

**MASSACHUSETTS SCHOOL OF LAW  
MASSACHUSETTS SEARCH AND SEIZURE**

**Winter/Spring 2009  
Judge Agnes**

**FINAL EXAMINATION**

Facts. On June 4, 2003, Adele Smith, a teacher at the Andover-Essex Vocational High School (high school) in Andover-Essex, was informed that an unauthorized computer known as Comrade55 was connected to the high school's computer network. Smith directed Dilly Thomas (Thomas), a computer specialist at the high school, to investigate. From her computer, Thomas accessed Comrade55 on the high school's network. There, Thomas found what appeared to be pirated movies and adult pornography, and reported the same to Smith. Smith, in turn, made a report to the school principal. Thomas continued to examine Comrade55's "open share" and found a file titled "Naked Bunnies" that depicted pornographic images of two adult females.

Thomas informed Smith and the principal of the pornography she had found in Comrade55. The principal examined the images himself in the presence of Andover-Essex Police Officer Darian Damian, an officer assigned to the high school. Officer Damian contacted the Andover-Essex police department for assistance.

Dilly Thomas explained to school and police officials that an "open share" is a system that helps share files among computers on a network by making certain resources on a computer available to other computers on the network. To create an open share, a computer user places the files to be shared in a folder and makes that folder visible and accessible to other network users. An open share may be accessed by any user on the network, unless access is restricted to certain users.

Further investigation by Thomas led her to conclude that Comrade55 and several other unauthorized computers on the school's network were physically located in the school's Maintenance Department which was under the control and supervision of Head Custodian Emile Sydney.

The School principal and Smith went to the Maintenance Department in the company of Officer Damian and Officer Brown, the department's Cyber Officer. Defendant Sydney and his three assistants were ordered to vacate their offices and to wait in the boys locker room. The principal gave officer Brown permission to log on to the school's network with his department issued laptop. When he did, Officer Brown was able to open Comrade55's open share. He found several movies, including several which had only recently been released into theaters. Detective James also found a motion picture file titled, "See Tina Masturbate," showing what appeared to be a young girl masturbating. With assistance from school officials, Officers Damian and Brown subsequently located the Comrade55 computer in the Maintenance shop, turned it off and impounded it. After interviewing the employees of the Maintenance Department, one of them, Louis Vera, told the police that Comrade55 was brought to school by the defendant Emile

Sydney, about two weeks ago and that Sydney told the employees of that department that the computer would be available to them for “entertainment purposes.” Vera also told the police that about a month ago he overheard several students talking together in the cafeteria one morning. One student remarked that “that Sydney dude is wacked; he’s got a whole box of child pornography in his jeep.”

Based on this report, the police went to the employee parking lot of the high school and found the location of Emile Sydney’s jeep. From outside the vehicle, the police were able to see inside the rear seat area where they observed a box which contained what appeared to be 24 VHS cassette tapes. It was difficult to read the handwritten titles on the tapes but one said “Little Tina Exposed.”

Based on this information, Officer Damian applied for a search warrant for Emile Sydney’s jeep. Emile’s affidavit contains all of the above facts. He described The items to be seized as “child pornography including films such as Little Tina Exposed.”

The application for a search warrant was presented to an assistant clerk magistrate of the Andover-Essex District Court. The warrant was issued within two hours of the discovery of the box of VHS cassettes in Sydney’s jeep. An examination of the tapes seized from the jeep revealed numerous films of young children engaged in sexual activity with adults. Sydney was charged with violations of Massachusetts law relating to the possession and distribution of child pornography.

Assignment. You are a junior associate in the office of Attorney Able Counsel who has been appointed to represent Emile Sydney. Your assignment is to draft a legal memorandum for Attorney Able Counsel outlining the grounds, if any, for a motion to suppress the evidence seized from Sydney’s jeep. Your legal memorandum should not exceed 15 typewritten pages.

Submission of papers. Students should not use their true names but only their student ID numbers. Papers are due on the date set for the final exam in this course. Whatever word processing program you use, please save your paper in rich text format. Papers should be emailed to me at [petera1009@aol.com](mailto:petera1009@aol.com).

