhouse from the ground level. This has little bearing, however, on the legitimacy of views from other vantage points.

Prior case law instructs that individuals have no reasonable expectation of privacy from aerial surveillance, provided the contraband in question is viewed while the aircraft is traveling lawfully in commonly navigated airspace. Analogizing to our case, Andrew is not infringing John's Fourth Amendment rights if hang gliders regularly and lawfully fly over the greenhouse. If they do, John cannot reasonably expect privacy in whatever may be viewed from such vantage points.

Answer **C** is wrong because the fact that Andrew could not have seen into the greenhouse from the street is unavailing where the contraband is viewed from a different location. **D** is wrong because the greenhouse's location within the curtilage of the home likewise does not suggest blanket privacy protection from all views.

On the other hand, the illegal nature of John's activity does not import that John has no Fourth Amendment protection in the area where the activity

occurs. If that were true, the police could invade any protected area and justify the invasion *post hoc* by noting that they found evidence of criminal activity after doing so. **B** is wrong.

Both **A** and **E** focus on the frequency with which the airspace Andrew accessed was used by third parties. This consideration is important, since routine traffic would extinguish John's reasonable privacy expectation in areas within the curtilage of his home that could be viewed from this vantage point.

E limits this inquiry to the conduct of police officers. **A** is broader, suggesting that John's Fourth Amendment rights would be compromised even if individuals other than law enforcement personnel regularly flew in this area. The reasonableness of one's expectation of privacy does not depend on who has visual access to the target area.

A is correct.

B. Ground-Level Views: From Flashlights to Beepers

In the 1980s, the U.S. Supreme Court decided a series of cases that addressed enhanced technology used to uncover criminal evidence or activity from ground-level views. In *Texas v. Brown*, 460 U.S. 730 (1983), the majority held that the officers' use of a flashlight to illuminate the interior of a car did not implicate Fourth Amendment concerns. Likewise, in *United States v. Dunn*, discussed in Chapter 3, the Court held that police officers' use of a flashlight to peer into the defendant's barn from the open fields "did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment."

While the use of flashlights did not trouble the Court, beepers introduced different concerns. In *United States v. Knotts*, 460 U.S. 276 (1983), police officers attached a beeper to a drum of chloroform, a chemical used to make methamphetamine. They used the beeper to monitor the movements of the car in which it traveled when they lost visual contact with it. In this way, they were able to locate the laboratory where the defendants unlawfully manufactured the drug. The U.S. Supreme Court found no constitutional violation, reasoning that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."

The following year, the justices revisited beepers in *United States v. Karo*, 468 U.S. 705 (1984). *Karo* also involved the placement of a tracking device in the drum of a chemical necessary to an illegal drug operation;[1] but, unlike

1. In both *Knotts* and *Karo*, the government's placement of the beeper was not trespassory, since it was placed in the drum with the consent of its original owner.

Knotts, the drum was manually transferred to the defendant and was subsequently used to monitor movements inside the house. While the transfer to the defendant did not trouble the U.S. Supreme Court, monitoring movement inside the home was a different matter altogether. The justices held that the police could not use a beeper for this purpose without a warrant, since the device revealed information about the interior of the home that they could not have gleaned from observation outside of the curtilage.

QUESTION 2. Beeper bust. Police Officer Matt wanted to know the location of a hideout where gang members manufactured methamphetamine. He had been unable to determine this through ordinary surveillance. To find the location, Matt attached a tiny beeper to the outside strap of Shannon's purse. Matt knew Shannon consorted with gang members and figured that, by placing the beeper there, it would lead him to the gang's secret laboratory.

Matt monitored the beeper as it moved from Shannon's place of work, through public roads, and ultimately to a private residence. From his position on the road, Matt observed Shannon walk to the side of the house where she walked through a gate and entered a detached building, resembling a shed, located ten feet from the residence. The beeper registered no further movement after Shannon reached the gate. Using this and other information, Matt obtained a warrant to search the premises, which turned up a wealth of incriminating evidence against Shannon and her cohorts. If Shannon challenges the use of the beeper to justify the search, she will likely:

A. Prevail, because Matt could not have acquired critical information without electronic surveillance.
B. Prevail, because women have a reasonable expectation of privacy in their purses.
C. Fail, because Matt was located in a public area when he obtained the information.
D. Fail, because Matt obtained no information about the interior of the home.
E. Fail, because Matt acquired no information about activity inside the shedlike building.

