CONFESSIONS, SEARCH, SEIZURE, AND ARREST
A GUIDE FOR POLICE OFFICERS
AND PROSECUTORS
JUNE 2014[1]

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[2]Any opinions expressed are those of the author, and not the official position of the Washington Association of Prosecuting Attorneys, nor of any individual prosecuting attorney's office.

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CONFESSIONS

I. Fifth Amendment Right to Counsel

A. Constitutional Requirement

1. No person shall be compelled in any criminal case to be a witness against him/herself. (Fifth Amendment, U.S. Constitution)

   a. Right must be asserted to take effect.

   b. Provision prevents the defendant from being called as a witness for the prosecution in a criminal case.

   c. Provision prevents the prosecution or any witness from commenting upon the defendant's failure to take the stand or to answer questions.

   d. Limited to testimonial evidence (oral or written).

      - Protects an individual from being forced to decrypt hard drive contents. *United States v. Doe (In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*), 670 F.3d 1335 (11th Cir. 2012).

        The Fifth Amendment does not, however, prevent the defendant from being compelled to provide his key to seized encrypted digital evidence when the the defendant's act of decryption would not communicate facts of a testimonial nature to the government beyond what the defendant already has admitted to investigators. Compelling the decryption falls within the "foregone conclusion" exception to the Fifth Amendment privilege against self-incrimination where the facts conveyed already are known to the government, such that the individual "adds little or nothing to the sum total of the Government's information." *Fisher v. United States*, 425 U.S. 391, 411, 96 S.Ct. 1569, 48 L. Ed. 2d 39 (1976). For the exception to apply, the government must establish its knowledge of (1) the existence of the evidence demanded; (2) the possession or control of that evidence by the defendant; and (3) the authenticity of the evidence. *Commonwealth v. Gelfgatt*, No. SHC 11358, ___ N.E.2d ___ (Mass. Jun. 25, 2014).

2. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense. (Wash. Const. art. I, § 9).

a. State constitution is co-extensive with the federal constitution. *See State v. Russell*, 125 Wn.2d 24, 59-62, 882 P.2d 747 (1994) (refusing to extend greater protection through Const. Art. 1, § 9 than that provided by the federal constitution to the use of un-*Mirandized* statements); *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) ("[R]esort to the *Gunwall* analysis is unnecessary because this court has already held that the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment."); *Dutil v. State*, 93 Wn.2d 84, 606 P.2d 269 (1980) (state constitution provides no greater protection for minors waiving their right to remain silent than is provided by the Fifth Amendment); *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630 (1971) ("The Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution. There is no compelling justification for its expansion.").

- With increasing frequency, defendants are arguing that Const. art. I, § 9 is more protective than the Fifth Amendment. The Washington Supreme Court refused to reach the issue in *State v. Piatnitsky*, No. 87904-4, ___ Wn.2d ___, ___ P.3d ___ (May 8, 2014), stating that:

> In the alternative, Piatnitsky argues that even if his invocation of the right to silence was equivocal, article I, section 9 of our state constitution limits law enforcement to clarifying questions when such an invocation is made. *See* Pet'r's Combined Suppl. Br. at 20, 30. Piatnitsky did not raise this argument at trial, at the Court of Appeals, or in his petition for discretionary review. We decline to reach it. *See* RAP 13.7(b); *State v. Radcliffe*, 164 Wn.2d 900, 907, 194 P.3d 250 (2008).

Slip. op. at 6 n.3.

b. With respect to *Miranda*, Const. art. I, § 9 is arguably less protective than the Fifth Amendment. The Washington Supreme Court stated in numerous cases that it was unnecessary to advise a suspect that she was not obligated to answer questions. *See, e.g., State v. Brownlow*, 89 Wash. 582, 154 P. 1099 (1916); *State v. Boyer*, 61 Wn.2d 484, 486-87, 378 P.2d 936 (1963). In fact, less than a year before the United States Supreme Court decided *Miranda*, the Court indicated in *State v. Craig*, 67 Wn.2d 77, 83, 406 P.2d 599 (1965), that:

> [E]veryone suspected of crime or charged therewith has the right to voluntarily speak or act, or refrain from doing so, without having sections of the state and federal

> constitutions recited to him before he can exercise that right.... Where such voluntary act tends to link him with [a] crime ..., should we disregard his freedom to speak and to write in order to save him, the wrongdoer, from paying for his crime and forget his victims entirely? If so, we are guilty of coddling the criminal and are, in effect abrogating the laws enacted for the protection of society in its person and property.

3. Fifth Amendment right can take effect in one of two ways:

   a. Suspect states, "I do not wish to answer any questions without my lawyer" or "I do not wish to answer questions."

      i. A suspect who is being questioned by police and who is not in custody, must specifically invoke his or her right of silence and/or ask for an attorney. *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013).

   b. Suspect is taken into ***custody*** and ***interrogated*** by police officer.

      i. Once a person is taken "into custody" (advised they are under arrest and/or have their freedom of movement curtailed to the same extent as that normally associated with formal arrest) ***and*** "interrogated", any statement is presumed to be ***involuntary***.

B. History of the *Miranda* Rule

1. Police questioned arrested person at police station for four hours until he confessed. The court was concerned about psychological coercion. *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

2. Officers agreed to drop some charges if suspect would confess to kidnaping. Suspect agreed and confessed. He was convicted of kidnapping and rape. Conviction overturned by court. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

   a. Court announces rule requiring people who are taken into custody to be advised of certain rights/warnings:

      - that he has the right to remain silent

      - that any statement he does make can and will be used as evidence against him in a court of law

- that he has the right to consult with counsel before answering any questions

- that he has the right to have his counsel present during the interrogation

- that if he cannot afford an attorney, one will be appointed for him without cost to him, prior to questioning, if he so desires.

State v. Creach, 77 Wn.2d 194, 199, 461 P.2d 329 (1969).

3. Congress promptly enacted a law designed to supersede the *Miranda* requirement. It was not until 2000, that the United States Supreme Court declared that the rule announced in *Miranda* is a constitutional rule that cannot be superseded by legislation. *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

C. *Miranda* Warnings

1. Language of Warnings. The actual warnings given need not track the language of *Miranda* word for word, nor must they parrot the language in *State v. Creach*. *See Florida v. Powell*, 599 U.S. 50, 130 S. Ct. 1195, 1203, 175 L. Ed. 2d 1009 (2010) ("The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed."). In determining whether police officers adequately conveyed the four warnings, the Supreme Court applies a common sense approach, instead of a legalistic one. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*." *Id.*

a. Most Washington *Miranda* warnings include additional information for juveniles:

> If you are under the age of 18, anything you say can be used against you in a Juvenile Court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if the juvenile court decides that you are to be tried as an adult.

These additional juvenile warnings do not invalidate the *Miranda* warning. The absence of any language indicating that a defendant may appear in adult court without a juvenile court declination hearing does not invalidate a juvenile arrestee's waiver of the rights. *State v. Campos-Cerna*, 154 Wn. App. 702, 226 P.3d 185, *review denied*, 169 Wn.2d 1021 (2010).

2. **Representative of the State.** The warnings are only necessary when the person asking the questions is a representative of the State or a person acting as an agent of the State. A "representative of the State" includes individuals other than law enforcement officers. *See State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004) (park bicycle security officers, city employees who were not commissioned police officers, must give *Miranda* warnings if conducting custodial interrogation).

   a. A defendant's *Miranda* rights can be violated only by the State or a person acting as an agent of the State. *State v. Cadena*, 74 Wn.2d 185, 190-93, 443 P.2d 826 (1968), *overruled on other grounds in State v. Gosby*, 85 Wn.2d 758, 767, 539 P.2d 680 (1975); *State v. Peerson*, 62 Wn. App. 755, 816 P.2d 43 (1991), *review denied*, 118 Wn.2d 1012 (1992); *State v. Brooks*, 38 Wn. App. 256, 261-62, 684 P.2d 1371, *review denied*, 103 Wn.2d 1005 (1984).

3. **Not Always Necessary.** The warnings are not required whenever a police officer asks questions. The following are examples of when *Miranda* warnings are not necessary:

   a. When administering field sobriety tests to a DUI suspect. *Heinemann v. Whitman County*, 105 Wn.2d 796, 718 P.2d 789 (1986).

   b. When a suspect has been stopped on reasonable suspicion for an investigation (*Terry* stop). *See, e.g. State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004); *State v. Marshall*, 47 Wn. App. 322, 737 P.2d 265 (1987).

   c. When a suspect is being asked to consent to a search. (But, *Miranda* warnings will be considered in determining the voluntariness of the consent.)

   d. When suspect comes to the police station on his or her own initiative and the person is free to leave.

   e. Persons voluntarily accompanying police to the police station as material witnesses are not under custodial interrogation if their freedom of action is not curtailed to a degree associated with a formal arrest. *See State v. Green,* 91 Wn.2d 431, 94 Wn.2d 216, 588 P.2d 1370, 616 P.2d 628 (1980); *State v. Grogan*, 147 Wn. App. 511, 195 P.3d 1017 (2008)*,, review granted and case remanded,* 168 Wn.2d 1039 (2010)*, reaff'd on reconsideration,* 158 Wn. App. 272, 246 P.3d 196 (2010), *review denied,* 171 Wn.2d 1006 (2011).

   f. Questioning an individual who has not yet been arrested at his or her workplace or home.

   g. Telephone conversations. *State v. Denton*, 58 Wn. App. 251, 792 P.2d 537 (1990); *Saleh v. Fleming*, 512 F.3d 548 (9th Cir. 2008) (call to investigators that was initiated by a suspect who was in jail for an unrelated offense).

h. Exchanges with barricaded individuals. *State v. Pesa*, 75 Wn. App. 139, 876 P.2d 963 (1994), *review denied*, 125 Wn.2d 1015 (1995).

i. When suspect is taken into custody but no interrogation is anticipated. Note: CrR 3.1/CrRLJ 3.1 warnings must still be given in these circumstances.

j. When compelling the production of physical evidence such as fingerprints, handwriting samples, blood samples, urine, or line-ups.

k. Routine inquiries by a guard concerning the security status of prisoners. *Kemp v. Ryan*, 638 F.3d 1245 (9th Cir.), *cert. denied*, 132 S. Ct. 553 (2011).

4. Procedural issues.

a. Interpreters. Warnings must be given to suspect in a language that the suspect can understand. *Utilize an interpreter when necessary.*

i. Be aware that the use of an uncertified interpreter during a police interrogation may render any statements made by the defendant inadmissible for any purpose, including impeachment. *See State v. Gonzalez-Hernandez*, 122 Wn. App. 53, 92 P.3d 789 (2004).

- When warnings are read to a suspect by an interpreter, the State must demonstrate that the interpreter actually read the warnings correctly. This requirement can be met by the testimony of the interpreter, the testimony of a witness who also understands the language the interpreter spoke, or by a tape recording of the interaction coupled with the in court testimony of a competent interpreter. *Cf. State v. Morales*, 173 Wn.2d 560, 269 P.3d 263 (2012) (stating rule applicable to the statutorily required implied consent warnings).

  When using an interpreter, a prudent officer will make every possible effort to videotape or otherwise record the interview. Police, however, are not required to electronically record any custodial interrogations in Washington. *See State v. Turner*, 145 Wn. App. 899, 187 P.3d 835 (2008), *review denied*, 165 Wn.2d 1016 (2009).

- The Yakima County Prosecuting Attorney's web site contains a Spanish translation of *Miranda* and the DUI warnings? These are recordings of the 2009 DUI Arrest Report form. http://www.yakimacounty.us/pa/Miscellaneous/Spanish%20Rights.html (last visited (June 13, 2012).

- Spanish-language warnings that use the word "libre" to mean "free" or "without cost" may be inadequate to reasonably convey a suspect's *Miranda* rights. Such warnings suggest that the right to appointed counsel is contingent on the approval or a request or on the lawyer's availability. *See United States v. Botello-Rosales*, 728 F.3d 865 (9th Cir. 2013).

b. ***Miranda* Cards.** Departmental issued cards forms should be utilized.

i. Departmental issued cards are updated frequently to comply with current case law and to respond to current challenges. Officers should make sure they have the most current version of the warnings in their possession. Officers should not deviate from the language on the card. *See Lujan v. Garcia,* 734 F.3d 917 (9th Cir., Oct. 29, 2013) (custodial confession was obtained in violation of *Miranda* because detective's self-styled *Miranda* warnings did not reasonably convey to petitioner that he had right to speak with attorney present at all times); *Doody v. Ryan*, 649 F.3d 986 (9th Cir.), *cert. denied*, 132 S. Ct. 414 (2011) (*Miranda* warnings were "defective" where the officer deviated from the language of the form).

- The portion of the warnings that is specific to juveniles is not mandatory. A juvenile offender need not be advised that he may be tried in superior court rather than juvenile court. *State v. Miller*, 165 Wn. App. 385, 267 P.3d 524 (2011), *review denied*, 173 Wn.2d 1035 (2012). Thus if an officer omits the juvenile language on the grounds that the suspect is over the age of 18, and the suspect is actually younger, this omission will not render the warnings "defective."

ii. Warnings must be read slowly enough to be understood.

iii. Some warning cards, such as the one that appears below, incorporate the CrR 3.1/CrRLJ 3.1 warnings.

YOUR CONSTITUTIONAL RIGHTS – MIRANDA WARNING

1. You have the right to remain silent.
2. You have the right at this time to an attorney.
3. Anything you say can and will be used against you in a court of law.
4. If you are under the age of 18, anything you say can be used against you in a Juvenile Court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if the juvenile court decides that you are to be tried as an adult.
5. You have the right to talk to an attorney before answering any questions.
6. You have the right to have an attorney present during the questioning.
7. If you cannot afford an attorney, one will be appointed for you without cost, if you so desire.
8. You can exercise these rights at any time.
9. Do you understand these rights?

Having been informed of these rights, do you wish to talk with me? *If the answer is **YES**, then ask:*
Have any threats or promises been made to you to convince you to waive your rights?

c. **Who Must Provide the Warnings.** The warnings need not be administered by the officer who actually engages in the questioning or by an officer from the same department as the officer who engages in the questioning so long as the warnings are given by a law enforcement agent prior to the start of questioning. *See, e.g., United States v. Banner*, 356 F.3d 478 (2nd Cir. 2004); *United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir. 1995) (repeat of warnings not required even though suspect had been moved to a different room and faced a new interrogator); *State v. Fedorov*,___ Wn. App. ___, 324 P.3d 784 (2014) (officer read warnings at roadside, questioning performed by different officer at police station).

d. **Staleness.** Warnings may become "stale".

i. When resuming interrogation of a suspect who previously waived his or her *Miranda* rights, it is preferable to re-advise the suspect of his or her *Miranda* rights. There is, however, no need to rewarn suspects from time to time during a single lengthy interrogation. *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 2263, 176 L. Ed. 2d 1098 (2010).

ii. Whether prior warnings have become "stale" is judged under a totality of the circumstances approach. *United States v. Rodriquez-Preciado*, 399 F.3d 1118, 1128 (9th Cir. 2005).

iii. Statements made more than 15 hours after advising the suspect of his or her *Miranda* warnings have been found to be admissible. *See, e.g.*, *United States v. Rodriquez-Preciado*, 398 F.3d 1118, 1128 (9th Cir. 2005) (interval of 16 hours); *Puplampu v. United States*, 422 F.2d

870 (9th Cir. 1970) (interval of two days); *Maguire v. United States*, 396 F.2d 327, 331 (9th Cir. 1968) (interval of three days); *State v. Blanchey*, 75 Wn.2d 926, 454 P.2d 841 (1969), *cert. denied*, 396 U.S. 1045 (1970)(interval of four days).

iv. In deciding whether warnings have become "stale", courts will consider (1) the length of time that elapsed between the warnings and questioning; (2) whether there was an interruption in police custody between the warnings and the questioning; (3) whether the second interrogation concerned a crime unrelated to that for which the defendant was initially arrested; (4) whether the second interrogation sought information similar to that sought in the earlier interrogation; and (5) the identity of the questioners. *State v. Fedorov*,___ Wn. App. ___, 324 P.3d 784 (2014) (the passage of 3 ½ hours between the initial advice of rights and subsequent questioning did not render the warnings "stale," as the defendant remained in police custody the entire time and both officers questioned the defendant in an effort to determine the defendant's true identity).

e. **Undermining the Warnings.** Do not "downplay" the significance of the warnings.

Miranda warnings were rendered defective by the officer's deviation from a simple reading of the accurate *Miranda* waiver form and by the officer's statements that the warnings were mutually beneficial. *See Doody v. Ryan*, 649 F.3d 986 (9th Cir. 2011). The *Doody* court found the following statements to the 17-year-old suspect to be problematic: "It's only something for, for your benefit and for our benefit, okay"; "[A]ll it is, is its [sic] something that's ah for your benefit, as well as four our's [sic], okay"; "it's for your benefit, it's for your protection and for our's [sic] as well okay?"

f. **Foreign Countries.** *Miranda* procedures are applicable to United States officials' or Washington state officials' custodial interrogation of a foreign national in a foreign country in relation to a crime alleged to have been committed in the United States. *United States v. Covington*, 783 F.2d 1052, 1056 (9th Cir. 1985) ("the constitutional guarantees of the fifth amendment as well as other constitutional safeguards secure United States citizens against acts of agents of the United States whether acting at home or abroad").

A suspect's invocation of his right to an attorney under the law of the foreign jurisdiction is not grounds to suppress the suspect's later statement, obtained by a Washington police officer following a waiver of *Miranda* rights. *State v. Trochez-Jimenez*, No. 88577-0, ___ Wn.2d ___, ___ P.3d ___ (May 8,

2014) (a suspect's invocation of a right to counsel made to foreign officials based on a foreign legal source does not trigger the *Edwards* and *Roberson* rule to invalidate a subsequent waiver of Fifth Amendment rights).

D. Custodial Interrogation

Miranda Rights are only triggered when a suspect is **"in custody"** and is subjected to **"interrogation"**.

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977).

Officers may speak to a person who may be a suspect without implicating *Miranda* as long as that person remains free to leave if he refuses to cooperate.

1. Probable Cause Irrelevant. Whether the officer has probable cause to arrest a suspect is irrelevant to whether the officer was required to administer *Miranda* warnings if the suspect's freedom of movement has not been curtailed to the extent associated with formal arrest. *See, e.g., State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992).

There is no court requirement that a suspect be given *Miranda* warnings when probable cause has been reached if there is no formal arrest. *See, e.g., State v. McWatters*, 63 Wn. App. 911, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992).

An officer may question a suspect without *Miranda* even after the officer has probable cause, as long as the suspect's freedom of movement has not been curtailed to the extent associated with formal arrest. *See, e.g., State v. Short*, 113 Wn.2d 35, 40 - 41, 775 P.2d 975 (1989) (explaining that the rule in Washington is coextensive with the rule announced in *Berkemer v. McCarty*, 468 U. S. 420, 104 S. Ct. 3138, 82 L. Ed.2d 317, 335 (1984), and earlier Washington decisions that utilized a probable cause test are no longer binding); *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992).

