

# Fourth Amendment

Josh Blanchard  
www.mielcarr.com

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# Fourth Amendment

"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."

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# What the 4<sup>th</sup> Amendment Protects:

○ Protects against **warrantless** searches and seizures by the **government**.

*Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (private citizen can act as instrument or agent of state).

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### What the 4<sup>th</sup> Amendment Protects

○The Fourth Amendment protects your:

- Person
- Home
- Papers
- Effects

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### What the 4<sup>th</sup> Amendment Protects

An effect is one of your belongings. It is broad.

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### Computers are “effects” under 4<sup>th</sup> Amendment

*People v. Gingrich*, 307 Mich App 656, 663 (2014)

It can hardly be doubted that a computer, which can contain vast amounts of personal information in the form of digital data, is an “effect[.]” . . . within the meaning of the constitutional proscription against unreasonable searches and seizures.

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### Analytical Framework: Is it a search?

It is a search if the government is looking for evidence.

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### Analytical Framework: Is it a search?

- In addition to "traditional" searches, infrared imaging (FLIR) is a search. *United States v. Kyllo*, 533 US 27 (2001).
- Electronic monitoring of sex offenders is a search. *Grady v. North Carolina*, 574 US \_\_\_\_ (2015).
- GPS Monitoring of cars is a search (under the trespass theory). *United States v. Jones*, 132 S. Ct. 945 (2012).

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### Analytical Framework: Containers

- Some times the first actions of the officer are not a search (or are permissible), but later actions are not.
- Consider each step of the officer's actions. Think of a computer / cell phone as a closed container.
- Consider each computer file as a closed container.
  - There is some support for this argument. In *Guest v. Leis*, 255 F.3d 325, 336 (CA6, 2001), the court discussed an off-site review to separate relevant from irrelevant files.

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## Analytical Framework

- Was there either:
  - A search of something in which your client had a reasonable expectation of privacy (*Katz*) **OR**
  - A physical intrusion on home, papers, or effects of your client? (*Jones, Jardines, Gingrich*)

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## Reasonable Expectation of Privacy

- Generally, we're looking at whether a search violates a person's "reasonable" or "legitimate" expectation of privacy. *Katz v United States*, 389 US 347, 361 (1967)
- Two Issues:
  - Did the person being searched have an "actual subjective expectation of privacy" AND
  - Was that expectation one that "society is prepared to recognize as reasonable"? *Katz* at 361.

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## Acknowledged reasonable expectations

- Property located inside a person's home. *Payton v New York*, 445 US 573 (1980).
- Relative heat of various rooms in the home using thermal imager. *Kyllo v United States*, 533 US 27 (2001).
- Conversations in closed telephone booths. *Katz*
- Contents of opaque containers. *US v Ross*, 533 US 27 (1982).
- And now, cell phones. *Riley v California*, 134 S Ct 2473 (2014).
- Overnight guests. *Minnesota v Olson*, 495 US 91 (1990).
- Motel rooms. *People v Oliver*, 417 Mich 366 (1983).

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## No expectation of privacy

- Activities in open fields. *Oliver v US*, 466 US 170 (1984).
- Garbage at the street. *California v Greenwood*, 486 US 35 (1988).
- Stranger's house that you enter without permission to commit theft. *Rakas v Illinois*, 439 US 128 (1978).
- Enclosed porches. *People v Tierney*, 266 Mich App 687 (2005). Still good after *Jardines*?

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## An easier approach to expectations . . .

- Property Rights Approach: A trespass is a 4<sup>th</sup> Amendment Violation
- *United States v Jones*, 132 S Ct 945 (2012)—A GPS device on defendant's vehicle, and its use of that device to monitor the vehicle's movements, constituted a search. (The case where Scalia opines that the government physically occupied private property for the purpose of obtaining information, the physical intrusion is a search.)
- *Grady v North Carolina*, 135 S Ct 1368 (2015)—GPS monitoring of a recidivist sex offender constituted a search within the scope of the Fourth Amendment, since attaching a monitoring device to the offender involved physically intruding on the offender's body without consent for purposes of obtaining information concerning the offender's movements. Remanded to determine whether it was unconstitutionally unreasonable based on the totality of the circumstances.
- The idea that trespass with intent to find something or obtain information is a search is reiterated in *Florida v Jardines*, 133 S Ct 1409 (2014)

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## An easier approach to expectations . . .