ANALYSIS. In answering this question, we need to address two separate issues: the placement of the beeper, and the movement of the beeper once placed. Women clearly have an expectation of privacy in their purses; the question is whether Matt's conduct violated that expectation. The facts indicate that he placed the beeper on the strap of the purse. This cannot infringe any privacy expectation since the strap is on the outside of the purse and thus is plainly visible to everyone. The strap is not used — indeed, cannot be used — to

secrete private items or information. Had Matt entered Shannon's purse and placed the beeper there without her consent, the Fourth Amendment would surely be implicated, but that did not happen here. Therefore, because Matt's conduct did not violate Shannon's expectation of privacy in her purse, **B** is wrong.

Answer **C** posits that Shannon's claim will fail because Matt is located in a public area when he acquires the information from the beeper. This proposition is clearly wrong, inasmuch as it suggests that police officers can lawfully obtain whatever information they want provided they position themselves in a public area when they do so. This contravenes the lesson of *Karo*, where the U.S. Supreme Court deemed certain evidence inadmissible, even though the police were situated in open fields when they acquired it.

By the same token, not all information concerning private residences is inadmissible where police officers could not have acquired it without electronic surveillance. This was, in fact, the factual predicate of *Knotts*; the police used a beeper precisely because they could not otherwise locate the defendant's drug laboratory. This did not compromise the admissibility of the evidence, because the information the beeper provided stopped at the threshold of the residence. **A** is wrong.

This leaves us with **D** and **E**, which are clearly the two best choices. Think carefully before choosing. Students are likely to be drawn to **D** since it is an accurate statement of law and is relevant to the case at hand. Unlike *Knotts*, the beeper does not monitor the movements inside the defendant's home. Instead, the facts appear similar to *Karo*, where the beeper reveals only the location of the lab.

E is, however, the *better* answer. Remember that the curtilage is an extension of the residence that merits equal constitutional protection. While the facts do not resolve the question of whether the "shedlike" structure is within the curtilage, they provide enough information to raise the possibility. Even if it is, however, the beeper did not contravene Shannon's Fourth Amendment rights. Because it stopped at the gate, the beeper provided no information about Shannon's activities inside the curtilage of her home. It did not monitor Shannon's movements inside the shed, just as the beeper in *Karo* did not reveal details about the interior of the defendant's residence.

For these reasons, **E** is a more complete answer than **D**.

C. Technology in the Twenty-First Century

Unsurprisingly, by the turn of the century, more sophisticated technology of the type referenced in *Dow Chemical* had become available to law enforcement. In *Kyllo v. United States*, 533 U.S. 27 (2001), federal agents used a thermal-imaging device to detect relative amounts of heat radiating from

a private residence to detect the presence of high-intensity lamps commonly used to grow marijuana indoors. The device required no physical invasion of the home; officers needed only to aim it at the residence from a public street to obtain a "reading."

The U.S. Supreme Court acknowledged that, to decide *Kyllo*, it must confront the larger question of the extent to which advancing technology "shrink[s] the realm of guaranteed privacy." In upholding the defendant's challenge, the majority emphasized the sanctity of the home, noting that the right to retreat into one's home free from unreasonable government intrusion is "[a]t the very core of the Fourth Amendment." Moreover, unlike the devices considered previously, the thermal-imaging scanner is a device not generally available to the public that has the ability to disclose "intimate" details of the home without physical intrusion. As such, its use in the instant case violated the Fourth Amendment.

Relying on the reasoning of *Kyllo*, lower courts have questioned the constitutionality of using thermal-imaging devices in aerial surveillance of residences or to measure heat emissions in back yards while standing in the open fields. Conversely, the use of a video camera without enhanced magnification has been upheld, as has the retention of a blood sample for possible future testing based on developing technologies. Storing blood samples involves no physical invasion and, unlike the thermal-imaging device, blood testing is commonplace.

QUESTION 3. Joint relief. Law enforcement officials in the Township of Serenity received an anonymous tip that marijuana was being sold out of one of the houses on Weed Lane. Unfortunately, the tipster failed to disclose which of the eight houses on the street was involved. To overcome this problem, the chief of police ordered a scanner he saw in a popular magazine. If pointed at an individual from a distance of up to 100 feet, the scanner is able to detect the presence of marijuana carried on the person targeted. If marijuana is present, the lights on the scanner begin to flash; if not, the scanner remains dark.

