

ACLU /

NORTHWEST MICHIGAN

✦ A Branch of the ACLU of Michigan ✦

Sheriff Michael Oltersdorf
 Leelanau County Sheriff's Office
 8525 East Government Center Drive
 Suttons Bay, MI 49682

October 5, 2009

Re: Unconstitutional Searches of Homes and People by Leelanau County
 Sheriff Deputies

Dear Sheriff Oltersdorf:

We are writing to express our deep concern about the reports the American Civil Liberties Union (ACLU) has been receiving about Leelanau County Deputy Sheriffs unconstitutionally entering local homes and forcing college age students to submit to breathalyzer tests. This letter briefly summarizes the facts that have been reported to us, outlines our concerns about abuse of power by your deputies and asks for assistance to ensure that your deputies will no longer engage in such unconstitutional activities.

I. The Facts

Below is an account of several separate incidents as they were reported to us. While we have not yet undertaken the task of speaking to each and every individual involved to verify the accounts, the reports are remarkably consistent and we have spoken with enough individuals to cause us to be alarmed by what appears to be a disturbing trend.

(1) Leland / July 2009

Leelanau County Sheriff's deputies, acting without a search warrant, entered a private home in Leland at approximately 3:23 a.m., following an alleged complaint made four hours earlier. A complainant was asleep in a bedroom on the second floor of the home when a deputy entered the room without knocking, shined a flashlight in her eyes, and ordered her to "get up, get dressed, and come downstairs." "Terrified" and her "heart pounding," she dressed and went downstairs where another deputy informed her that she

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and several others "would be violating Michigan law if they refused to take a breathalyzer test." Citations were issued to eight individuals that night but all charges were dismissed prior to trial.

(2) Leland / August 2009

Leelanau County Sheriff deputies, acting without a search warrant, entered a private home in Leland through a back door and checked the ID of everyone present. All present were young people over the age of 21. No citations were issued.

(3) Leelanau County / June 2009

Leelanau County Sheriff deputies, acting without a search warrant, entered a private home near Suttons Bay, Michigan in the middle of the night and required everyone present to submit to a breathalyzer test. The cases against all persons cited were dismissed when the judge ruled the entry was illegal in violation of the Fourth Amendment. The purpose for entering the residence was "an attempt to identify and ascertain the well-being of the two passengers that had fled the scene of an accident." An accident had occurred a short distance from the residence; however, the officers did not have any information that the passengers had gone to the residence, nor did they have any information whatsoever that their "well being" was in question.

(4) Leland / December 2007

Leelanau County Sheriff deputies, acting without a search warrant, entered a private home around 4:00 a.m. during the week of Christmas, 2007. Everyone present was required to wake up and take a breathalyzer test. A summer resident who was underage briefly attended the party. He had already been drinking before he arrived. When he left the party he refused a ride home from a non-drinker, preferring to walk, then mistakenly attempted to enter a neighbors' house. The sheriff's department was called and the deputies took the underage drinker home, and learned the approximate location of the party on Lake Leelanau. The deputies then scouted around for parked cars and found the home. By this time it was late, lights were off, and the occupants had cleaned up and were asleep. The deputies called for back-up from tribal officers, then entered the house on the pretense that the condition of the underage drinker who left the party earlier suggested that others in the home might be in distress and in need medical attention. A young man who was asleep on the couch woke up to the deputies already in the house. The owners then received a call from the deputies while they were still in the house. The deputies told the owners they had received permission from an assistant prosecutor to enter the house, and informed the owners they had done so for the welfare of the occupants of the house. The owners arrived about 20 minutes later and the occupants of the house had already been woken from sleep by deputies shining flashlights in their eyes and the deputies were administering breathalyzer tests. The owners believe the warrantless entry into the house was illegal and that the grounds for the entry, concern for the welfare of the sleepers, was a pure fabrication.

(5) Leland / August 2007

Leelanau County Sheriff deputies, acting without a search warrant, entered a private home in the late afternoon in August, 2007. They asked the owner if he planned to be home that evening, to which the owner replied "yes". The officers said that a parent had seen on "Facebook" that there was going to be a party at the house that evening. The owner told the officers that he was cooking enchiladas that evening for his daughter and some of her friends, and that both he and his wife were going to be there all evening. He assured the officers that nothing illegal would take place.

While we have been made aware of other similar instances of unconstitutional activity in Leelanau County, we have not at this writing had an opportunity to verify them.

