

Determining Probable Cause

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A Widely Used Standard

- For issuing arrest warrants and other criminal process
 - G.S. 15A-304(d)
- For issuing search warrants
 - U.S. Const. Am. IV
 - G.S. 15A-245
- For civil license revocations
 - G.S. 20-16.5

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An Important Balance

- Setting the bar too high
 - Hamstrings law enforcement
 - Invites complaints from influential stakeholders
- Setting the bar too low
 - Infringes on citizens' freedom
 - Leads to the suppression of evidence
 - Can lead to civil liability for officers

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What Is Probable Cause?

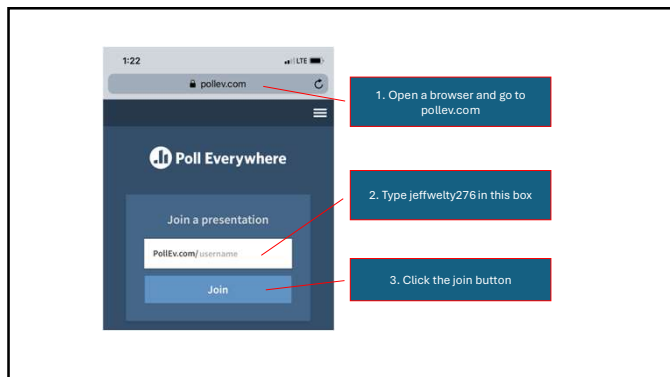
- It is a "fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules"
 - Illinois v. Gates, 462 U.S. 213 (1983)
- It is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."
 - Maryland v. Pringle, 540 U.S. 366 (2003)
- It requires a "substantial basis," Gates, or a "reasonable ground for belief of guilt," Pringle

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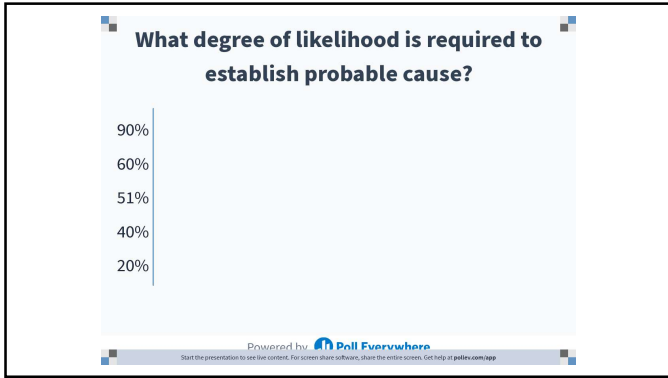
Comparing Standards

- Beyond a reasonable doubt
- Clear and convincing evidence
- Preponderance of the evidence
- Probable cause
- Reasonable suspicion

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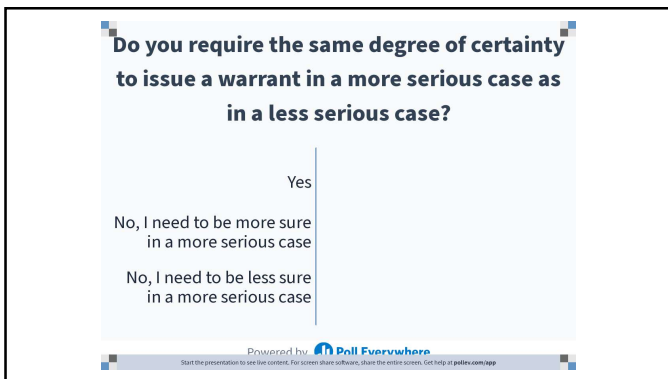
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Zacarais is a French citizen. He is in the U.S. on a student visa that recently expired. He has enrolled as a student at a plane driving school but has no prior experience in that industry. An employee of the school called the police to report that Zacarais was evasive when asked about his country of origin. French authorities say that Zacarais is an Muslim activist with a "radical background." Is there probable cause to search his home and laptop for evidence of a plot to use an plane as a weapon in some type of terrorist attack?



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Is PC a Single Standard?

- "[O]fficers need a greater quantum of evidence when making arrests for less serious crimes"
 - Pasiewicz v. Lake Co. Forest Preserve Dist., 270 F.3d 520 (7th Cir. 2001)
- "Common sense demands" that determining PC includes considering "the gravity of the investigated offense"
 - Craig S. Lerner, The Reasonableness of Probable Cause, 81 Tex. L. Rev. 951 (2003)

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What You May Consider

- Evidence that has been illegally seized
 - Cf. United States v. Calandra, 414 U.S. 338 (1974)
- Evidence that will be inadmissible at trial, such as hearsay
 - Brinegar v. United States, 338 U.S. 160 (1949)
 - N.C. R. Evid. 1101(b)(3) (rules of evidence don't apply in proceedings for issuance of search and arrest warrants)

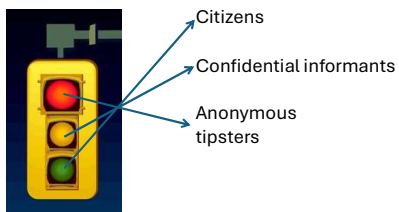
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What You May Not Consider

- Defenses such as insanity or entrapment
- Possible exceptions
 - Slam dunks, such as misdemeanor statute of limitations?
 - Self-defense?
 - Immunities from being charged, e.g., G.S. 90-113.27(c) (providing that "no employee, volunteer, or participant of [an authorized needle exchange] program . . . shall be **charged with** or prosecuted for" possessing needles and other injection supplies)

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Types of Witnesses



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A witness who does not make eye contact with me is more likely to be lying than one who looks me in the eye.