The day the scanner arrived at the station, the chief ordered Deputy Dan to use it to conduct surveillance on Weed Lane. Dan spent the day pointing the device at everyone exiting the eight houses there. Finally, after four hours, the scanner began to flash when pointed at Mabel Miller, aged 70, as she exited 18 Weed Lane. Mabel explained that she was using marijuana to alleviate chronic pain in her joints. While she knew this was illegal, her doctor recommended it. If Mabel challenges the use of the scanner, which of the following is LEAST relevant in evaluating her claim?

A. The scanner cannot take account of Mabel's medical authorization to use marijuana.

B. The chief purchased the scanner from a magazine.
C. The scanner was pointed at Mabel after she exited a residence.
D. The scanner revealed information that Dan could not otherwise have discovered without searching Mabel.

ANALYSIS. This problem applies the reasoning of *Kyllo* to a novel technology: a hypothetical marijuana body scanner. Mindful of the inevitability of differing types of technological innovation in law enforcement, the justices intended the reasoning of *Kyllo* to be used by lower courts in resolving future controversies such as this. To determine which of the four choices is the least relevant, we must identify the analytical benchmarks relied on by the majority in upholding Mr. Kyllo's challenge to the thermal-imaging device used to measure heat emissions in his residence.

Answer **B** references the chief's purchase of the scanner from a magazine. In *Kyllo*, the U.S. Supreme Court relied in part on the fact that the thermal-imaging device used by the police was not commonly available to the public; as such, residents would reasonably expect privacy in protected areas into which it alone could invade. Here, the scanner's purchase from a popular magazine suggests that many citizens would have been aware of it and, presumably, could have purchased it for themselves. While we do not have enough information to determine how widespread the distribution of the item may have been, or for how long it had been marketed, its availability to the public through a popular publication is clearly relevant.

Answer **C** notes Mabel's location outside the home when Deputy Dan conducted the scan. This is a relevant consideration, since, in *Kyllo*, the Court emphasized repeatedly that the device's constitutional infirmity was in part a function of its ability to reveal "intimate details of the home." Because the "sanctity of the home" figured so prominently in the Court's analysis, the failure of this device to invade the home is significant.

In *Kyllo*, the Court found that a Fourth Amendment search had occurred based, in part, on the fact that the thermal-imaging device revealed information that the police officers could not otherwise have gleaned without physically invading the defendant's home. Likewise, in this instance, without the scanner, Deputy Dan could only have found the marijuana carried by Mabel if he had searched her body—conduct that certainly constitutes a physical intrusion. Therefore, answer **D** states a consideration that is clearly relevant to Mabel's claim.

This leaves us with **A**. While Mabel may have felt justified in using marijuana because her doctor recommended it to her to alleviate her chronic pain, this belief has no bearing on the constitutionality of Deputy Dan's use of the device to ferret out criminal misconduct. The Fourth Amendment's privacy test asks whether Mabel's expectation of privacy is both genuine and

reasonable. Even if she honestly considered her acquisition of marijuana to be a private matter, society would not find this expectation to be reasonable in light of its criminal nature.

A is the correct answer.

D. Dogs: A Cop's Best Friend

Police dogs merit special treatment because they present a unique type of technological enhancement. The U.S. Supreme Court recognized as much in *United States v. Place*, 462 U.S. 699 (1983), declaring canine sniffs to be *sui generis* by virtue of the limited manner in which information is obtained and the limited scope of the information obtained from the sniff. In *Place*, law enforcement officers brought a narcotics detection dog to an airport concourse and "introduced" it to a closed suitcase believed to contain contraband. The dog "alerted" to the suitcase almost immediately, without the necessity of opening the luggage or otherwise compromising the owner's privacy in its contents. Under these circumstances, canine sniff was held not to be a "search" under the Fourth Amendment.

