



Lee Burgess: Welcome to the Law School Toolbox. Today, we're doing another in our "Listen and Learn" series – this one is on warrant exceptions. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series. Today, we will be discussing a commonly tested area of Criminal Law: warrants. You'll need to know both when a warrant is required and what is required for law enforcement to get a warrant. This is important, because if law enforcement conducts a search without a valid warrant, all evidence they gathered is not admissible at trial! But, as you know by now, there are always exceptions to that rule.

Lee Burgess: Stepping back a bit, it's important to know that warrant requirements fall under the Fourth Amendment to the U.S. Constitution. We've discussed the Fourth Amendment in a [prior episode](#), including how to determine whether there was a state action and whether the state action constituted a search. That episode is helpful context for this one, so feel free to pause and listen to that one first. We've linked to it in the show notes.

Lee Burgess: Now that we have some context, let's start with a general question: What is a warrant? A warrant is basically official permission given to law enforcement to do something. It is a document typically issued by the court that authorizes the police, or another law enforcement agent, to issue an arrest, conduct a premises search, or carry out some other action.

Lee Burgess: So, why do we require our police officers to get warrants before making an arrest or conducting a search? Because we have the Fourth Amendment to the Constitution. The Fourth Amendment guarantees that "[t]he 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." As a side note, remember that the Fourth Amendment contemplates federal action, but it is incorporated to the states by the Due Process Clause of the Fourteenth Amendment.



- Lee Burgess: So, the Fourth amendment is relevant to both federal and state law enforcement action. When we parse warrant requirements in Criminal Procedure, we're basically trying to understand and apply that amendment. When is a search or seizure unreasonable? What is probable cause? How particular must the description of the person or location be for the warrant to be valid? So, let's dive in.
- Lee Burgess: The basic rule is that a warrant is required for all searches and seizures, unless an exception applies. We'll get into those exceptions later on, but let's begin by defining what a valid search warrant is. A valid search warrant requires, one, probable cause – that is, reliable information that evidence of illegality will be found; two, It must state with particularity the place and items to be searched and seized; and three, it must be issued by a neutral and detached magistrate. Evidence obtained without a valid warrant is excluded, unless it falls under an exception.
- Lee Burgess: This issue typically arises in life and on exams through a motion to suppress at trial. In that motion, the defense will typically argue that either, one, the police did not obtain a warrant when they should have – that is, no exception applied and they still went ahead with a warrantless search or seizure; or two, that the warrant was no longer proper. If either of those things are true, the defense can have any evidence obtained through that illegal search or seizure suppressed.
- Lee Burgess: Okay, so now we know what a valid warrant looks like. But how do we know when we need one? I keep mentioning exceptions to the warrant requirement and you may be wondering what those exceptions are. Well, that's a good question, because deciding whether an exception applies is often a big part of the analysis on an exam question.
- Lee Burgess: There are eight exceptions to the warrant requirement that you need to know. This tends to be a heavily tested area, so be sure to get these down. The eight exceptions are:
1. Plain view doctrine;
 2. Exigent circumstances;
 3. Automobile exception;
 4. Search incident to arrest;
 5. Consent;
 6. Inventory search;
 7. Stop and frisk; and
 8. Special need.
- Lee Burgess: Let's take them one at a time. Number one, plain view doctrine. Under the plain view exception to the warrant requirement, police may seize items if, one, they are observed in plain view, with any of the five senses; two, from a place the officer is lawfully permitted to be; and three, probable cause exists to believe



the items are evidence of a crime or contraband. In short, an officer who is in a place he is lawfully permitted to be can seize items they reasonably believe to be evidence of a crime, if the items can be observed in plain view through sight, smell, listening, touching, or taste. As you might imagine, some of those might be a little less common than others. I don't think I've ever seen a question where the officer tasted the evidence before seizing it. But, hey, if you see it, now you'll know what to do!

Lee Burgess: The second exception is exigent circumstances. Under the exigent circumstances exception to the warrant requirement, a warrantless search is permitted if, one, evidence is evanescent – that means it will dissipate or disappear; two, it's necessary to prevent the imminent destruction of evidence; three, the police are in hot pursuit of a felon and evidence is in plain view; or four, the emergency aid exception applies. This is basically the "emergency" exception, so if you see a question where the police are seizing evidence in a "heat of the moment" situation, go through the four categories in your mind to see if any apply. And remember, it's best to actually memorize these terms; don't just familiarize yourself with the concepts. On an exam, you want to be able to throw out terms like "exigent circumstances" and "hot pursuit", and not have to explain or talk around the issue.

