To the reader:

This paper was written for PLSC 414: The US Supreme Court, a seminar taught by Professor Wendy Martinek. It responds to a hypothetical legal scenario involving Fourth Amendment issues. I was assigned the role of the American Civil Liberties Union, the *amicus curiae* in this matter. This situation is entirely fictional and all views and opinions are my own.

Decision-on-the-Merits Simulation #2

Abbot v. State of New York

During Parents' Weekend for Binghamton University during the Fall of 2012, Alan Abbot hosted a party at his apartment in the University Plaza on the Vestal Parkway. The party went on into the wee hours of the morning and involved a great deal of alcohol consumption. Barbara Bailey and Catherine Colson, who lived in the apartment next door to Alan, attended the party in the company of Barbara's younger sister, Bethany, and Catherine's younger brother, Charlie. Bethany and Charlie had come to Binghamton with their parents to visit Barbara and Catherine. While their respective parents had reservations to stay in the Hampton Inn and Suites, they permitted Bethany and Charlie to stay with their siblings in their apartment in the University Plaza.

Barbara and Catherine brought their siblings to the party because they wanted to show them a good time and provide a little insight into the social scene at college. However, they opted to leave the party, taking their younger siblings with them, when the drinking led to rambunctious behavior on the part of some partygoers. Though Barbara and Catherine did not really mind that their younger siblings had each had at least a beer or two, they had no desire to deal with the hangovers that were sure to transpire if they did not get them away from the party. Moreover, they cringed to think of having to explain to their parents the next morning why their younger siblings were hung over to their parents. Barbara and Catherine were especially glad to have made the decision to leave when they caught the telltale scent of marijuana coming from one of the bedrooms in the apartment. After settling their siblings on the couch and futon in the living room of their own apartment, Barbara and Catherine went to their respective bedrooms to retire for the evening.

An hour or so later, Barbara and Catherine awoke to a loud commotion in the hallway. Groggily they made their way to their apartment door, noting that neither Bethany nor Charlie were asleep in the living room as they had left them only an hour before. Upon opening their apartment door and peering into the hallway, Barbara and Catherine found the hallway crowded with what appeared to be partygoers scrambling to leave. The girls also saw, through the open door of Alan's apartment, two police officers conversing with Bethany and Charlie. A sense of dread and foreboding gathering in their stomachs, Barbara and Catherine made their way to Alan's apartment.

Upon entering their neighbor's apartment, the girls found that the police officers had placed Alan under arrest and were in the process of questioning Bethany and Charlie about how to contact their parents. Barbara and Catherine pieced together the following story: After they went to bed, their younger siblings decided to return to the party. The front door to the apartment was slightly ajar when they returned so they entered without knocking, closing the door behind them. Upon entering the apartment, Bethany and Charlie were greeted in a friendly manner by Alan and three other partygoers, all of who were sitting at the kitchen table passing a joint around. Bethany and Charlie joined the on-going conversation at the table but declined to take a hit off of the joint. Thirty minutes or so after they returned to the party, Bethany and Charlie left the table and made themselves comfortable with another group of partygoers sitting on the couch watching reruns of *The Brady Bunch*. Eventually, those remaining at the table dispersed, including Alan, who retired to a bedroom at the rear of the apartment.

Shortly thereafter, there was a knock at the apartment door. Charlie, who was seated immediately next to the apartment door on the couch, called to the back bedroom, saying, "Hey, Alan, someone's at the door? Should I get it?" Charlie thought he heard Alan say "yes" so he reached up from his place on the couch and pulled the door open a few inches. When Charlie saw that there were two police officers at the door, he immediately jumped up and stood facing the door, with his hand on the doorknob to prevent it from opening more than half way. The officers said they were there to investigate a noise complaint and asked Charlie if it was his apartment. Charlie said that it was not but that he was there visiting a friend. The officers, Officers Dawson and Edwards, then asked if they could come in. Charlie looked nervously over his shoulder to see if there was any evidence of the earlier marijuana smoking visible in the kitchen. Charlie did not see anything but, in his state of nervousness, he did not realize that the odor of marijuana smoke was strong. Not seeing anything, Charlie opened the front door fully without saying anything. The officers, who could clearly smell the marijuana smoke, took this as consent by Charlie and stepped into the apartment.