2. Arrest Need Not Be Accelerated. There is no requirement that an officer make an arrest as soon as probable cause is present so that constitutional protections are triggered at the earliest possible moment. Statements made pre-arrest in answer to questions are not subject to suppression solely because the judge thinks it was not sporting to provide *Miranda* warnings prior to the defendant incriminating himself. *See Hoffa v. United States*, 385 U.S. 293, 310, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *United States v. Wynne*, 993 F.2d 760 (10th Cir. 1993).

3. Custody. "Custody" means:

The suspect has been placed under arrest, or the suspect's freedom of action or movement has been curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U. S. 420, 104 S. Ct. 3138, 82 L. Ed.2d 317, 335 (1984); *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986).

A suspect is "in custody" when arrested, taken into full custody, or otherwise deprived of his or her freedom of action in a "significant way." *State v. McWatters*, 63 Wn. App. 911, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992). "In custody" often means the suspect has been cuffed and is in a secure environment, even if not actually arrested.

- A barricaded individual is not in custody for *Miranda* purposes. *State v. Pesa*, 75 Wn. App. 139, 876 P.2d 963 (1994), *review denied*, 125 Wn.2d 1015 (1995).

- A suspect who, due to injuries, is confined to a hospital bed at the time of the interview is not "in custody". *State v. Butler*, 165 Wn. App. 820, 269 P.3d 315 (2012).

a. Distinguished from *Terry* Stops. "In custody" and "seizure" or "seized" (not free to leave) are not the same.

"Seizure" means "not free to leave." A *Terry* detention is a seizure, but not an arrest.

A person who is only subjected to a *Terry* routine investigative stop need not be given *Miranda* warnings prior to questioning. *State v. Huynh*, 49 Wn. App. 192, 201, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988).

Even the fact that a suspect is not "free to leave" during the course of a *Terry* or investigative stop does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less "police dominated," and does not lend

itself to deceptive interrogation tactics. *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003); *Walton*, 67 Wn. App. At 130.

i. Temporary Detention "Ripens" Into Custody. *Miranda* warnings are required when a temporary detention ripens into a custodial interrogation. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002); *State v. King*, 89 Wn. App. 612, 624-25, 949 P.2d 856 (1998) ("Because a *Terry* stop is not a custodial interrogation, an officer making a *Terry* stop need not give the *Miranda* warnings before asking the detainee to identify himself."); *State v. D.R.*, 84 Wn. App. 832, 836, 930 P.2d 350, *review denied*, 132 Wn.2d 1015 (1997) (*Miranda* safeguards apply as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest).

A temporary detention does not ripen into a custodial interrogation simply because officers have probable cause to arrest the suspect. *See State v. Short*, 113 Wn.2d 35, 40-41, 775 P.2d 458 (1989); *State v. Ustimenko*, 137 Wn. App. 109, 151 P.3d 256 (2007). Because there is no constitutional right to be arrested, a suspect cannot complain that officers postponed arresting him in order to obtain more incriminating statements or other evidence against him. *Hoffa v. United States*, 385 U.S. 293, 310, 87 S. Ct. 408, 417, 17 L. Ed. 2d 374 (1966); *United States v. Wynne*, 993 F.2d 760, 765 (10th Cir. 1993)*; Koran v. United States*, 469 F.2d 1071, 1071-72 (5th Cir. 1972).

Unfortunately, many trial court judges erroneously apply the repudiated probable cause test, and a fairly recent Division Two case further muddied the waters. *See State v. France*, 121 Wn. App. 394, 106 P.3d 762 (2004), *petition for review granted and remanded for reconsideration*, 153 Wn.2d 1008 (2005) (*Miranda* warnings were required because the officer's had probable cause to make an arrest but delayed doing so to circumvent *Miranda* requirements).

If questions asked during a *Terry* detention elicit incriminating answers, Division II of the Court of Appeals may suppress the statements if *Miranda* warnings were not provided. *See State v. France*, 129 Wn. App. 907, 120 P.3d (2005) (*Miranda* warnings were required because the officer's had probable cause to make an arrest but delayed doing so to circumvent *Miranda* requirements); *State v. France*, 121 Wn. App. 394, 88 P.3d 1003 (2004), *petition for review granted and remanded for reconsideration in light of State v. Hilliard*, 89 Wn.2d 430, 573 P.2d 22 (1977), and *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004), 153 Wn.2d 1008 (2005); *contra State v. Heritage*, 152 Wn.2d210, 95 P.3d 345 (2004); and

State v. Ustimenko, 137 Wn. App. 109, 151 P.3d 256 (2007).

This passage from *State v. Heritage* identifies the error in Division II's analysis:

> Whether a defendant was in custody for *Miranda* purposes depends on "whether the suspect reasonably supposed his freedom of action was curtailed." *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989) (citing *State v. Watkins*, 53 Wn. App. 264, 274, 766 P.2d 484 (1989)); see *Berkemer*, 468 U.S. at 442, 104 S. Ct. 3138 ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."). It thus is irrelevant whether the police had probable cause to arrest the defendant, *Harris*, 106 Wn.2d at 789-90, 725 P.2d 975 (citing *Berkemer*, 468 U.S. at 442, 104 S. Ct. 3138); whether the defendant was a "focus" of the police investigation, *Beckwith v. United States*, 425 U.S. 341, 347, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976); whether the officer subjectively believed the suspect was or was not in custody, *Berkemer*, 468 U.S. at 442, 104 S. Ct. 3138; or even whether the defendant was or was not psychologically intimidated, *Sargent*, 111 Wn.2d at 649, 762 P.2d 1127.

State v. Heritage, 114 Wn. App. 591, 598-99, 61 P.3d 1190 (2002), *aff'd*, 152 Wn.2d 210, 95 P.3d 345 (2004).

On remand, Division II affirmed the defendant's conviction. *See State v. France*, 129 Wn. App. 907, 120 P.3d 654 (2005). Division II acknowledged that the "Supreme Court reiterated the test for determining whether police contact was a custodial interrogation stating 'whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest.'" *France*, 129 Wn. App. at 910 (quoting *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). Division II, nonetheless, held that the questioning of France without *Miranda* warnings was improper as it occurred "after police told him that he could not leave until the matter was cleared up, its duration was open-ended and because police had probable cause to arrest France." *France*, 129 Wn. App. At 910-11. Division II's continued reliance on the existence of probable cause indicates that the court has not completely embraced the modern rule that was reaffirmed in *Heritage*.

b. **Focus of Investigation.** A person is not placed in the functional equivalent of custody for *Miranda* purposes simply because that person is the focus of a criminal investigation and is being questioned by authorities. *Beckwith v. United States*, 425 U.S. 341, 346-48, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976).

A police officer's "unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time." *State v. Solomon*, 114 Wn. App. 781, 790, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025 (2003), citing *Berkemer v. McCarthy*, 468 U.S. 420, 442 (1984).

Whether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489, 495 (2003), citing *State v. Knox*, 86 Wn. App. 831, 839, 939 P.2d 710 (1997) (subjective intent of police is irrelevant to the question whether a seizure occurred unless it is conveyed to the defendant). The nature of the officer's subjective suspicion is generally irrelevant to the question whether a seizure has occurred. *O'Neill*, 148 Wn.2d at 575.

c. **Factors to Be Considered.** Factors to be considered in deciding whether someone is "in custody":

- the place of the interrogation
- whether the interrogation is conducted during normal business hours or is conducted at an odd hour of the night
- the presence of friends, relatives or neutral persons at the interview
- the presence or absence of fingerprinting, photographing, and other booking procedures
- telling a suspect that s/he is under arrest
- the length and mode of the interrogation
- the existence or probable cause to make the arrest

Ferguson, 12 Wash. Prac., *Criminal Practice and Procedure* § 3309, at 858-59 (3d ed. 2004).

d. **"Reasonable Person" Standard**

Whether a suspect is "in custody" is an objective inquiry. Two discrete inquiries are essential to the determination: first, what were the

circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. For the most part, the "reasonable person" standard ignores the subjective views harbored by the person being questioned. *See generally Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994). The test, in other words, involves no consideration of the "actual mindset" of the particular suspect subjected to police questioning. *Yarborough v. Alvarado*, 541 U.S. 652, 667, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). The benefit of the objective custody analysis is that it is "designed to give clear guidance to the police. *Yarborough*, 541 U.S. at 668.

Officers are under no duty "to consider . . . contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights". *Yarborough*, 541 U.S., at 668. This means that an individual's lack of prior exposure to the criminal justice system plays no part in deciding whether an individual is"in custody" for purposes of *Miranda*. *Id.*

i. **Youth.** The reasonable person standard is modified to a "reasonable child" standard if the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer. *See J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310 (2011). "This is not to say that a child's age will be a determinative, or even a significant, factor in every case." *Id.* Merely, this is a recognition that a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. *See J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). Washington courts applied this rule prior to the issuance of the Supreme Court's 2011 decision in *J.D.B.*. *See, e.g., State v. D.R.*, 84 Wn. App. 832, 930 P.2d 350, *review denied*, 132 Wn.2d 1015 (1997) (teenage student who was questioned by a police officer in an administrative office of the school was "in custody" for *Miranda* purposes as most children that age would feel they were not free to leave the principal's office).

e. **Location of Interviews**.

i. **Police Stations.** Interviews conducted at police stations will be subjected to heightened scrutiny. *See, e.g., United States v. Jacobs*, 431 F.3d 99, 105 (3rd Cir. 2005). Factors that will be considered in determining whether an interview conducted at a police station is "custodial" include the following:

- Whether the questioner informed the person being interviewed that they are not under arrest, *see, e.g., California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); *Dyer v. Hornbeck*, 706 F.3d 1134 (9th Cir.), *cert. denied*, 134 S. Ct. 82 (2013); *State v. Grogan,* 147 Wn. App. 511, 195 P.3d 1017 (2008)*, review granted and case remanded,* 168 Wn.2d 1039 (2010), *reaff'd on reconsideration,* 158 Wn. App. 272, 246 P.3d 196 (2010), *review denied,* 171 Wn.2d 1006 (2011).

- Whether the person being interviewed was allowed to have friends, relatives or neutral persons at the interview, *see, e.g. State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007) (defendant was "in custody" where she was questioned for over 90 minutes by two police detectives at the precinct in an 8 foot by 10 foot room and the detectives refused to allow the defendant's father to accompany her in the interrogation room).

- Whether the person being interviewed voluntarily went to the police station understanding that questioning would ensue, *see, e.g.*, *United States v. Jacobs*, 431 F.3d 99, 106 (3rd Cir. 2005); *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002).

- Whether the person being interviewed was able to leave the station at the end of the interview or whether they were arrested, *see, e.g., Slwooko v. State*, 139 P.3d 593, 600 (Alaska Ct. App. 2006) ("the fact that the police arrest a suspect following an interview may shed light on otherwise ambiguous facets of the police officers' interaction with the suspect. But the fact that the police decide to arrest a person after the person has confessed to a serious crime is, of itself, unremarkable."); *Commonwealth v. Barnes*, 20 Mass. App. Ct. 748, 482 N.E.2d 865 (1985); *Roman v. State*, 475 So.2d 1228, 1231-32 (Florida 1985) (the mere fact that an arrest follows a confession does not convert what theretofore had been a noncustodial situtation into a custodial one); *State v. Grogan,* 147 Wn. App. 511, 195 P.3d 1017 (2008), *review granted and case remanded,* 168 Wn.2d 1039 (2010)*, reaff'd on reconsideration,* 158 Wn. App. 272, 246 P.3d 196 (2010), *review denied,* 171 Wn.2d 1006 (2011) (defendant allowed to leave at the end of the interview).

- Whether the person being interviewed was transported to the station by a police officer or whether they drove themself to the station, *see, e.g., State v. Pinder*, 250 Con.. 385, 736 A.2d 857, 874 (1999) (noting that defendant had been given the option or riding in his own car or with the state police).

- Whether the door to the interview room was locked and/or whether there were locked doors between the person being interviewed and the police station's entry, *see, e.g. State v. Grogan*, 147 Wn. App. 511, 195 P.3d 1017 (2008), *review granted and case remanded,* 168 Wn.2d 1039 (2010), *reaff'd on reconsideration,* 158 Wn. App. 272, 246 P.3d 196 (2010), *review denied,* 171 Wn.2d 1006 (2011) (noting defendant did not need a door key or police escort to leave the interview room); *Slwooko v. State*, 139 P.3d 593, 598-99 (Alaska Ct. App. 2006).

- How long the interview lasted. *Compare State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007) (defendant was "in custody" where she was questioned for over 90 minutes by two police detectives at the precinct in an 8 foot by 10 foot room and the detectives refused to allow the defendant's father to accompany her in the interrogation room) *with Slwooko v. State*, 139 P.3d 593, 597 (Alaska Ct. App. 2006) (suspect was not in custody where the station house interview lasted less than 30 minutes); *Roman v. State*, 475 So.2d 1228, 1231 (Florida 1985) (where questioning lasts less than 30 minutes, the length of the contact favors a finding that a reasonable person would assume that they were not in custody). *But see State v. Pinder*, 250 Conn. 385, 736 A.2d 857 (1999) (in light of the repeated reminders that the defendant was free to leave, the fact that the defendant had been at the polygraph unit for approximately 2 ½ hours doe not necessitate the conclusion that a reasonable person would believe that he could not leave).

- Whether the questioning is non-confrontational and polite or accusatorial in nature. *Slwooko v. State*, 139 P.3d 593, 597, 599 (Alaska Ct. App. 2006).

- Whether the suspect was allowed to take unaccompanied breaks. *Dyer v. Hornbeck*, 706 F.3d 1134 (9th Cir.), *cert. denied*, 134 S. Ct. 82 (2013) (two breaks taken during the interview; "During the first break Dyer got up, left the room, walked to the restroom (approximately 30 yards away), used

the restroom, and returned to the interview room.”).

ii. **Suspect’s Home**. Interviews conducted in a suspect’s home may, if imbued with a “police-dominated atmosphere”, be considered custodial for purposes of *Miranda* warnings. Factors that courts will consider in deciding whether a police-dominated atmosphere exists include:

- the number of law enforcement personnel
- the number of law enforcement agencies represented
- whether the law enforcement representatives are armed
- whether the suspect was at any point restrained, either by physical force or by threats;
- whether the suspect was isolated from others
- whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.

United States v. Craighead, 539 F.3d 1073 (9th Cir. 2008) (in-home interview was “custodial” for *Miranda* purposes where 8 armed officers, from 3 different agencies entered the suspect’s home, it was unclear whether the officer who informed the suspect that his statements were voluntary and that he was free to leave spoke for all three agencies, the suspect was escorted to a back storage room and one officer leaned with his back against the door in such a way as to block the suspect’s exit).

iii. **Jails and Prisons.** Incarcerated defendants are only “in custody” for purposes of *Miranda* when they are subjected to more than just the normal restrictions on freedom incident to incarceration. *See State v. Warner*, 125 Wn.2d 876, 885, 889 P.2d 479 (1995) (juvenile offender was not “in custody” when he made statements within the context of a sex offender treatment program at DJR’s Maple Lane center); *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992) (defendant who was on work release not “in custody” when he made statements to a prison psychologist). *Accord Howes v. Fields*, ___ U.S. ___, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012) (an inmate, who is questioned in prison about events in the outside world, is not necessarily “in custody” for *Miranda* purposes); *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010)

(incarceration does not constitute custody for *Miranda* purposes; a prisoner, who is removed from the general population and taken to a separate location for questioning, is in custody for *Miranda* purposes).

4. Interrogation. "Interrogation" involves express questioning, as well as all words or actions on the part of the police, other than those attendant to arrest and custody, that are likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); *State v. Johnson*, 48 Wn. App. 681, 739 P.2d 1209 (1987).

a. Interrogative Acts. When not dealing with express questioning, the focus is primarily upon the perception of the suspect, rather than the intent of the police. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts. *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988). In determining whether the officer should know what impact his words or acts will have, the focus is on the perceptions of the suspect, rather than on the intent of the police. *State v. Wilson*, 144 Wn. App. 166, 181 P.3d 887 (2008).

Declaratory statements intended to affect the personality and psychological makeup of the suspect may constitute interrogation. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) ("Christian burial speech"); *State v. Wilson*, 144 Wn. App. 166, 181 P.3d 887 (2008) ("death notification" to woman who was in custody for stabbing her husband).

Case law examples of interrogative questions and acts:

- Questions as "did you do it?" and "come to the truth", are interrogative in nature. *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988).

- Police officer's general statement in presence of arrestee that "God forbid a handicap child might find the murder weapon" was not the functional equivalent of interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

- Officers' statements to suspect that they "need[ed] to adhere to the search warrant and continue the sexual assault kit collection procedures" was not the functional equivalent of interrogation. *State v. Chapple*, 103 Wn. App. 299, 12 P.3d 153 (2000) (unpublished

portion of opinion).

- Officer's informing a woman who was in custody for stabbing her husband that her husband had died was the functional equivalent of interrogation. The suspect's subsequent statement that "'I didn't mean to kill him. I didn't mean to stab him", was inadmissible even though the officer's death notification was not intended to provoke a response. *State v. Wilson*, 144 Wn. App. 166, 181 P.3d 887 (2008).

- An officer's comment to a murder suspect that "sometimes we do things we normally wouldn't do and feel bad about it later . . .was redolent of the very recent and horrific murders and, thus, appeared reasonably likely to elicit an incriminating response." *In re Personal Restraint of Cross*, No. 79761-7, ___ Wn.2d ___, ___ P.3d ___ (Jun. 26, 2014).

b. **Booking Questions**. Routine questions asked during the booking process are not interrogation; general questions regarding someone's background are not interrogation; and questions normally attendant to an arrest are not interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980); *State v. Bradley*, 105 Wn.2d 898, 903-04, 719 P.2d 546 (1986); *State v. McIntyre*, 39 Wn. App. 1, 6, 691 P.2d 587 (1984). *But see State v. Denney*, 152 Wn. App. 665, 218 P.3d 633 (2009) (routine jail booking questions constitute "interrogation" for which the *Miranda* warnings are required if the questions are reasonably likely to produce an incriminating response; a standard booking question regarding recent drug use is not shielded from *Miranda* requirements when the defendant is arrested for a drug offense).

c. **Routine Inquires By Jail Staff**. Routine inquiries by a guard concerning the security status of prisoners are not interrogation. *Kemp v. Ryan*, 638 F.3d 1245 (9th Cir.), *cert. denied*, 132 S. Ct. 414 (2011).

d. **Hostage Negotiations.** Officer's negotiations with barricaded individual not the functional equivalent of interrogation. *State v. Pesa*, 75 Wn. App. 139, 876 P.2d 963 (1994), *review denied*, 125 Wn.2d 1015 (1995).

e. **Request for Physical Object**. An officer's request that a suspect hand over or reveal the location of incriminating evidence can elicit a nonverbal act that may be testimonial in nature. If the request is made after the suspect is in custody, the suspect's acts will be suppressed if performed in the absence of *Miranda* warnings. The produced evidence, however, will still be admissible if the suspect's actions were not the product of coercion. *State v. Wethered*, 110 Wn.2d 466, 755 P.2d 797 (1985).

f. **Casual Conversation.** Casual conversation is generally not the type of behavior that a police officer should know is reasonably likely to elicit an incriminating response. *United States v. Tail*, 459 F.3d 854, 858 (8th Cir. 2006) ("Polite conversation is not he functional equivalent of interrogation."); *United States v. Satterfield*, 743 F.2d 827, 849 (11th Cir. 1984) ("Incriminating statements made in the course of casual conversation are not products of a custodial interrogation.").

