

## QUESTION 4

Claire, a four-year-old girl, went missing. Ike, who regularly provided reliable information to Officer Ava, told her that he had recently overheard Don planning to kidnap a child to raise as his own daughter. Officer Ava's partner, Officer Bert, hurried to the courthouse to apply for a search warrant for Don's house. Meanwhile, Officer Ava rushed to Don's house and knocked on the door. Don answered. Officer Ava told him, "I heard that a missing child might be here," and asked, "Can I come in and look for her?" Don replied, "No." Officer Ava said, "A life is at stake. I am searching your home, whether you want me to or not." Don stepped aside and allowed Officer Ava to enter.

Officer Ava searched the home thoroughly. In a closet in the bedroom, she found a bomb, measuring about 2 feet by 2 feet. In a medicine cabinet in the bathroom, she found several vials of cocaine. While looking under the bed, she found a plain sealed envelope, which she opened, that contained a map with a highlighted route from Don's house to Claire's house. She did not find Claire. Immediately after she completed the search, Officer Bert arrived with a warrant authorizing the "search of Don's home for Claire." Not long afterward, Claire turned up elsewhere unharmed.

Don was charged with: (1) possession of a bomb; (2) possession of cocaine; and (3) attempted kidnapping.

Don filed a motion, under the Fourth Amendment to the United States Constitution, to suppress evidence of the bomb, the cocaine and the map.

1. How should the court rule on the motion to suppress regarding:
  - a. the bomb? Discuss.
  - b. the cocaine? Discuss.
  - c. the map? Discuss.
  
2. Can Don be found guilty of attempted kidnapping? Discuss.

## QUESTION 4: SELECTED ANSWER A

### MOTIONS TO SUPPRESS

Under the Fourth Amendment of the U.S. Const., which applies to states via the Due Process Clause of the Fourteenth Amendment, all *unreasonable* searches and seizures of persons, properties, and papers are unlawful. Where an unlawful search has taken place, the exclusionary rule generally applies -- that is, the evidence wrongfully obtained will not be allowed in as evidence, although it can typically be used for impeachment and other limited purposes. Similarly, evidence *derived* from wrongfully obtained evidence is deemed "fruit of a poisonous tree" and will not be admitted unless there has been attenuation. All that said, courts will follow the "harmless error" rule and not overturn a conviction unless the admission of the wrongfully obtained evidence was material and affected the final judgment.

### **Reasonable Expectation of Privacy**

In order to bring a suppression claim under the 4th Amendment, a person must have a reasonable expectation of privacy in the place searched. Here, Don's house was subject to a search. Don, who answered the officer's knock, undoubtedly has a reasonable expectation of privacy in his home.

### **Warrant Requirement**

The Supreme Court has upheld a warrant requirement under the 4th Amendment. The warrant must describe in reasonable specificity the places and persons to be searched, and the types of things to be searched for. Therefore, barring certain exceptions to be discussed, an officer must have a warrant to search someone's house. There are six exceptions to the warrant requirement: (1) Search Incidental to Arrest, (2) Consent, (3) Hot Pursuit and Exigent Circumstances, (4) Automobiles, (5) Plain View, (6) Stop and

Frisk.

Here, the prosecution will argue that Officer Ava had both consent to search D's house and was compelled to search his house given the exigency of the situation.

### **Consent**

An otherwise unlawful search is permitted if the searched party voluntarily consented to the search. The person need not have known that he was free to decline consent; however, officers cannot utilize coercive methods in obtaining such consent or else it will not be deemed voluntary.

Here, Ava asked D for permission to search the house but was flatly told, "No." Thus, D can, likely successfully, argue that there was no consent here. Prosecution will respond, however, that when Ava told D that "[a] life is at stake" and that she is therefore searching the house, D's stepping aside was implicit consent. That is unlikely to be a successful argument with a court, especially when it comes at the heels of being denied consent. A court will likely conclude that D felt that he had no choice but to allow the officer in -- indeed, the officer said she would search the home "whether you want me to or not."

Thus, consent is unlikely to provide the exclusion from warrant in this case.

### **Exigent Circumstances**

There is also an exception to the warrant requirement where emergency circumstances require that the officer not wait for a warrant. Such circumstances exist where, say, a felon is fleeing or an officer is worried that defendant will destroy the evidence or instrumentality of the crime in the time it would take to obtain a warrant.