At this point, Bethany got up from the couch and stood by Charlie, hoping she could slip out and return to her sister's apartment. When she stood up Bethany noticed that there was a Ziploc bag with what appeared to be a green, herbaceous substance sitting on the counter next to the stove. She could not tear her eyes away from the bag, which the officers noticed and, following her line of sight, they saw the Ziploc bag themselves.

At this point, Alan came out of the back bedroom. Needless to say, he was unhappy to find the police officers in his apartment. Alan said, "Hey, how did you get in here? Do you have a warrant or something?" The officers said they did not but indicated that they were voluntarily let into the apartment by Charlie. Alan then exclaimed, "But it's not his apartment! He can't let you in without my permission." Charlie interjected, "You did, though, you did say I could let them in." "No way, man. I said you could answer the door. I didn't tell you to let some pig-fuzz in my apartment," Alan retorted. While this exchange was taking place, Alan reached for the Ziploc bag and headed down the hallway of his apartment with the bag in his hand. Officer Dawson started after Alan, grabbing his arm and stopping him before he got further than halfway down the hallway. Officer Dawson retrieved the bag from Alan and, upon examining it and seeing the herbaceous contents, he and Officer Edwards placed Alan under arrest. At this point, the remaining partygoers began the mad scramble to leave the apartment. Some went out the window, some dashed out the front apartment door. The officers immediately began a search of the kitchen, hallway, and back bedroom, in the process finding a variety of drug paraphernalia and an additional Ziploc bag, this one containing a fine white powder. It was at this point that Barbara and Catherine returned to retrieve their siblings.

After his arrest, Alan was charged with drug possession. At a pretrial hearing regarding the admissibility of the Ziploc bags and their contents as evidence, Alan argued that both of the Ziploc bags and their contents should be excluded from evidence under the Exclusionary Rule as it was obtained in violation of his protections against unreasonable searches and seizures under the Fourth Amendment of the Constitution. He claimed, first, that the officers were obligated to obtain a warrant to enter his apartment unless they had his permission, which they did not. He further argued that, even if the trial court found that the Ziploc bag with the herbaceous material was in plain view once the officers entered the apartment, it should still be excluded from evidence since the only reason the officers saw it was because they had entered the apartment without a warrant or permission from an appropriate party. Charlie was merely a temporary guest

in the apartment (and a minor to boot), not an occupant with lawful control over the premises. Moreover, even if the officers thought Charlie did have the authority to grant permission to them to enter the apartment, Charlie did not actually grant permission; rather, he merely opened the door fully. Alan also argued that, even if the trial court (erroneously according to Alan) found that the officers were in the apartment lawfully, the Ziploc bag of herbaceous material was not really in plain view since they saw it only because of Bethany's actions. Finally, Alan argued that even if the first Ziploc bag was not excluded from evidence, the Ziploc bag containing the fine white power should be because it was obtained without a warrant and there were no exigent circumstances that required an immediate search without a warrant.

The Broome County District Attorney's Office, however, argued vociferously against the exclusion of the Ziploc bags and their contents. The attorney argued that, while the Fourth Amendment certainly protects individuals from unreasonable searches and seizures, it cannot reasonably be invoked in this case to exclude the Ziploc bags and their contents. First, while a warrant may have been desirable, it was unnecessary for the officers to obtain one in this instance, as they believed they had secured permission from an appropriate party to enter the apartment. Moreover, the person from whom they secured permission (Charlie) himself believed he had the authority to grant permission since he asked Alan and believed he had received an affirmative answer from him to open the door. The attorney argued, further, that permission was unnecessary since the officers could plainly smell the marijuana smoke coming from inside the apartment. This made it at least permissible, consistent with the Fourth Amendment, for the officers to cross the threshold of the apartment. This, in turn, made the seizure of the Ziploc bag and its contents permissible under the plain view exception to the warrant requirement. While it is true that the offices saw the Ziploc bag of herbaceous material by following Bethany's line of sight, the bag was out in the open and it is reasonable to assume that the officers would eventually have seen it even if Bethany had not been staring at it. Further, with regard to the Ziploc bag containing the fine white powers, though Alan was under arrest and, therefore, the officers would have no reason to believe he could have disposed of any additional evidence in the apartment, the general chaos in the apartment at that time made it prudent for them to conduct the search.