E. Invocation of Rights

A suspect may knowingly, voluntarily and intelligently waive his or her rights under *Miranda*.

A suspect who has waived his or her rights under *Miranda* may change his or her mind at any time.

1. **Request for Counsel.** Once a suspect requests counsel, police ***must*** cease questioning the suspect and cannot try again until counsel has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). This request must, however, be made to an officer during a custodial encounter. *See Bobby v. Dixon*, ___ U.S. ___, 132 S. Ct. 26, 29, 181 L. Ed. 2d 328 (2011) (a person's refusal to answer questions without a lawyer present during a ***non-custodial*** interview, does not prevent an officer from conducting a custodial interrogation four days later; "And this Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation.' *McNeil v. Wisconsin*, 501 U.S. 171, 182, n. 3, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991); *see also Montejo v. Louisiana*, 556 U.S. 778, 795, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) ("If the defendant is not in custody then [*Miranda* and its progeny] do not apply")."); *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (A request for counsel at arraignment or first appearance, however, does not prevent officers from contacting the defendant to request an interview.)

a. **Defendant Reinitiation.** While a defendant's reinitiation of conversation with police following a request for an attorney will resolve any Fifth Amendment issues, CrR 3.1 and CrRLJ 3.1 may still result in the suppression of any statements. The admissibility of any statements will turn upon whether officers made reasonable efforts to place the defendant into contact with an attorney prior to the resumption of questioning. *See State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012).

b. **Police Officer Reinitiate.** Police may not reinitiate questioning without counsel being present even if the suspect has consulted with an attorney in the interim. *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990).

i. **Break in Custody.** An exception to this rule clearly applies where there is a break in custody of at least two weeks in length. *See Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010). A break in custody can include incarceration in the general prison population. *Id.*

A break in custody that is contrived, pretextual, or made in bad faith may be insufficient to remove the protections of the *Edwards* rule. *State v. Jones*, 102 Wn. App. 89, 96-97, 6 P.3d 58 (2000), *review denied*, 142 Wn.2d 1018 (2001).

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); and *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), protections also may not apply to a defendant who has already been tried and convicted of the crime for which he was taken into custody and with respect to which he asserted a right to counsel. *See, e.g.*, *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010); *United States v. Arrington*, 215 F.3d 855 (8th Cir. 2000) (*Edwards* protections do not continue indefinitely just because a person remains in custody).

c. **Separate Investigation.** After a suspect invokes his or her right to counsel, police may not contact the suspect regarding a separate investigation. *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

i. The "break in custody" exception announced in *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010), will also apply in the different investigation context.

d. **Unequivocal Request.** Suspect's request for counsel must be unequivocal. *Davis v. United States*, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* A request is equivocal if further questions are needed to determine if the suspect has made a request. *State v. Smith*, 34 Wn. App. 405, 408-09, 661 P.2d 1001 (1983). "Context", however, will not transform an unambiguous invocation of the right to counsel into open-ended ambiguity. *State v. Nysta*, 168 Wn. App. 30, 275 P.3d 1162 (2012), *review denied*, 177 Wn.2d 1008 (2013).

An officer who is confronted with an equivocal or ambiguous request for counsel may simply proceed with questioning. *Davis v. United States*, 512

U.S. 452, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994); *State v. Radcliffe*, 164 Wn.2d 900, 194 P.3d 250 (2008) (repudiating the rule adopted in *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982)).

Cases have established that the following constitutes ambiguous requests for counsel:

- Suspect's statement "maybe I should talk to a lawyer," was ambiguous, and hence was not a request for counsel. *Davis v. United States*, 512 U.S. 452, 458-59, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994).

- Suspect's statement that he did not know how much trouble he was in and did not know if he needed a lawyer was an equivocal request for an attorney. *State v. Radcliffe*, 164 Wn.2d 900, 194 P.3d 250 (2008).

- A suspect's statement that he *might* want to talk to a lawyer constitutes an equivocal request for an attorney. *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985).

- Suspect's question, "[b]ut excuse me, if I am right, I can have a lawyer present through all of this, right?, was an equivocal request for an attorney. *United States v. Younger*, 398 F. 3d 1179, 1187-88 (9th Cir. 2005).

- An inquiry whether the police officer thinks that the interrogated person in custody needs an attorney does not constitute even an equivocal request for a lawyer. *Norman v. Ducharme*, 871 F.2d 1483, 1486 (9th Cir. 1989).

- "Do I need a lawyer?" or "do you think I need a lawyer" does not rise to the level of even an equivocal request for an attorney. *United States v. Ogbuehi*, 18 F.3d 807, 814 (9th Cir. 1994).

- "What time will I see a lawyer?" not an unambiguous request for counsel. *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999).

- "Maybe [I] ought to see an attorney" not a clear and unambiguous request for counsel. *United States v. Doe*, 60 F.3d 544, 546 (9th Cir. 1995).

- "Go ahead and run the lawyers" not a clear and unambiguous request for counsel. *Mincey v. Head*, 206 F.3d 1106, 1132 (11th Cir. 2000), *cert. denied*, 532 U.S. 926 (2001).

- Defendant's response of "I mean I guess I'll just have to talk to a lawyer about it and, you know, I'll mention that you guys are down here with a story", to the officer's statement that "we don't end up here with you in custody unless we've got a probable cause" *State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, 249 P.3d 857 (2013).

On the other hand, the following requests were found to be unambiguous:

- "Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?" was an unambiguous request for counsel. *Smith v. Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988).

- Suspect's questions "(1) Can I get an attorney right now, man? (2) You can have attorney right now? and (3) Well, like right now you got one?" constituted an unambiguous request. *Alvarez v. Gomez*, 185 F.3d 995, 998 (9th Cir. 1999).

- "My attorney does not want me to talk to you" in tandem with a refusal to sign written waiver of right to attorney form was an unambiguous request for counsel. *United States v. Cheely*, 36 F.3d 1439, 1448 (9th Cir. 1994).

- A suspect's statement during a custodial interrogation that "shit man I gotta talk to my lawyer," is an unequivocal invocation by the suspect of his right to an attorney. *State v. Nysta*, 168 Wn. App. 30, 275 P.3d 1162 (2012), *review denied*, 177 Wn.2d 1008 (2013).

- A murder suspect's statement that "If you're … trying to say I'm doing [sic] it I need a lawyer. I'm gonna need a lawyer because it wasn't me." *State v. Pierce*, 169 Wn. App. 533, 545-56, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012).

- A suspect's question about how to get an attorney when he lacks funds: "I can't afford a lawyer but is there any way I can get one?" *Lord v. Duckworth*, 29 F.3d 1216, 1220 (7th Cir. 1994).

- These statements that have been held to be unequivocal requests for a lawyer: "I think I should call my lawyer", "I have to get me a good lawyer, man. Can I make a phone call?", "Can I talk to a lawyer? … I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?", and "Can I have a lawyer?". *See United States v. Lee*, 413 F.3d 622, 626 (7th Cir. 2005); *Lord v. Duckworth*, 29 F.3d 1216, 221 (7th Cir. 1994).

i. **"I Think."** The case law is inconsistent on whether the phrase "I think" will render a request for counsel equivocal. *Compare Shedelbower v. Estelle*, 885 F.2d 570, 571 (9th Cir. 1989) (the statement "you" know, I'm scared now. I think I should call an attorney," was a valid invocation of the suspect's right to an attorney); *Cannady v. Dugger,* 931 F.2d 752, 754 (11th Cir. 1991) ("I think I should call my lawyer" was an unequivocal request for counsel); *United States v. Perkins*, 608 F.2d 1064, 1066 (5th Cir. 1979) ("I think I want to talk to a lawyer" was an unequivocal request for counsel) *with Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996) (suspect's statement "do you think I need a lawyer" was ambiguous within the meaning of *Davis*); *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) ("I think I need a lawyer" does not constitute an unequivocal request for counsel).

e. **Personal Right.** The Fifth Amendment right to counsel belongs to the suspect. It may not be asserted on the suspect's behalf by another. An officer engaged in a non-custodial interview with a suspect or in a post-*Miranda* waiver interview with a suspect has no obligation to terminate the interview solely because an attorney who purports to represent the suspect appears at the station house and asks to speak with his or her client. *See Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991).

4. **Right to Remain Silent.** Once a suspect expresses a desire to remain silent, the police **must** scrupulously honor the request and cease questioning. Police may, however, after the passage of a significant period of time and the provision of a fresh set of *Miranda* warnings, reapproach the defendant and resume questioning. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). A shorter break may be sufficient if, after fresh *Miranda* warnings, officers limit their questioning to a different crime than the one at issue when the suspect initially expressed a desire to remain silent. *State v. Brown*, 158 Wn. App. 49, 240 P.3d 1175 (2010), *review denied*, 171 Wn.2d 1006 (2011) (two hour break).

a. **Unequivocal Invocation.** Suspect's invocation of the right to remain silent must be unequivocal. *United States v. Burns*, 276 F.3d 439, 441-42 (8th Cir. 2002); *Simmons v. Bowersox*, 235 F.3d 1124, 1131 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 280 (2001); *cf. Davis v. United States*, 512 U.S. 452, 458-59, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994) (right to counsel).

A significant body of federal law indicates that an officer who is confronted with an equivocal or ambiguous request to remain silent may simply proceed with questioning. *See, e.g.,Simmons v. Bowersox*, 235 F.3d 1124, 1131 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 280 (2001); *Bui v. DiPaolo*, 170 F.3d 232, 239 (1st Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000); *United States v.*

Mills, 122 F.3d 346, 350-51 (7th Cir.) (citing *United States v. Banks*, 78 F.3d 1190, 1196-97 (7th Cir. 1996)), *cert. denied*, 118 S. Ct. 637 (1997); *Medina v. Singletary*, 59 F.3d 1095, 1100-01 (11th Cir. 1995), *cert. denied*, 517 U.S. 1247 (1996).

Mere silence in the face of questioning does not constitute an unambiguous invocation of the right to remain silent. In such cases, an officer may continue to question the suspect until he or she invokes. *See Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) (suspect, who after receiving *Miranda* warnings, never stated that he wanted to remain silent or that he did not want to talk with the police, and who was largely silent during the 3-hour interrogation, but near the end, answered "yes" when asked if he prayed to God to forgive him for the shooting, had not invoked his Fifth Amendment rights; statement is admissible).

Case law has held that the following are examples of equivocal assertions of the right to remain silent:

- A suspect's reply of "Nope" to the investigating officer's inquiry about making a formal statement was not an unequivocal assertion of the suspect's right to remain silent which required an end to further questioning. *James v. Marshall*, 322 F.3d 103 (1st Cir. 2003).

- A suspect's refusal to answer a question after agreeing to answer certain specific questions was not a clear and unequivocal assertion of his right to remain silent to subsequent questions. *United States v. Hurst*, 228 F.3d 751 (6th Cir. 2000).

- "I just don't think that I should say anything" and "I need somebody that I can talk to" do not constitute an unequivocal request to remain silent. *Burket v. Angelone*, 208 F.3d 172 (4th Cir.), *cert. denied*, 530 U.S. 1283 (2000).

- Silence in response to certain question not an unequivocal assertion of right to remain silent. *United States v. Mikell*, 102 F.3d 470, 476-77 (11th Cir.1996); *State v. Hodges*, 118 Wn. App. 668, 77 P.3d 375 (2003).

- "I refuse to sign that [the waiver of rights form] but I'm willing to talk to you" not an unequivocal assertion of the right to remain silent. *State v. Parra*, 96 Wn. App. 95, 99-100, 977 P.2d 1272, *review denied*, 139 Wn.2d 1010 (1999); *accord State v. Manchester*, 57 Wn. App. 765, 771, 790 P.2d 217, *review denied*, 115 Wn.2d 1019 (1990).

- “I don't want to talk about it" and "I'd rather not talk about it" are not unequivocal invocations of right to silence. *Owen v. State*, 862 So. 2d 687, 696-98 (Fla. 2003), *cert. denied*, 543 U.S. 986(2004).

- "Just take me to jail" is not unequivocal invocation of right to silence. *Ford v. State*, 801 So. 2d 318, 319-20 (Fla. 1st DCA 2001), *review denied*, 821 So. 2d 295 (Fla. 2002), *cert. denied*, 537 U.S. 1010 (2002).

- Act of tearing up waiver form is not unequivocal invocation of right to silence. *Sotolongo v. State*, 787 So. 2d 915 (Fla. 3d DCA 2001), *review denied*, 816 So. 2d 129 (Fla. 2002).

- "I can't say more than that. I need to rest." was not an unambiguous invocation of the right to remain silent. *Dowthitt v. Texas*, 931 S.W.2d 244, 257 (Tex. Crim. App. 1996).

- A defendant’s statement that it was too hard to talk on tape and that he would rather write down what happened in his own words. *State v. Piatnitsky*, No. 87904-4, ___ Wn.2d ___, ___ P.3d ___ (May 8, 2014).

Case law establishes that the following are examples of unequivocal assertions of the right to remain silent:

- Sixteen year old suspect's statement "I don't want to talk about it. I don't want to remember it . . . ." was an unequivocal assertion of her right to remain silent. *McGraw v. Holland*, 257 F.3d 513 (6th Cir. 2001).

- An arrested individual’s statement to a police officer that “I plead the Fifth” was an unequivocal invocation of the right to remain silent. *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008).

- A suspect’s statement that “I have nothing else to say” or “I have nothing further to add” was a sufficiently clear invocation of his right to remain silent. *United States v. Reid*, 211 F. Supp. 2d 366, 372 (D. Mass. 2002); *People v. Douglas*, 8 A.D.3d 980, 778 N.Y.S.2d 622, 623 (N.Y. App. Div. 2004)), *appeal denied*, 818 N.E.2d 675, 3 N.Y.3d 705, 785 N.Y.S.2d 33 (N.Y. 2004).

- "I don't want to talk to you m----- - f------" is a sufficiently clear invocation of the suspect’s right to remain silent. *United States v.*

Stewart, 51 F. Supp. 2d 1136, 1142-45 (D. Kan. 1999), *reconsidered in part*, 51 F. Supp. 2d 1147, 1162 (D. Kan. 1999), *affirmed*, 215 F.3d 1338 (10th Cir. 2000) (unpublished opinion)

- Suspect's statement, "I don't want to tell you guys anything to say about me in court," is an unambiguous and unequivocal invocation of right to remain silent. *State v. Day*, 619 N.W.2d 745, 750 (Minn. 2000).

- Suspect's statement, ""I don't want to talk about it." *In re Personal Restraint of Cross*, No. 79761-7, ___ Wn.2d ___, ___ P.3d ___ (Jun. 26, 2014).

b. **Partial Invocation.** The Ninth Circuit held that a suspect can partially invoke his right to remain silent by refusing to talk on tape. In *Arnold v. Runnels*, 421 F.3d 859 (9th Cir. 2005), the defendant orally waived his *Miranda* rights, but stated that he did not wish to talk on tape. Once the tape-recorder was turned on, the defendant's only response to questions was "no comment." The defendant's actions were held to be an unequivocal assertion of his right not to speak on tape. The tape recording was, therefore, suppressed.

F. Public Safety Exception to *Miranda*

In *New York v. Quarles*, 467 U.S. 649, 656, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984), the Supreme Court, in response to concerns for police and public safety, created a "public safety exception" to the *Miranda* requirement. In *Quarles*, the Court concluded "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." In adopting the rule, the Court indicated that it

> declined to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to . . . neutralize the volatile situation confronting them.

Qualres. At 657-58.

To determine whether the public safety exception applies, the court asks whether there was "an objectively reasonable need to protect the police or the public from any immediate danger . . . ." *Quarles*, 467 U.S. at 659.

Case law provides the following examples of when the public safety exception was appropriately invoked:

- Police properly questioned a defendant who was arrested in supermarket about the location of a loaded firearm that the police believed the defendant had discarded where a third party could gain access. *New York v. Quarles*, 467 U.S. 649, 656, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984).

- SWAT negotiators properly dispensed with *Miranda* warnings while attempting to convince a barricaded individual who had shot and killed two people, one of whom was a police officer, to voluntarily surrender. *State v. Finch*, 137 Wn.2d 792, 830, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999).

- Officer responding to a report of a stabbing, who heard a scream inside the house prior to making an emergency entry, properly asked where the stabbing victim was located prior to administering *Miranda* warnings. *State v. Richmond*, 65 Wn. App. 541, 545-46, 828 P.2d 1180 (1992).

1. Pre-Search Inquiry re Weapons or Needles.

Police officer's pre -*Miranda* question to arrested person regarding whether there is anything else in his car that might hurt the officer, that was asked after the officer discovered an unloaded .38 caliber revolver under the front seat. *United States v. Liddell*, 517 F.3d 1007 (8th Cir. 2008).

Other Eighth Circuit cases recognize that the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search. *See United States v. Luker*, 395 F.3d 830, 832 (8th Cir.), *cert. denied*, 546 U.S. 831 (2005) (public safety exception applied to post-arrest question whether there was anything in intoxicated driver's car the police should know about); *United States v. Williams*, 181 F.3d 945, 953-54 (8th Cir. 1999) (public safety exception applied to post-arrest question, "is there anything we need to be aware of" in the suspect's apartment, because the police "could not have known whether other hazardous weapons were present . . . that could cause them harm if they happened upon them unexpectedly or mishandled them in some way").

