

# Michigan Judicial Institute Magistrate Specialty Seminar

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## *Advanced Issues in the Issuance of Search Warrants*

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## **Hon. Patrick C. Bowler**

Judge Patrick C. Bowler, retired, served as a Judge with the 61st District Court in Grand Rapids, Michigan, for twenty-four years. He was elected in 1984, and served as Chief Judge for ten years.

Judge Bowler was an honors graduate of Michigan State University in 1968, and an honors graduate of the Detroit College of Law in 1975. From 1975-1985, Judge Bowler was the Director/Attorney of the Kent County Office of the Defender.

Judge Bowler served as an Adjunct Professor of Law at MSU Law School where he taught Criminal Procedure and other criminal practice courses. He also served as an Adjunct Professor of Criminal Law at the Thomas M. Cooley Law School and faculty member of the Michigan Judicial Institute.

Judge Bowler was President of the Michigan District Judges Association in 1994. He served on the Executive Board of the Judicial Conference Section of the Michigan State Bar and was elected Chairperson in 1997. He served as Co-Chair of the Michigan State Bench/Bar Planning Committee for four years. Judge Bowler has served as Co-Chair of the Racial Justice Institute Immediate Response Team and as Co-Chair of the Grand Rapids Bar Association's Legal Assistance Center Committee. He was elected President of the Grand Rapids Bar Association for the term 2002-2003.

In 1998 Judge Bowler instituted a Drug Treatment Court Program for felons and misdemeanants in Kent County, Michigan. He was the Drug Treatment Court Judge for ten years. Judge Bowler also founded a Sobriety Court Program directed at multiple-offender misdemeanor and felony drunk drivers, and founded a Hispanic Sobriety Court. Judge Bowler is a past member of the Board of Directors of Project Rehab, a residential and outpatient drug rehabilitation program in Grand Rapids.

Judge Bowler presently serves as faculty for the National Drug Court Institute assisting in the development of drug treatment courts and sobriety courts nationwide. He has represented the State of Michigan on the Congress of State Drug Court Associations and as a consultant to the Department of Justice, Bureau of Justice Assistance. Judge Bowler is a past president of the Michigan Association of Drug Court Professionals and continues to serve on the Board of Directors. He was appointed by the Michigan Legislature to serve on the State Drug Treatment Court Advisory Committee where he served as Chair of the Committee. In 2011 Judge Bowler was the recipient of the Thomas M. Cooley Law School Award for Public Service to his community.

Most recently, Judge Bowler has been selected as the first State of Michigan Judicial Outreach Liaison to provide training and technical assistance to Michigan trial courts and other State officials regarding impaired driving and other traffic issues.

## Advanced Issues in the Issuance of Search Warrants

Hon. Patrick C. Bowler, ret.  
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### U.S. Constitution

- **Fourth Amendment - Search and Seizure**
  - 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.
- **U.S. 4<sup>th</sup> Amendment Case Law:**
  - A search occurs when a reasonable expectation of privacy is infringed.
  - A seizure occurs when the police's conduct would communicate to a reasonable person, taking into account the circumstances surrounding the encounter, that the person is not free to ignore the police presence and leave at his will.

### Michigan Constitution:

- **Article 1, Section 11.**
  - The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

**Note:** The Michigan provision is worded similarly to the Fourth Amendment, and, absent compelling reasons, provides the same protection as the Fourth Amendment. People v Levine (Brian), 461 Mich 172, 178 (1999).

### Michigan Statutes Governing Search Warrants MCL 780.651 - 780.659

**MCL 780.653** The judge or district court magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

- (a) If the person is named, affirmative allegations from which the judge or district court magistrate may conclude that the person spoke with personal knowledge of the information.\*
- (b) If the person is unnamed, affirmative allegations from which the judge or district magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

\*Did the person sound like they knew what they were talking about?