- In *Gingrich* the COA adopted the logic of *Jardines* as it applies to computers.
- The benefit of this approach is that it keeps easy cases easy. *Jardines*.
- If what the police do amounts to a trespass, you've got a good 4A challenge.
- EITHER: 1) reasonable expectation of privacy OR 2) trespass to obtain evidence.

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**Is it a seizure?**

A person is seized under the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

*United States v Mendenhall*, 446 U.S. 544, 545 (1980)

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**Is it a seizure?**

A suspect isn't seized by an officer unless he is physically touched by the officer or the suspect submitted to the officer's show of authority.

*California v Hodari D.*, 499 US 621 (1991).

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**Is it a seizure?**

Consensual encounter between police and citizen with no suspicion where police ask questions, ask for ID, and ask for consent to search is not a seizure, if a reasonable person would feel free to end the encounter and leave.

*United States v Drayton*, 536 US 194 (2002).

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Is it a seizure?

Terry v Ohio, 392 US 1 (1968) –  
Reasonable Articulable Suspicion

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Warrant Requirement

For a warrant to be valid, the warrant  
itself must comply with the Fourth  
Amendment.

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Warrant Requirement: Particularity

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

*Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76 (1927)

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### Warrant Requirement: Particularity

2. The PROPERTY to be searched for and seized, if found, is specifically described as:

White two-story farm house located at the above venue. House is on the westside of Bass Lake Road, facing east. It has a porch on the east side with an entrance door. There is also an entrance door on the north side of the house. The numbers 5175 are attached on to the house at the northeast corner.

There is also an unattached, two stall garage 50 feet to the north of the residence. It has a service door on the south side. It is described as white with tan trim.

To seize window air conditioners and blue/gold coins bags. We would also ask to seize any and all items believed to have been stolen during this series of break ins.

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### Warrant Requirement: Probable Cause

"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."

*People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000).

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### Warrant Requirement: Probable Cause

Credibility is a factor of totality of circumstances of reasonableness. *People v Collins*, 298 Mich App 458 (2012)

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**Warrant Requirement: Probable Cause**

The magistrate's findings of probable cause must be based on the facts related within the affidavit.

MCL 780.653; People v Ulman, 244 Mich App 500, 509; 625 NW2d 429 (2001)

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**Warrant Requirement: Under Oath**

Probably unlikely to encounter, but make sure that the officer swore to the affidavit.

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**Warrant Requirement: Neutral Magistrate**

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## Warrantless Searches

A search without a warrant is unreasonable per se unless there exists both probable cause and circumstances establishing of the delineated exceptions.

*People v Anthony*, 120 Mich App 207 (1982), cert. denied 462 U.S. 1111 (1983).

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## Exceptions - Consent

- *Schneekloth v. Bustamante*, 412 U.S. 218, 219 (1973)
- The government carries the burden of proving that consent was voluntary. See *United States v. Matlock*, 415 U.S. 164, 177 (1974)

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## Exceptions – Scope of Consent

So your client gave consent? What is the scope?

- *People v Dagwan*, 269 Mich App 338 (2005)—Defendant’s written consent to search the vehicle, including interior, trunk, engine compartment, and all containers, included searching the contents of his computer.
- What would a reasonable person have considered the scope to be? *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)

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### Exceptions – Scope of Consent (cont.)

- *People v Horan*, 2010 Mich App LEXIS 2289—Wife’s consent to remove husband’s computer from the home was consent to search the contents of the computer after it was removed.
- Consent to search computer --
  - Does this include a cloud drive such as dropbox, box.net, google drive, or some other web storage that is related to computer?
  - What if the computer has the password saved?

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### Exceptions - Exigency

Exigent circumstances are present where immediate action is necessary to (1) protect the police officers or other persons, (2) prevent the loss or destruction of evidence, or (3) prevent the escape of a suspect.