The Eighth Circuit's position is consistent with that of most other federal circuits. *See United States v. Shea*, 150 F.3d 44, 48 (1st Cir. 1998) (pre-*Miranda* question asking arrested defendant whether he had any weapons fell within the public-safety exception); *United States v. Webster*, 162 F.3d 308, 332 (5th Cir. 1998) ("The police acted constitutionally when they asked [the defendant] whether he had any needles in his pockets that could injure them during their pat down; such questioning, needed to protect the officers, does not constitute interrogation under *Miranda.*")*; United*

States v. Edwards, 885 F.2d 377, 384 (7th Cir. 1989) (public-safety exception applied to pre-*Miranda* question asking arrested defendant whether he had a gun); *United States v. Carrillo*, 16 F.3d 1046, 1049-50 (9th Cir. 1994) (pre-*Miranda* question asking arrested defendant whether he had any needles on him was within the public-safety exception); *United States v. Lackey*, 334 F.3d 1224, 1227-28 (10th Cir.), *cert. denied*, 540 U.S. 997 (2003) (public safety exception applied to post-arrest, pre-search question of "Do you have any guns or sharp objects on you?").

Not every circuit, however, agrees that such questions fall within the public-safety exception. *See, e.g., United States v. Williams*, 483 F.3d 425, 428 (6th Cir. 2007).

II. Sixth Amendment Right to Counsel

A. When Right Attaches

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

- State constitution, Const. art. I, § 22, is co-extensive with the Sixth Amendment. *See generally State v. Medlock*, 86 Wn. App. 89, 935 P.2d 693, *review denied*, 133 Wn.2d 1012 (1997).

1. Initiation of Prosecution. The Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *McNeil* v. *Wisconsin*, 501 U.S. 171, 175, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991).

- A defendant's custodial status is irrelevant to the determination of whether the Sixth Amendment right to counsel has attached.

2. Deliberate Elicitation. Once the Sixth Amendment right to counsel attaches, police may not interrogate the suspect regarding the pending charges without a waiver of *Miranda*. *Patterson v. Illinois,* 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988).

Once the Sixth Amendment right to counsel attaches, police may not deliberately elicit statements from the accused in the absence of counsel. *Fellers v. United States*, 540 U.S. 519, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004).

Deliberate-elicitation standard is not the same as the Fifth Amendment custodial interrogation standard. *Fellers*, 124 S. Ct. at 1023.

Deliberate-elicitation will not be found if the government agent "made 'no effort to stimulate conversations about the crime charged.'" *Kuhlmann v. Wilson*, 477 U.S.

436, 442, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986) (quoting *United States v. Henry*, 447 U.S. 264, 271 n.9, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980)).

Case law indicates that statements were deliberately elicited in the following circumstances:

- Officers went to defendant house, knocked on door, identified themselves when defendant answered the door and asked if they could enter the house. Defendant allowed them in. Officers then told defendant they had come to discuss his involvement in methamphetamine distribution and that a grand jury had indicted the defendant for conspiracy to distribute methamphetamine. Officers telling the defendant the names of the other individuals named in the indictment was held to have been designed to elicit an acknowledgement from defendant that he knew the other individuals. *Fellers v. United States*, 540 U.S. 519, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004).

- At least one court has held that officers do not deliberately elicit statements when the officers merely tell the defendant that they are there to serve an indictment and to take him into custody. The officers in this case did not indicate to the defendant that they were there to "discuss" anything with him, and when the defendant started to speak, the officers told him to be quiet while they read him his *Miranda* warnings. The officers also advised the defendant not to speak to them and reminded him that he had an attorney. *See Commonwealth v. Torres*, 442 Mass. 554, 813 N.E.2d 1261, 1277-78 (2004). *See also Torres v. Dennehy*, 615 F.3d 1 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 1038 (2011) (the troopers did not "deliberately elicit" information from him when visiting him in jail to read him the indictment).

- Placement of an undercover informant, who was paid on a contingency fee basis and to whom the defendant's name was mentioned by the government, in the same cell block as the indicted defendant constitutes the type of affirmative steps that violate the deliberate-elicitation test. *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980).

- A probation officer's request that the defendant tell her his version of the offense during a presentence investigation interview constituted "deliberate eliciation." *State v. Everybodytalksabout*, 161 Wn.2d 702, 166 P.3d 693 (2007).

- Tour of area of crime scene with defendant after he had invoked his Sixth Amendment right to counsel was attempt to deliberately elicit an incriminating statement. *Commonwealth v. Cornelius*, 2004 PA Super 255, 856 A.2d 62 (Pa. Super. 2004).

3. **Luck or Happenstance.** Incriminating statements obtained by "luck or happenstance" after the right to counsel has attached do not violate the Sixth Amendment. *Maine v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985).

- Recording telephone conversations the detained defendant made to his parents and the use of those recordings at trial, did not violate the defendant's Sixth Amendment right to counsel as neither parent agreed to work with the government to elicit information and the defendant was clearly informed that his conversations could be recorded. *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997, *review denied*, 174 Wn.2d 1004 (2012).

4. **Termination of Right.** The Sixth Amendment right to counsel generally ends with the dismissal of charges. An exception may apply if the dismissal of the original charges was a deliberate effort by government representatives to circumvent the Sixth Amendment rights of the accused. *See, e.g., United States v. Montgomery*, 262 F.3d 233, 246-47 (4th Cir.), *cert. denied*, 534 U.S. 1034 (2001) ("most courts to consider the question have refused to hold that 'once a defendant has been charged,' even after those charges are dismissed, the police and their agents are barred from questioning him "about the subject matter of those charges unless his counsel is present."); *State ex rel. Sims v. Perry*, 204 W. Va. 625, 515 S.E.2d 582, 584 (W. Va. 1999); *Lindsey v. United States*, 911 A.2d 824 (D.C. App. 2006).

B. Charge Specific Right

The Sixth Amendment right to counsel is offense specific. It cannot be invoked once for all future prosecutions. *McNeil* v. *Wisconsin*, 501 U.S. 171, 175, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991); *State v. Stewart*, 113 Wn.2d 462, 780 P.2d 844 (1989), *cert. denied*, 494 U.S. 1020 (1990).

Thus an individual who has been charged with robbery, may be contacted by police and interrogated about unrelated burglaries. *State v. Stewart, supra*.

1. **Unrelated Crimes.** "Unrelated crimes" in the context of the Sixth Amendment means those crimes that do not satisfy the *Blockburger* double jeopardy test. *Texas v. Cobb*, 532 U.S. 162; 121 S. Ct. 1335, 1343, 149 L. Ed. 2d 321 (2001).

   Two statutes satisfy the *Blockburger* test if proof that the defendant violated one statute would establish a violation of the other statute. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

   A defendant's statements regarding offenses for which he had not been charged are admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses.

Even though the right to counsel under the Sixth Amendment does not attach to uncharged offenses, suspects retain the ability, under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), to refuse any police questioning concerning uncharged offenses.

C. Waiver of Right

The Sixth Amendment right to counsel is no greater than the Fifth Amendment right to counsel that existed before charges are formally filed. *State v. Visitacion*, 55 Wn. App. 166, 170, 776 P.2d 986 (1989) (citing *Patterson v. Illinois*, 487 U.S. 285, 101 L. Ed. 2d 261, 108 S. Ct. 2389, 2397 (1988)).

The Sixth Amendment right to counsel can be waived by a defendant if he so chooses, and the waiver will be upheld if the State can show that the defendant knowingly, voluntarily, and intelligently waived his right to counsel. *Visitacion*, 55 Wn. App. at 170 (citing *Brewer v. Williams*, 430 U.S. 387, 404, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938).

1. Children. A child younger than 12 years of age cannot waive his or her Sixth Amendment rights. *See* RCW 13.40.140(10). The child's parent, guardian, or custodian must waive the child's Sixth Amendment rights in order for a confession to be admissible.

- If both parents are present, get a waiver from both parents.
- If the parents waive the child's Sixth Amendment rights, but the child does not wish to speak to the officer, any confession will probably be ruled inadmissible.
- For older children, the presence of the child's parents and whether the child's parents concurred in the waiver of the Sixth Amendment right to counsel are factors to be considered in the "totality of the circumstances." *Dutil v. State*, 93 Wn.2d 84, 93, 606 P.2d 269 (1980).

2. *Miranda* Warnings. *Miranda* warnings are adequate to advise an individual of his or her post-indictment Sixth Amendment right to counsel. *Patterson v. Illinois*, 487 U.S. 285, 101 L. Ed. 2d 261, 108 S. Ct. 2389, 2398 (1988); *Visitacion*, 55 Wn. App. at 170-71.

- Because it is very easy for an officer to say something that a court may later determine was designed to deliberately elicit an incriminating statement, officers are encouraged to read *Miranda* warnings to anyone who is arrested pursuant to a warrant as early into the contact as possible, regardless of whether the officer intends to interrogate the suspect.

3. **Personal Right.** The Sixth Amendment right to counsel in a criminal case belongs to the defendant, not to the attorney. Therefore, a defendant's attorney cannot prohibit law enforcement from responding to a defendant's request for contact. *See, e.g., State v. Petitclerc*, 53 Wn. App. 419, 425, 768 P.2d 516 (1989) (defense attorney's notice of appearance which contained a request that no law enforcement officials question the defendant without his attorney being present did not make it inappropriate for law enforcement officials to contact the defendant, or preclude the defendant from choosing to ignore his attorney's advice and choose to talk to law enforcement officials). When a defendant initiates contact with the police, the responding officer should administer *Miranda* warnings prior to speaking with the defendant.

a. **Attorney Ethics Rules.** While police officers may speak with a represented defendant if the defendant initiates contact, prosecutors may not. *See* RPC 4.2;, *United States v. Jamil,* 546 F. Supp. 646, 652 (E.D. Ny. 1982)*, rev'd on other grounds*, 707 F.2d 638 (2nd Cir. 1983) ("[t]here is unanimous and fully documented authority for the proposition that prosecutors are no less subject to the prohibition against communication with a represented person than are members of the private bar."); *State v. Morgan*, 231 Kan. 472, 646 P.2d 1064, 1070 (1982) ("The prosecutor is a lawyer first; a law enforcement officer second. The provisions of the Code of Professional Responsibility are as applicable to him as they are to all lawyers."); *but see State v. Nicholson*, 77 Wn.2d 415, 463 P.2d 633 (1969) (former ethics Cannon 9 only applies to civil cases and does not apply to prosecutors).

The focus of RPC 4.2 is on the obligation of attorneys to respect the relationship of the adverse party and the party's attorney. *See United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993). The right belongs to the party's attorney, not the party, and the party cannot waive the application of the no-contact rule — only the party's attorney can waive the attorney's right to be present during a communication between the attorney's client and opposing counsel. *Id.*; *State v. Miller*, 600 N.W.2d 457, 464 (Minn. 1999). The fact that a defendant initiated contact does not excuse a prosecutor from adherence to RPC 4.2. *See State v. Ford*, 793 P.2d 397, 400 (Utah App. 1990); *People v. Green*, 405 Mich. 273, 274 N.W.2d 448, 453 (1979).

A prosecutor may not order a police officer to do what the prosecutor may not do. *See* RPC 5.3(c)(1); *State v. Miller*, 600 N.W.2d 457, 464 (1999) (prosecutors will be responsible for a police officer's contact with a represented individual if the prosecutor "orders or, with knowledge of the specific conduct, ratifies the conduct involved.").

i. **Sanctions for Violating the Rule.** A violation of RPC 4.2 may subject a prosecuting attorney to discipline by the bar. *See, e.g., People v. Green*, 405 Mich. 273, 274 N.W.2d 448, 454-455 (1979).

Statements obtained in violation of RPC 4.2 may be suppressed. *See*, *e.g.*, *United States v. Hammad*, 858 F.2d 834, 840-41 (2nd Cir. 1988); *State v. Miller*, 600 N.W.2d 457, 467-68 (Minn. 1999); *contra State v. Nicholson*, 77 Wn.2d 415, 419, 463 P.2d 633 (1969); *State v. Morgan*, 231 Kan. 472, 646 P.2d 1064, 1070 (1982) (suppression is never a remedy for a violation of RPC 4.2); *People v. Green*, 405 Mich. 273, 274 N.W.2d 448, 454-455 (1979) (suppression is never a remedy for a violation of RPC 4.2).

4. **Appointment of a Lawyer.** The appointment of an attorney at first appearance or arraignment does not bar an officer from contacting a defendant for an interview. The officer must, however, immediately tender *Miranda* warnings and must obtain a voluntary waiver of the defendant's right to remain silent and right to have an attorney present for the interview. *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009).

III. Court Rule Right to Counsel

A. CrR 3.1(c)(1) and CrRLJ 3.1(c)(1)

1. **Immediate Notification of Right to an Attorney.** CrR 3.1(c) and CrRLJ 3.1(c) both provide a pre-charging, post-arrest right of contact with an lawyer. The rules have two parts.

   The first duty under the rule is to advise the arrested person of the right to a lawyer. This advise must be given "immediately." *State v. Templeton*, 148 Wn.2d 193, 210-11, 59 P.3d 632 (2002). An arrested person must be notified as soon as practicable after arrest of his/her court rule right to an attorney. *See* CrR 3.1(c)(1) and CrRLJ 3.1(c)(1).

   This court rule right is not the same as an arrested person's *Miranda* rights. The *Miranda* warnings contained on some departmental issued cards will not adequately advise a suspect of his or her court rule rights to counsel. *See generally State v. Templeton*, 148 Wn.2d 193, 218-19, 59 P.3d 632 (2002) (removal of the phrase "at this time" from the phrase "'[y]ou have the right at this time to an attorney of your own choosing and to have him or her present before or during questioning," does not adequately convey the suspect's CrR 3.1/CrRLJ 3.1 rights).

   - The court rule right to counsel may appear on the departmental issued card as a separate warning.

2. **Telephone Contact with Lawyer.** The second duty under CrR 3.1(c) and CrRLJ 3.1(c) is to place the person in custody with access to a telephone and the telephone number of an attorney "at the earliest opportunity." No Washington case has

adopted a specific test for determining what constitutes the "earliest opportunity." Instead, courts consider the totality of the circumstances.

Cases in which the defendant was denied access to a phone upon arrival at the police station, courts have easily found that the court rule right to counsel has been violated. *See, e.g., State v. Copeland*, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996) (defendant's court rule right to an attorney was violated when he was not provided access to a phone upon being taken to the Kent City Jail); *Seattle v. Orwick*, 113 Wn.2d 823, 784 P.2d 161 (1989) (defendant's right of access to an attorney was violated when he was refused access to a phone upon arrival at the police station). Even in these circumstances, contact need not be instantaneous. Police are allowed in certain circumstances to complete the process of booking a suspect into jail or to execute a search warrant before they provide access to a telephone and the number for a public defender. *State v. Mullins*, 158 Wn. App. 360, 369-70, 241 P.3d 456 (2010), *review denied*, 171 Wn.2d 1006 (2011) ("the rule does not necessarily compel police to postpone routine prebooking procedures or the execution of a search warrant when an arrestee expresses the desire to consult an attorney").

A delay in providing the defendant with telephonic contact with an attorney may occur when the defendant is treated at a hospital before booking. Officers should note availability of a government issued cell phone, hospital rules governing use of cell phones in treatment areas, and other barriers to making the phone call. Currently, there are no Washington appellate court cases that addresses what is the "earliest opportunity" while someone is receiving medical treatment. *But see State v. Schulze*, 116 Wn.2d 154, 804 P.2d 566 (1991) (assuming a violation occurred when defendant was not provided with access to a phone in the emergency room, but finding that neither dismissal of charges or suppression of blood test was an appropriate remedy).

B. Practical Aspects of the Court Rule Right to Counsel

1. Access to Telephone and Telephone Numbers. The arrested person must be given access to a telephone and the telephone number of the public defender.

- In most cases, police are not required to postpone routine prebooking procedures or the execution of a search warrant when an arrestee expresses the desire to consult an attorney.

- In DUI cases, police must facilitate a telephone call prior to administering the alcohol test. *See State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893, *vacated and remanded*, 449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240, *aff'd on remand*, 94 Wn.2d 858, 620 P.2d 999 (1980), *overruled on other grounds by City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991). An extended delay is not required. If an accused has been allowed reasonable access and has made no contact with counsel, but the test can no longer be

delayed, the driver must decide on his own whether he will submit to the test. *State v. Staeheli*, 102 Wn.2d 305, 310, 685 P.2d 591 (1984); *Seattle v. Koch*, 53 Wn. App. 352, 357, 767 P.2d 143, *review denied*, 112 Wn.2d 1022 (1989).

- There may be other situations in which the booking process should be interrupted. An example would be if the booking process is unduly protracted.

State v. Mullins, 158 Wn. App. 360, 366, 241 P.3d 456 (2010), *review denied*, 171 Wn.2d 1006 (2011).

2. **Actual Contact.** Actual contact with an attorney is not required. *Bellevue v. Ohlson*, 60 Wn. App. 485, 803 P.2d 1346 (1991). The rules require an opportunity, rather than actual communication with an attorney. Thus reasonable, albeit, unsuccessful attempts to contact counsel will satisfy the rule. *Airway Heights v. Dilley*, 45 Wn. App. 87, 94, 724 P.2d 407 (1986).

   - Failure of police to allow defendant to make an additional call after receiving no answer from a 10 p.m. call to the attorney's office violated this court rule. *Tacoma v. Myhre*, 32 Wn. App. 661, 648 P.2d 912 (1982).

   - Rule satisfied where defendant phoned his personal attorney and three public defenders, but was unable to actually reach an attorney to advise him. *Bellevue v. Ohlson*, 60 Wn. App. 485, 803 P.2d 1346 (1991).

   - Rule satisfied when the defendant was provided with the phone number of the regularly appointed public defender for the city, as well as another attorney. When attempts to call these attorneys failed, the defendant did not request any further attempts when the officer asked him if there was anyone else whom the defendant wished to have called. *Airway Heights v. Dilley*, 45 Wn. App. 87, 94, 724 P.2d 407 (1986).

   - Rule violated when the defendant, after unequivocally requesting an attorney after normal business hours, was booked into jail. Although the defendant had the ability to make free calls to the public defender's office business line and those lines are posted in the jail, the business lines are not monitored after hours. *State v. Pierce*, 169 Wn. App. 533, 547-550, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012).

3. **Choice of Attorney.** The arrested person must be provided with any other means to place him/her in communication with a lawyer." CrR 3.1 (c)(2). This does not mean the arrested person must be placed in contact with his or her personal attorney. *Seattle v. Sandholm*, 65 Wn. App. 747, 829 P.2d 747 (1992).

4. **Reasonable Privacy.** The arrested person must be given reasonable privacy during

the phone call. *Seattle v. Koch*, 53 Wn. App. 352, 767 P.2d 143, *review denied*, 112 Wn.2d 1022 (1989). This does not mean that in every case where an arrestee requests additional privacy, the police must grant the request. Whether the request should be granted will depend on a number of factors such as the unique security and safety problems presented by a particularly uncooperative, intoxicated defendant. *Koch*, 53 Wn. App. at 358 n. 7.

If an arrested person requests additional privacy, the "reasonableness" of the privacy provided will depend upon the demeanor of the defendant, the physical set up of the room, whether physical restraints were necessary, and numerous other factors. Officers should explain what efforts they made to preserve privacy, whether the arrested person requested even greater privacy, what action the officer took in response to the request for privacy, and what factors were considered in formulating the response to the request for privacy.