Summary: Application of State and Federal Privacy Law

U.S. 4<sup>th</sup> A = Floor (Standard for S and S of person)

MI (any state) = Ceiling  
(No basement allowed below the U.S. 4<sup>th</sup> A. Floor)

Bottom Line: States can add MORE Protections to Privacy Rights for S and S but NOT LESS.\*

\*Exception: Searches of Parolee or Probationer  
... an example of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law.' *Samson v California*, 547 U.S. 847 (2006)

The Heart of the 4<sup>th</sup> Amendment: Privacy

"Alexa, Give Me Some PRIVACY!"

The word "Privacy" does not appear in the U.S. Constitution, yet most people will tell you they have a fundamental 'Right to Privacy,' but...21<sup>st</sup> Century?

- The case of the 'hot tub' drowning - Will 'Alexa' testify?
- Algorithmic Sciences and the government.
- Your Apps "Are telling on you" to Facebook, others?

The Future: Case Law (*Riley*, *Carpenter* and DWI Cases) and Statutory Law: The Law of Confidentiality,

And, Role of the Magistrate



Nation of Laws – Not Men

- Aristotle: wrote: "It is more proper that law should govern than any one of the citizens"
- The rule of law implies that every person is subject to the law, including people who are lawmakers, law enforcement officials, and judges and Presidents. (*Trump v Vance*)
- When you 'speak' as a magistrate you are speaking as the law.
- Example of the Lack of the rule of law – Houston, February 2019

4<sup>th</sup> Amendment Caselaw

- The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions."

*Katz v. United States*, 389 U.S. 347, 357

#### 4<sup>th</sup> Amendment: Judicial Process or Police Riley v California (2014)

**Issue:** Whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested?

**Holding:** The 'search incident to arrest doctrine' does not apply to modern cell phones.

**Reason:** Cell phones "... are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." (Justice Roberts)

"...this decision will have some impact on the ability of law enforcement to combat crime. But...

✓ **Get a search warrant** - The warrant requirement is (still) an important component of the Court's Fourth Amendment jurisprudence;

**Note:** Warrants may be obtained with increasing efficiency!

**Bit of Irony: With a Cell Phone!**

#### Privacy: The Heart of the 4<sup>th</sup> A. - Riley



- A Cell phone is not a pack of cigarettes (ref. Robinson)
- A "cell phone" is NOT just a phone; it's a minicomputer that can be used as a telephone.
- (Cell phones) could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.
- Cell phones are not just another technological convenience, they are loaded with

**"...The Privacies of Life"**

Government must generally secure a warrant before conducting such a search.



#### The Balancing Test

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement

*"by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."*

Wyoming v. Houghton, 526 U. S. 295, 300 (1999).

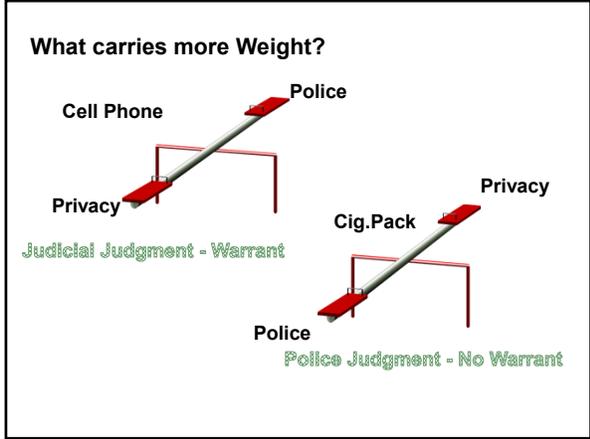
#### The Separation of Powers

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

**Checks**

**Balances**





### The 'Reach' of the Expectation of Privacy

**Carpenter v United States**, U.S. Supreme Court (2018) 5-4 opinion.

- **Issue:** Did the defendant have a reasonable expectation of privacy in the location information (C.L.I. collected by the FBI?)
- **Majority:** Yes...Reasonable expectation of privacy – get a warrant!
- **Dissent:** No, he had shared that information with his wireless carriers; wasn't his anymore. Government could seize it.

**4<sup>th</sup> Amendment:**

- When is the 'Expectation of Privacy' private enough to interject the **Judiciary** between the government and the citizen?
- When (and why) do we substitute the judgment of the magistrate for the judgment of the police officer?

