ANSWER TO QUESTION NO. 4

The Fourth Amendment to the United States Constitution guarantees the people the right to be free from unreasonable searches and seizures. Likewise, the Michigan Constitution also guarantees against unreasonable searches and seizures. Mich Const 1963, art 1, §11. The protection afforded under the Michigan Constitution is equivalent to the protection provided under the federal constitution. *People v Faucett,* 442 Mich 153, 158 (1993). As a general matter, where evidence has been seized in violation of the right to be free from unreasonable searches and seizures, the court will suppress the illegally seized evidence and preclude it from being admitted in the related criminal prosecution. This is known as the exclusionary rule. E.g., *Mapp v Ohio,* 367 US 643 (1961) (exclusionary rule applicable to states).

Generally, in the criminal context, a search or seizure conducted without a warrant is unreasonable unless there exists both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Tierney,* 266 Mich App 687, 704 (2005). Several exceptions to the warrant requirement have evolved in the law. One such exception is known as the exigent circumstance warrant exception. Under this exception, evidence that is seized from a dwelling without a warrant may be admitted in a criminal prosecution if at the time the law enforcement officers entered the dwelling they had probable cause to believe that: (1) a crime was recently committed on the premises; (2) the dwelling contained evidence of illegal activity or the perpetrators of the suspected crime. Additionally, the prosecution must present specific and objective factual evidence that establishes the existence of an actual emergency whereby immediate action is necessary to either: (1) prevent the eminent destruction of evidence; (2) protect law enforcement officers or others from harm; or, (3) prevent the escape of a suspected perpetrator. *People v Cartwright,* 454 Mich 550 (1997), citing *In re Forfeiture of $176,598,* 443 Mich 261, 266 (1993).

The validity of an entry into a dwelling in which exigent circumstances are claimed must be based on the facts as perceived by law enforcement at the time of the entry. *People v Olajos,* 397 Mich 629, 634 (1976). The entire premises may be examined as long as it relates to the purpose of addressing the exigent circumstances that justified the entry. *Mincey v Arizona,* 437 US 385 (1978). Further, law enforcement officers are free to seize evidence in plain view. *Id.* However, searches into specific areas outside the scope of the emergency are not warranted under this exception. *Id.*

Another is the consent exception to the warrant requirement, which allows search and seizure when consent is unequivocal and specific, and freely and intelligently given. *People v Galloway,* 259 Mich App 634, 648 (2003). Although consent to a search must ordinarily be given by the person affected, a third party may consent to the search when the consenting person has equal right of possession or control of the premises. *People v Brown,* 279 Mich App 116, 131 (2008).

Further, even if evidence is unconstitutionally seized, evidence is not to be excluded if law enforcement would have inevitably discovered the evidence regardless of the unconstitutional conduct. *People* v *Stevens* (After *Remand),* 460 Mich 626, 637 (1999). Under this exception, evidence illegally seized in violation of the Fourth Amendment may nonetheless be admitted in a criminal prosecution if the prosecution establishes by a preponderance of the evidence that the evidence inevitably would have been discovered by lawful means. *Nix v Williams,* 467 US 431 (1984). The prosecution is not required to prove the absence of bad faith under this rule. *Id.*

Under the facts presented in this case, Officer Jones clearly entered the curtilage of the Pusher home without a warrant when he proceeded to the rear door of the home. However, in *Hardesty v Hamburg Twp,* 461 F3d 646 (CA 6, 2006), the court recognized that police officers are permitted to enter private property and approach and knock on the front door of a home in order to ask questions of persons inside the home. Where there is no response at the front door of a home, an investigating officer may also proceed around the house and knock on a rear door of the home in order to initiate a conversation with persons believed to be in the house. *Id.* Therefore, the officer's entry into the curtilage in order to effectuate the knock and talk investigative technique did not violate Paul Pusher's Fourth Amendment rights.

Once at the rear door, the facts indicate that Officer Jones "looked into a basement window located to the rear door of the home." Looking through a window of a home does not violate Paul Pusher's Fourth Amendment rights, since Officer Jones was legitimately at the rear of the home. *People v Custer,* 248 Mich App 552, 561-563 (2001). After Officer Jones looked through the window, he forcibly entered the Pusher home without a warrant. Thus, absent an exception to the warrant requirement, the evidence will be suppressed under the exclusionary rule.

The prosecution will have an excellent argument that entry into the Pusher's home was authorized due to exigent circumstances. Upon peering into the basement window of the Pusher's home, Officer Jones observed what he believed to be a laboratory designed to manufacture illegal drugs. Thus, he had reason to believe that a crime was recently committed on the premises and that the premises

contained evidence of illegal activity. Additionally, Officer Jones observed "an extraordinarily high flame burning under a petri dish filled with liquid and solid substances." The facts tell us that Officer Jones believed this was a lab constructed for the manufacture of methamphetamine. Officer Jones knew that "such labs often result in explosions that expose the public to hazardous chemicals. Thus, based on the perceptions of the officer, the prosecutor will be able to present specific and objective factual evidence that established the existence of an actual emergency such that immediate action was necessary to prevent the imminent destruction of evidence and protect Officer Jones and the persons residing in nearby homes.

However, the establishment of exigent circumstances will justify only the seizure of the drugs and paraphernalia found in the basement that was in the vicinity of the Bunsen burner. The cash and weapons found in the Pusher's attic do not in any way relate to the exigent circumstances that justified the entry. In *United States v Buchanan,* 904 F2d 349, 357 (CA 6, 1990), the court held that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one." Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment. Thus, to justify the admission of this evidence, the prosecution will rely on the inevitable discovery rule to justify admission of the cash and guns.

Specifically, the prosecution will argue that the Pushers were at the police station reporting their concerns of suspected criminal activity that possibly involved their son at the time Officer Jones was searching the attic. In the course of reporting their concerns to law enforcement, Officer Smith requested and received permission from the Pushers to search their home. While Paul Pusher may have an expectation of privacy in the private room in which he resided in his parents' home, see *People v Flowers,* 23 Mich App 523 (1970), the attic cannot be considered Paul's private area. Paul's parents "freely and voluntarily" consented to a search of their home. Thus, the prosecution will argue, discovery of the evidence in the attic was inevitable.

Paul's defense counsel may advance an argument that because consent to search was obtained only after Officer Jones had illegally seized the cash and guns from the attic, this evidence remains subject to exclusion under the exclusionary rule. Regardless, however, given the parents' consent, the prosecution can nonetheless show that tainted evidence would ultimately have been obtained in a constitutionally accepted manner. *People v Kroll,* 179 Mich App 423, 429 (1989). In other words, the prosecution can show that Officer Smith would have searched the attic pursuant to a valid consent and discovered the cash and guns irrespective of Officer Jones' conduct. See, *United States v*

Kelly, 913 F2d 261 (CA 6, 1990) (holding consent to search may be obtained after an unlawful search).