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**WINTER/SPRING, 2007**

**JUDGE AGNES**

**FINAL EXAMINATION**

**Part One**

Directions: You are an Assistant District Attorney for the Andover-Essex District Attorney's Office. You have been assigned to the case of Commonwealth v. Anon Namuh and the companion case of Commonwealth v. Eruthia Namuh. Mr. And Mrs. Namuh have filed a joint motion to suppress evidence as a result of a warrantless search following a stop of their motor vehicle. You are assigned to prepare a Memorandum of Law in Opposition to the Defendants' Motion to Suppress. Although an evidentiary hearing will take place, you are asked to prepare a draft of the Commonwealth's Memorandum of Law in advance of the hearing based on the police report. Your Memorandum of Law should not exceed 8 double-spaced typed pages. Your draft Memorandum of Law should address the arguments set forth in the defendants' Joint Memorandum in which they contend that the police lacked grounds to stop the vehicle, lacked probable cause for the arrest of Anon Namuh, lacked justification for a search incident to arrest, lacked justification for the impoundment of the vehicle, lacked authority for the inventory search, and lacked authority to inspect the contents of the purse. The defendant's Memorandum of Law relies on both the Fourth Amendment, Article 14 of the Declaration of Rights and the common law. In particular, the defendant's Memorandum asks the Court to adopt the position recently taken by the Vermont Supreme Court in State v. Bauder, March 16, 2007. Your supervisor has indicated that she is concerned about how the Massachusetts courts will respond to State v. Bauder and asks that your draft include a address this issue

Police Report of Officer Damien D.

On November 17, 2006, at approximately 12:45 a.m., I was on patrol on Route 88, a state highway in the City of Andover-Essex. I was in a marked cruiser and in uniform. I observed a red Toyota parked in a rest area on the north bound side. The interior lights of the vehicle were illuminated and an individual appeared to be speaking on a cell phone. I decided to conduct a wellness check. The driver and sole occupant of the vehicle, who produced a valid license and registration upon request, informed me that he was about to call the police to report that a "short time earlier" a blue colored BMW sedan containing one occupant (the driver) had passed him on the right by entering the breakdown lane at a high rate of speed and then by returning to the travel lane after it had passed. I notified dispatch and then proceeded north on Route 88. Approximately four miles beyond the rest area I observed a Black BMW sedan traveling in the far right lane at a speed which I estimated to be 35 m.p.h. in an area in which the speed limit was 55 m.p.h. Based on the report received earlier and my training and experience that persons who are under the

influence of alcohol or drugs often travel at a rate of speed below the posted limit, I activated my blue lights and pulled the black sedan over. The sedan pulled over onto the shoulder of the road without incident.

After radioing my location to dispatch, I exited my cruiser with my flashlight in hand and approached the driver's side of the vehicle. There appeared to be two occupants in the vehicle—a male in the driver's seat and a female in the front passenger seat. The male handed me his license and the vehicle's registration. As he did so, the female party, who identified herself as Eruthia Namuh, the defendant's wife, spoke up and said "I was not feeling well tonight and so I asked my husband to drive. His license is suspended. It's all my fault, but we're only about 2 miles from our home. I hope you understand." I instructed the occupants to remain seated while I checked on the license and registration (name: Anon Namuh; address: 99 Lincoln Street, Andover-Essex). I returned to my cruiser. I confirmed that the male driver's license was suspended for non-payment of parking tickets. I returned to the sedan and told the male driver to step outside the vehicle and to accompany me to the front of the vehicle. I told the passenger to remain seated and to keep her hands where I could see them. I asked him where he had been that evening. I detected a slight slurring of his speech and he seemed somewhat unsteady as he walked. The driver said he and his wife had been at a wedding reception for his nephew. I asked him if he had been drinking and he said "I had a few beers earlier in the evening." I told him I wanted him to perform some field sobriety tests. He replied "my attorney told me they are not valid and I shouldn't do them because I'm overweight and have had several surgeries on my knees to repair athletic injuries. My Orthopedist is a well known doctor at the New England Baptist Hospital. I have his card and phone number in my wallet if you need to verify any of this." bad knees." I then told him he was under arrest for operating a motor vehicle while under the influence of alcohol. I asked him to give me his keys and he complied.