*People v Love*, 156 Mich App 568 (1987)

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### Exceptions – Exigency (Emergency Aid)

Based on an objectively reasonable belief that a person within the house is in need of immediate aid, officers may enter without a warrant.

*Michigan v Fisher*, 558 US at 47, citing *Mincey v Arizona*, 437 US 385, 392; 98 S Ct 2408 (1978)

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### Exceptions – Community Caretaker

The community caretaking exception is an exception to the warrant requirement that can only apply when the police are doing something that is "totally unrelated to the criminal investigation duties of the police."

*People v Davis*, 442 Mich 1, 22: 497 NW2d 910 (1993); *Cady v Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973).

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### Exceptions - Automobile

In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, the Court held that a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment.

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### Exceptions - Automobile

The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

*United States v. Ross*, 456 US 798, 824; 102 S Ct 2157, 2172 (1982)

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### Exceptions - Search Incident to Arrest

*Riley v. California*, 134 S Ct 2473 (2014)—Police officers generally cannot, without a warrant, search digital information on the cell phones seized from the defendants as incident to the defendants' arrests.

A search of the passenger compartment incident the arrest of an occupant is now permitted only when: 1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or 2) because circumstances concerning the vehicle context are unique, the police may accomplish a search of the vehicle incident to a lawful arrest when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.

*Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009)

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### Exceptions – Inventory Search

- The government needs to show that the vehicle was impounded for safekeeping following arrest of driver. *People v. Krezen*, 143 Mich App 34 (1985).
- Look for an inventory policy from the police agency. Use FOIA.
- Need to show policy to get into trunk. *People v. Long*, 419 Mich. 636, 359 N.W.2d 194 (1984)

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### Exceptions – Plain View

- *Arizona v Hicks*, 480 US 321 (1987) (holding that evidence is not in plain view if view is caused by any manipulation of the item).
- Performing a field test is reasonable seizure of the powder because it can only reveal the presence of cocaine and nothing more about the powder. See *US v Jacobsen*, 466 US 109, 123

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### Plain View - Bad File Names

- In *Waller*, a private party opened a misdirected shipping carton discovering a cache of motion picture film with descriptive labels suggesting that the movies depicted homosexual acts, and thus appearing to be contraband. 447 US 649, 651-52. The FBI was called, responded, and seized the films. *Id.* FBI agents, viewed the films with a projector to determine whether the movies were contraband, without a warrant. *Id.*

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### Exceptions – Plain Feel

3 Q So when you first touched it, you couldn't tell exactly  
 4 what it was. But then you pinched it, and you could feel  
 5 what it was?  
 6 A Yes, you could say.  
 7 Q You had to squeeze it a little bit, and then you thought  
 8 those are probably pills?  
 9 A Yes.

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## Exceptions – Plain Feel

- In conducting a patdown search, an officer may seize items that the officer has probable cause to believe feel like contraband. *Minnesota v Dickerson*, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).
- "An object felt during an authorized patdown search may be seized without a warrant if the item's **incriminating character is immediately apparent** . . ." *People v Champion*, 452 Mich. 92, 105-106; 549 N.W.2d 849 (1996).
- The police cannot manipulate an object in order to determine whether it is contraband; it must be **immediately apparent from plain view or plain feel** that the object is contraband. *People v Custer*, 465 Mich. 317, 336; 630 N.W.2d 870 (2001).

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## Third-party searches / Private Searches

- We have a bunch of non-computer 3<sup>rd</sup> party search cases. We're starting to collect some good 3<sup>rd</sup> party search cases for computers.
- In *US v Lichtenberger* and *People v Gingrich*, we had third parties that set off the events.

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## Private Searches

- Generally, private searches, without government involvement is permissible. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)
- Look to the scope of the initial private search.
- Why did the private party engage in the search?
- Did the police have the private party re-do the search? *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997) (stating in dicta that Jacobsen does not permit law enforcement to reenact a private search of a private home or residence).
  - Probably moot in light of *Lichtenberger*.