True
False

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My ability to tell whether someone is telling the truth is

Above average

Average

Below average

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Witness Credibility

- Factors approved by the courts
 - Factors concerning the content of the witness's testimony
 - Factors concerning the witness's demeanor
- What social science research shows: "For . . . decades, researchers have systematically explored human deception detection ability. The major finding is that people, both lay persons and presumed lie experts working within the legal field, are not very skilled in distinguishing between truthful and deceptive statements, with hit rates generally around the level of chance."
 - Maria Hartwig, et al., Detecting Deception Via Strategic Disclosure of Evidence, Law and Human Behavior 469 (Aug. 2005).

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Scenario 1

An officer brings an arrestee before you. The officer testifies that he saw the arrestee's vehicle cross the center line and stopped the arrestee for failure to maintain lane control.

When he approached the vehicle, he smelled marijuana and saw marijuana residue on the floorboard. He searched the vehicle and found a Ziploc bag with marijuana in the glove compartment. The bag weighs two ounces. The officer asks you to charge the arrestee with felony possession of marijuana.

You know that marijuana and hemp look and smell similar, if not identical. The officer has not conducted any testing on the THC content of the marijuana. The arrestee has not admitted that the substance is marijuana, but also has not said anything to the officer or to you about the substance being hemp.

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Is there PC to charge felony possession of marijuana?

Yes 0%

No 0%

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Scenario 2

Same as before, with the following additional facts:

- The arrestee was pulling out of a dispensary when the officer saw the traffic violation
- When questioned by the officer, the arrestee claimed that the substance was smokable hemp
- A label describing the contents as hemp was affixed to the two-ounce bag



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Is there (still) PC to charge felony possession of marijuana?

Yes 0%

No 0%

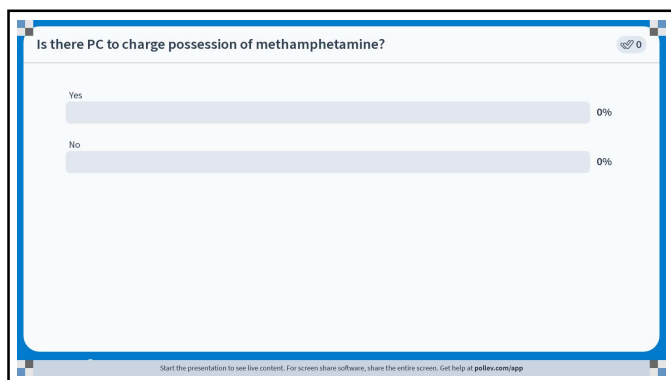
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Scenario 3

An officer brings an arrestee before you. The officer testifies that he was on patrol in a high-drug area when he saw the arrestee standing on a street corner. The officer approached and asked for consent to do a pat down, which the arrestee gave. While patting down the arrestee's pants pocket, the officer felt a lump that he immediately knew was a baggie corner full of drugs. He pulled the baggie corner out of the pocket; it contained white powder. The arrestee made no incriminating statements and the officer did not field test the powder. (His agency does not use field tests on white powder substances for officer safety reasons). He says he thinks it is "powder meth" and asks you to charge the arrestee with possession of methamphetamine.

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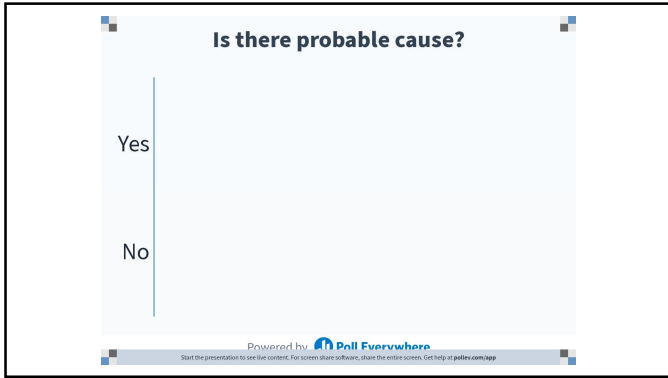