While it sanctioned the use of police dogs in airport drug interdiction, *Place* did not consider the constitutionality of using canines in other law enforcement contexts. The U.S. Supreme Court first addressed this larger issue in *Illinois v. Caballes*, 543 U.S. 405 (2005), where a state trooper used a narcotics detection dog during a routine traffic stop to detect the presence of narcotics inside the vehicle in the absence of any facts suggesting that either the car or the driver was carrying drugs. The majority held that the use of the canine did not raise Fourth Amendment concerns for two reasons. First, the "sniff" did not infringe any protected interest since it detected only the presence of contraband, and one cannot have a legitimate expectation of privacy in contraband. See also *United States v. Jacobsen*, 466 U.S. 109 (1984). Second, because the ten-minute duration of the stop "was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop," the use of a narcotics dog did not prolong the length of the traffic stop. However, had the K-9 officer's conduct extended the stop beyond the time necessary to investigate the alleged motor vehicle infraction, the Fourth Amendment would be violated. *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). Not all uses of drug-sniffing dogs are shielded, however, from Fourth Amendment scrutiny. In *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the Court held that the Fourth Amendment applied when an officer took a drug-sniffing dog to the defendant's front porch. Because this conduct created an "unlicensed physical intrusion" into a constitutionally protected area (the curtilage) to gather criminal evidence against the homeowner, the officer's trespassory conduct implicated the Fourth Amendment. As such, the majority opinion did not address *Katz*' alternative expectation-of-privacy test.

QUESTION 4. Canine crimestopper. Myra was pulled over by Officer Adam for speeding on the interstate. When Adam asked Myra for her license and registration, Myra replied, "Sure, Mr. Blue," and started laughing inappropriately. Adam then noticed that her eyes were bloodshot. He asked if she had been smoking marijuana, to which she replied, "You'll never know, will you?" Adam then asked if he could search her car. Myra declined. After Adam finished writing Myra's speeding ticket in the squad car, he called police headquarters and told them to send the canine unit.

Seven minutes later, a narcotics dog arrived. As Adam handed the ticket to Myra, a fellow officer quickly led the dog around the outside of the car, and it alerted to the trunk. Knowing he did not need a warrant to search the trunk, Adam opened it. As he did, Myra told him that the trunk contained an overnight bag that she had brought from home, as she was planning to visit a friend out of state. Myra told Adam not to touch the bag, since it contained "private stuff." He disregarded her request and, searching the bag, found a crack pipe hidden among Myra's undergarments. He seized the pipe and placed Myra under arrest. From start to finish, the stop lasted eleven minutes. If Myra challenges the seizure of the pipe, she will likely:

A. Prevail, because the canine sniff prolonged the traffic stop.
B. Prevail, because the canine sniff revealed items brought from home.
C. Fail, because the narcotics dog was standing in a public area when it alerted.
D. Fail, because the stop was completed in eleven minutes.

ANALYSIS. Remember that, in answering multiple-choice questions, it is important to keep in mind the relevant legal standard, since the correct answer typically references it. In finding that the canine sniff was not a Fourth Amendment search, *Caballes* focused on two considerations: the failure to prolong the traffic stop unreasonably and the lack of infringement of any protected interest. These factors must, therefore, frame our discussion.

The facts specify that Adam radioed for the dog after Myra refused consent to search and the dog arrived seven minutes later. It alerted to the trunk. Opening the trunk, Adam discovered contraband in an overnight bag. He seized it.

In many respects, the facts of this case mirror those of *Caballes* and *Rodriguez* In all three cases, a canine alerted to the presence of drugs in the vehicle, leading to their seizure. In our problem, however, the contraband was located in a piece of luggage containing personal items of clothing. We must determine, therefore, whether this distinction makes Adam's conduct a search under the Fourth Amendment.

Answer **B** would exclude the contraband because it was found in an overnight bag brought from the defendant's home. While bringing a drug-sniffing dog to the front porch of a residence implicates the Fourth Amendment under *Jardines*, the canine never entered the home or its curtilage in our fact pattern. Because there was no physical intrusion into these areas by law enforcement personnel, *Jardines* does not apply here. **B** is wrong.

Answer **C**'s emphasis on the dog's location in the open fields is a necessary but not sufficient consideration in answering the problem. For example, a dog sniff may violate the Fourth Amendment even if the canine is standing in the open fields if its use created an unreasonable delay in the length of the detention. It is the diligence with which the officer completes his investigation into the alleged traffic violation that is dispositive.