### Summary: The 4<sup>th</sup> A. – A Compromise

- Both the US and Michigan Constitutions protect individuals from unreasonable search/seizure.
- A compromise (balance) between the need of government officials to gather evidence and the right of citizens to be free from governmental intrusion.
  - ✓ To ensure the protection of the 4<sup>th</sup> A, prior to a search there needs to be a warrant based on probable cause.
  - ✓ If no warrant = unreasonable\*

\*Unless there is an Exception to the Warrant Requirement

**Note:** Magistrate is deciding whether there is probable cause for issuance of a warrant, not whether there is an 'Exception' and thus no warrant required.

### Common Search Warrant Requests for Magistrate

**It All Begins With A Stop: Reasonable Suspicion to Stop**

- Vehicle stop is a seizure under 4<sup>th</sup> Amendment
- Stop is permissible if based on reasonable articulable suspicion
  - Pretext stops permissible
  - But stops based on mere hunch or speculation are not.

**Whren v. U.S.**, 517 U.S. 806 (1996)

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## Reasonable Articulate Suspicion To Effect A Traffic Stop?

### Hypothetical

- 911 call from named caller that car “ran me off the road 5 minutes ago” (3:45 p.m.)
- Caller described vehicle, tag #, location and route of travel
- 13 minutes after dispatch call, vehicle matching description is located
- Police follow vehicle for 5 minutes, observing no erratic driving/infractions
- Traffic stop made 18 minutes/19 miles after 911 call

### Good Stop or Bad Stop?

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## Navarette v. California 134 S.Ct. 1683 (2014)

### Holding:

- Tip was reliable
  - Eyewitness knowledge
  - Contemporaneous report
  - Caller used the 911 system
- Call created reasonable suspicion of drunk driving
- Once officer had RAS, there was no need to personally observe/verify suspicious driving

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## Seizure (then) Search

### Hypothetical

**Facts:** Deputy Sheriff sees pickup truck, runs license plate, owner’s driver’s license is revoked. Stops truck.

- Question 1: What is the legal standard for the stop?
- Question 2: Does the deputy have ‘Reasonable Articulate Suspicion?’

### Constitutional Issues:

- A. Was there Reasonable Articulate Suspicion of Criminal Activity that will allow for the seizure?
- B. Next Issue: Is there ‘Probable cause’ for the Search?

## Kansas v Glover, 140 S.Ct. 1183 (2020)

**Facts and Issue:** (Per hypothetical)

**Holding:** When the officer lacks information negating an inference that the owner is driving the vehicle, an investigative stop per facts is reasonable under the 4<sup>th</sup> Amendment.

**The Law:** An officer may make a brief investigative traffic stop when he has “a particularized and objective basis” to suspect legal wrongdoing.”

“The level of suspicion required is less than that necessary for probable cause and “depends on “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” Navarette

**Glover:** Use of data base + common sense = Reasonable Suspicion.

However: The scope of this holding is ‘narrow.’ The R.S. standard “takes into account the “Totality of the Circumstances.” The presence of additional facts might DISPEL reasonable suspicion. (Examples?)

In **Glover:** The deputy possessed no information sufficient to rebut the reasonable inference that Glover was driving his own truck.

### Duration of Traffic Stop: *What is Reasonable?*

- Once stopped, officer may conduct an investigation “reasonably related” to the scope of the stop, including
  - Check license, registration & insurance
  - Check for outstanding warrants
- Once purpose of traffic stop has been addressed – or reasonably should have been addressed – officer cannot extend the stop even briefly for unrelated investigative activities

Rodriguez v. United States, 135 S.Ct. 1609 (2015)

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### Duration of Stop

Rodriguez v. U.S., 135 S.Ct. 1609 (2015)

BUT: The stop may be extended for unrelated investigation with “reasonable, articulable suspicion”



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### Legal Basis for A Stop and to Request Roadside Tests

#### Standards of Proof – Evidentiary Standards

- **Traffic Stop** - Reasonable Articulable Suspicion
- **SFSTs** – Reasonable Articulable Suspicion
- **PBT** – Reasonable Grounds
- **Arrest** – Probable Cause

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### Breath & Blood Testing and the 4<sup>th</sup> Amendment

- Missouri v. McNeely (2013)
- Birchfield v. North Dakota (2016)
- Mitchell v. Wisconsin (2019)



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**Missouri v. McNeely**  
133 S.Ct. 1552 (2013)



**Issue presented:** “whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations”

Missouri was seeking a per se rule (Latin ‘*by itself*’ (inherently)) that “whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances (an exception to the warrant requirement) will necessarily exist because BAC evidence is inherently evanescent.”