Here, prosecution would argue that Ava had just such a concern. After having sent Bert to obtain a warrant, Ava was worried (given the reliability of Ike) that it might be too late by the time the warrant came -- D might already have concealed or transported Claire by then. D, however, will respond that that does not qualify as an exigent circumstance that would warrant a non-consented, unwarranted search of a person's home. D would

argue that Ava, if she was so concerned about Claire's kidnapping, could have waited *outside* Don's house after he was refused consent -- that would have prevented Don from transporting anyone he had kidnapped. But that might have still given Don time to conceal a small four-year-old girl or perhaps even cause her harm.

Ultimately it will be upon the court to decide whether the "totality" of the circumstances are in favor of allowing the exigent circumstance exception. But even if the court chose not to do so, the government can rely on the inevitable discovery doctrine (discussed below) to argue in favor of admission.

### **Officer Bert's Search Warrant / Inevitable Discovery**

The obtaining of a warrant *after* a search has been performed does not provide immunity to the unlawful search carried out. Thus, if Ava was unjustified in searching D's home, the warrant would not, by itself, render the search lawful.

Nonetheless, whether Bert's warrant was a valid one is important because, if the warrant was valid, it could render the search harmless under the inevitable discovery doctrine, which provides that evidence that otherwise should be excluded can be included where it would have been inevitably discovered by lawful means.

Here, first, the warrant was a valid one (nothing to the contrary in the facts; moreover, officers are allowed good faith reliance on a warrant they believe valid). Assuming Ava had waited to conduct the search until the warrant arrived, the warrant would have allowed her to then go ahead and conduct the same search that she did (that said, we discuss below how Ava exceeded the scope of her search under either the warrant or exigent circumstance theory).

Thus, between the exigent circumstance and warrant, the court will likely deem the search itself to be lawful, though that brings us to the specific search itself and how it might have exceeded its *lawful scope*.

### **Scope of Search**

Under both exigent circumstances exception, whereby Don would be searching for a

little girl or other evidence of kidnapping, or under the explicit terms of the warrant, Ava's search was limited in scope to the "search of Don's home for Claire" and, perhaps under the former exception, also of evidence of kidnapping.

### Bomb

Ava discovered the bomb in a closet in the bedroom. A closet, arguably, *is* a good place to hide a kidnap victim. Thus, Ava's search of the closet was proper. Once she had opened the closet, of course, the large 2'x2' bomb was in plain view, another exception to the warrant requirement which allows the search (and thus confiscation) of items found in plain sight in a location where the officer is lawfully present. Here, Ava was lawfully in the closet and the bomb was in her plain view. Thus, the court should deny the motion to suppress evidence of the bomb.

### Cocaine

The cocaine was found in a medicine cabinet, which is probably too small to hide a child, even a little girl who is four. Prosecution would argue that, at least under exigent circumstance exception where evidence of kidnapping (and not just of Claire physically) would be allowed, Ava looked to find clues to any kidnapping. That, however, is likely to fail because under that theory almost every aspect of the house would be searchable -- courts find warrant exceptions to be narrow in scope. Under the express warrant itself, of course, Ava's search was limited to Claire, who could not have been found in the medicine cabinet. Thus, the court should grant the motion to suppress evidence of the cocaine.

### Map

The map was found whilst Ava was looking "under the bed." Like the closet, under the bed is a location where a kidnapping victim might be tied or placed. However, the map was in an envelope that the officer had to open in order to access the map. Under the warrant, that is clearly beyond the scope. Even under the exigent circumstances exception, this is likely to come closer to the finding of the cocaine than the bomb. Unless the map was visible from the outside (facts do not state), Ava would be beyond her authority to search inside it. Thus, the court should grant the motion to suppress evidence of the map.

In conclusion, the court should admit the bomb, but not the cocaine or the map.

## 2. ATTEMPTED KIDNAPPING OF CLAIRE

Whether Don can be found guilty of Claire's attempted kidnapping.

### **Kidnapping**

Under common law, the prosecution for kidnapping must prove the following elements beyond a reasonable doubt (the first two elements are essentially those involved in the lesser crime of false imprisonment): (1) confinement or restraint, (2) to a bounded area, (3) and victim was either moved or concealed. The confining or restraining must be of such a nature that the victim does not feel that she is free to leave. Similarly, the bounded area must prevent, at least in the victim's knowledge, her from escaping without harm. The confinement or the bounded area need not be physical -- being threatened with a gun on a porch could satisfy the requirements. In addition, kidnapping requires that the victim either be concealed or moved during her state of false imprisonment.

### **Attempted Kidnapping**

Attempted kidnapping (AK) is an inchoate crime and would merge with the actual crime of kidnapping, if that were charged. AK is a specific element crime, which means that D must have had the particular intent to satisfy the elements of kidnapping as described above. In addition, attempt requires the presence of an overt act. Under common law, this meant that D had to be "dangerously close" to committing the actual crime. Modern courts have relaxed that rule some, although they still require more than mere preparation, which is what is needed to prove the overt act in a conspiracy. Typically, they require a "substantial step" in furtherance of the actual crime.