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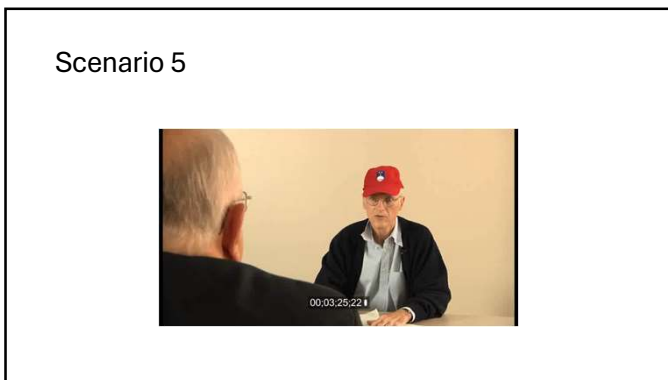
Scenario 4

An officer brings several arrestees before you. The officer testifies that he stopped a minivan for speeding. During the stop, he saw a small bag of marijuana in plain view in the front passenger footwell. There were five adults in the minivan, all of whom denied ownership of the drugs. He arrested all of the occupants for possession of marijuana.

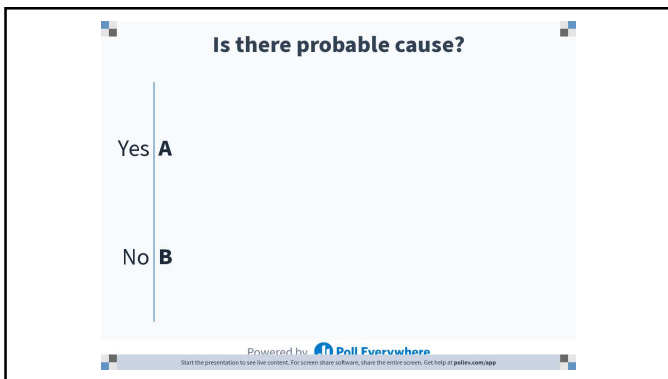
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Scenario 6




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Is there probable cause?

Yes

No

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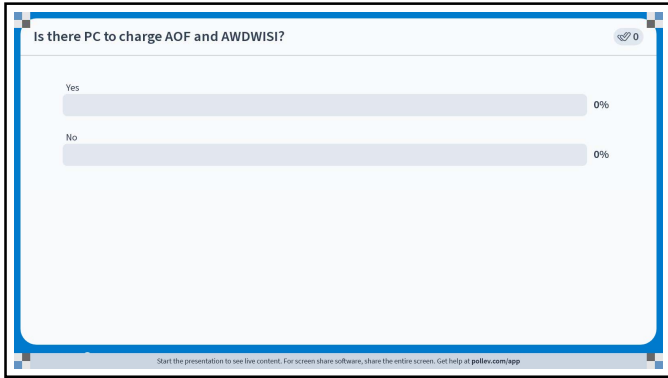
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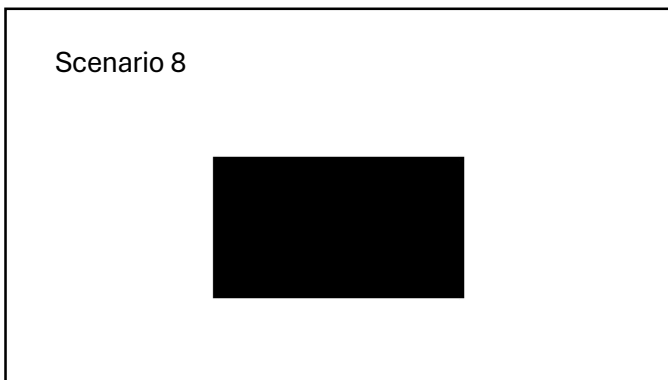
Scenario 7

An officer brings an arrestee before you. The officer testifies that the arrestee and the arrestee’s girlfriend had a disagreement about something the girlfriend posted on social media. The defendant became angry and began beating his girlfriend. Specifically, he head-butted her, causing bruising to her forehead, and he punched her in the nose, breaking it. The officer wants you to charge the defendant with AOF for the head butt and AWDWISI for the broken nose, with the arrestee’s hands being the deadly weapon.

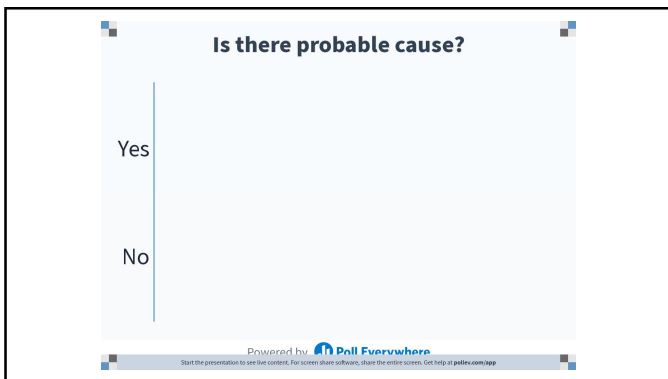
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Scenario 9




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Is there probable cause?

Yes

No

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