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**Missouri v. McNeely, 133 S.Ct. 1552 (2013)**

**The Facts:**

- At **2:08 a.m.** McNeely is observed speeding and repeatedly crossing the centerline. When stopped, police observe an odor of alcohol on his breath, bloodshot eyes, slurred speech, and McNeely admits to a “couple of beers.” He was unsteady on his feet after exiting his car.
- Failed SFSTs.
- Refused PBT; refused breath test; refused blood test
- Blood drawn at hospital at **2:35 a.m.** over objection
- No warrant.
- BAC = 0.154

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**Non-consensual blood draw constitutes a search subject to 4<sup>th</sup> Amendment scrutiny**  
**Missouri v. McNeely, 133 S.Ct. 1552 (2013)**

*“When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.”*

**Result Police:** An Exigency is based on a case-by-case assessment, i.e. particularities of the case. No exigency – Get a Warrant

**Result - Magistrate:** Wake-Up!



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**Exigent Circumstances?**

- Officer delayed by need to investigate crash
- Officer had to go to hospital to begin DWI investigation
- Suspect was being treated for injuries
- Alcohol/drug dissipation
- Time necessary to obtain warrant
- Unavailability of magistrate/judge

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**New Issue:  
What is the Impact of Test Refusal?**

- Administrative sanctions – loss of license
- Evidentiary inferences
- Criminal prosecution
- Enhanced penalties
- Ignition interlock



**Birchfield v. North Dakota**, 136 S.Ct 2160 (2016)

Issue: Absent a warrant, may a State criminalize one's refusal to take a chemical test ?

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The decision whether to exempt [the] search from the warrant requirement is made by assessing:

Degree to which it intrudes upon an individual's privacy

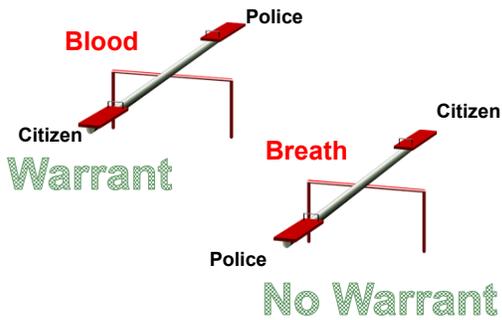
Versus

Degree to which it is needed for the promotion of legitimate governmental interests



Birchfield v North Dakota

**Is there a 'Privacy' distinction?**



DWI Case: Birchfield v North Dakota (2016)  
Breath Test or Blood Test

- 4<sup>th</sup> Amendment permits warrantless **breath** tests incident to arrests for drunk driving
- HELD: Motorists may **not** be criminally punished for refusing a **blood** test based on legally implied consent to submit to them.
- It is one thing to approve implied-consent laws that impose **civil penalties** and **evidentiary consequences** but quite another for a State to insist upon an intrusive blood test and then to impose **criminal penalties** on refusal to submit.
- **blood** tests are significantly more intrusive; therefore 4<sup>th</sup> amendment does not permit a warrantless **blood** test incident to arrest for drunk driving. (Contrast: Breath test)

## Application of *Birchfield*

- Warrantless Breath Test – refusal is subject to prosecution
- Warrantless Blood Test – refusal is not subject to prosecution unless
  - valid exception to warrant requirement?
- Warrantless Urine Test – ???
- Administrative sanctions & evidentiary inferences permissible – To what extent?

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## 2019 U.S. Supreme Court Returns to the Question: DWI, Blood Draw, Need a Warrant?