Here, a jury would be able to impute specific intent from both the actual and circumstantial evidence. Assuming Ike testifies, he will be able to tell them what he overheard regarding Don's plan to kidnap a child and the map found in Don's house

(assuming it is admitted) will confirm that the child to be kidnapped was in fact Claire. It is unlikely that the bomb and cocaine, assuming that they are admitted into evidence, will inform the charge of attempted kidnapping. Perhaps the bomb was going to be used to threaten or restrain Claire, but the facts do not say anything in that regard. Whilst the evidence is relatively slim, a jury could nonetheless reasonably find that D had the specific intent to commit the kidnapping of C.

The overt act is a closer question, and likely to ultimately resolve in D's favor. While the map is certainly an overt act that at least satisfies the "mere preparation" requirement of a conspiracy, it likely is *not* a "substantial step" in achieving the crime (and far from coming "dangerously close" to achieving it). The jury would perhaps have to rely on other circumstantial evidence to reach that conclusion, but the facts as presented do not state what other evidence might exist. Without the map, there almost certainly is no overt act.

Thus, under the circumstances and without more evidence of steps taken by D, D is unlikely to be found guilty of attempted kidnapping.

### **Defenses**

According to the prompt, it does not appear that D has any valid defense to his specific intent crime, such as voluntary or involuntary intoxication, duress, entrapment, or insanity.

## **QUESTION 4: SELECTED ANSWER B**

### **1. DON'S MOTION TO SUPPRESS**

The issue is whether the evidence of the bomb, cocaine, and the map were obtained in violation of Fourth Amendment to the US Constitution.

### **FOURTH AMENDMENT**

The Fourth Amendment of the US Constitution protects citizens from unreasonable search and seizures.

### **Government Conduct**

The Fourth Amendment applies to conduct by the government. There must be conduct by a publicly paid police or a person acting in the direction of the police.

Officer Ava (A) is a publicly paid police officer.

Therefore, there was government conduct.

### **Reasonable Expectation of Privacy**

In order to have standing to challenge a search or seizure, the person must have standing. Standing exists where the person has a reasonable expectation of privacy over the place or item to be searched or seized. A person has a reasonable expectation of privacy over his home.

A searched Don's (D) home, so D had a reasonable expectation of privacy.

Therefore, D has standing to challenge the search and seizure.



## **WARRANT**

A search and seizure are reasonable if it is based on a valid warrant. A warrant requires probable cause and particularity. Probable cause requires a fair probability that evidence of a crime will be found in the place or item to be searched. Particularity requires a description of the items that can be searched and seized. Probable cause may be based on information obtained from a reliable and credible source.

A had probable cause to believe that Claire (C) would be at D's home. A reliable informant, Ike, told A that she overheard D planning to kidnap a child to raise as his own, and C, a four-year-old girl went missing. Additionally, B obtained a warrant to search D's house for C, so the warrant contained particularity. However, even though Officer Bert (B) obtained a warrant, A did not have a warrant to search D's house when she conducted the search.

Therefore, the search was not based on a warrant. Since the search was not based on a warrant, the evidence of the bomb, the cocaine, and the map was obtained in violation of D's Fourth Amendment right.

## **WARRANT EXCEPTION**

Absent a warrant, evidence obtained from a search and seizure will be inadmissible at trial unless the search falls within an exception to the warrant requirement.

### **Consent**

A police officer may search an item or place with consent so long as the consent is voluntary and the person has apparent authority to consent.

A knocked on D's door and asked D if she could come in and search for a missing girl. D responded, "No." Although D stepped aside and allowed A to enter and search, D's consent was not voluntary because A told him that he had no choice, indicated by the fact that she said she would search whether D wanted her to or not.

Therefore, the search was not based on consent.

## **Exigent Circumstances**

Under exigent circumstances such as emergency aid, a police officer may enter the home of another and conduct a search without a warrant.

C, a four-year old girl went missing and A had reliable information to believe that D had kidnapped her. The fact that a young child may have been in D's home and likely needed help to escape could constitute an exigent circumstance, which allowed A to enter D's home to render aid to C.

Assuming exigent circumstances exist, the next step is to analyze whether each item found in D's house was obtained through a valid warrant exception.

## **Plain View**

Evidence may be seized without a warrant if (1) the police officer was legitimately on the premises, (2) the item was contraband or evidence of a crime was in plain sight, and (3) the police officer had probable cause to believe that the item was evidence of a crime or contraband.