Answer **D** would permit the seizure, since the entire stop—including the canine sniff and the subsequent search and seizure lasted eleven minutes, only one minute more than in *Caballes*. In *Caballes* and *Rodriguez*, however, the U.S. Supreme Court's focus was not on the number of minutes but, rather, on whether the use of a canine officer extended the stop beyond the time necessary to resolve the alleged motor vehicle violation that initially prompted it. Here, unlike in *Caballes*, the officer requested the dog after he had written the ticket for the speeding violation. As such, the canine sniff delayed the stop unreasonably. The fact that Adam waited until the dog arrived to give Myra the ticket is beside the point.

A is the correct answer.

E. The Closer

QUESTION 5. Look, I'm flying! Believing that Paige was growing marijuana plants inside her home, Officer Taylor flew a helicopter over Paige's house to inspect the property. When the helicopter was flying at an altitude of 400 feet, Taylor's colleague, Officer Ross, looked down and could detect nothing. As a result, Ross devised another plan. Wearing a 100-foot cord attached to the helicopter, Ross jumped out of the helicopter and, while suspended 300 feet above Paige's house, viewed the marijuana plants through an open window with a professional quality 35-millimeter camera. If FAA regulations permit flying at altitudes of 400 feet and higher, does the search comply with Fourth Amendment requirements?

A. Yes, because the helicopter was traveling within navigable airspace.
B. Yes, because there was no physical intrusion into Paige's home.
C. No, because aircraft are not permitted to fly at altitudes of 300 feet.
D. No, because Ross used a professional quality camera.

ANALYSIS. This problem revisits the impact of modern technology on Fourth Amendment privacy in a twist on *Ciraolo* and *Riley*. In *Ciraolo*, the U.S. Supreme Court found that the defendant's expectation of privacy was not violated where marijuana plants growing in his back yard were viewed by police officers from an aircraft flying 1,000 feet above his home. In reaching this conclusion, the justices reasoned that Ciraolo could not reasonably expect privacy in his yard under these circumstances, since planes routinely fly at this altitude and the plants were visible to the naked eye from this vantage point. *Riley* permitted a fly-over at 400 feet, with four justices emphasizing the flight's compliance with FAA regulations and a fifth justice reasoning, instead, that any expectation of privacy from this vantage point is unreasonable since there is significant use of public airspace at this altitude.

In this problem, Ross is not viewing the plants from a helicopter; instead, he sees them from the bottom of a 100-foot cord hanging *below* a helicopter flying at 400 feet. This difference changes the constitutional dimension of the case. While the police can argue that they satisfied the plurality in *Riley* by ensuring that the aircraft remained at 400 feet in compliance with FAA regulations, the actual search was conducted from a lower vantage point where aircraft are not permitted to fly. As such, the search would not satisfy the standard embraced by Justice O'Connor, who provided the crucial fifth vote in *Riley*, since there is no evidence that public use of airspace within this prohibited area is sufficiently common to render unreasonable a homeowner's expectation of privacy in areas that can be viewed from 300 feet above the home. See also *Ciraolo*. Therefore, by peering into Paige's house while suspended from a cord 300 feet above it, Ross violated her Fourth Amendment rights.

As explained above, answer **A** misses the point. While it is true that the helicopter was traveling within navigable airspace, Ross viewed the plants from a lower, unlawful altitude. In *Ciraolo* and *Riley*, the U.S. Supreme Court's reference to the aircraft's altitude made sense because the officer viewed the defendants' back yards from the aircraft; here, Ross did not.

Answer **B** is incorrect as a matter of law. A visual search or seizure of an item can be unlawful, even if a police officer never physically invades the home. To that end, we must ask whether law enforcement has intruded upon a protected privacy interest, either physically *or* visually. Ross's conduct satisfies this standard. **B** is wrong.

Answer **D** would invalidate the search because Ross used a professional quality camera. While the U.S. Supreme Court has not decided the extent to which the Fourth Amendment permits police officers to augment their sensory faculties, the device used here clearly does not raise constitutional concerns. While the camera may be of "professional quality," the facts do not indicate that Ross magnified the images he saw through a zoom lens or its equivalent. As such, his conduct is not more invasive than that of the law enforcement personnel in *Dow Chemical*. **D** is wrong.

As discussed above, Ross's descent to 300 feet placed him below the altitude at which aircraft may lawfully travel. Because aircraft are forbidden from entering this area, it was reasonable for Paige to expect privacy in protected areas that could be viewed from this vantage point, including the inside of her home. Ross's conduct, therefore, violated the Fourth Amendment.