Alan's arguments were not persuasive to the judge at the pretrial hearing, whereupon he filed an appeal. Unsuccessful in his appeals in the New York State court system, Alan ultimately filed a petition for a writ of certiorari with the United States Supreme Court. The Court has granted Alan's petition and the case is now being heard by that court.

Amicus Curiae Memorandum in Abbott v. State of New York
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PLSC 414: Professor Wendy Martinek

The American Civil Liberties Union files this memorandum as *amicus curiae* in the matter of *Abbott v. State of New York*. Mr. Alan Abbott was arrested for drug possession following a warrantless search on his apartment. He challenges the search on the basis of the Fourth Amendment of the Constitution as incorporated to the states through the Fourteenth Amendment. The ACLU urges the Court to consider the Appellant's position and the following issues: Was the consent of Mr. Charlie Colson constitutional under the Fourth Amendment of the Constitution as incorporated to the states through the Fourteenth Amendment? Was the search following the alleged consent still constitutional under the Fourth Amendment of the Constitution as incorporated to the states through the Fourteenth Amendment, if the consent was found to be invalid? And last, does the unconstitutionality of the consent subject any searches following to the "fruit of the poisonous tree" doctrine?

The Fourth Amendment of the United States Constitution protects "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" (Mapp v. Ohio, 367 U.S. 643, 647). It is intended to prevent the intrusion of law enforcement into the private lives of citizens. As a part of the Bill of Rights, the Amendment only applied originally to federal intrusions, but in subsequent years it was incorporated through the Fourteenth Amendment's Due Process Clause (650). *Mapp v. Ohio* required that the Exclusionary Rule, a rule that holds the "exclusion of evidence seized in violation of its [the

Fourth Amendment] provisions," be applied to states (655, 660). As a case involving local authorities in the State of New York, the incorporation process ensures that legal issues involved are applicable to the federal constitution. The problems presented by Mr. Abbott's situation involve consent, privacy, and other issues explicitly related to the Fourth Amendment.

The single largest issue of this matter is whether or not there was consent to enter the apartment and conduct a search. Law enforcement often attempts to gain consent for searches over other methods since it is often easier and less intrusive than other methods (Kentucky v. King, 131 S. Ct. 1849, 1861). It is reasonable to assume that the officers attempted to gain some form of consent and thus this memo must address it as a separate issue from other entry problems. The American Civil Liberties Union contends that there was no valid consent in this case because the individual who answered the door had no authority to allow a search of the premises or to have the police enter the apartment at all. First, Mr. Colson could not have given voluntary consent because he was coerced into doing so. Second, this young man verbally indicated that he had no control or authority over the apartment in question. Third, since he indicated that he was a visitor and from his underage status, it is clear that he could not have been a co-inhabitant of the apartment and could not grant permission for a search. Fourth, once the occupant of the apartment, who was in the apartment at the time, had verbally revoked any permission for the police to search or even be within the premises, any evidence found due to the police's illegal entry is not allowable.

In order to conduct a warrantless search without exigent circumstances, law enforcement officers must obtain consent from the individuals subject to the search. In Schneckloth v. Bustamonte (412 U.S. 218), the Court determined what "valid" consent requires; specifically that it must be voluntary. The Court requires a "test of voluntariness" which asks: "Is the confession a

product of an essentially free and unconstrained choice by its maker" (225)? Voluntary consent that is free from coercion of any kind is the only form of consent that is constitutionally acceptable. This applies mostly to issues of confession, but it has been expanded in *Schneckloth* to include searches (230). While coercion can take many forms, from the explicit to the implicit, only one form is wholly applicable to the case at hand. Coercion includes consent "granted in submission to lawful authority" or consent that is given to police when the individual in question assumes or is led to assume that the officers have permission to perform certain conduct (233). Consent given under this assumption does not constitute permission for a search. The young man who erroneously allowed the police to enter the apartment did so due to the presumption that the police would most likely enter regardless. While the officers asked permission to enter, Mr. Colson was possibly unaware of his ability to refuse the officers. His nervousness at answering the door of someone else's home made the influence of the inherent authority present in officers much more suggestive and coercive. The responsibility for determining if the "suspect" knew he could refuse consent lies on the State, or in this case, their agents (230). There is no evidence in the record that the officers took steps to ensure that the youth knew he could refuse. This failure, combined with the subtly coercive influence of police presence, sufficiently demonstrates that the young man could not voluntarily consent to the search.