At this point, two state police cruisers pulled up to my location. There were four troopers in each vehicle who reported that they were on their way to a staging area for a drunk driving roadblock and asked if they could be of assistance. I explained the situation as I placed the driver in handcuffs and put him in the rear seat of my cruiser. Also, a second police car from the Andover-Essex Police Department arrived on scene as well. I directed the defendant's wife to step outside the vehicle while I conducted a search incident to arrest of the passenger compartment of the defendant's vehicle. I found and seized a buck knife in a leather sheath from underneath the driver's seat, and a small, clear plastic bag containing green leafy vegetable matter which I believed to be marijuana, a Class D controlled substance. When I showed these items to the defendant's wife she exclaimed "those don't belong to us; they must be our neighbor's items; he borrowed the car yesterday to go fishing." Meanwhile, the two state police cruisers left the scene.

I told her that the car would be impounded in accordance with the impoundment policy of the Andover-Essex Police Department and that I would conduct a complete inventory

search. She stated that she was sure her children were home and would be able to get here in "five minutes." She added "they will drive me and the car to the police station or wherever you're going to take Anon." She then proceeded to take out her cell phone and make a call. I decided that we could not wait for the arrival of others because we were short a patrol that evening and I had a responsibility to get back to duty as soon as possible. Officer Harry H., the second Andover-Essex Officer on scene, agreed to transport the prisoner and wait for the tow truck. I proceeded to conduct an inventory search of the vehicle. I removed what appeared to be a woman's "clutch" purse. At this point, Eruthia Namuh exclaimed, "Hey, that's my purse; hand it over!" Since I had taken the item into police custody, I carried out my duty to inspect it before returning it to her. When I opened it to check its contents I found two bottles of pills described as "Hydrocodone" in the names of two different males whose last names were other than that of the defendant. The defendant's wife observed this conduct and said nothing. When I asked her to explain the contents of the purse, she replied "I have nothing to say to you until I speak to my attorney." I also found what appeared to be a "tackle" box full of fishing lures and a fishing license in the name of Goober Johnson with a street address of 97 Lincoln Street, Andover-Essex. Based on the fact that the purse contained papers in the name of Eruthia Numah, appeared to match the evening gown worn by Eruthia that morning, and was found underneath the seat where she had been riding, she was charged with unlawful possession of a Class B controlled substance.

At this point, a completed the standard inventory search form and turned things over to Officer Harry H. I returned to my patrol. Officer Harry H. radioed my cruiser about 30 minutes later and reported that the two adult children of the defendant arrived on scene about 10 minutes after I left but were denied permission to remove the vehicle. The Tow Truck arrived about 5 minutes after that and removed the vehicle.

#### Written Impoundment and Inventory Policy.

The City of Andover-Essex has adopted the following general orders:

General Order 443. "Officers of the Andover-Essex Police Department are required to remove, or cause to be removed, any vehicle found upon a road/state highway when the operator of the vehicle is physically arrested and (1) the vehicle would be left unattended, or (2) other exigencies relating to the safety of the public or the needs of law enforcement require prompt action to remove the vehicle."

General Order 444. "A detailed inventory shall be made whenever a vehicle is ordered towed, removed, or impounded in accordance with General Order 443. The standard inventory procedure consists of a detailed inspection of the interior and exterior of the vehicle for damaged and missing parts, as well as to locate and record the contents of the vehicle. The following units should be inventoried: the interior of the vehicle; the glove compartment and trunk (unless they are locked and there is no key available); and the exterior of the vehicle for missing or damaged parts. The inventory listing of personal

items and valuables will extend to all storage areas and compartments that are accessible to the operator or occupants. This encompasses all open areas, including the floor areas, the surfaces of the instrument panel and rear deck above the rear passenger seats, the open area under the seats, the glove compartment and trunk, and other places where property is likely to be kept. All closed but unlocked containers should be opened, and each article inventoried individually. Locked containers should be inventoried as a single unit. If an owner and/or operator requests to remove or entrust their possessions to another person without it impeding the towing or impoundment process, such request may be granted unless the officer has probable cause to seize the items."

## **Part Two**

Other than in connection with the doctrine of search incident to arrest as discussed by the Vermont Supreme Court in *State v. Bauder*, identify three decisions by state appellate courts (other than Massachusetts) in three different areas of search and seizure law in which the state court relied on state law to reach a result different from that of a controlling precedent of the United States Supreme Court under the Fourth Amendment and explain why the state court analysis was persuasive or not persuasive. This memorandum should not exceed six double spaced typed pages. You may cite cases from any jurisdiction in your analysis, but not secondary authorities (treatises, law review articles, etc.).