The correct answer is **C**.

Cornwell's Picks

1. Shroom with a view **A**
2. Beeper bust **E**
3. Joint relief **A**
4. Canine crimestopper **A**
5. Look, I'm flying! **C**

5

Private Information

CHAPTER OVERVIEW

Privacy protection is not necessarily limited to physical spaces. The U.S. Supreme Court has also considered the extent to which the Fourth Amendment limits the ability of law enforcement to gather potentially incriminating personal information. This information comes in many forms, characterized here as personal characteristics, conversations, and public versus private records.

A. Personal Characteristics

In *United States v. Dionisio*, 410 U.S. 1 (1973), the defendant was required to furnish a voice exemplar to federal investigators for comparison to recorded voices discussing alleged criminal activity. The justices rejected Dionisio's claim that this procedure violated his Fourth Amendment rights, finding that an individual cannot have a reasonable expectation of privacy in the tone and manner of his or her voice since they are "repeatedly produced for others to hear." That same year, in *United States v. Mara*, 410 U.S. 19 (1973), the U.S. Supreme Court likewise found that Fourth Amendment protections did not apply to handwriting samples compelled by law enforcement. The justices reasoned that because handwriting "is repeatedly shown to the public, . . . there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice."

The fact that a bodily characteristic is publicly visible is not always sufficient, however, to extinguish Fourth Amendment protection. In *Cupp v. Murphy*, 412 U.S. 291 (1973), decided the same year as *Dionisio*, police investigators detained a suspect to take fingernail scrapings from him against his will, believing that they would provide DNA evidence linking him to his wife's death by strangulation. Addressing the Fourth Amendment challenge, the U.S. Supreme Court distinguished *Dionisio*, noting that "the search of the respondent's fingernails went beyond mere 'physical characteristics . . . constantly exposed to the public.'" It constituted instead "the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Cupp v. Murphy* (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)). Nonetheless, the Court deemed the fingernail evidence admissible, noting the existence of probable cause, the "very limited intrusion" incident to the suspect's detention and the "ready destructibility of the evidence."

QUESTION 1. Caught in the crosshairs. Marcie was a bank teller at Fawn Lake Savings & Loan. One afternoon, a man wearing a face mask entered the bank. He approached Marcie's window and demanded all the cash in her drawer. She complied with the demand, after which the man exited the bank. While Marcie could not see the robber's face, she told the police he had platinum blond hair, a strand of which was found at the crime scene. Suspicion focused on Scott, a disgruntled former bank employee, whose hair was platinum blond. Scott agreed to come to the police station to answer questions, but he refused an officer's request to take a sample of his hair. When Scott turned his back, the officer snipped a lock of it anyway. Angry, Scott demanded that the officer return the sample, but the officer refused. The sample was tested that same day to see if it matched the strand found at the crime scene. It did. Scott claims that the introduction of the hair as evidence at his trial violated his Fourth Amendment rights. Which of the following arguments in support of the admission of the hair sample most closely follows the reasoning of *Dionisio* and *Cupp*?

A. Scott's hair is constantly exposed to public view.
B. The hair sample was tested soon after it was obtained.
C. An eyewitness reported that the robber's hair was platinum blond, the same as Scott's.
D. Scott was present at the station house voluntarily when the officer obtained the sample.

ANALYSIS. This problem explores the U.S. Supreme Court's reasoning in *Dionisio* and *Cupp* as applied to a hair sample. Like facial characteristics,

fingerprints, and a voice exemplar, the color of an individual's hair can be readily ascertained by anyone who comes into contact with that person. As such, the Fourth Amendment would not be implicated if police officers simply visually observed or photographed someone's hair. In this case, however, the police do more: They take the sample furtively from an unwilling suspect and test it later that day to see if it matches that of the robber. The key question is, therefore, whether any of the police actions compromise Scott's Fourth Amendment rights.

Let us first consider the length of time the police "detained" the sample before testing it. The amount of time the police held the sample to test it is irrelevant, since the violation, if any, occurred the moment the police took the lock of hair against Scott's will. Retaining the sample for a greater or lesser amount of time does not affect the privacy infringement in any way. It is not restricting Scott's movement, as detaining his person would. **B** is, therefore, wrong.

