Township District Court. Magistrate Daniel Goulette issued the search warrant." **(Exhibit C- Police Report)** Had, Deputy Elsey, been relying on Mather's consent, he would not have obtained a warrant, Albeit, invalid.

It is undisputed that Deputy Elsey, authored the Petition to involuntarily admit Mathers into a hospital, due to his belief she had "mental illness". Ms. Mathers was involuntarily hospitalized for five days subsequent to his petition. **(Exhibit D- Petition)** Mathers had broken her wrist, toes, and was concussed due to the accident. The hospital gave her narcotic pain medication including Vicodin and Norco which further diminished any intelligent ability to give consent to a blood draw.

Clearly, Deputy Elsey knew or should have known that Ms. Mather's was in no condition to consent to a blood draw, voluntarily and knowingly, and that is exactly why he obtain a warrant.

Under the totality of circumstances and fact set forth herein and in Defendant's first Motion and Brief to Dismiss, it is clear without any doubt that Mather's alleged consent could not be valid to take Mather's blood.

Conclusion

In sum, the blood evidence obtained from Defendant should be suppressed, the information quashed, and the charge of Operating While Intoxicated dismissed. First, Magistrate Goulette did not have the authority to issue a warrant for a crime that occurred in Shelby Township when he is a Clinton Township Magistrate. Second, the warrant obtained by Deputy Elsey was not facially valid because it does not state with particularity whose blood would be withdrawn. Third, the warrant is invalid because it does not state facts with which would establish probable cause for issuance of the warrant. Finally, the defective warrant was not cured but Mather's consent, because Mather's consent was not knowingly, voluntarily or intelligently made.

WHEREFORE, the People of the Township of Macomb respectfully requests that this Honorable Court deny Defendant's Motion because a valid search warrant was executed, consent was properly obtained, and the blood draw was constitutional.

Respectfully submitted,

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Dated: March 9, 2016

PROOF OF SERVICE

I hereby certify that I served copies of People's Response to Defendant's Motion and Brief to Suppress Evidence, Quash the Information and Dismiss the case upon the attorneys of record and/or parties on March 9, 2016 by placing the documents in postage prepaid envelopes addressed to them at their respective addresses, and depositing the envelopes in the U.S. Mail at Sterling Heights, Michigan.

Judy Franz

3. In conjunction with this motion, Defendant is filing a Motion to Suppress Evidence, Quash the Information and Dismiss the Charges against her.

4. Defendant's Motion challenges her consent for the blood draw, and is based on her contention that the consent was not knowingly and voluntarily obtained.

5. This Defense hinges on Defendant's mental state at the time of this incident, and in support of her contention that consent was not knowingly and voluntarily obtained, the Court unavoidably needs to be advised of personal and private health information which is protected by the Health Insurance Portability and Accountability Act (HIPPA).

6. Defendant requires a seal to protect this confidential and protected health information in order to support her defenses.

7. Sealing the record concerning Defendant's confidential health information from the public will not be prejudicial to the public, and will not jeopardize the safety or interests of the public.

8. The prosecution has expressed no objection to Defendant's request for the record to be sealed and will consent.

9. Sealing Defendant's personal and confidential health records, and motions and transcripts containing this confidential information in this case is the least restrictive means of protecting her privacy. MCR 8.119(I)(1)(c).

10. Pursuant to MCR 8.119(1)(a)(b)&(c), The Court may enter an Order if the Defendant has filed a written motion that identifies the specific interest to be protected, the court has made a finding of good cause in writing or on the record which specifics the ground for the Order, and there is no less restrictive means to adequately and effectively protect the specific

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influence of drugs, prescribed or otherwise, or the influence of alcohol may tip the balance in favor of finding a lack of capacity to consent to the search." U.S.C.A. Const.Amend. 4. *United States v. Montgomery*, 621 F.3d 568 (6th Cir. 2010).[1]

Furthermore, Ms. Mathers lacked the capacity to consent due to mental illness, and therefore her consent was not knowingly or voluntarily given. **Deputy Elsey, the same peace officer requesting Defendant's consent, petitioned the Macomb County Probate Court for involuntary hospitalization** based on his belief, statements of Lieutenant Briney and that of witnesses that Defendant Mathers purposely attempted to harm herself by driving her car in a ditch in a suicide attempt and further alleged in his petition:

> I believe the individual has mental illness and . . .
>
> "[A]s a result of the mental illness can be reasonably expected within the near future to intentionally or unintentionally seriously physically injure self or others, and has engaged in an act or acts or made significant threats that are substantially supportive of this expectation." **(Exhibit C- PCM 201 Petition)**.

Ms. Mathers was involuntarily hospitalized for five days, subsequent to this petition.

Moreover, Ms. Mathers was just involved in a roll-over car accident where she sustained the following painful injuries: **broken wrist, broken toes, bruising and a *concussion***. Ms. Mathers was taken to the hospital by paramedics for treatment of these injuries and **she was given narcotic pain medication including Vicodin and Norco** which further inhibited her ability and mental capacity to consent to a search of her blood. Defendant could not have knowingly and voluntarily consented to a blood draw based on these aforementioned conditions.