Lee Burgess: The third exception is the automobile exception. Under the automobile exception to the warrant requirement, a warrantless search is permitted if probable cause exists that contraband or evidence of a crime will be found in the vehicle. It is important to note here that police can search the entire vehicle, plus any packages, luggage, or containers that may reasonably contain the items for which there is probable cause. Another important reminder is that, in order for this search exception to apply after a traffic stop, the police must have had probable cause prior to the search. The officer cannot pull someone over for no reason and then, after stopping them, conduct a valid warrantless search under the automobile exception.

Lee Burgess: Fourth, we have search incident to arrest. Under this exception, while executing an arrest, the police may search a suspect's person and "wingspan". I'd think about this as the person's actual wingspan – what is within arm's reach of the suspect during the arrest? This is a little different for automobile arrests. If a suspect is arrested in an automobile, the wingspan includes the passenger's compartment and any containers found in the car, if there is reason to believe they contain contraband.

Lee Burgess: The fifth exception is consent. For a warrantless search to be valid under the consent exception, the suspect must have given their consent freely, voluntarily, and intelligently. That is relatively self-explanatory, though good lawyers will typically be able to make another argument on both sides of this issue, of course. But what if consent is given by another person, not the suspect? A third



person with authority may consent. The question here will be, did that third person have authority? Are they the owner of the home, for example? But what if more than one person has authority over a location? Must they both consent? The rule here is, if two or more people share authority, any one of them may consent, but the police cannot search private areas that only the non-consenting person has authority to give. For example, if two people, say Laura and Anne, own a house together, and only Laura consents to the police searching the house, the police may properly enter and search, but they may not enter or search Anne's private bedroom without Anne's consent. In these types of scenarios, think about how far Laura's authority extends. She has authority to grant access to the home she co-owns, but she cannot grant access to the areas that are not her own. The consent she gives the police only extends as far as her authority.

Lee Burgess: Moving on to the sixth exception: inventory search. Under this exception, a warrantless search is permitted when a person is incarcerated or when the search is of an impounded vehicle. But just because a person or a vehicle is in custody doesn't mean all searches are reasonable. To be valid, an inventory search must be, one, reasonable; and two, conducted pursuant to established police agency procedures that are designed to meet the legitimate objectives of the search while limiting the discretion of the officer in the field. I know, this is a pretty loose rule. But it gives you a chance to argue both sides on an exam and show off your legal reasoning.

Lee Burgess: We're almost done! The seventh exception is one you may have heard of from the news: stop and frisk. To conduct a valid search pursuant to stop and frisk, the police must have, one, a reasonable articulable suspicion; two, that criminal activity is afoot; and three, that the person has a weapon. I recommend you memorize the words to this exception. The term "reasonable articulable suspicion" is definitely a buzz word that you'll want to be able to use with confidence in your answer. And remember, for stop and frisk to be valid, the officer can't just have suspicions about a person. They can't just think they are breaking the law. They must also have a reasonable articulable suspicion that the person has a weapon, so be sure you don't miss that prong. It's also important to remember the plain feel doctrine, a sub-topic under stop and frisk that limits what police may seize during a frisk. Specifically, during the frisk, police may only seize items reasonably believed to be contraband or a weapon.

Lee Burgess: And finally, the eight exception is the special need exception to the warrant requirement, which I won't get into here, because it only applies in very limited circumstances.

Lee Burgess: So, there you have it! You know the requirements for a warrant and the circumstances in which a warrant is not required. The hardest part here is just the sheer quantity of the exceptions. Unfortunately, there is no shortcut around



just committing those exceptions to memory. But it's much easier to memorize the exceptions if you understand how these exceptions arise in a fact pattern – memorization does not happen well in a vacuum! So, let's take a look at some examples together to make sure you understand the rules and are well on your way to memorizing them. The first example is adapted from the [July 2009 California bar exam](#):

Lee Burgess: “State Patrol Officer Patricia pulled Daniel over after she observed him speeding and weaving in and out of traffic. She asked Daniel for his license and registration, both of which he gave her. Patricia then walked to her patrol vehicle to check for any outstanding arrest warrants against Daniel. As she was walking, Patricia looked back and saw that Tom, the passenger, appeared to be slipping something under his seat. Patricia returned to Daniel's car, opened the passenger side door, looked under the seat, and saw a paper lunch bag. She pulled the lunch bag out, opened it, and found five small bundles of what she recognized as cocaine. Patricia arrested Daniel and Tom, who were subsequently charged with possession of cocaine. What arguments could be raised in support of a motion to suppress the cocaine?”