Washington's appellate courts have not explained further the rule announced in *Koch*. Other states, however, have issued cases related to their court rule or statutory right to counsel.[3] These cases provide the following guidance:

- An arrestee's right to confer with counsel is not violated merely because the arresting officer maintains physical proximity to the arrestee.

    - The arrestee's right of privacy was not violated when the officer stood within 1 1/2 feet of arrestee because the handcuffed arrestee could not keep the phone's handset by his ear without assistance, there were valid reasons for not removing the handcuffs, and using the phone's speaker option would have allowed the call to be heard throughout the substation; officer could hear arrestee's side of the conversation but not the attorney's responses. *Alexander v. Municipality of Anchorage*, 15 P.3d 269 (Alas. App. 2000).

    - The arrestee's right of privacy was not violated when the officer stood ten to fifteen feet away during the arrestee's conversation with the attorney. *Mangiapane v. Anchorage*, 974 P.2d 427 (Alaska App.

[3]One caveat regarding reliance on out-of-state cases. Oregon has the most restrictive rule in the country. In Oregon, the fact that an observation period required by rule or statute would have to be terminated is insufficient, standing alone, to justify an officer's proximity during an arrestee's consultation with his or her lawyer. This rule is based upon the Oregon Constitution rather than on a statutory right. The Oregon Constitution, unlike Washington's Constitution, confers a Sixth Amendment-like right of attorney before the filing of charges. *State v. Durbin*, 335 Ore. 183, 63 P.3d 576 (2003). Even the Oregon rule has some limits. *See, e.g., State v. Matviyenko*, 212 Ore. App. 125, 130, 157 P.3d 268 (2007) ("[W]e acknowledge that an officer may be justified in remaining in the room until contact with an attorney is made in order to ensure that the suspect actually calls an attorney rather than using the telephone for some inappropriate purpose.").

1999).

- Once defendant began talking to counsel, he had a right to confidentiality so long as it did not impair the investigation or the accuracy of a subsequent breath test. *State v. Holland*, 147 Ariz. 453, 711 P.2d 592, 595 (1985).

- A mere desire to finish an already begun 15 minute mouth check will probably be an insufficient basis to "hover" over an arrestee, unless the arrival at the breath test machine has been significantly delayed due to traffic, the need to make arrangements for the disposition of the defendant's vehicle, or other similar event, such that any additional delay in administering the test could compromise the validity of any result.

5. **Length of Contact.** Once contact is made with an attorney, reasonable limitations may be placed upon the length of the consultation. In DUI cases, Oregon courts have held that a

> "15-minute opportunity to call [an attorney] may satisfy the liberty interest in communication. *Cf. State v. Durbin*, 335 Ore. 183, 193, 63 P3d 576 (2003) (in the DUI context, where an arrested driver has an Article I, section 11, "right to a reasonable opportunity to consult privately with counsel," a 15-minute opportunity "normally will be sufficient for a person to contact and consult with a lawyer after that person invokes the right to counsel").

Staglin v. Driver & Motor Vehicle Servs. Div. (DMV), 227 Ore. App. 240, 205 P.3d 90 (2009). *See also State v. Tyon*, 226 Ore. App. 428, 204 P.3d 106 (2009).

6. **Physical Presence of Attorney**. Need not delay alcohol or filed sobriety testing to wait for attorney. *State v. Staeheli*, 102 Wn.2d 305, 309, 685 P.2d 591 (1984). But, "[i]f the defendant requests the assistance of counsel, access to counsel must be provided before administering the test." *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824, 831, 675 P.2d 599 (1984).

a. If the attorney that the client called actually gets to the station house, police may not mislead the attorney about his client's whereabouts. *Seattle v. Box*, 29 Wn. App. 109, 627 P.2d 584 (1981).

b. If an attorney arrives at the station house on his or her own, without being called by the arrestee, an officer is not required to delay the administration of the test until after the unretained attorney has contact with the arrestee. *Cf. Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (Fifth Amendment); *State v. Earls*, 116 Wn.2d 364, 372-805 P.2d 211 (1991) (Fifth Amendment and Const. art. I, § 9).

C. Waiver

A suspect may waive his rights under CrR 3.1 and/or CrRLJ 3.1 by voluntarily initiating communication with the police. *State v. Mullins*, 158 Wn. App. 360, 366, 241 P.3d 456 (2010), *review denied*, 171 Wn.2d 1006 (2011).

D. Violations

1. Not a constitutional error so the admission of evidence obtained in violation of the court rule right is tested under the constitutional harmless error standard. *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632 (2002).

2. Evidence obtained in violation of the court rule right will only be suppressed if the defendant can demonstrate prejudice arising from the violation.

   Defendants will be unable to demonstrate prejudice when the only advice an attorney can give is to submit to a compelled collection of evidence. *State v. Copeland*, 130 Wn.2d 244, 281-83, 922 P.2d 1304 (1996) (even assuming the court rule right to counsel was violated when the defendant was not given access to an attorney prior to the collection of blood and hair pursuant to a search warrant, tests performed on the blood and hair are not subject to suppression); *State v. Schulze*, 116 Wn.2d 154, 804 P.2d 566 (1991) (even assuming that the court rule right to counsel was violated when the defendant was not permitted to contact his attorney prior to the mandatory blood draw, the results of the blood test are not subject to suppression).

IV. Consular Notification

A. Treaty Obligations in Criminal Cases

1. **Vienna Convention on Consular Relations.** In 1963, Vienna Convention on Consular Relations (Vienna Convention), 21 U.S.T. 77, 596 U.N.T.S. 261, T.I.A.S. No. 6820 (April 24, 1963), was completed and countries throughout the world began ratifying it. The Vienna Convention entered into full force with respect to the United States of America on December 24, 1972.

   a. To facilitate the foreign government's ability to protect its nationals, Article 36(1)(b) of the Vienna Convention provides that any person who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" must be informed that consular officials of his or her country may be notified about the detention. If the detainee "so requests," the consular officials must be notified of the detention "without delay". Vienna Convention, art. 36(1)(b), 21 U.S.T., at 101.

   b. Other specifically enumerated functions include "helping and assisting nationals . . . of the sending State", "safeguarding the interests of nationals

> . . . of the sending State in cases of succession *mortis causa* in the territory of the receiving State . . . .", and "safe-guarding the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons." Vienna Convention, art. 5(e), (g) and (h), 21 U.S.T., at 83.

2. **Bilateral Agreements.** In addition to the Vienna Convention, the United States has entered into numerous treaties with specific countries ("bilateral agreements") to address the conduct of consular relations. Some of the bilateral consular agreements require that consular officials be notified of the arrest and/or detention of one of their nationals regardless of their national's request. These bilateral agreements are commonly called "mandatory notification" agreements and the countries to which they pertain are called "mandatory notification countries." Countries and jurisdictions with mandatory notifications may be found on the U.S. Department of State's web site at http://travel.state.gov/content/travel/english/consularnotification/countries-and-jurisdictions-with-mandatory-notifications.html (Last visited Jul. 1, 2014).

3. **Binding Nature.** The obligations of consular notification and access contained in the Vienna Convention and relevant bilateral agreements are binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause in Article VI of the United States Constitution, which provides that

> all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Const. Art. II, cl. 2.

a. A violation of the duties imposed by the Vienna Convention and the various bilateral agreements are not constitutional violations. Remedies for violations of the Vienna Convention, therefore, does not include the suppression of evidence obtained following the violation.

i. The United States has been condemned by the International Court of Justice in the Hague for not fulfilling its obligations under the Vienna Convention. The International Court of Justice's decision in *Mexico v. United States*, issued March 31, 2004,[4] requires the United States to review all violations and to fashion a remedy.

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[4]The International Court of Justice's opinion in *Mexico v. United States* may be found at http://212.153.43.18/icjwww/idocket/imus/imusframe.htm.

ii. The International Court's decision in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.),* 2004 I.C.J. 12 is not directly enforceable in state courts. *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

iii. The federal circuit courts have split with respect to an alien's right to maintain an action for money damages under 42 U.S.C. § 1983, against a police officer who failed to advise the alien of the right to have their consular official notified that the alien has been detained. *Compare Gandara v. Bennett,* 528 F.3d 823 (11th Cir. 2008); *De Los Santos Mora v. New York*, 524 F.3d 183 (2nd Cir. 2008), *and Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007) (may not maintain a § 1983 action), *with Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (may maintain a § 1983 action). The United State's *Medellin* decision does not resolve this split as the Court found it "unnecessary to resolve whether the Vienna Convention . . . . grants Medellin individually enforceable rights."

B. Summary of Obligations in Criminal Cases

1. When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified.

   a. For the purposes of consular notification, a "foreign national" is any person who is not a U.S. citizen. The term "foreign national" may be used interchangeably with the word "alien". A person with a U.S. "green card" is considered a "foreign national" for purposes of consular notification.

   b. "Federal law requires that most foreign nationals carry immigration documents with them at all times while in the United States. See 8 U.S.C. § 1304(e). However, arresting officers will frequently come across aliens without documentation identifying their country of nationality. It is the arresting officer's responsibility to inquire about a person's nationality if there is any reason to believe that he or she is not a U.S. citizen. In all cases where an arrestee claims to be a non-U.S. citizen, arresting officers should follow the appropriate consular notification procedures, even if the arrestee's claim cannot be verified by documentation." Consular Notification and Access, at 13 (4th ed. Mar. 2014).[5]

2. In some cases, the nearest consular officials *must* be notified of the arrest or detention of a foreign national, **regardless of the national's wishes**.

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[5]United States Department of State Consular Notification and Access (4th ed. March 2014) is available at http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAManual_Feb2014.pdf (Last visited Jul. 1, 2014).

3. Consular officials are entitled to access to their nationals in detention, and are entitled to provide consular assistance.

4. When a government official becomes aware of the death of a foreign national, consular officials must be notified.

C. Procedure to Follow When a Foreign National is Arrested or Detained

1. Prior to any station house interrogation or, if no interrogation is being undertaken prior to booking, at booking, determine the foreign national's country. In the absence of other information, assume this is the country on whose passport or other travel document the foreign national travels.

   a. After consultation with various minority communities, the decision was made by some local police agencies to not have officers ask individuals upon initial contact if they are a foreign national. In light of the International Court of Justice's opinion in *Mexico v. United States*, it is strongly suggested that prior to any station house interrogation, after giving a suspect *Miranda* warnings, the officer should ask if the suspect is a United States citizen. If the answer is no, the officer should ask, What is your citizenship?". The answers to both questions should be documented in the police report.

      i. If the citizenship question is not routinely incorporated into station house interrogations, officers must consider their obligations under the Vienna Convention whenever a language barrier exists, if the suspect produces a foreign passport or similar document as identification.

         The State Department advises the following:

         > If you do not routinely ask each person you arrest whether he or she is a U.S. citizen, you will need to develop other procedures for determining whether you have arrested or detained a foreign national and for complying with consular notification requirements. A driver's license issued in the United States will not normally provide information sufficient to indicate whether the license holder is a U.S. citizen. Nor does the fact that a person has a social security number indicate that the person is necessarily a U.S. citizen. A foreign national may present as identification a foreign passport or consular identity card issued by his government or an alien registration document issued by the U.S. Government. If the person presents a document that indicates birth

> outside the United States, or claims to have been born outside the United States, he or she may be a foreign national. (Most, but not all, persons born in the United States are U.S. citizens; most, but not all, persons born outside the United States are not U.S. citizens, but a person born outside the United States whose mother or father is a U.S. citizen may be a U.S. citizen, as will a person born outside the United States who has become naturalized as a U.S. citizen.) Unfamiliarity with English may also indicate foreign nationality, though some U.S. citizens do not speak English. Such indicators could be a basis for asking the person whether he or she is a foreign national. You should keep copies of any identification presented and note in the file the basis on which you concluded the person was or was not a foreign national.

Consular Notification and Access, at 13 (4th ed. Mar, 2014).

ii. If an arrested person claims to be a foreign national but has no "proof", the State Department recommends that the individual be advised of the person's right to have the consulate officer of the person's country notified of the person's detention.

b. A question regarding citizenship should be added to all jail booking forms. If a detainee refuses to answer the citizenship question or if a detainee claims to be a United States citizen, a note must be made of the answer and no further action needs to be taken unless the detainee is in possession of a passport issued by a mandatory notification country.

2. Provide the correct notice to the foreign national without delay.

a. The International Court of Justice indicates that "without delay" means that the detainee is advised of his or her right to consular notification as soon as there are grounds for the officer to think that the detainee is probably a foreign national. *Mexico v. United States*, at ¶ 88.

b. If the foreign national's country is ***not*** on the mandatory notification list the interrogating officer or jail booking officer must offer, without delay, to notify the foreign national's consular officials of the arrest/detention. The

language suggested by the State Department for the notice is as follows[6]:

> As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?

c. If the foreign national's country ***is*** on the list of mandatory notification countries the officer should tell the foreign national that the officer will be notifying the consular official of the individual's detention. The language suggested by the State Department for the notice[7] is as follows:

> Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.

3. Notify the nearest consular official of the foreign national's country without delay if the detainee is from a mandatory notification country or if the detainee requests that notice be given.

   a. Easiest manner of notification is sending a fax message to the consular official's office.

      i. Fax notifications can be sent 24 hours a day.

      ii. Fax machines produce a receipt that notice was provided.

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[6]The State Department has translations of the advisements in Arabic, Cambodian, Chinese, Creole, Farsi, French, German, Greek, Hindi, Italian, Japanese, Korean, Lao, Polish, Portuguese, Russian, Spanish, Tagalog, Thai, and Vietnamese on the internet at http://travel.state.gov/content/travel/english/consularnotification.html (Last visited Jul. 1, 2014).

[7]See fn. 7.

iii. Current fax numbers may be obtained on the State Department's web site: http://travel.state.gov/content/travel/english/consularnotification.html (Last visited Jul. 1, 2014).

iv. Suggested fax form available on the State Department's web site http://travel.state.gov/content/dam/travel/cna_pdf/CNA%20Fax%20Sheet_ArrestOrDetention.pdf (Last visited Jul 1, 2014).

4. A written record should be made of the date and time that the foreign national was informed of the option of consular notification, whether the foreign national requested that consular officials be notified, the date and time notification was sent to the consular officer of the detention or arrest, any confirmation of receipt of notification received from the consular officer, and a record of any actual contact between the foreign national and a consular officer.

D. Answers to Frequently Asked Questions

The following is a list of questions that are likely to occur to officers and prosecutors. Few of these questions have been addressed yet by the courts. The answers, therefore, occasionally represent the author's best guess in light of the intended purpose of consular notification and the Department of State's guidance.

1. If law enforcement officials of the foreign national's government are helping with the investigation, should I still go through the process of notifying consular officers?

   Yes. It is important to distinguish between a government's consular officers and other officials, such as law enforcement officers, who have different functions and responsibilities. Even if law enforcement officials of the foreign national's country are aware of the detention and are helping to investigate the crime in which the foreign national allegedly was involved, it is still important to ensure that consular officers are made aware of the arrest or detention when required.

2. If an arrested foreign national asks to have his or her consul notified of the detention during an interrogation what should the officer do?

   Arrested foreign nationals who are interrogated at the police station prior to booking should generally be advised of their right to consular access at the same time they are advised of their *Miranda* warnings. *See Cardona v. State*, 973 S.W.2d 412, 417-18 (Tex. App. 1998); *Mexico v. United States.* If possible, a fax should be sent to the closest consulate or embassy immediately if the foreign national requests that notification be made. The foreign national should be informed once notification is sent.

   There is no legal requirement that interrogation be suspended following the sending

of the fax and/or the placing of a phone call[8], but as a matter of courtesy and to avoid misunderstandings it may be appropriate to suspend interrogation if the foreign national indicates that s/he desires to cease answering questions until s/he hears from a consular official. If interrogation is suspended at the request of a foreign national pending contact with a consular official, the appropriate consular official should be contacted and his or her intentions with respect to visiting or calling the detainee should be ascertained, if possible, and relayed to the foreign national. The foreign national may then be asked whether he/she is prepared for interrogation to resume. If the consular official cannot be reached, further interrogation should only occur if the foreign national initiates contact.

3. If I have a foreign national who is hospitalized or quarantined, do I have to provide consular notification?

   Usually. If the foreign national is hospitalized or quarantined pursuant to governmental authority (law enforcement, judicial, or administrative) and is not free to leave, under the Vienna Convention on Consular Relations and most bilateral agreements he or she must be treated like a foreign national in detention, and appropriate notification must be provided. Consular officers must be notified of the detention (regardless of the foreign national's wishes) if the detention occurs in circumstances indicating that the appointment of a guardian for the foreign national is required (e.g., if the detention is the result of an involuntary commitment due to mental illness).

4. Should I notify the consulate any time I detain a foreign national who is a minor? What if the minor is unaccompanied and I am unable to locate the parent or guardian?

   You must notify the nearest consulate, without delay, if the minor is a national of a "mandatory notification" ("list") country. If the minor is not a national of a list country, you should attempt to locate the minor's parent or guardian and ask whether he or she wants you to notify the consulate of the minor's detention. If you are unable to locate the legal guardian within 24 to 72 hours, or you believe the minor to be a victim of abuse or trafficking and that contacting the parent or guardian would place the minor in danger, you should notify the consulate unless, under the circumstances, there is reason to believe notification could be detrimental to the minor (e.g., if the minor is seeking asylum in the United States). In such cases, you should ask a court or other competent authority to determine whether notification would be in the best interests of the minor. Consular notification is required in any case if the court or other appropriate authority initiates proceedings to appoint a guardian or trustee for the detained minor.

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[8] *See, e.g.*, *United States v. Ortiz*, 315 F.3d 873, 887 (8th Cir. 2002), *cert. denied sub nom Tello v. United States*, 123 S. Ct. 2095 (2003);*United States v. Alvarado-Torres*, 45 F. Supp.2d 986, 991 (S.D. Cal. 1999).

i. In Washington, the parents of a child under 12 years of age should also be advised of the availability of consular notification, and a request by the parent or the child that notice be sent to the consular official should be honored. *Cf.* RCW 13.40.140(10).

5. When I notify the consular officers, should I tell them the reasons for the detention?

A handful of bilateral consular agreements require you to give the foreign consular officer the reasons why the foreign national was detained:

> Algeria: Only one bilateral agreement, the agreement with Algeria, requires you to inform the foreign consular officer of the reasons—in the words of the agreement, the "motivating circumstances"—behind the detention, whether or not the consular officer expressly asks you for the reasons.
>
> Bulgaria, China (including Hong Kong and Macao), Czech Republic, Mongolia, Poland, and Slovakia: Bilateral agreements with these other six countries require you to inform the foreign consular officer of the reasons behind the detention only if the consular officer asks for the reasons. Similarly, if the foreign national is ultimately charged with a crime and his or her consular officers ask to know the charges, bilateral agreements with Bulgaria, China (including Hong Kong and Macao), the Czech Republic, Mongolia, Poland, and Slovakia require you to tell them the charges. The agreement with Tunisia also requires you to tell the consular officers the charges, unless the detained Tunisian national expressly asks you not to do so.