Coercion also existed because the young man did not intentionally abandon his right to refuse a search and he was not in a place where familiarity could be assumed. There was no indication that a search would occur following the officer's entrance to the apartment and there was no indication that he knew he had the ability to refuse a search. Consent requires the "intentional relinquishment or abandonment of a known right or privilege" (235). The youth never uttered the words "I consent to a search" nor did he verbally state any phrase equivalent to

that. His only actions were to open the door and allow police enter to the apartment, which in and of itself does not constitute explicit consent to a search, but only entrance to the apartment. In Georgia v. Randolph (547 U.S. 103), the Court found that there was a distinction between circumstances where police may enter without committing a trespass and circumstances when police may enter and conduct a search.

Without an affirmative consent to a search, it was unreasonable for officers to assume consent for a search had been given, as opposed to consent for them to simply enter the apartment to deal with a noise complaint. Even so, the consent to enter the apartment simply to discuss the noise complaint was not valid for other reasons (a lack of control over the apartment and the tenant's revocation of consent). Law enforcement should not assume a search is always consented to; caution should be used (Illinois v. Rodriguez, 497 U.S. 177, 188). In addition, the officer's entry into the apartment was a form of trespass. There were no circumstances that allowed the officers to enter the apartment aside from consent. Since there was no valid consent in this case, the entry was also a form of trespass.

In addition, the Court found in *Schneckloth* that unlike issues of confession where the environment is inherently coercive (a police station's interrogation room is no suspect's “home court”), a search does not present the same issues because most searches occur in familiar territory (247). If the young man had been the owner or tenant or co-tenant of the apartment, this would be applicable to him, but he was a visitor. He had stated he was a visitor to the officers and they could not assume that the coercive aspect was waived after this admittance. He was on unfamiliar territory and the officer could not reasonably believe that he was not under a form of coercion when he granted them access to the apartment. If anything, his protest to the tenant of the apartment over “permission to open the door” should have confirmed to the officers the

unease the young man felt by opening the door. The "consent" in question is invalid because of the coercion involved.

The next point to address is that the young man verbally indicated he had no control over the premises in question and thus could not consent to a search of the apartment. Consent has a standard of reasonability associated with it. A police officer must believe that the answers or the consent is reasonable for it to have any constitutional force (Illinois v. Rodriguez, 497 U.S. 177, 186). In the case of a warrantless search, the officer will need to determine if there is "reasonable consent." However, in the cast at hand, the youth who answered the door verbally declared he was a visitor to the apartment. No one can reasonably expect a visitor of the apartment to be able to consent to a search of the apartment-- it is clear that he does not live there. If the officer had any reason to believe that the young man was a resident of the apartment, then the consent would be acceptable (186). That does not apply in this case because of the verbal declaration. Since the young man was clearly not a resident of the apartment, he had no control or authority over the space of the apartment, common areas or not. He could not consent to a search of an apartment that was not his. Nor could he be confused for a more permanent guest staying over a long period of time. The police were sent for a noise complaint at a party. The only reasonable assumption the police could make was that all the guests at the party were temporary; they could not distinguish which were more permanent and which were not. There is no possible way for the police to have reasonably assumed that Mr. Colson could consent.

In addition to the fact that the young man stated he was not an owner, tenant, or occupant of the apartment, it was not possible to the police to assume that his answers were satisfactorily reasonable. While the Court has found that "shared tenancy" has some risk and that officers may assume that those who open the door have the ability to consent to searches (by

being one of the tenants), when that assumption is clearly contradicted by the evidence present, there cannot be valid consent. Perhaps the officer assumed he was lying, and that he still had the ability to consent? Unless it is common practice for an officer to assume he or she speaks to is lying, then it certainly is not reasonable to assume Mr. Colson was lying as well. Again, it is the responsibility of the officers to use caution when attempting to obtain consent for a search and they have clearly failed to do so in this case (Illinois v. Rodriguez, 497 U.S. 177, 188).