Lee Burgess: What do you think? You would typically want to first analyze whether a search occurred, but since that analysis is covered in another podcast, I'll just tell you that opening the car door, looking under the seat, and opening the bag count as a search. Once we know a search occurred, the next question is, was there a valid warrant for that search? The facts don't mention a warrant at all, so we can safely assume there wasn't one. So, the final and most important question for this analysis is, is there a valid exception to the warrant requirement? If not, Officer Patricia's search was illegal and Daniel may be successful on a motion to suppress the cocaine.

Lee Burgess: Let's make our way through the eight exceptions and see if any might apply. Note that you likely won't have time to analyze each and every exception in your essay, but it's good practice to run through them quickly in your head to make sure you don't miss any.

Lee Burgess: When you see a question dealing with a car – a traffic stop, the search of a vehicle, etc. – it's a good rule of thumb to start out with the warrant exceptions that have to do with cars. So, let's do that. First, let's start with inventory search, because we can do away with this one rather quickly. Remember, under this exception, a warrantless search is permitted when a person is incarcerated, or when the search is of an impounded vehicle. Because Daniel and Tom were not yet arrested during the search and their vehicle had not been impounded, this exception is not going to apply. If Officer Patricia had made the arrest, brought them to the station, and then searched the vehicle in police custody, that would be a different story. But that's not what happened here, so let's move on to the next car-related exception, the auto exception.



Lee Burgess: Under the auto exception, a warrantless search is permitted of an entire vehicle, including packages, luggage, or containers if probable cause exists that contraband or evidence of a crime will be found in the vehicle. But remember, because this is a traffic stop, probable cause must have existed prior to the search. Here, Officer Patricia saw Tom “slip something under his seat.” Under these circumstances, what Officer Patricia saw is likely not enough to generate probable cause. Ask yourself: From what she saw and knew before the search, could she articulate with particularity what she suspected the contraband to be? In this case, there is nothing more to indicate a crime had occurred than that Officer Patricia saw that Tom “appeared to” hide a bag. The mere fact that Tom appeared to be concealing whatever it was, is not enough. A mere hunch or suspicion stemming from a suspect hiding something is not enough to create reasonable suspicion, much less the higher standard of probable cause. Imagining a different scenario where Officer Patricia saw the cocaine itself, or if the contraband was something other than cocaine and she could smell it, she’d be more likely to be able to articulate probable cause. But not so here! So, let’s keep moving.

Lee Burgess: As an aside, being able to marshal case law and precedent here will help you mightily. It’ll help you analyze whether an exception applies, and will also win you points with your grader. Did you learn or study any cases having to do with the auto exception? Or when there is probable cause to search a package? If so, compare them with the facts in this case as you make arguments. However, on the bar exam, these specific mentions of cases are not quite as important.

Lee Burgess: What about search incident to arrest? Here, while executing an arrest, the police may search a suspect’s person and “wingspan”, which, in an automobile, includes the passenger’s compartment and any containers found in the car if there is reason to believe they contain contraband. The bag might arguably be within Daniel’s wingspan, but this exception fails for a few reasons. First, no arrest has occurred. This is a good reminder to pay close attention to the question and the facts. As soon as you remember the “wingspan” exception, you may get so excited that you launch into analyzing whether the package was within Daniel or Tom’s wingspans, and completely forget to analyze the first part – whether this search was “incident to arrest” at all. It doesn’t matter whether the bag was in Daniel’s wingspan if he wasn’t being arrested. Second, Officer Patricia still needs to have reason to believe the car’s compartment and containers contain contraband, and like we’ve already discussed, she doesn’t have that.

Lee Burgess: Alright, we’re done with the car-related exceptions. So let’s see if the plain view doctrine gives Officer Patricia an exception that merits her warrantless search of Daniel’s vehicle. Remember, under this exception, police may seize items that are observed in plain view, from a place the officer is lawfully permitted to be,



and probable cause exists to believe they are evidence of a crime or contraband. Officer Patricia might argue that the bag was in plain view when she saw Tom slip it under the seat, but I think she'll have a hard time winning on that argument. As we already discussed, it will be hard for Officer Patricia to argue she had probable cause to believe the bag she saw Tom move from many feet away contained contraband. And by the time she seized it, it certainly wasn't in plain view. She had to open the door, fish out the bag, and open it to discover there was cocaine. I think Daniel wins on this point as well.