II. The Law: Illegal Entry Into Homes

Americans deeply value the right of privacy in their homes against government intrusion. The Fourth Amendment to the Constitution provides: "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." Applying the Fourth Amendment in a variety of cases, the United States Supreme Court has often stated that the "capacity to claim the protection of the Fourth Amendment depends...upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."¹ The Court has held that such a place includes not only a person's home, but the home of the person who is a host of a person unlawfully searched.²

A major exception to these general rules against unlawful searches and seizures is the existence of "exigent circumstances." Exigent circumstances are "situations where real immediate and serious consequences will certainly occur if a police officer postpones action to obtain a warrant."³ They include such matters as "(1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) the need to prevent a suspect's escape; and (4) a risk of danger to the police or others."⁴ We believe none of these factors were present in any of the instances recited above.

The courts have ruled that the police don't need a search warrant to enter a home if the owner gives them permission. Such consent, however, must be unequivocally specific and freely,

¹ *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

² *Minnesota v. Olson*, 495 U.S. 91, 96 (1990).

³ *United States v. Williams*, 342 F.3d 430, 436 (6th Cir. 2003); see also *Thacker v. City of Columbus*, 328 F.2d 244,253 (6th Cir. 2003).

⁴ *United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994) (citations omitted).

voluntarily, and intelligently given.⁵ Consent that is the product of official intimidation or harassment is not consent at all.⁶ This standard applies even though the individual searched is placed under arrest.⁷

This fundamental right guaranteed by the founders of this country in the Fourth Amendment thus prevents governmental agencies such as the Leelanau County Sheriff's Office generally from invading the privacy of citizens' homes without a search warrant signed by a judge after the judge has been convinced that there is probable cause to believe that a crime has been committed and a search of the house will produce evidence of that crime. The search warrant requirement serves as a check by the judiciary on the ability of police officers to break into citizens' homes arbitrarily.

If the reports we've received are true, the Leelanau County Sheriff deputies have clearly been unconstitutionally entering local residents' homes. In each case, there was no search warrant, no valid consent to the search, and no evidence of exigent circumstances.

III. The Law: Illegal Searches of People

In addition to illegally entering the private homes of Leelanau County residents, it appears that Leelanau County Sheriff deputies are illegally searching individuals. In two separate federal lawsuits brought by the ACLU of Michigan, the federal courts have clearly established that unless the police have a warrant, they cannot force individuals who are not driving a car to submit to a breathalyzer test.⁸ In fact, in the *Platte v. Thomas Township* case, the federal court issued an injunction barring officers from threatening minors who are not driving with a \$100 civil infraction if they refused to take a breath test.

It is our understanding, albeit unverified, that after the order in the *Platte* case was issued in September 2007, the Leelanau County Prosecutor's Office sent a memorandum to the Leelanau Sheriff's Office advising it of the federal court decision. Yet, inexplicably, Leelanau County Sheriff deputies continued to demand that minors submit to warrantless searches and continued to threaten minors with civil fines for refusing to submit to breathalyzer tests.

As explained above, at the July, 2009 incident in Leland, a Leelanau County Sheriff deputy barged unannounced into a closed upstairs bedroom where a young woman had been asleep for more than two hours. Ordering her to dress and come downstairs, she was informed by the officer that she and seven of her friends "needed to take a breathalyzer test." When she asked the officer "what would happen if I refused the breathalyzer . . . the cop said I would be given an MIP and a ticket for refusing the breathalyzer."

⁵ *Bumper v. North Carolina*, 391 U.S. 543 (1968); *People v. Kaigler*, 368 Mich. 281 (Mich.Sup.Ct. 1962).

⁶ *Ohio v. Robinette*, 519 U.S. 33 (1996).

⁷ *United States v. Watson*, 423 U.S. 411 (1976).

⁸ *Spencer v. City of Bay City*, 292 F.Supp.2d 932 (E.D.Mich. 2003); *Platte v. Thomas Township*, 504 F.Supp.2d 227 (E.D.Mich. 2007).

By violating clearly established law, these deputies are not only violating individual rights, but are recklessly exposing the county to potential lawsuits that could cost the county significant sums of money — money it cannot afford in these bad economic times.