Even if the Court finds that despite the clear statement that the youth had no control over the apartment that his consent was valid, once the tenant of the apartment objected to both any possible search and the very presence of the police in the apartment consent was revoked. In Georgia v. Randolph (547 U.S. 103), the Court found that when inhabitants, who had an equal right to consent or decline to consent to a search of a dwelling, disagree about giving consent, the police cannot search the living space in question (114). If the individual is present and actively objecting to the search, regardless of whether the other inhabitant has given consent, the "police officer has no claim to reasonableness in entering than the officer would have had in the absence of any consent at all" (114). In this case, the individual consenting to the search was not even a co-inhabitant of the apartment. The Court recognizes this equal right of consent for co-inhabitants, not visitors or the younger siblings of visitors (who were also visitors themselves). Visitors are clearly subordinate to the inhabitants of an apartment and do not have an equal right to consent. The tenant's objections trump those of the young man.

Mr. Abbott did not consent to a search or even the presence of police in his apartment. However, the timing of his protest raises some questions. By the time Mr. Abbott had emerged from the back of the apartment and found the police officers, they had already seen the contraband. In *Georgia*, Randolph had denied consent before the search began which caused the

Court to find that his Fourth Amendment rights had been violated. This matter presents a different set of events which do not create the same rights violations. The police cannot "unsee" something, even if consent is revoked. However, the purpose of the Fourth Amendment is to act as a deterrent on law enforcement behavior. It is reasonable for law enforcement to make the judgment that if the person answering a door explicitly states that he is a visitor to the apartment that the tenant or owner of the apartment is not consenting himself, and that there is a significant probability that consent would not be granted by the correct individual. Mr. Abbott's vocal protest to the officer's presence in the apartment demonstrates this. The Fourth Amendment requires law enforcement to act with caution; here they acted with recklessly by failing to ascertain that they had valid consent to enter. In cases like this, the proper course would be for the officers to ask for the tenant or owner to fully obtain consent to enter or search. However, they did not. Regardless of when Mr. Abbott actually revoked consent, the officers should have anticipated that course of events and acted accordingly.

The consent was clearly invalid, but the legality of the subsequent searches are still possible. They were warrantless searches and the State of New York claims that they are valid under the plain view doctrine. The ACLU concedes that the initial evidence seized by the police was fully within plain view, once the officers had entered the apartment. Plain view requires that "the police officer... had prior justification for an intrusion, during the course of which he came inadvertently across a piece of evidence incriminating the accused" (Horton v. California, 496 U.S. 128, 136). In addition, the item in question must be clearly incriminating and the police officer must be in a place to lawfully seize the object (136, 137). However, because of the unlawful access to the apartment, any searches and seizures, including plain view, are invalidated. For plain view to be a valid form of search, the entry to the premises in question

must be valid. Otherwise the Fourth Amendment does little to protect privacy. A home is the most protected of places when issues of privacy are considered because "all details are intimate details" (Kyllo v. United States, 533 U.S. 27, 38). The home is a space where one does not have to hide, thus entry into the home and searching of the home violates all notions of privacy. Thus, entry and the searches based on entry are subject to strict standards. The Court has been clear about the need for valid, non-coerced consent in warrantless searches. Only in cases where exigent circumstances are present, may such searches without consent be constitutional. Exigent circumstances are the ways by which warrantless entry may be legally acceptable. The question here, is whether exigent circumstances existed to allow police entry in this case? Second, were the searches and seizures also valid if there are no exigent circumstances for entry?

In cases where the evidence is clearly contraband (evidence that is visibly shown to be illegal), the police may seize it if they have right to be on the premises via exigent circumstances. In Washington v. Chrisman (455 U.S. 1), an officer who was present to contain and eventually detain the suspect for underage drinking, constitutionally seized evidence of marijuana use and production. The Court found that "This is a classic occurrence of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy" (9). An arrest is considered an exigent circumstance; an officer must be able to control the movements of the individual and thus they may violate any privacy legally due to this. Should it be shown that the police entry followed the exigent circumstances rule, and that the "fruits" of their labor have been validly seized? An exigency is more than just an arrest, it can include a variety of circumstances.