Lee Burgess: Now, what about exigent circumstances? For exigent circumstances to apply, we're looking in the facts for evidence that is going to disappear or be destroyed, hot pursuit, or emergency aid. I don't see any of that here. There is nothing in the facts suggesting Tom was destroying evidence; only that he was hiding it.

Lee Burgess: We can quickly do away with the consent exception, because nothing in the facts indicates Daniel or Tom consented to the search. If, perhaps, one of either Daniel or Tom consented, but not the other, this would be an interesting analysis. But don't analyze facts that don't exist in the question! So, let's move on.

Lee Burgess: We're almost done! I know this is a long process, but take heart. Once you have the exceptions committed to memory, this will go much faster. You'll be able to do this process mentally and focus your writing on only the potentially relevant exceptions. The last exception I want to discuss is stop and frisk, also known as a Terry stop. Again, to conduct a valid search pursuant to stop and frisk, the police must have, one, a reasonable articulable suspicion; two, that criminal activity is afoot; and three, that the person has a weapon. While the traffic stop was not an arrest, it was a detention. When an officer detains a suspect because of a reasonable suspicion that a crime has occurred (here, the vehicle code infractions), she has the right to frisk the suspect for weapons to protect herself. This allows a visual scan, as well as a brief physical inspection of the outer garments by running her hands along them. To do this, the officer must have at least a reasonable suspicion that the person might be carrying a weapon. Here, Officer Patricia went far beyond what was allowed. She wasn't looking for weapons and had no suspicion that either Daniel or Tom had a weapon.

Lee Burgess: Now, if perhaps she had run her check for warrants, and found a warrant out for Daniel or Tom for a violent offense, that might have generated the necessary suspicion for some kind of frisk. But even then, the frisk would have permitted her to search Daniel and Tom's persons for weapons; she would still not have been permitted to look under their seats and inside bags.

Lee Burgess: We've made it through the exceptions. Since no warrant exception permitted Officer Patricia to make the search, and she did so in violation of reasonable



expectation of privacy, without a warrant, the search was unlawful, the cocaine that was found is “fruit of the poisonous tree” and should be excluded.

Lee Burgess: Phew - that was long! There are so many exceptions to wrap our minds around. Let’s just do one more so we can nail these down. This hypo is adapted from the [February 2006 California bar exam](#):

Lee Burgess: “Deft saw Oscar, a uniformed police officer, attempting to arrest Friend, who was resisting arrest. Believing that Oscar was arresting Friend unlawfully, Deft struck Oscar in an effort to aid Friend. Both Friend and Deft fled. The next day, as a result of Oscar’s precise description of Deft, Paula, another police officer, found Deft on the street, arrested him for assault and battery, and searched him, finding cocaine in his pocket. Deft was then charged with assault and battery of a police officer and possession of cocaine. How should the judge rule on a motion made by Deft at trial to suppress the cocaine? Discuss.”

Lee Burgess: Again, since there is no warrant here, you should immediately be thinking about what exceptions to the warrant requirement may apply. One exception to the warrant requirement is for searches incident to a lawful arrest. A lawful arrest can be made in public, without a warrant, if the officer has probable cause to believe that the defendant has committed a felony. Paula was making a lawful arrest, because she knew that Oscar had been assaulted and battered, and that Deft fit the description of the perpetrator. Thus, she had probable cause to believe that Deft was the perpetrator of these felonies. Because Paula made a lawful arrest of Deft, her search of his body was also lawful. Thus, the court should deny Deft’s motion to suppress the cocaine.

Lee Burgess: I want to point out how much faster this analysis is than the prior one. This is an example of what your analysis might look like once you can mentally tick off all of the relevant exceptions. No need to discuss any car-related exceptions, no need to discuss consent. We can focus on exceptions having to do with searching a person’s body, since that is what the facts contemplate. Now, do you understand why I focused on search incident to arrest and not the other exceptions having to do with searching a person’s body? We don’t apply stop and frisk here, because the search happened after the arrest. And we don’t apply inventory, because the search happened before Deft was put in jail. So, when you’re figuring out what exception should apply to the search of a person, think about when the search happened along the spectrum of an arrest and detainment. That will help you know which exception to analyze.

Lee Burgess: That’s all the time we have for today. Keep practicing hypos and you’ll be able to move from the first, longer analysis to the second, more streamlined approach. I wish we had time to practice more together, but for now, that’s a wrap. I am glad you could join me as we discussed warrants! If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a



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