For all other countries, you do not have to inform the consular officer of the reasons why the foreign national was detained, as no such obligation exists under the Vienna Convention on Consular Relations or relevant bilateral agreements with other countries. Nevertheless, the Department of State recommends that, if the consular officers ask you the reasons, you provide them as a courtesy, if possible. Mexico, for example, has informed the Department that it would like to be advised of the reasons for the arrest of its nationals so that it can focus its consular resources on death penalty and other serious cases. The Department asks that, where possible, you comply with this request.

Generally you may use your discretion in deciding how much information to provide, consistent with privacy considerations and the applicable international agreements, in the initial notification of an arrest or detention. In doing so, you may wish to balance the privacy interests of the detainee with the interests of the foreign government in allocating its resources to respond first to the most serious cases. If a consular official insists that he or she is entitled to information about a foreign national that the foreign national does not want disclosed, the Department of State can provide guidance.

In some cases, federal or state law may prohibit you from providing detailed information concerning the reasons for the detention. For example, certain laws may prohibit you from giving information to third parties concerning the medical condition of persons confined to a medical institution. Where you have detained a foreign national for medical reasons and the foreign consular officer asks to know the reasons for the detention—especially where the detainee's nationality is Algerian, Bulgarian, Chinese, Czech, Mongolian, Slovakian, or Tunisian—contact the Department of State for guidance.

6. What can I expect a consular officer to do once notification of an arrest or detention has been made?

A consular officer may do a variety of things to assist a detained foreign national. The consular officer may ask to speak with the foreign national over the phone, may write to him or her, or may arrange one or more consular visits to meet with the detainee to discuss his or her situation and needs. A consular officer may assist in arranging legal representation, monitor the progress of the case, and seek to ensure that the foreign national receives a fair trial (e.g., by working with the foreign national's lawyer, communicating with prosecutors, or observing the trial). The consular officer may speak with prison authorities about the foreign national's conditions of confinement, and may bring the detainee reading material, food, medicine, or other necessities, if permitted by prison regulations. A consular officer will often get in touch with the foreign national's family members, particularly if they are in the country of origin, to advise them of his or her situation, morale, and other relevant information.

The consular officer may also deliver correspondence addressed to the foreign national, subject to applicable regulations of the prison facility. These may include letters from the national's family members or government, including correspondence from courts of the home country or the national's lawyer in the home country on legal matters concerning the national. It is also within the scope of the consular officer's duties to assist the foreign national in transmitting correspondence to these outside entities, as long as any assistance provided is in accordance with applicable rules and regulations of the prison facility.

As the purpose of the consular visit is to allow the consular officer the opportunity to provide consular services to the foreign national with a view to safeguarding the national's own personal interests, the consular officer may not engage in law enforcement activities, such as taking or recording a statement from the national for use in a lawsuit or prosecution in the home country.

The actual services provided by a consular officer will vary in light of numerous factors, including the foreign country's level of representation in the United States and available resources. For example, some countries only have an embassy in Washington, D.C., and will rarely be able to visit their nationals imprisoned in

locations elsewhere in the United States. Other countries have consulates located in many major U.S. cities and may regularly perform prison visits throughout the United States. Each country has discretion in deciding what level of consular services it will actually provide.

i. A consular officer may not act as legal counsel for a detained foreign national. *United States v. Alvarado-Torres*, 45 F. Supp.2d 986, 993 (S.D. Cal. 1999). *See also*; RCW 2.48.180 (making it a crime for an individual who is not admitted to practice law in Washington to represent someone in court). A detained foreign national who is indigent and eligible for court-appointed counsel must be provided with a lawyer in accordance with a jurisdiction's local practice.

ii. A consular officer may address the court on issues of release to the same extent that a detainee's family members or friend may be heard.

iii. A consular officer is entitled to visit with and to communicate with their detained nationals. While the visits may be subject to the normal visitation rules applicable to a particular detention facility, the visits, like those of an attorney, should normally be permitted to occur in private. Application of a facilities' legal mail, attorney phone call rules, and attorney visitation rules to consular officers is probably the safest course to pursue.

V. Procedure for Establishing the Admissibility of Statements

A. Admissibility Hearings

1. **When Needed.** Before introducing evidence of any custodial statement, or any statement made to a state actor, the court must hold a hearing to determine if the statement was freely given. *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964).

   a. Voluntariness hearings not required when statements are made to private citizens. *State v. McFarland*, 15 Wn. App. 220, 548 P.2d 569 (1976), *review denied*, 87 Wn.2d 1006 (1976).

   b. A defendant may waive the voluntariness hearing.

2. **CrR 3.5 and CrRLJ 3.5.** Procedural rule for the voluntariness hearings is CrR 3.5 in the superior court and CrRLJ 3.5 in the district court.

   a. Hearing may be conducted prior to trial, or mid-trial. *State v. Thompson*, 73 Wn. App. 122, 867 P.2d 691 (1994); *State v. Sharp*, 15 Wn. App. 585, 550 P.2d 705 (1976).

b. Separate hearing need not be held when the case is being tried to the bench. *State v. Wolfer*, 39 Wn. App. 287, 291-92, 693 P.2d 154 (1984), *review denied*, 103 Wn.2d 1028 (1985).

c. In district court, a hearing will only be held "upon demand." CrRLJ 3.5(a).

3. Failure to Hold a Hearing. The failure to hold a voluntariness hearing will not render a statement inadmissible when a review of the record discloses that there is no issue concerning its voluntariness. *State v. Falk*, 17 Wn. App. 905, 908, 567 P.2d 235 (1977); *State v. Harris*, 14 Wn. App. 414, 422, 542 P.2d 122 (1975).

4. Burden of Proof. The burden is upon the State to prove the voluntariness of a statement. It need only do so, however, by a preponderance of the evidence. *State v. Braun,* 82 Wn.2d 157, 162, 509 P.2d 742 (1973); *State v. Davis,* 34 Wn. App. 546, 550, 662 P.2d 78 (1983).

a. Multiple Officers. If multiple police officers are present when a defendant waives his *Miranda* warnings, the State need not call each and every officer at the admissibility hearing. *State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012), *overruling State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968). The trial court, however, remains free to draw adverse inferences if (1) the defendant raises the issue that another officer was present, and (2) the prosecutor neither calls that officer nor provides any explanation for the officer's absence. *Abdulle*, 174 Wn.2d at 420, ¶ 17.

There is no requirement, moreover, that before police interrogate a suspect at least two officers must be present so that one can corroborate the other in the event of a suppression hearing. Neither do the cases require police to obtain a written acknowledgment and written waiver of rights. *State v. Haack*, 88 Wn. App. 423, 434, 958 P.2d 423 (1997).

b. Custody. The burden is upon the defendant to prove he or she was "in custody" for purposes of *Miranda*. *United States v. Bassignani*, 560 F.3d 989, 993 (9th Cir. 2009).

5. Findings of Fact. Written findings of fact and conclusions of law must be entered at the conclusion of a CrR 3.5 hearing. The failure to enter findings will not preclude the admission of an otherwise voluntary statement, but the lack of findings can impede the appeal.

District courts and municipal courts are not required to enter written findings of fact

or conclusions of law. The court must, however, "state" its findings on the record. *See* CrRLJ 3.5(c).

6. **Appellate Review**. A trial court's finding of voluntariness is binding on appeal where the record contains substantial evidence supporting that conclusion. *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988); *State v. Wolfer*, 39 Wn. App. 287, 290, 693 P.2d 154 (1984), *review denied*, 103 Wn.2d 1028 (1985); *State v. Vannoy*, 25 Wn. App. 464, 467, 610 P.2d 380 (1980). "Substantial evidence" is evidence that is sufficient to persuade a fair-minded person. *State v. Cyrus*, 66 Wn. App. 502, 506 n. 4, 832 P.2d 142 (1992), *review denied*, 120 Wn.2d 1031 (1993).

B. Establishing a Valid *Miranda* Waiver

Statements are only admissible at trial in the prosecution's case in chief if the prosecution can prove a voluntary waiver of *Miranda* Rights. *See, e.g., State v. Ellison*, 36 Wn. App. 564, 676 P.2d 531, *review denied*, 101 Wn.2d 1010 (1984).

1. **Knowingly, Intelligently, and Voluntarily Made.** Any waiver of a suspect's *Miranda* rights must be knowingly, voluntarily, and intelligently made.

   The State need not prove that the suspect's confession was made when he was totally rational and for the proper motives. Coercive police activity is the necessary predicate to finding that a confession or the waiver of a right is not "voluntary" within the meaning of the Fourteenth Amendment. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 520-21, 93 L. Ed. 2d 473 (1986); *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973).

   The defendant need not understand the legal consequences of giving an incriminating statement, possible defenses available, or the risks involved in speaking to the police without counsel present. *See State v. McDonald*, 89 Wn.2d 256, 264, 571 P.2d 930 (1977), *overruled in part by State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988).

   - A defendant's ignorance of the full consequences of his decision does not vitiate the voluntariness of custodial statements. Thus, the detectives accurate statement that the statute of limitations for rendering criminal assistance had run, did not override the defendant's independent decision-making process or coerce her into giving a statement that was ultimately used in her murder prosecution. *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496, *review denied*, 172 Wn.2d 1012 (2011).

2. **Totality of the Circumstances.** The test for the waiver is the "totality of the circumstances." *See, e.g., Dutil v. State*, 93 Wn.2d 84, 606 P.2d 269 (1980).

   The court must look to the totality of the circumstances, including the setting in

which the statements were obtained, the details of the interrogation, and the background, experience, and conduct of the accused. *United States v. Carroll*, 710 F.2d 164 (4th Cir.), *cert. denied*, 464 U.S. 1008 (1983) (citing *Schenckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854 (1973)); *State v. Robtoy*, 98 Wn.2d 30, 36, 652 P.2d 284 (1982).

a. Children

A child younger than 12 years of age cannot waive his or her *Miranda* Rights. *See* RCW 13.40.140(10). The child's parent, guardian, or custodian must waive the child's *Miranda* Rights in order for a confession to be admissible.

- If both parents are present, get a waiver from both parents.

- If the parents waive the child's *Miranda* Rights, but the child does not wish to speak to the officer, any confession will probably be ruled inadmissible.

For older children, the presence of the child's parents and whether the child's parents concurred in the waiver of the child's *Miranda* Rights are factors to be considered in the "totality of the circumstances." *Dutil v. State*, 93 Wn.2d 84, 93, 606 P.2d 269 (1980).

3. Form of Waiver. Waiver may be in writing or oral. *State v. Rupe*, 101 Wn.2d 664, 678, 683 P.2d 571 (1984) (validity of waiver is not dependent upon signed written waiver form).

4. Statements Obtained in Violation of *Miranda*. Statements obtained in violation of *Miranda* may still be used to impeach a defendant if the statement was voluntarily given. *Oregon* v. *Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975); *State v. Hubbard*, 103 Wn.2d 570, 575, 693 P.2d 718 (1985).

a. Purposeful Violations. Statements obtained pursuant to a purposeful violation of *Miranda* may not be utilized for any purpose. *See Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (question-first interrogation tactic where *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them resulting in the suppression of both pre- and post-*Miranda* statements).

i. "Two-Step" Process. In situations where the "two-step" process was not deliberately employed by police, the post-warning statement may be admitted at trial. *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). *Elstad* held that "absent

deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" with respect to the postwarning confession. 470 U.S. at 314. Rather, "once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Id.* at 308. The Court thus held that a "suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id* at 318. *Accord State v. Allenby,* 68 Wn. App. 657, 847 P.2d 1 (1992), *review denied*, 121 Wn.2d 1033 (1993) (rejecting the "cat out of the bag" doctrine and holding that defendant's prior unwarned and unexpected statement in which the defendant confessed to a crime of which the trooper was unaware did not render invalid a subsequnet statement made after the trooper's careful reading of the *Miranda* warnings); *State v. Ustimenko*, 137 Wn. App. 109, 151 P.3d 256 (2007) (a defendant's post-warning statements are not inadmissible simply because the defendant may have let "the cat out of the bag" prior to receiving *Miranda* warnings).

ii. A trial court must suppress post-warning confessions obtained during a deliberate two-step interrogation. In determining whether the interrogator deliberately withheld the *Miranda* warnings, trial courts will consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning. *See United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006). Objective evidence includes the timing, setting and completeness of the pre-warning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements. *United States v. Narvaez-Gomez*, 489 F.3d 970, 974 (9th Cir. 2007). Suppression is required even if the officer did not have a subjective intent of trying to avoid *Miranda's* requirements. *State v. Hickman*, 157 Wn. App. 767, 238 P.3d 1240 (2010).

- The two-step cases ONLY apply when the initial questioning was in violation of *Miranda*-- that is when the suspect was in custody when he was interrogated. Custody is not established by the initial community caretaking/investigative contact your officer made. *See, e.g. State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004). *See also Bobby v. Dixon*, ___ U.S. ___, 132 S. Ct. 26, 29, 181 L. Ed. 2d 328 (2011) (a person's refusal to answer questions without a lawyer present during a

non-custodial interview, does not prevent an officer from conducting a custodial interrogation four days later; "And this Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation.' *McNeil v. Wisconsin*, 501 U.S. 171, 182, n. 3, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991); *see also Montejo v. Louisiana*, 556 U.S. 778, 795, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) ("If the defendant is not in custody then [*Miranda* and its progeny] do not apply").").

b. **Sixth Amendment.** Some courts have indicated that voluntary statements obtained in violation of a defendant's Sixth Amendment right to counsel may be used to impeach a defendant, but this view is not unanimously shared. *United States v. Ortega*, 203 F.3d 675 (9th Cir. 2000) (statements may be used to impeach); *United States v. Brown*, 699 F.2d 585 (2d Cir. 1983) (statements may not be used to impeach); *People v. Brown*, 42 Cal.App.4th 461, 49 Cal. Rptr. 2d 652 (1996) (statements may be used to impeach); *People v. Harper*, 228 Cal. App. 3d 843, 279 Cal. Rptr. 204 (1991) (statements may not be used to impeach); *United States v. McManaman*, 606 F. 2d 919, 925 (10th Cir. 1979) (voluntary statements obtained in violation of Sixth Amendment may be used to impeach)*; Martinez v. United States*, 566 A.2d 1049 (D.C.1989) (allowing impeachment use of voluntary statement despite failure to observe invoked right to counsel), *cert. denied,* 498 U.S. 1030 (1991); *State v. Swallow*, 405 N.W.2d 29 (S.D.1987) (allowing impeachment use of voluntary statement despite failure to observe invoked Sixth Amendment right to counsel); *New York* v. *Ricco,* 56 N.Y. 2d 320, 437 N.E. 2d 1097 (1982) (admissible for impeachment). *See also Lucas v. New York*, 474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 246 (1985) (J. White, dissenting from the denial of certiorari).

c. **Physical Evidence.** Physical evidence discovered due to statements given by an arrestee who has not been given his *Miranda* warnings does not violate the *Miranda* rule or the Self-Incrimination Clause of the constitution. *United States v. Patane*, 542 U.S. 630, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2003).

i. Physical evidence discovered due to statements given in violation of the Sixth Amendment right to counsel may be suppressed. *Fellers v. United States*, 540 U.S. 519, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004) (applying the fruits of the poisonous tree to statements obtained in violation of the defendant's).

C. Establishing a Voluntary Statement

A statement that was obtained in compliance with *Miranda* may still be excluded from evidence if the confession was not voluntarily given.

The test in determining whether a confession is voluntary is whether the behavior of the state's law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined. *State v. Tucker*, 32 Wn. App. 83, 85, 645 P.2d 711 (1982); *State v. Forrester*, 21 Wn. App. 855, 863, 587 P.2d 179 (1978); *State v. DeCuir*, 19 Wn. App. 130, 133-34, 574 P.2d 397 (1978); *State v. Riley*, 19 Wn. App. 289, 298, 576 P.2d 1311 (1978); *State v. Fischer*, 13 Wn. App. 665, 667, 537 P.2d 1074 (1975).

A number of specific allegations repeatedly appear in the case law.

1. Physical abuse

In looking at interrogative tactics that were found to violate a defendant's constitutional rights, the historical prohibition has been against extracting confessions by physical abuse.

- Confession found to be involuntary where police officers held gun to the head of wounded confessant to extract confession. *Beecher v. Alabama*, 389 U.S. 35, 88 S. Ct. 189, 19 L. Ed. 2d 35(1967).

2. Isolation

Confession obtained after 16 days of incommunicado interrogation in closed cell without windows, limited food, and coercive tactics was inadmissible. *Davis v. North Carolina*, 384 U.S. 737,, 86 S. Ct. 1761 16 L. Ed. 2d 895 (1966).

Confession from defendant who was held for five days of repeated questioning during which police employed coercive tactics was inadmissible. *Culombe v. Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961).

Refusing to allow the suspect to call his spouse until after the suspect signed a confession rendered the confession involuntary. *Haynes v. State*, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963).

Confession obtained from defendant after an attorney hired by the defendant's wife arrived at police station and was told by the police that he could not speak to the defendant unless the defendant asked for an attorney was voluntary despite failure of the police to inform defendant that an attorney had been retained for him. *State v. Bradford*, 95 Wn. App. 935, 978 P.2d 534 (1999).

Confession obtained from a 17-year-old arrestee after nearly thirteen hours of questioning by a tag team of detectives, without the presence of an attorney or contact with any non-police, and without the protections of proper *Miranda* warnings required the suppression of his confession. *Doody v. Ryan*, 649 F.3d 986 (9th Cir.), *cert. denied*, 132 S. Ct. 414 (2011).

3. Withholding of sleep, food, beverages, medical care and/or bathroom privileges

Defendant, on medication, interrogated for over 18 hours without food or sleep. *Greenwald v. Wisconsin*, 390 U.S. 519, 88 S. Ct. 1152, 20 L. Ed. 2d 77 (1968).

Defendant held four days with inadequate food and medical attention until confession obtained. *Reck v. Pate*, 367 U.S. 433, 6 L. Ed. 2d 948, 81 S. Ct. 1541 (1961).

Defendant questioned by relays of officers for thirty-six hours without an opportunity for sleep. *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 1192 (1944).

Confession obtained during 7 1/2-hour police interrogation which ended at 3:30 a.m., was held to be voluntary where suspect told police he had 11 hours' sleep the night before and the suspect was permitted to drink coffee and smoke during the interview. *State v. Acheson*, 48 Wn. App. 630, 634, 740 P.2d 346 (1987), *review denied*, 110 Wn.2d 004 (1988).