IV. Recent Michigan Court of Appeals Case Makes Clear that the Warrantless Home Entries and Breathalyzer Tests Made by the Leelanau County Sheriffs Department Were Illegal Under Both the United States and Michigan Constitutions

On September 10, 2009, the Michigan Court of Appeals decided the case of *People of the City of Troy v. Chowdhury*⁹ holding, on facts very similar to those in the four situations described in this letter, that the entry into a private home without a search warrant, and the subsequent requirement that the young persons present in the home submit to a preliminary breath test (PBT) constituted violations of both the United States¹⁰ and the Michigan¹¹ Constitutions.¹² The Court affirmed a lower court decision finding an ordinance of the City of Troy authorizing such conduct by police officers unconstitutional on its face and suppressed the evidence collected from the defendant by the PBT.

This case is significant for several reasons: First, the Michigan Court of Appeals relied in part and endorsed in full the federal court decisions in *Platte* and *Spencer* mentioned above. Second, the Court declined to accept the City's argument that exigent circumstances existed because the time taken to obtain a search warrant would have been sufficient for the blood alcohol levels of the defendant to dissipate, thus resulting in the "destruction" of evidence. Third, the Court also refuted the argument of the City that a PBT was less invasive than a breathalyzer test and that it therefore did not constitute a "search" under the law. Fourth, the Court held that the City had failed to carry its burden to present evidence that the police officers could not have sought and obtained search warrants before dissipation of the minors' bodily alcohol content.

Accordingly, the *Chowdhury* decision leaves no doubt but that the pattern of conduct engaged in by the Leelanau County Sheriff's Office in such matters is a violation of the rights of citizens and residents of Leelanau County, and that evidence obtained as the result of the use of such techniques and tactics will not be permitted to support criminal prosecutions of persons accused of violating laws regulating the use of alcoholic beverages.

IV. Request for Assurances that the Leelanau County Sheriff's Office Will Respect the Privacy Rights of Residents and Train Its Officers on Fourth Amendment Protections

⁹ *People of the City of Troy v. Chowdhury*, 2009 Mich.App. Lexis 1842 (September 10, 2009).

¹⁰ U.S. Constitution, Amendment IV.

¹¹ Michigan Constitution, Article 1, Section 11.

¹² The Appellate Court in *Chowdhury* also noted that the aforementioned provision of the Michigan Constitution "in this regard is generally construed to provide the same protection as the Fourth Amendment to the United States Constitution," citing *People v. Jones*, 279 Mich.App. 86, 90-91, 755 N.W.2d 728 (2005).

We understand and support the Leelanau County Sheriff's objective of limiting underage drinking, but Leelanau County deputies are not above the law and they must act consistently with the privacy protections guaranteed by the Bill of Rights. The ACLU wishes to resolve these issues amicably rather than bringing a third federal civil rights lawsuit over what is now clearly established law. Accordingly, we ask that you:

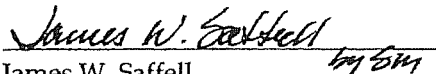
- (A) Assure us that Leelanau County Sheriff deputies will not in the future enter residents' homes without a search warrant unless they truly have the voluntary consent of the appropriate person to enter or that another recognized exception to the search warrant requirement exists;
- (B) Assure us that Leelanau County Sheriff deputies will not in the future force individuals who are not driving to take breathalyzers without a search warrant and will not threaten such individuals with a civil infraction if they refuse to take a breathalyzer; and
- (C) Institute a training program where all Leelanau County Sheriff deputies will be properly trained on the constitutional limits on entering residents' homes and administering breathalyzer tests to non-drivers.

Thank you very much for your attention to this matter. If you have any questions please contact any of the attorneys listed below.

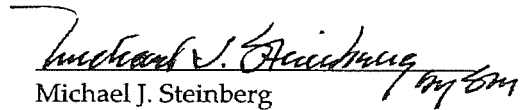
Very truly yours,



Franklin A. (Steve) Morse II
Chair, Legal Committee
Northwest Michigan Branch
American Civil Liberties Union of Michigan
4437 S. Independence Dr.
Suttons Bay, MI 49682
231-271-6193
231-271-6147 (fax)



James W. Saffell *by SM*
Cooperating Attorney
American Civil Liberties Union of Michigan
416 St. Joseph Street, PO Box 148
Suttons Bay, MI 49682
231-271-6667
231-271-6555 (fax)



Michael J. Steinberg
Legal Director
American Civil Liberties Union of Michigan
2966 Woodward Avenue
Detroit, Michigan 48103
313-578-6814 (direct dial)
313-578-6611 (fax)

cc: Joseph T. Hubbell
Leelanau County Prosecutor
8527 E. Government Center Drive
Suite 202
Suttons Bay, MI 49682

Eric Cline
Leelanau County Administrator
8527 E. Government Center Drive
Suite 101
Suttons Bay, MI 49682