Answer **C** emphasizes Marcie's eyewitness testimony identifying the color of the robber's hair. Such evidence, while important to the prosecution's overall case, is less critical in the Fourth Amendment context of *Dionisio* and *Cupp.* Those cases import that it is not the characteristic's visibility to the *witness* that is dispositive but, rather, its overall public nature.

Thus, we are left with a choice between **A** and **D**. **D** notes that Scott was present at the station voluntarily at the time the officer surreptitiously took a sample of his hair. In this regard, our facts differ from those of *Cupp*, where the defendant was involuntarily detained at the station house for investigatory purposes. This distinction was not, however, the basis of the U.S. Supreme Court's decision, which found that the scraping of the defendant's fingernails, *not* the detention of his person, raised a constitutional flag.

A, by contrast, reflects the Court's primary focus of the Fourth Amendment inquiry in *Dionisio* and *Cupp*: whether the evidence in question is or is not constantly exposed to public view. Accordingly, the prosecution will endeavor to liken the hair sample to a voice exemplar, "static" evidence that is easily discerned by anyone who encounters Scott. The defense may counter that subjecting the hair to forensic analysis distinguishes *Dionisio.* We need not assess the merit of this contention, however, since whoever prevails, **A** identifies the appropriate analytical framework.

A is the correct answer.

B. "Private" Conversations

In a series of cases decided over an eight-year period, the U.S. Supreme Court considered the extent to which individuals may reasonably expect privacy with respect to information relayed in conversations with friends or confidantes. In

the first, *Lopez v. United States*, 373 U.S. 427 (1963), the defendant attempted, in a series of meetings, to bribe an agent of the Internal Revenue Service. In the final encounter, the agent recorded their conversation in the defendant's business office with an electronic device carried in the agent's pocket. The U.S. Supreme Court rejected Lopez's claim that the admission of his recorded statements violated his Fourth Amendment rights. Since the agent himself was constitutionally permitted to testify as to the substance of the conversations, the justices saw no difference, under the Fourth Amendment, between this testimony and a recording of the same. If the placement of the device had created an unlawful physical invasion, the result might have been different but, in this case, with the device in the agent's pocket, the recording device "neither saw nor heard more than the agent himself."

In *Hoffa v. United States*, 385 U.S. 293 (1966), the defendant's incriminating statements were made in a hotel suite to one Partin, who was a business associate, not a government agent. While Hoffa acknowledged that he consented to Partin's entry into the suite, Hoffa claimed that the consent was invalid because he was unaware of Partin's role as a government agent. As such, Partin's conduct amounted to an illegal search for criminal evidence.

The U.S. Supreme Court rejected Hoffa's argument. While Hoffa had a right to privacy in his hotel room, just as Lopez did in his business premises, Partin's conduct did not violate that right. Like the agent in *Lopez*, Partin was invited into the private space by the defendant. All that is left, then, is the conversation itself. The Fourth Amendment is unavailing in this context as well since it does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."

The Fourth Amendment analysis is no different if the government agent is someone previously unknown to the defendant who lies about his identity to gain access to the defendant's home. In *Lewis v. United States*, 385 U.S. 206 (1966), the defendant invited an undercover government agent into his home, believing that he was an ordinary citizen looking to purchase narcotics. Lewis's subsequent arrest for the sale made to the agent did not compromise Fourth Amendment protections since one assumes the risk that individuals with whom one converses or transacts business may be law enforcement agents or people working with them.

The final case, *United States v. White*, 401 U.S. 745 (1971), is similar in certain respects to *Lopez* and *Hoffa*. In all three cases, the defendant, believing he was speaking in confidence to a friend, made incriminating statements that were recorded electronically. In *White*, however, the conversations were also simultaneously transmitted via a radio receiver to a government agent located outside the residence. The U.S. Supreme Court did not view this distinction between "probable informers" and "probable informers with transmitters" as raising constitutional concerns, reasoning that a defendant's sense of privacy was not infringed to a greater degree by the possibility that a friend or business associate is "wired for sound."

QUESTION 2. A third ear. The police arrested Zack for the murder of his business partner. Zack claimed that he committed the murder at the behest of Ian, a business competitor, who paid Zack $100,000 for the "hit." The district attorney told Zack, who was released on bail, that she would recommend lenient sentencing if he helped garner evidence against Ian about Ian's participation in the crime. Zack agreed to visit Ian at his home, where Zack would introduce topics of conversation designed to elicit incriminating information against Ian.