4. Intoxicated or medicated individuals

"Intoxication alone does not, as a matter of law, render a defendant's custodial statements involuntary and thus inadmissible." *State v. Turner*, 31 Wn. App. 843, 845-46, 644 P.2d 1224, *review denied*, 97 Wn.2d 1029 (1982). Intoxication renders a statement involuntary only if it rises to the level of mania. *State v. Cuzzetto*, 76 Wn. App. 378, 383, 457 P.2d 204 (1969). In this context, "mania" means that the defendant was unable to comprehend what he was doing and saying. *Id.*, at 386.

Confession of a defendant, who was subjected to 4-hour interrogation while incapacitated and sedated in intensive-care unit, held to be involuntary. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

Confession admissible, notwithstanding the defendant's drug withdrawal symptoms, where the defendant was coherent and oriented throughout the interrogation. *United States v. Kelley*, 953 F.2d 562, 565 (9th Cir. 1992).

Confession admissible, notwithstanding the defendant's claim that he was undergoing heroin withdrawal when questioned, where the (1) defendant was repeatedly advised of his *Miranda* rights; (2) he indicated he wanted to waive them; (3) he appeared rational at all times; and (4) the jail physician saw no necessity for medical treatment. *State v. Turner,* 31 Wn. App. 843, 847, 644 P.2d 1224, *review denied,* 97 Wn.2d 1029 (1982).

Statements were "voluntary" despite the hospitalized suspect's consumption of pain medication, as the suspect's nurse indicated that the suspect was well enough to speak to the officer and the officer stopped the interview when the suspect became tired. *State v. Butler*, 165 Wn. App. 820, 269 P.3d 315 (2012).

5. Promises or threats

A promise of leniency standing alone, does not automatically invalidate a confession; rather, the totality of the circumstances must be closely examined to determine its impact. *Brady v. United States,* 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); *Haynes v. Washington,* 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); *State v. Unga*, 165 Wn.2d 95, 196 P.3d 645 (2008). In order to result in a suppression of a confession, the promise must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances. *State v. Unga*, 165 Wn.2d 95, 196 P.3d 645 (2008).

A bare offer by the police to reduce one count of murder from first degree to second degree did not render the defendant's confession involuntary where the defendant did not identify this promise as one of the reasons for his confession at the time he made the confession or when he testified at the CrR 3.5 hearing. *State v. Riley*, 19 Wn. App. 289, 576 P.2d 289, *review denied*, 90 Wn.2d 1013 (1978).

Statement from a juvenile offender who was told by the officer that the officer would make a juvenile referral, without physical arrest, if he told the officer about the burglary, was admissible and voluntary. *State v. Riley*, 17 Wn. App. 732, 736, 565 P.2d 105 (1977), *review denied*, 89 Wn.2d 1014 (1978).

Statement by defendant inadmissible where officers coerced defendant to confess by promising him they would get his wife released from jail and confronting him with illegally seized drugs. *State v. Gonzales*, 46 Wn. App. 388, 401, 731 P.2d 1101 (1986).

Defendant's confession not voluntary where induced by the statement that if the defendant confessed he would not be prosecuted under the habitual criminal statute. *State v. Setzer*, 20 Wn. App. 46, 51, 579 P.2d 957 (1978).

Confessions voluntary even though officer told the suspect that it was in his favor to tell the truth. *See, e.g., State v. Rook*, 304 N.C. 201, 283 S.E.2d 732, 744 (1981), *cert. denied*, 455 U.S. 1038 (1982); *People v. Dozier*, 67 Ill.App.3d 611, 385 N.E.2d 155, 158, 24 Ill. Dec. 388 (1979).

Confession voluntary even though police told suspect that they would recommend "reasonable bail terms" if he cooperated. *United States v. Reed*, 572 F.2d 412, 426 (2nd Cir.), *cert. denied*, 439 U.S. 913 (1978).

Confession voluntary even though the detective promised the 16-year-old suspect that he would not be charged with a crime for the graffitti on the interior of the stolen vehicle. *State v. Unga*, 165 Wn.2d 95, 196 P.3d 645 (2008).

Confession voluntary even though the polygrapher, who adopted an empathetic and parental or maternal demeanor, told the 18-year-old defendant that if he was telling the truth, and if he was in fact innocent, she could help him get cleared. *Ortiz v. Uribe*, 671 F.3d 864 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1811 (2012).

Youthful (18-year-old) defendant's confession was not rendered involuntary by the polygrapher's statements that reminded the defendant of his obligation to his family to tell the truth and that his children were counting on him to do the right thing. *Ortiz v. Uribe*, 671 F.3d 864 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1811 (2012).

An undercover officer's role as a member of an organization that has used violence on occasion to achieve its goals or protect its members did not render the suspect's non-custodial statements involuntary, as the suspects were never threatened with physical harm or placed in a position suggesting they were subject to imminent physical harm. *State v. Rafay*, 168 Wn. App. 734, 258 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023, *cert. denied*, 134 S. Ct. 170 (2013).

6. Mental illness or low intelligence

A criminal defendant's mental illness or low intelligence will not necessarily render a defendant's confession involuntary, but it is a factor to be considered in determining voluntariness.

Defendant's confession to murder was admissible under *Miranda* and the Due Process Clause where police did not coerce the confession despite defendant's claim that his mental illness compelled his waiver of his *Miranda* rights. *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

Confession by defendant, who was hospitalized at Western State after being found incompetent to stand trial, and who was administered strong anti-psychotic drugs and was exhibiting symptoms of schizophrenia when confession was made, was not voluntary. *State v. Sergent*, 27 Wn. App. 947, 621 P.2d 209 (1980), *review denied*, 95 Wn.2d 1010 (1981).

Confession from a defendant who had the mental age of a 9.9-year old, a borderline I.Q. of 77, and was considered a slow learner found to be voluntary. *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1990), *review denied*, 115 Wn.2d 1021 (1991).

The length of the interrogation will be a significant factor when dealing with a mentally impaired individual. *See, e.g., Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir. 2011) (focusing on time as an important factor in concluding that a twelve-hour

investigation of a mentally impaired suspect was coercive); *Com. of N. Mariana Islands v. Mendiola*, 976 F.2d 475, 485–86 (9th Cir. 1992) (determining that the interrogation of a cognitively impaired defendant was coercive when "[p]olice repeatedly informed Mendiola that he would be charged or released within twentyfour hours, they interrogated him on numerous occasions without affording him the comfort of friends, family, employer, or attorney, they repeatedly accused him of lying, and they instructed him to sign statements he could not understand"), *overruled on other grounds by George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997).

Police tactics that are not inherently coercive may render a confession from a suspect with an intellectual disability "involuntary." *See United States v. Preston*, No. 11-10511, ___ F.3d ___ (9th Cir. May 12, 2014) (defendant's will was overborne and his statement involuntary, considering various factors: the defendant's severe intellectual impairment, the police's repetitive questioning and the threats that it would continue without end, the pressure placed on the defendant to adopt certain responses, the use of alternative questions that assumed his culpability, the officers' multiple deceptions about how the statement would be used, the suggestive questioning that provided details of the alleged crime, and the false promises of leniency and confidentiality).

7. Language barriers

Warnings must be administered to a suspect in a language that the suspect understands.

Using a co-defendant as interpreter for advising defendant of his *Miranda* rights will lead to the suppression of any confession. *State v. Cervantes*, 62 Wn. App. 695, 814 P.2d 1232 (1991).

Do not use victims of crimes or witnesses to crimes as interpreters.

The use of an uncertified interpreter during a police interrogation may render any statements made by the defendant inadmissible for any purpose, including impeachment. *See State v. Gonzalez-Hernandez*, 122 Wn. App. 53, 92 P.3d 789 (2004).

When warnings are read to a suspect by an interpreter, the State must demonstrate that the interpreter actually read the warnings correctly. This requirement can be met by the testimony of the interpreter, the testimony of a witness who also understands the language the interpreter spoke, or by a tape recording of the interaction coupled with the in court testimony of a competent interpreter. *Cf. State v. Morales*, 173 Wn.2d 560, 269 P.3d 263 (2012) (stating rule applicable to the statutorily required implied consent warnings).

8. Prior experience with the criminal justice system

Substantial experience with the criminal justice system will support the conclusion that the defendant appreciates the gravity of the *Miranda* warnings. *See, e.g. State v. Hutchinson*, 85 Wn. App. 726, 938 P.2d 336 (1997) (in 12 preceding years, defendant had been *Mirandized* on at least five separate occasions, and on each occasion had acknowledged those rights, waived them, and answered questions).

9. Deception

Some deception will be allowed on the part of the officer. The critical question is whether deception on the part of the police officer overcame the suspect's will to resist.

A confession has been held to be voluntary even though police concealed the fact that the victim had died. *People v. Smith*, 108 Ill. App. 2d 172, 246 N.E.2d 689 (1969), *cert. denied*, 397 U.S. 1001 (1970).

Statement found to be voluntarily given where police wrongly told co-defendant that his confession could be used against suspect, police then let co-defendant and suspect confer. During conference, co-defendant told suspect his confession would be used against suspect. *See, e.g., State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973).

A confession has been held to be voluntary even though the suspect was falsely told his polygraph examination showed gross deceptive patterns. *State v. Keiper*, 8 Ore. App. 354, 493 P.2d 750 (1972).

A confession has been held to be voluntary even though the suspect was falsely told, or that a co-suspect had named him as the triggerman. *Commonwealth v. Baity*, 428 Pa. 306, 237 A.2d 172 (1968).

A confession was held to be admissible even though the police falsely told the defendant that they had obtained a victim's hair sample in vehicle driven by defendant. *State v. Burkins*, 94 Wn. App. 677, 973 P.2d 15 (1999).

10. Sympathy, Empathy, or Paternal Manner

A polygrapher's empathetic and parental or maternal questioning style did not render the 18-year-old defendant's confession involuntary. *Ortiz v. Uribe*, 671 F.3d 864 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1811 (2012).

"'[A] raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne.'"*United States v. Astello*, 241 F.3d 965, 967 (8th Cir. 2001), (*quoting Jenner v. Smith*, 982 F.2d 329, 334 (8th Cir. 1993)).

Placing a defendant in a relaxed and comfortable mood by the use of empathetic conversation for three or four minutes does not rise to a level of psychological manipulation that will render a confession involuntary. *Sotelo v. Indiana State Prison*, 850 F.2d 1244, 1249 (7th Cir. 1988).

A sympathetic attitude on the part of an interrogator is not in itself enough to render a confession involuntary. *See, e.g., Beckwith v. United States*, 425 U.S. 341, 343, 348, 96 S. Ct. 1612, 1614, 1617, 48 L. Ed. 2d 1 (1976) (interrogator adopted sympathetic attitude but resulting confession was voluntary). Even where a friendly interrogator's questioning involved misrepresentation of facts the Supreme Court has held that there was no error in the admission of a defendant's confession. *Frazier v. Cupp*, 394 U.S. 731, 737-40, 89 S. Ct. 1420, 1424-25, 22 L. Ed. 2d 684 (1969). *Accord Miller v. Fenton*, 796 F.2d 598, 607 (3d Cir.), *cert. denied*, 479 U.S. 989 (1986).

"Excessive friendliness on the part of an interrogator can be deceptive. In some instances, in combination with other tactics, it might create an atmosphere in which a suspect forgets that his questioner is in an adversarial role, and thereby prompt admissions that the suspect would ordinarily only make to a friend, not to the police." *Miller v. Fenton*, 796 F.2d at 604 (3d Cir. 1986), *cert. denied*, 479 U.S. 989 (1986). "Nevertheless, the 'good guy' approach is recognized as a permissible interrogation tactic." *Id*. (holding confession admissible despite interrogating officer's "supportive, encouraging manner . . . aimed at winning [appellant's] trust and making him feel comfortable about confessing."). *See also Beckwith v. United States*, 425 U.S. 341, 343, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976) (interrogator had sympathetic attitude but confession voluntary); *Frazier v. Cupp*, 394 U.S. 731, 737-38, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) (confession voluntary when petitioner began confessing after the officer "sympathetically suggested that the victim had started a fight.").

11. Accusations of Lying

Accusing a suspect of lying "does not automatically render the questions coercive, as an interrogator can legitimately express his disbelief at a defendant's story in order to elicit further comments or explanations." *United States v. Wolf*, 813 F.3d 970, 975 (9th Cir. 1987).

"[C]ontinuing to question a suspect after the suspect claims he is innocent does not constitute coercion and is often necessary to achieve the truth." *Cunningham v. City of Wenatchee*, 345 F.3d 802, 810 (9th Cir. 2003).

12. Confusion or Emotionalism

Though questions may have "unsettled" the suspect, "mere emotionalism and confusion do not invalidate confessions." *Cunningham v. City of Wenatchee*, 345

F.3d 802, 810 (9th Cir. 2003).

CONFESSION AND INTERROGATION

(Seth Fine's Summary of the Rules)

1. Suspect out of custody and not formally charged

Police may initiate interrogation about any crime, so long as officers do not compel an unwilling suspect to talk to them. No *Miranda* warnings need be given. These rules are not affected by suspect's previous attempts to assert rights.

2. Suspect out of custody but formally charged

Police may initiate interrogation about the crime that has been charged only if *Miranda* warnings are given. Police may initiate interrogation about any other crime without giving *Miranda* warnings, so long as officers do not compel an unwilling suspect to talk to them. These rules are not affected by suspect's previous attempts to assert rights.

3. Suspect in custody (no previous assertion of rights)

Police may initiate interrogation about any crime. *Miranda* warnings must be given.

4. Suspect in custody (previous assertion of right to remain silent)

Police may initiate interrogation only if the suspect's right to silence is "scrupulously honored." Factors that may justify initiation of interrogation include (a) lapse of time, (b) change in circumstances (e.g., discovery of significant new evidence), and (c) interrogation about different crime. *Miranda* warnings must be given.

Note: Assertion of right to remain silent is only valid if made during custodial interrogation. Assertion remains effective so long as suspect is in continuous custody. If assertion was made outside of custodial interrogation, or if suspect has been released and re-arrested, situation is the same as (2) above.

5. Suspect in custody (previous assertion of right to counsel)

Police may not initiate interrogation about any crime.

Note: Assertion of right to counsel is only valid if made during custodial interrogation. Assertion remains effective until suspect is released from custody for at least 14 days. If assertion was made outside of custodial interrogation, or if suspect has been released for more than 14 days and then re-arrested, situation is the same as (3) above.

6. Suspect initiates contact with police

Notwithstanding the limitations described above, police may interrogate suspect on the subjects as to which he initiated contact. *Miranda* warnings must be given if suspect is in custody or has been formally charged. It is advisable to obtain written statement from suspect confirming that he initiated contact.

Search, Seizure and Arrest

I. Introduction

Law enforcement officers are sworn to uphold the Constitution of the United States and the Constitution of the State of Washington. The federal constitution protects the right of people from unreasonable searches and seizures.

FOURTH AMENDMENT-U.S. CONSTITUTION

> 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.

The federal constitution and the cases interpreting the Fourth Amendment establish the "floor" or minimum amount of protection that the federal government and every state government must extend to individuals. States, however, are free to provide individuals located within their borders with greater protection from search and seizure than that guaranteed by the Fourth Amendment.

"It is by now commonplace to observe Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment." *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994). This observation rests, in large part, upon the clear variance in the wording of the two provisions.

ARTICLE I, SECTION 7-WASHINGTON CONSTITUTION

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

A determination of whether Const. art. I, § 7 provides broader protection than the Fourth Amendment in a particular case requires consideration of the six nonexclusive factors first articulated by the Washington Supreme Court in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Four of the six factors[9] require a review of the language and structure of the constitution from the viewpoint of the ratifying citizenry: The remaining two factors look to post-adoption events, but always with an eye to maintaining the rights as originally established against changed expectations. *See, e.g., State v. Sieyes*, 168 Wn.2d 276, 225

[9]The factors are: (1) the textual language; (2) textual differences; (3) constitutional and common law history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or federal concern. Gunwall, 106 Wn.2d at 61-62. determine in any given case whether the state constitution provides different and broader protection than the federal constitution. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

P.3d 995 (2010) (constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future generations think the scope too broad or too narrow); *State v. Eisfeldt*, 163 Wn.2d 628, 637, 185 P.3d 580 (2008) (article I, section 7 protections are not confined to the subjective privacy expectations of modern citizens); *State v. Jorden*, 160 Wn.2d 121, 137, 156 P.3d 893 (2007) (Madsen, J., dissenting) ("To decide if an interest is one that citizens of the State 'have held,' we look to the protection historically accorded the interest.").

The size of the gulf created by the difference in the actual words depends upon the meaning the ordinary citizen would give to the phrase "private affairs" in 1889. *See generally State ex rel. State Capitol Commission v. Lister*, 91 Wash. 9, 14, 156 P. 858 (1916). When Const. art. I, § 7 was adopted in 1889, the phrase "private affairs" was understood to mean a person's papers and business affairs.[10] In other words, this language merely restated the protections afforded by the Fourth Amendment. This conclusion is supported by early Washington cases which resolved questions under Const. art. I, § 7 by relying upon decisions issued by states whose constitutional language bore a greater resemblance to the Fourth Amendment than to Const. art. I, § 7. *See, e.g., State v. Royce*, 38 Wash. 111, 80 P. 268 (1905) (citing cases from Illinois, Georgia, Missouri, Alabama, South Carolina, and New Hampshire). This tacit understanding was explicitly acknowledged by this Court in later years.[11] *See, e.g, State v. Smith*, 88 Wn.2d 127, 133, 559 P.2d 970 (1977) ("It is apparent

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[10] *See, e.g., ICC v. Brimson*, 154 U.S. 447, 478, 14 S. Ct. 1125, 38 L. Ed. 1047 (1894) ("the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 250, "'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.'"); *United States v. Boyd*, 46 U.S. 29, 50, 12 L. Ed. 36 (1846) ("The public moneys in his hands constitute a fund, which it is his duty to keep, and which the law presumes is kept, distinct and separate from his own private affairs. It is only upon this view, that he can be allowed to purchase the public lands at all, consistently with the provisions of the act of Congress."); *Hunter v. United States*, 30 U.S. 173, 187, 8 L. Ed. 86 (1831) ("It might be dangerous to give the same effect to a voluntary payment, by an agent of the government, as if made by an individual in his own right. The concerns of the government are so complicated and extensive, that no head of any branch of it can have the same personal knowledge of the details of business, which may be presumed in private affairs."); *United States v. Duane*, 25 F. Cas. 920, 921 (1801) ("Jurors are not volunteers; they are called here by compulsion of law, and generally give their attendance to the great detriment of their private affairs.").