### Hypothetical

- Single vehicle accident, minor injuries to driver; driver appears disoriented
- Odor of alcohol on breath; odor of marijuana from inside vehicle
- Burnt roach inside cup holder
- At police station – 0.03 BAC (breath)
- Refuses blood test
- Taken to hospital for warrantless blood draw

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### Under what circumstances may the police obtain blood without a warrant?

1. Exigent circumstances?
2. Consent?
3. Incident to arrest?
4. Medical treatment?

#### What About Implied Consent:

- Is "implied consent" sufficient consent under the 4th amendment?
- May a driver withdraw his/her implied consent?
- What if driver is unconscious and unable to either expressly consent, or withdraw implied consent?

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### Mitchell v. Wisconsin: 139 S.Ct. 2525 (2019) Plurality Opinion Expansion of 'Exigent Circumstances'

- **Facts:** A person's stupor required trip to hospital.
- **Held:** Exigent circumstances exist when natural dissipation is combined with other pressing police duties. State may 'almost always' order a warrantless blood test
- **Reason:** "BACs serve important purpose to enforce DUI laws that save lives" - test must be prompt because it is a biological certainty that alcohol dissipates from the bloodstream literally disappearing by the minute."
- "There is clearly a compelling need for a blood test of drunk-driving suspects whose conditions deprive officials of a reasonable opportunity to conduct a breath test."
- **Dissent:** Implied Consent statute cannot create the actual and informed consent that 4<sup>th</sup> amendment requires.

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### Schmerber-McNeely-Mitchell

- “**McNeely** was about the minimum degree of urgency common to all drunk-driving cases.” Court held that the fleeting nature of blood-alcohol evidence alone was not enough to bring BAC testing within the exigency exception.
- “In **Schmerber**, a car accident heightened that urgency.” dissipation of BAC did justify a blood test of a drunk driver whose accident gave police other pressing duties.
- “And here **Mitchell’s** medical condition did just the same.” When person’s stupor requires trip to hospital, State may “almost always” order a warrantless blood test

### Urgency



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### Consent: The Unanswered Question

- Consent under the 4<sup>th</sup> amendment historically must be “freely and voluntarily given” and generally may be withdraw
- BUT Supreme Court has not yet addressed whether “implied” consent is valid consent as an exception to the warrant requirement

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### Commonwealth v. Bell 211 A.3d 761 (Pa. 2019)

- **Issue:** Whether a motorist’s assertion of his Fourth Amendment right to refuse consent to a warrantless blood test may be used as evidence of guilt for the offense of driving under the influence.
- Petition for Cert. Denied (1/21/20)

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### When A Non-consensual Blood Draw Is Lawful

#### A Review

- With a search warrant
  - Consent not required
  - Exigencies not required
- Without a search warrant
  - under exigent circumstances; or
  - by consent (express or implied)
- Incident to medical treatment (no 4<sup>th</sup> amendment issue)

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**WHY?** Is the Government Seeking to Eliminate You?

Both implicate significant privacy concerns.

**The U.S. Supreme Court  
The 'Point of the 4<sup>th</sup> Amendment'**

- “The point of the Fourth Amendment, which often is not grasped by zealous officers, is **not** that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence.
- Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” *Johnson v. United States*, 333 U.S. 10, (1948)

*(Law) ...thereby interposing "a magistrate between the citizen and the police." Warden, Maryland Penitentiary v Hayden, 387 US 294 (1967).*

**The Michigan Supreme Court**

- The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.  
*People v Payne*, 424 Mich 475 (1985)
- This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.  
*United States v U. S. Dist Court*, 407 US 297 (1972)

**The Magistrate**

You represent on the 'local level' the judicial branch of government in the "Separation of Powers"

- You have the authority to allow government to invade the privacy of a citizen's life.
- And/or ...the authority to prevent government from intruding in the privacy of a citizen's life.

"We are a "Nation of laws – Not men and women."

**You Inject a Deliberate & Impartial Legal Decision**

### Neutral and Detached

Johnson v. United States, 333 U.S. 10, 14, 369 (1948)

- In determining a probable-cause decision the U.S. Supreme Court has said:

*"the courts must . . . insist that the magistrate purport to 'perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.' "* U.S. v Leon, 468 U.S. 897 (1984); quoting Aguilar v. Texas, 378 U.S.108, at 111.