When he went to Ian's house, Zack carried a tape recorder in his front shirt pocket. When Ian turned his back, Zack secretly placed the recorder under the sofa where Ian was sitting. The device recorded their entire conversation, including incriminating remarks Ian made to his wife while Zack was out of the room. The conversation was also transmitted simultaneously to Officer Bruce, who was sitting in a police van across the street. Before he left, Zack surreptitiously removed the recorder from under the sofa and took it with him. Because Zack was unavailable at trial, the entirety of Ian's remarks was introduced at his trial through the testimony of Bruce. Which of the following is Ian's best argument that the introduction of the tape recording of his conversation with Zack violated his Fourth Amendment rights?

A. Bruce could not witness Ian's facial expression and other nuanced aspects of his conversation with Zack.
B. Zack placed the tape recorder under the sofa where Ian was sitting.
C. Zack was not present when Ian spoke to his wife.
D. The conversation took place in Ian's home.

ANALYSIS. We know from the foregoing discussion of the case law that the U.S. Supreme Court has been largely dismissive of Fourth Amendment claims based on misplaced trust in conversational privacy with friends or business associates — the so-called "unreliable ear" or "false friend." His best argument must, therefore, uncover the type of police or informer conduct that has not yet received judicial approval.

Answer **D** is perhaps the most easily eliminated. The incriminating statements in the leading cases were made in a variety of locations, including a hotel, a business office, and the informant's residence. In *Lewis*, however, the defendant's purchase of illegal narcotics from an undercover agent occurred in the defendant's home, a fact that did not alter the Court's view that one assumes the risk that a person with whom one converses or transacts business may betray one's trust. **D** is, therefore, incorrect.

Answer **B** focuses on the location of the recording device. In the cases discussed, the device was usually a wire attached to the informant's body or a tape recorder carried on his person. Here, Zack removes the recorder and

hides it under the sofa. This distinction should not matter under the Fourth Amendment. The analytical focus is the infringement of Ian's privacy. Whether the recording device is secreted on Zack's person or somewhere in the room, the privacy incursion is the same. **B** is wrong.

Answer **A** makes a fine point: The officer listening to the conversation outside the room cannot see Ian's face and thus would be unable to discern any nuance that Ian's facial expression may disclose. Consider, for example, the information an individual can convey by a rolling of the eyes, a hand gesture, or other nonverbal cues. While Zack will have witnessed any such occurrences, Bruce would not. This introduces a risk that Bruce's testimony may mislead the jury since it cannot appreciate the full context of Ian's statements.

This possibility troubled some members of the U.S. Supreme Court in *White*, influencing their decision to dissent. The majority felt, however, that any testimonial infirmity created by the absence of the officer is counterbalanced by the benefit of having a complete and accurate transcript of the dialogue. The tape recording eliminates, that is, the possibility that the informer may recall certain parts of the conversation inaccurately and to the detriment of the defendant. **A** is wrong.

The remaining answer, **C**, is Ian's best argument. In rejecting the defendant's challenge in *Lopez*, the U.S. Supreme Court reasoned that the recording device "neither saw nor heard more than the agent himself." In this case, that is not true. The device recorded the conversation between Ian and his wife, which took place when Zack was out of the room. This distinction may or may not rise to the constitutional level; however, of the four choices, it is the only one not precluded by existing U.S. Supreme Court precedent.

The correct answer is **C**.

C. Public Versus Private Records

The text of the Fourth Amendment expressly shields "papers" from unlawful search and seizure. Originally, the U.S. Supreme Court interpreted this provision as disallowing the seizure of any private papers that were not instrumentalities of crime. In *Warden v. Hayden*, 387 U.S. 294 (1967), the Court abandoned this "mere evidence" rule, reasoning that an individual's privacy was no more infringed "by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or contraband." Thus, the justices found that evidence discovered during a search of the defendant's residence was admissible, whether it was of purely evidentiary value or an instrumentality of crime itself.

The protection afforded to papers does not apply to documentary evidence that is public in nature since seizure of such papers cannot, by definition, infringe any privacy expectation in them. The question is, then, when is information sufficiently public in nature to avoid Fourth Amendment scrutiny?