Exigent circumstances include emergency situations, in addition to arrests (as in *Washington*). A report of gunshots in an apartment was sufficient to legalize the extensive and

"intrusive" search (Mincey v. Arizona, 437 U.S. 385, 389). In Michigan v. Tyler (436 U.S. 499), "a burning building clearly presents an exigency of sufficient proportions to render a warrantless search 'reasonable'" (509). Even non-life threatening circumstances can lower the threshold needed for a warrantless search. Heavily regulated industries such as liquor sales and distribution or the same for firearms have legislated lower burdens for law enforcement searches. The Court found such a warrantless search legal when this regulatory legislation was in place (United States v. Biswell, 406 U.S. 311, 315). These circumstances are narrowly drawn; the Court creates a high standard for warrantless searched outside of these kinds of situations. In the case at hand, there is a severe lacking of exigent circumstances. The initial cause for police presence was a noise complaint, an innocuous and routine police matter. Noise complaints (with perhaps the exception of an individual calling for help or screaming, which do not apply in this case) do not constitute an exigent circumstance. The plain view search of the common living room and kitchen area was illegal. There is no need for an officer to enter a dwelling for a routine noise complaint.

It may be argued that the police satisfied the exigent circumstances rule once the odor of marijuana was detectable. In Kentucky v. King (131 S. Ct. 1849), the Court found that police may enter a dwelling to preserve evidence when destruction of evidence is a reasonable possibility (1857). Police, entering an apartment emitting an odor of marijuana after announcing themselves, did not commit an invalid entry. This ruling follows the "police-exigency" rule; officers "must be responding to an unintended exigency rather than simply creating the exigency for themselves" (1856). The Courts require that there be more than simple police presence in order to claim exigent circumstances for entry. In this case the officers were chasing a suspect who had been observed making a drug purchase. There was a strong possibility that even if the

police had selected the wrong apartment, there was a high probability of evidence being destroyed after the police announced their presence. Justice Alito emphasizes that the announcement of the police presence ensures there was no Fourth Amendment violation; the police knocked and yelled "Police!" or some equivalent which is entirely consistent with Fourth Amendment requirements (1863). Law enforcement did not create the exigency by announcing their presence and acted in concert with a genuine exigency (destruction of evidence). This ruling is inapplicable in the matter at hand since there was no real concern about destruction of evidence at the point when officers were attempting to enter the apartment. The exigency in question is the destruction of evidence, which was a possibility in *Kentucky* because the police announced their presence. In our case, the police did not announce their presence or otherwise contribute to the exigent circumstances allowing them entrance. Mr. Colson was the only person in the apartment who knew the individuals at the door were officers. There was no need to be concerned about destruction of evidence once it was clear that Mr. Colson had not informed any one else of police presence. Yes, there was marijuana smoke in the air around Mr. Abbott's apartment when the door was opened, but that alone did not create sufficient circumstances for entry. The concern about destruction of evidence was an exigent circumstance, but it was one that was not relevant to our case. There was no exigency for the police to enter without a warrant.

In addition, evidence seized in a search permitted by exigent circumstances is legally seized, despite the fact that there is a lack of connection between the cause of entry for a search and the objects seized. In normal warrant based searches, there is a clear connection between the reasons for the warrant and the evidence being sought (warrants must specify the items). In a plain view situation, there is always disconnect between the reasons for police presence and the items found under the plain view doctrine (Arizona v. Hicks, 480 U.S. 321, 325). The seizures

are still legal with this disconnect. A defendant could not claim that a search and seizure was illegal simply because the police had entered for a different purpose. Emergency situations and arrests often have nothing to do with evidence discovered through these situations. In *Washington*, the exigent circumstance was Chrisman's detainment for underage drinking. He was not arrested for marijuana use. If it can be demonstrated that exigent circumstances existed in this matter, then a plain view justification would protect the initial search of the area.