- What does 'neutral and detached' mean? Not taking sides; but applying the law.
- Question: If you are 'not' neutral and detached, on whom may citizens rely to protect their Fourth Amendment rights?

### PROBABLE CAUSE

The basis of your decision to sign:

- *Would the included facts and circumstances lead a reasonable person to believe that evidence of a crime or contraband is going to be found at this location?*

#### The Standard - People v Russo

- "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." Russo, at 439 Mich 584, 604 (1992); quoted in Kazmierczak, 605 NW2d 667 (2000)

*\*See Prof. LaFave Analysis*

### Probable Cause: Most Important

#### 1. Four corners of the document



2. Oral testimony not acceptable—they might talk to you and tell you other things not in the document.

### Hypothetical

- Officer called scene of fatal accident.
- Preprinted search warrant form: *P.O. observed, or informed Smith driving, and believes Smith OWI.* (Blanks filled in: date, place, and time)
- Affidavit: *"(Smith) was the driver of a motorcycle involved in fatal accident in which his female passenger was killed. Witness observed (Smith) driving in a reckless manner, speeding. (Smith) at HFA being treated for severe injury."*

**Issue:** Is there Probable Cause for you to sign a Search Warrant?

How would you rule?

Legal Standard: Is there a **fair probability** that evidence of a crime will be found in DeBruyn's body?

People v DeBruyne,

MI Ct of Appeals July 11, 2019, Unpub'd

- **Holding:** No. The warrant affidavit in this case was woefully deficient.
- **Reason:** DeBruyn may have been DWI, or road rage, showing off, tardy, or in an emergency. (Testosterone) The affidavit expresses officer's mere conclusion that he was intoxicated based on very broad descriptions of his driving. Magistrate could not reach independent finding the probable cause existed (for OWI) based on information provided.
- **Does the 'Good Faith Exception' to the Warrant Requirement Apply?**
- **No Exception.** Finding indicia of probable cause in the affidavit would permit the 'good-faith' exception to swallow the exclusionary rule whole.

Why Important?

**If a Warrant is not issued when required or if issued improperly:**

- The consequences can be severe:
  - ✓ Evidence suppressed
  - ✓ No prosecution
  - ✓ Convictions overturned
  - ✓ (Magistrate professionally embarrassed?)
- Early on damage may be irreparable if evidence is lost.
- For the citizen: Appellate courts can legally fix but damage is done.



Magistrate....Just the FAX?

The Task of the Issuing Magistrate

**IS simply to make a practical, common-sense decision whether:**

- Given the **facts** set forth in the affidavit before him or her, including the "veracity" and "basis of knowledge" of persons supplying hearsay information,
- there is a fair probability that contraband or evidence of a crime will be found in a particular place.

**Practice Tip**

**Read Recent Case Law to See How Law Applies to Facts:**

People v Barnes, Ct App, May 8, 2018. Issue: Was their probable cause sufficient for Search Warrant to issue?  
Holding: 2 to 1 decision on the defendant's residence.  
(Good case discussion on the law and analysis whether facts sufficient to meet the 'fair probability' test)

### Summary

**“It is not necessary to determine that the items sought are “more likely than not” in the place to be searched.**

It is only necessary that the affidavit enable the magistrate to conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.” *People v Russo*, 439 Mich 584 (1992)

What do you do if stumped? What do you do if you are presented a defective search warrant? What if you aren't sure?

- Indicate you are not satisfied
- Have police contact prosecutor
- Have alternatives worked out with Chief Judge

### A Magistrate's Loyalty

- ▶ The probable cause determination must be made by a person whose loyalty is to the judiciary alone, unfettered by professional commitment, and therefore loyalty, to the law enforcement arm of the executive branch. *People v Payne*, 424 Mich 475 (1985)
- ▶ When the 'right of privacy' must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policemen or other government agent.
- ▶ Individual freedoms will best be preserved through the separation of powers and division of functions.

**'Neutral and Detached'**



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