### **A. THE BOMB**

A searched D's home and found a bomb in a closet in the bedroom. Because there were exigent circumstances, A had a legitimate right to be in D's house. Additionally, A had reason to believe that C could be hidden in the closet, so A was legitimately in the closet, the bomb was in plain sight since A saw the bomb when she opened the closet, and the bomb was about 2 feet by 2 feet. Additionally, given the fact that A is a police officer and the bomb was clearly visible, A had probable cause to believe that the bomb was evidence of a crime.

Therefore, evidence of the bomb was not obtained in violation of D's Fourth Amendment rights.

### **B. THE COCAINE**

It is unlikely that C could be found in the medicine cabinet in the bathroom, but A searched the medicine cabinet and found several vials of cocaine. Since A was searching for C, she did not have a reasonable belief to search D's medicine cabinet. Since A opened the cabinet, the cocaine was not in plain sight.

Therefore, the evidence of the cocaine was obtained in violation of D's Fourth Amendment rights.

### C. THE MAP

A had a reasonable belief that C could be under the bed because she is a four-year-old girl and could fit there, so the envelope was in plain sight. However, A did not have probable cause to believe that the envelope was evidence of a crime, since C could not fit inside of it. Since A opened the sealed envelope that contained the map, the map was not in plain sight.

Therefore, the evidence of the map was obtained in violation of D's Fourth Amendment rights.

### EXCLUSIONARY RULE

Evidence obtained in violation of a person's constitutional rights is inadmissible at trial. Additionally, evidence obtained from an illegal search and seizure will also be inadmissible as fruit of the illegal search and seizure. However, evidence that would be subject to the exclusionary rule may be admitted at trial if the prosecution can remove the taint of the evidence. The prosecution has the burden of showing by a preponderance of evidence that (1) the evidence would have been obtained through an independent source, (2) the evidence was inevitably discoverable, or (3) intervening acts broke the causal chain between the illegal conduct and the evidence obtained.

Because the map and cocaine were obtained in violation of D's Fourth Amendment right, the map and cocaine should be suppressed at trial unless the prosecution can remove its taint.

The prosecution cannot show that the evidence would have been inevitably discovered. Although A conducted an illegal search, B obtained a warrant to search D's home for Claire and arrived immediately after A had completed the search. The warrant authorized search of D's home for C and since C could not be found in the medicine cabinet or the envelope, A and B would not have been able to search those areas. Because the medicine cabinet and map exceeded the scope of the search warrant, the

cocaine and map would not have been inevitably discovered. Additionally, because D did not consent to the search, there were no intervening acts that broke the chain of illegality. Furthermore, it is unlikely that the cocaine and map would have been discovered from an independent source because they were in D's home and in his possession.

Therefore, the evidence of the map and cocaine should be suppressed.

Alternatively, if the court finds that exigent circumstances did not exist and the evidence of the bomb was obtained in violation of D's Fourth Amendment rights, the evidence of the bomb would have inevitably been discovered through the search warrant because the police officers would have had a reasonable belief that C could be hidden in the closet.

Therefore, the court should grant the motion to suppress regarding the cocaine and the map, but should deny the motion to suppress regarding the bomb.

## **2. ATTEMPTED KIDNAPPING**

The issue is whether D can be found guilty of attempted kidnapping.

### **KIDNAPPING**

Kidnapping is the act of confining another person with movement or in a concealed place. Kidnapping is a general intent crime and requires an intent to perform the proscribed conduct or an awareness of the circumstances of one's conduct or that a proscribed result may occur.

### **ATTEMPT**

Attempt is an act to commit a proscribed crime, that falls short of the completed crime. Under the majority view, a defendant is guilty of attempt when he takes a substantial step in committing the proscribed crime. Under the minority view, a defendant is guilty

of attempt when he is dangerously close to completing crime. Attempt is a specific intent crime and the defendant must act with the specific intent to commit the crime. Attempted kidnapping requires an act with the intent to kidnap another person.

A searched D's home and found a map that contained a map with a highlighted route from D's home to C's house. Additionally, Ike overheard D planning to kidnap a child to raise as his own daughter. The prosecution will argue that D had the intent to kidnap C because he had a plan to kidnap a child, which shows that he intended to commit a kidnapping. However, D had not taken a substantial step in committing the kidnapping. Although D had the map, D was not in the course of a kidnapping. D was in his home when A arrived and C had already been kidnapped. D had not taken a substantial step to kidnap C and the map was an act of preparation that does not amount to a substantial step in the course of completing the crime. Additionally, D was not dangerously close to committing the kidnapping since he was at his home alone when A arrived.

Therefore, D cannot be found guilty of attempted kidnapping.