The seizure of the contraband was also illegal. While the Court has established that any contraband in plain view may be seized if the officer has a right to be in the place in question (Washington v. Chrisman, 455 U.S. 1, 9), it has not ruled that contraband found in an illegal plain view search may also be seized. The Fourth Amendment relies on two primary individual rights: privacy and property. Issues of consent and intrusion violate rights of privacy, while issues of evidence seizure violate rights to property. As invalid entry for a warrantless search is an issue of privacy. Contraband is evidence of a crime (since the possession itself is a crime) and if an officer is lawfully in a position to seize the evidence, the seizure will stand. As has been stated previously, this requirement is twofold: An officer must "be lawfully located in a place from which the object can be plainly seen... [and] he or she must have a lawful right of access to the object itself" (Horton v. California, 496 U.S. 128, 137). Having established that the officer unlawfully gained entrance to the apartment, they not only lacked the ability to legally search the premises but also the ability to legally seize the objects found therein. There were no exigent circumstances or a valid consent, thus the seizure of the evidence was also illegal.

In theory, it can be claimed that two searches occurred in this incident. The first occurred following the illegal entry of the police officers in to the apartment. The second occurred when law enforcement searched after Mr. Abbott's arrest. The first search was clearly illegal due to the

failure of the officers to obtain valid consent. The second search is not as clear. If Mr. Abbott had been arrested through a legal course of events, there would be no question about the search afterward. Arrests, as stated in *Washington*, count as exigent circumstances and searches "incident to a valid arrest" are constitutional (8). However, because the arrest was tied to the original search, a question of legality arises. If the search following the arrest is a continuation of the original, invalid search then there is no issue. It is clear that the arrest of Mr. Abbott was based on the original search. If that is invalid (as it has been shown) then an arrest resulting from a bad search is also invalid. In Johnson v. United States (333 U.S. 10), an arrest was declared invalid and thus the subsequent search was also invalid (17). The matter at hand must follow the same principle. The arrest is invalid since the police had no authority to be in the apartment, and thus the exigent circumstance (the arrest) which would justify the second search isn't valid.

If the initial action preceding a search is illegal, then the search itself and any evidence seized during this search is also illegal. This logical progression, often referred to as the "fruit of the poisonous tree," holds that the results of illegal searches or consent are also illegal. In this case, the failure of police to obtain valid consent from the tenant of the apartment renders all searches, seizures, and evidence unconstitutional. The first container of herbaceous material, which led to Mr. Abbott's arrest, and the second bag of contraband were both illegally seized from the apartment.

The "fruit of the poisonous tree" doctrine is fully utilized by the Court to find searches and the evidence found and seized during them illegally seized. In United States v. Jacobsen (466 U.S. 109), it was found that if the initial action was constitutional (for example, the consent), then it follows generally that the actions that follow are as well, barring specific circumstances (126). The Court implies in *Jacobsen* that should an initial action prove illegal, then the actions

that follow are also illegal. The Court explicitly comes to this conclusion in Byars v. United States (273 U.S. 28), writing: “A search prosecuted in violation of the Constitution is not made lawful by what it brings to light” (28). It does not matter how powerful or damning the evidence shows to be; nor does it matter how many convictions it brings. Once an action in the chain of events is unconstitutional, the rest is no longer valid. This applies for any point within the chain of events. It is irrelevant whether the error was the failure of the police to properly ask for the tenant or when they assumed they had an exigency to enter. Once there was an illegal action, anything that followed was also illegal.

Police officers illegally entered Mr. Abbott's apartment and all of the actions that followed are invalidated because of this initial error. The ACLU urges the Court to find in favor of Mr. Abbott and hold that law enforcement officers must use more caution and ensure that they obtain valid consent before entering a home.

Cases Cited:

1. Arizona v. Hicks (480 U.S. 321)
2. Byars v. United States (273 U.S. 28)
3. Georgia v. Randolph (547 U.S. 103)
4. Horton v. California (496 U.S. 128)
5. Illinois v. Rodriguez (497 U.S. 177)
6. Johnson v. United States (333 U.S. 10)
7. Kentucky v. King (131 S. Ct. 1849)
8. Kyllo v. United States (533 U.S. 27)
9. Mapp v. Ohio (367 U.S. 643)
10. Michigan v. Tyler (436 U.S. 499)
11. Mincey v. Arizona (437 U.S. 385)
12. Schneckloth v. Bustamonte (412 U.S. 218)
13. Washington v. Chrisman (455 U.S. 1)
14. United States v. Biswell (406 U.S. 311)
15. United States v. Jacobsen(466 U.S. 109)