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### Private Searches – US v Lichtenberger

- To accomplish this, Officer Huston had to proceed with "virtual certainty" that the "inspection of the [laptop] and its contents would not tell [him] anything more than he already had been told [by Holmes.]" Id. That plainly was not the case. As the district court found, "there was absolutely no virtual certainty that the search of Lichtenberger's laptop would have" revealed only what Officer Huston had already been told. *US v Lichtenberger*, No. 14-3540, \_\_\_ F3d \_\_\_ (2015 CA6).

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### Third Parties – Computer Service Providers

- Watch out for the language in service orders that diminishes an expectation of privacy.
- Many computer repair facilities get agreement that CP may be turned over to the fuzz.
- If there isn't such an agreement, look at the scope of the private search and whether the subsequent search by the police was broader than the private search.

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### Relinquishing Control to Third Party

- Generally, when someone releases an item to a third party, they give up their expectation of privacy.
  - *United States v. King*, 55 F.3d 1193, 1196 (6th Cir. 1995) [sender's expectation of Searching and Seizing Computers privacy in letter "terminates upon delivery"].
- Look at the terms of the service agreement when a computer is being serviced.

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## Subscriber Information

○ Courts have applied this principle to computer searches and seizures to conclude that computer users do not have a legitimate expectation of privacy in their subscriber information because they have conveyed it to another person—the system operator.

*Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. Ohio 2001)

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## Good Faith Exception

When officers obtain evidence after executing invalid warrant, no exclusion as long as officers were acting in good faith.

*United States v. Leon*, 468 US 897 (1984)

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## Good Faith Exception

*Leon* has been adopted in Michigan.

*People v. Goldston*, 470 Mich 523 (2004)

*Leon* includes reliance on bad appellate law.

*People v. Mungo*, 295 Mich App 537 (2012)

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### Good Faith Exception, Exceptions

Lies, false statements or reckless omissions by the officer in the affidavit.

*Franks v Delaware*, 438 US 154 (1978).

General warrants. Perhaps overbroad warrants.

*United States v Leon*, 468 US 897, 923 (1984).

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### Good Faith Exception, Exceptions

Inevitable discovery.

*Nix v Williams*, 467 US 431 (1984)

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### Good Faith Exception, Exceptions

To allow a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement. Even in the context of a good-faith error, we reject the notion that a post hoc probable cause analysis can preclude the constitutional requirement that a neutral and detached magistrate issue the warrant.

*People v Hyde*, 285 Mich App 428, 445-46; 775 NW2d 833, 843 (2009)

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### “Testifying” Witness

**Testifying:** The act of creatively shading the facts in favor of the government while under oath. Often done by people with badges.

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### Use the head fake . . .

- The best approach is to lock in the testimony when the witness doesn't know what you're up to.
- Make the witness think that you're focusing on something other than your real issue.
  - Preliminary exams, other motion hearing, companion neglect/abuse cases, PPO hearings, DAAD hearings, etc.

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### Challenge the factual assertions.

Make sure to investigate the factual claims in the search warrant affidavit. Some times you'll find that the truth was stretched or just plain fabricated.

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### Franks Motions

If the affiant who procured the search warrant made a false statement either knowingly and intentionally or with reckless disregard for the truth, and if that false statement is necessary to the finding of probable cause, a hearing must be held.

Franks v Delaware, 438 US 154, 155; 98 S. Ct. 2674; 57 L. Ed. 2d 667 (1978).

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### Franks Motions

"In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks v Delaware, 438 US 154, 155; 98 S. Ct. 2674; 57 L. Ed. 2d 667 (1978).

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### Calling your client . . .

MRE 104(D) states:

**Testimony by Accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

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### Calling your client . . .

13 Q Will you agree with me that toilet paper two or three  
14 squares of it is not that substantial?  
15 A No.  
16 Q You wouldn't agree with me?  
17 A No.  
18 Q You think that's pretty thick?  
19 A It was Charmin.  
20 Q Okay, so you think it's pretty thick?  
21 A Charmin's very thick.

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