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[1] Defendant does not admit that she was intoxicated at the time of operating a motor vehicle.

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of the circumstances." *Lavigne*, 307 Mich App at 538; see also *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003).

Here, consent was unequivocal, specific, and freely and intelligently given. Deputy Elsey followed proper protocol when he sought consent to conduct the blood draw. He asked twice, once at the scene of the accident and again at the hospital, if Mathers would consent to the blood draw. Both times Mathers freely, intelligently, and unequivocally said she would consent and gave officers no problems and did not resist. Deputy Elsey read Mathers the specific Chemical Test Rights for a blood draw and asked if Mathers had any medical conditions that would require anti-coagulants—at which point Mathers explained that she did not. The blood draw was taken without incident. Defendant, however, argues that she could not consent because: (1) she was so intoxicated due to drugs and alcohol that she could not give consent; and (2) Deputy Elsey believed that Mathers was mentally ill and unable to consent. These arguments are without merit.

1. **Consent was valid because Defendant Mathers was not incapacitated due to drugs and alcohol**

The Defendant requests that this Court find she was so intoxicated due to drugs and alcohol that she did not have the capacity to consent. As a remedy, she seeks to suppress evidence of a blood draw that proves she was intoxicated. Disregarding the unusual nature of this argument, the fact is Mathers was not so incapacitated that the law renders consent ineffective. Defendant cites *United States v Montgomery* for the proposition that "medication or intoxication may diminish the capacity to consent to the extent it undermines an individual's grasp on the reality of what he is doing." 621 F.3d 568, 572 (6th Cir. 2010). However, *Montgomery* further explains: "Drug-induced impairment . . . is a matter of degree, making it appropriate to gauge the impact of drugs, in the context of a consent to search, on a case-by-case basis and in view of

other circumstances at play.[2]

Moreover, the *Montgomery* court explains that many factors are considered when determining voluntariness: the defendant's intelligence, age, education, length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment to coerce consent. *Id.* at 571-72.

In this case, Deputy Elsey believed that Mathers was coherent, as she was able to give her proper identifying information, was able to state that she did not need anti-coagulants for the administration of the blood draw, and because she gave officers no problems and did not resist. Even if Mathers' speech was slightly slurred, she was not acting in a manner that made Deputy Elsey believe she was incapacitated and out of touch with reality. Moreover, Mathers, a consenting adult, was never in police custody, was only asked to consent on two separate occasions, and gave consent in the absence of physical force. Defendant has presented no evidence that she was so intoxicated that she was out of touch with reality and there is nothing else to prove Mathers did anything but voluntarily consent to the blood draw. Courts must look at all the circumstances at play when determining incapacity and Deputy Elsey's observations at the time of the incident proved Mathers was competent and capable to voluntarily consent.

2. Consent was valid because Defendant Mathers was not incapacitated due to mental illness.

Defendant also argues Deputy Elsey knew or should have known that Mathers lacked the mental capacity and cognitive ability or intelligence to consent to a search. For this proposition, Defendant cites a single federal case out of the Seventh Circuit where the "mental health and capability of the person giving consent" was listed as a factor among many when determining

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[2] *Id.* In *Montgomery*, the court found the defendant was capable of consenting to a blood draw even after he was administered morphine, dulling the defendant's pain so much that he went from a 10 to a 4 on the pain scale. *Id.* at 574.

voluntary consent. *United States v Grap*, 403 F3d 439, 443 (7th Cir 2005).

First and foremost, Deputy Elsey did not know and could not have known that Mathers' accident was from her own suicidal actions until after the search warrant was retrieved and the blood draw was given. Even if somehow Deputy Elsey should have known that this accident, which looked to be caused from alcohol, was due to Mathers' mental illness, Defendant has failed to cite a single case binding on this court. Third, Defendant has failed to cite any case that proves that mental illness due to suicidal actions would prove incapacity to consent. In fact, the court in *Grap* cites *United States v Strache*, where a known suicidal defendant's voluntary consent was upheld because, in the officers' observations, the defendant acted "calm, and cooperative," the officers' exchanges with the defendant were "low-key and non-confrontational," and the defendant "appeared to be in control of his faculties and understood what was transpiring." *Id.* at 444 citing *United States v Strache*, 202 F3d 980, 986 (7th Cir 2000).

Even if for the sake of argument, mental illness based on suicidal actions constitute a permissible factor in this jurisdiction, Mathers was calm, cooperative, and non-confrontational. At all times, Mathers appeared in control of her faculties, answering all of Deputy Elsey's questions. There was no reason for Deputy Elsey to believe, at the time he obtained consent, that Mathers was mentally ill and incapable of consenting to the blood draw.

C. The results of the blood draw are admissible.

Defendant finally argues that the blood test in this case is unreliable due to a lapse in time of "almost two hours" between when the accident occurred and when the test was administered. Not only is reliability argument misguided, she has produced no evidence that proves the length of the lapse in time. Moreover, if this Court assumes Defendant's facts as alleged, Michigan courts have upheld the admissibility of blood tests administered after longer lapses in time.