[11] Some of the Washington Supreme Court's recent opinions substitute the phrase "right to privacy" for Const. art. I, § 7's actual "private affairs" language. *See, e.g., State v. Schultz*, 170 Wn.2d 746, 758, 248 P.3d 484 (2011). This rephrasing is less awkward to modern ears then the original historical language. This rephrasing, however, creates a risk that Const. art. I, § 7 decisions will become unmoored from its historical underpinnings.

The phrase "right to privacy" has a popular and emotionally charged meaning that was unknown to the drafters of our Constitution. The delegates to the constitutional convention, however, lived in a world that did not recognize a "right to privacy" that could be vindicated in courts. The concept of a tort "right of privacy" was pioneered in a law review article published one year after the Washington Constitution was ratified. *See* S. Warren and L. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

The first discussion of a "right of privacy" in a Washington case was in *Hillman v. Star Publishing Co.*, 64 Wash.

that the fourth amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution are comparable and are to be given comparable constitutional interpretation and effect."); *State v. Miles*, 29 Wn.2d 921, 926, 190 P.2d 740 (1948) ("It will be observed that the fourth amendment to the constitution of the United States, and Art. 1, § 7, or our state constitution, although they vary slightly in language, are identical in purpose and substance.").

While the text of the Washington Constitution does not support significant deviations from the protections provided by the Fourth Amendment, the structure of the Washington Constitution does support modest departures from Fourth Amendment rules. The simple fact that the Declaration of Rights is the *first* section of the State's Constitution supports the proposition that protection of individual rights against government intrusion was a significant concern of the drafters. *State v. Schelin*, 147 Wn.2d 562, 593-94, 54 P.3d 632 (2002) (Sanders, J., dissenting). "The state constitution limits powers of state government, while the federal constitution grants power to the federal government." *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994) (citing *Gunwall*, 106 Wn.2d at 66).

This structural difference did not historically result in article 1, section 7 rulings that were significantly different than opinions that relied upon the Fourth Amendment. Prior to 1961 all Washington search cases were based solely on article 1, section 7, as the Fourth Amendment had not yet been applied to the states. Once the United States Supreme Court held *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), that the Fourteenth Amendment applies the Fourth Amendment to the states, Washington's appellate courts initially relied upon federal court search cases because the protections afforded under the Fourth Amendment in those cases was frequently greater than that afforded in the pre-1961 Washington jurisprudence. *See, e.g., State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962) (disapproving of prior Washington car search cases as inconsistent with opinions of the United States Supreme Court and the Ninth Circuit). Whether citing federal cases or only state cases, the courts determined the legality of the search and seizure under article I, section 7. *See State v. Smith*, 9 Wn. App. 309, 311, 511 P.2d 1390 (1973) ("The legality of a search and seizure must be determined under state law initially, but the constitutional protection given to citizens from unreasonable searches and seizures must be no less than that given under the standards set forth by the federal courts.").

691, 117 P. 594 (1911). In that case, a newspaper published an article describing the filing of criminal charges against a man. The article included a photograph of his daughter. The daughter sued, claiming that this publication violated her right of privacy. This Court held that there was no such right: "Not so much because a primary right may not exist, but because, in the absence of a statute, no fixed line between public and private character can be drawn." The opinion closed with a call for legislative action on this subject. As late as 1950, this Court continued to question the very existence of a right to privacy. *See, e.g., Lewis v. Physician's & Dentists Credit Bureau, Inc.*, 27 Wn.2d 267, 177 P.2d 896 (1947) (tracing the origin of the phrase "right of privacy" to the 1890 law review article and noting that "in a majority of the states even the existence of the right is still an open question."); *State ex rel. Hodde v. Superior Court*, 40 Wn.2d 502, 244 P.2d 668 (1952) (rejecting claims that the activities of the legislative investigative committees violated a "right of privacy"); *State v. James*, 36 Wn.2d 882, 221 P.2d 482 (1950) (same).

Beginning in the 1980's, the Washington Supreme Court expressly identified some opinions as applying the Fourth Amendment and some opinions as applying Const. art. I, section 7. When an opinion does not expressly state which constitution is being applied, the default rule is that the state constitution was applied. *See State v. Patton*, 167 Wn.2d 379, 385, 219 P.3d 651 (2009) ("When a party claims both state and federal constitutional violations, we turn first to our state constitution.").

In April of 2012, the Washington Supreme Court highlighted the differences between the Fourth Amendment and article I, section 7, stating that "[t]he protections guaranteed by article I, section 7 are qualitatively different from those under the Fourth Amendment." *State v. Snapp*, 174 Wn.2d 177, 187 at ¶ 23, 275 P.3d 289 (2012). "[A]rticle I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law." *Id.,* at ¶ 39. "The authority of law to search under article I, section 7 is not simply a matter of pragmatism and convenience." *Id*., at ¶ 43.

Because Const. art. I, § 7 is frequently interpreted as providing broader protection than the Fourth Amendment, most materials on search and seizure prepared for a national audience will not accurately set forth Washington law. Specific instances where article 1, section 7 goes further than the Fourth Amendment are listed in the table at the end of these materials. It is important that every police officer and prosecutor understand the rights guaranteed by both the Fourth Amendment and article I, section 7. Failure to honor an individual's right to be free from unreasonable search and seizure under the Fourth Amendment can result in civil liability, criminal liability, and/or the suppression of evidence. Failure to honor an individual's right to be free from unreasonable search and seizure under article I, section 7 can result in criminal liability and/or the suppression of evidence.[12]

II. Definitions

A. Search

1. **Fourth Amendment.** For constitutional purposes, under the Fourth Amendment, a search occurs when the state intrudes upon an area where a person has a legitimate reasonable expectation of privacy. *See, e.g., United States v. Jones*, ___ U.S. ___,

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[12]Washington Constitution art. I, § 7 will not support a private cause of action for damages. *See Reid v. Pierce County,* 136 Wn.2d 195, 961 P.2d 333, 342 (1998) (stating that Washington courts do not recognize a private cause of action for State constitutional violations); *Spurrell v. Block,* 40 Wn. App. 854, 701 P.2d 529, 534-35 (1985) (same); *Sys. Amusement, Inc. v. State,* 7 Wn. App. 516, 500 P.2d 1253, 1254-55 (1972) (same).

An officer can, however, still be sued on a common law invasion of privacy theory. In order to prevail on such a claim, the plaintiff must establish that the officer "acted deliberately to achieve the result, with the certain belief that the result would happen." *Youker v. Douglas County*, 178 Wn. App. 793, ___ P.3d ___ (2014) (affirming the dismissal of a common law invasion of privacy claim where deputies were legitimately investigating the ex-wife's report about a gun in the plaintiff's home and the available information indicated that the ex-wife lived in the plaintiff's home and could grant access to the home, no trier of fact could find the necessary intent element).

132 S. Ct. 945, 950, 181 L. Ed. 2d 911 (2012) (citing cases in which the Court applied the analysis of Justice Harlan's concurring opinion in *Katz* to hold that a of the Fourth Amendment occurs when government officers violate a person's "reasonable expectation of privacy"); *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("the Fourth Amendment protects people, not places").

A reasonable expectation of privacy is measured by a two-fold analysis. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). First, a person must have "exhibited an actual (subjective) expectation of privacy." *Id.* Second, the individual's expectation must be "one that society is prepared to recognize as "reasonable." *Id.*

Government conduct that is a trespass onto persons, houses, papers, or effects is also a Fourth Amendment search. *See United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (restoring the trespass test of Fourth Amendment).

> A trespass on "houses" or "effects," or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.

Jones, 132 S. Ct. at 951 n. 5.

2. **Const. art. I, § 7.** Violation of a right of privacy under Article 1, section 7 turns on whether the State has unreasonably intruded into a person's "private affairs." *State v. Young*,135 Wn.2d 498, 957 P.2d 681 (1998); *State v Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996); *State v. Goucher*, 124 Wn.2d 778, 881 P.2d 210 (1994). The focus is on "those privacy interest which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

3. **Difference Between the Constitutional Definitions.** The difference between Const. art. 1, § 7 and the Fourth Amendment has been explained as follows:

> Const. art. 1, § 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment, but is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives. Rather, it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.

State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990).

> "[T]he test for a disturbance of a disturbance of a person's private affairs under **article 1, section 7** is a purely objective one, looking to the actions of the law enforcement officer, thus rejecting the test for a seizure under the Fourth Amendment…"

State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

> Under the Fourth Amendment a seizure is a mixed objective/subjective test. A seizure occurs "when the officer, by means of physical force or a show of authority, has in some way restrained the liberty of the citizen."

California v. Hodari D., 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed.2d 690 (1991).

B. Seizure

1. Property. For constitutional purposes, a seizure occurs when there is some meaningful interference with an individual's possessory interest in property and a government official exercises dominion and control over the property or the person.

No seizure occurs when an individual voluntarily relinquishes a piece of property. *State v. Wethered*, 110 Wn.2d 466, 755 P.2d 797 (1988) (hashish voluntarily retrieved by the defendant from the defendant's vehicle was admissible); *State v. Freeman*, 17 Wn. App. 377, 381, 563 P.2d 1283, *review denied*, 89 Wn.2d 1007 (1977) ("consensual relinquishment of an item cannot fairly be construed as a seizure;" defendant removed an incriminating sweatshirt and handed it to the investigating officer).

2. Person. A "seizure" occurs when an officer, by physical force or by show of authority, restrains an individual's freedom of movement. *United States v. Mendenhall*, 466 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). A "seizure" occurs when the circumstances surrounding the encounter demonstrate that a reasonable person would not feel free to disregard the officer and go about his business. *California v. Hodari D.*, 111 S. Ct. 1547, 1551, 113 L. Ed. 2d 690.

> A person is 'seized' within the meaning of the Fourth Amendment of the United States Constitution only when restrained by means of physical force or a show of authority. A police officer does not necessarily seize a person by striking up a conversation or asking questions....The relevant inquiry for the court in deciding whether a person has been seized is whether a reasonable person would have felt free to leave or otherwise decline the officer's request and terminate the encounter. The court must look to the totality of circumstances to determine whether a seizure has

> occurred.

State v. Thorn, 129 Wn.2d 347, 352, 917 P.2d 108 (1996).

With respect to pedestrians, the Court has stated that:

> In our judgment, a police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.

State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280(1997). This same rule applies to individuals who are in parked vehicles. *See State v. Afana,* 147 Wn. App. 843, 196 P.3d 770 (2008), *rev'd on other grounds*, 169 Wn.2d 169 (2010); *State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005).

The rule is different with respect to passengers in a moving car. For a passenger in a moving car, an officer seizes the person by asking for identification or name and birth date. An officer may only request identification if the officer has reasonable suspicion to believe the passenger has committed a traffic infraction or a crime, or if the passenger needs to be identified as a witness to any crime. *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004); *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005). An officer may not request that the driver identify the passengers in the vehicle unless the officer has reasonable suspicion to believe the passengers have committed a traffic infraction or a crime, or if the passenger needs to be identified as a witness to any crime, or if the passenger needs to be identified as part of the investigation into the actions of the driver (i.e. to determine whether the driver is violating a restricted license by carrying non-family members as passengers). *State v. Allen*, 138 Wn. App. 463, 157 P.3d 893 (2007). When the identification is made to determine whether the passenger and the driver are barred from contact by a court order, the officer must have a specific basis to believe that the passenger is either the protected or restrained person. *Compare State v. Pettit*, 160 Wn. App. 716, 251 P.3d 896 (2011) (officer properly asked the passenger her name when the officer knew that the protected person was a 16-year-old female and the passenger appeared to be a 16-year-old female), *with State v. Allen*, 138 Wn. App. 463, 469, 157 P.3d 893 (2007) (officer improperly asked the passenger his name when he did not know the sex of the person who was restrained from contact with the driver).

Whether a seizure occurs does not turn upon an officer's suspicions. Whether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer. Not only is the nature of the officer's subjective suspicion generally irrelevant to the question whether a seizure has occurred under *Terry* there are sound reasons why it should be irrelevant to that question. *See State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489, 495-96 (2003). In other words, the standard is "a purely objective one, looking to the actions of the law enforcement officer. The relevant question is whether a reasonable person in the

individual's position would feel he or she was being detained. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009).

a. Specific Examples

- The shining of a flashlight on a person in a public place is not a seizure. *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998).

- Article 1, section 7 does not forbid social contacts between police and citizens.

- No seizure occurred when an officer asked someone who exited a vehicle and who was walking away for identification so the officer could verify that the individual was not another person who was suspected of committing a crime. *State v. Vanderpool*, 145 Wn. App. 81, 184 P.3d 1282 (2008).

- A seizure for constitutional purposes occurs when an officer retains a suspect's ID or driver's license and takes it with him to conduct a warrants check. *State v. Thomas*, 91 Wn. App.195, 955 P.2d 420, *review denied*, 136 Wn.2d 1030 (1998); *State v. Dudas*, 52 Wn. App. 822, 834, 764 P.2d 1012, *review denied* 112 Wn.2d 1011 (1989). So long as the officer does not remove the ID or license from the individual's presence and the ID or license is returned to the individual while waiting for a warrant's check to be performed, a seizure does not occur by a police officer's retention of the identification or driver's license for the few minutes required to record the individual's name and birth date. *See State v. Hansen*, 99 Wn. App. 575, 994 P.2d 855 (2000).

- A seizure occurs if an officer demands, versus requests, identification. *See State v. Rankin*, 108 Wn. App. 948, 33 P.3d 1090 (2001), *reversed on other grounds*, 151 Wn.2d 689, 92 P.3d 202 (2004).. In reference to whether a seizure has occurred, the determination of whether an officer has required identification is a question of fact. The words used by the officer are relevant, but not dispositive, in determining whether the officer has required or merely requested identification. Other factors include but are not limited to the officer's tone of voice and manner, the officer's position at the vehicle, and whether the officer has made a show of force. The fact that a uniformed police officer has effected a traffic stop on the vehicle may be taken into consideration, but this factor alone does not transform a permissible request for identification into an impermissible demand.
- Examples of circumstance that might indicate a seizure, even where

the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998), quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877, 64 L. Ed.2d 497 (1980).

- A seizure occurred when an officer flagged a person down as that person was getting into his car to leave a parking lot, indicating that he wanted to talk to the person by yelling at the person "to hold on a minute". *State v. Dorey*, 145 Wn. App. 423, 186 P.3d 363 (2008).

- A seizure does not occur when a police officer approaches an individual who is sitting in a parked vehicle and asks, but does not demand, the individual's identification. *See, e.g., State v. O'Neill,* 148 Wn.2d 564, 62 P.3d 489 (2003) (officer did not seize occupant of parked car by approaching vehicle, shining a flashlight into the car, and asking the occupant to roll down the window); *State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005) (a person seated in a parked car is comparable to a pedestrian and Const. art. I, § 7, does not prohibit an officer from asking for identification from such a person); *State v. Cerrillo*, 122 Wn. App. 341, 93 P.3d 960 (2004) (men sleeping in parked truck were not seized when police officers woke the men up, asked to see the driver's identification, and then advised the driver not to move the vehicle until he sobered up); *State v. Knox*, 86 Wn. App. 831, 833, 939 P.2d 710 (1997), *overruled on other grounds by State v. O'Neill,* 148 Wn.2d 564, 62 P.3d 489 (2003) (no seizure took place when an officer approached a vehicle parked on a ferry and asked the sleeping driver repeatedly to roll down the window).

- A seizure does not occur when a law enforcement officer knocks on a door and announces who he or she is. In doing so, the officer does "no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. . . And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time." *Kentucky v. King*, ___ U.S. ___, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011).

- A seizure does not occur when an officer who lacks a reasonable suspicion questions an individual about his or her immigration status. *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 1471-72, 161 L. Ed. 2d 299 (2005). *Be aware that some jurisdictions have local ordinances precluding officers from asking such questions except where the questioning is mandated by a specific law.*

- An officer seizes a vehicle by pulling behind the vehicle and activating a patrol car's emergency lights. *State v. Gantt*, 163 Wn. App. 133 (2011), *review denied*, 173 Wn.2d 1011 (2012). *This rule may only apply when officer's use lights that are not on a typical vehicle. The use of yellow blinkers, similar to the emergency lights on private automobiles, to alert traffic to the officer's presence, may not constitute a seizure. The use of blue or red lights that are visible from the front of the patrol car will be deemed a show of authority. Questions should be asked to clarify which lights or combinations of lights the officer used. Officers should specify which lights were used in their police reports.*

C. Probable Cause

1. Generally. The probable cause test requires the same amount of evidence for both arrests and searches. Probable cause requires:

- Sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity. *State v. Gentry*, 125 Wn.2d 570, 607, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995).

- There must be "reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe" the suspect is involved in criminal activity. Probable cause is a quantum of evidence less than would justify a conviction, but more than bare suspicion. *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949); *State v. Cord*, 103 Wn.2d 361, 365, 693 P.2d 81 (1985); *State v. Conner*, 58 Wn. App. 90, 97, 791 P.2d 261 (1990).

- A quantum of evidence "less than . . . would justify conviction," yet more than bare suspicion." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

2. For Arrest

To make an arrest, the officer need not have facts sufficient to establish guilt beyond

a reasonable doubt but only reasonable grounds for suspicion coupled with evidence of circumstances sufficiently strong in themselves to warrant a cautious and disinterested person in believing that the suspect is guilty." *State v. Bellows*, 72 Wn.2d 264, 266, 432 P.2d 654 (1967).

"Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested. For information to amount to probable cause, it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence. . . police are not required 'to believe to an absolute certainty, or by clear and convincing evidence, or even by a preponderance of the available evidence' that a suspect has committed a crime. All that is required is a 'fair probability,' given the totality of the evidence, that such is the case." *Garcia v. County of Merced*, 639 F.3d 1206, 1209 (9th Cir. 2011) (citations omitted).

a. Objective Standard. Probable cause is generally an objective standard. *Beck v. Ohio*, 379 U.S. 89, 96, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *State v. Gaddy*, 152 Wn. 2d 64, 70, 93 P.3d 872 (2004). It is determined with reference to a reasonable person with the expertise and experience of the officer in question. The expertise of an officer is critical. *See United States v. Ortiz*, 422 U.S. 891, 897–98, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975) (border patrol officers are entitled to draw inferences in light of their prior experience with aliens and smugglers); *State v. Cole*, 128 Wn.2d 262, 289, 906 P.2d 925 (1995), *abrogated on other grounds by In re Det. of Petersen*, 145 Wn.2d 789, 42 P.3d 952 (2002) (acknowledging officer's drug enforcement experience and ability to identify marijuana smell); *State v. Rodriguez-Torres,* 77 Wn. App. 687, 693–94, 893 P.2d 650 (1995) probable cause existed when an officer with specialized training in narcotics enforcement observed exchange of money for hidden, cupped object in an area known for narcotics, and defendant fled upon notice of officer's presence). What constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer. *State v. Remboldt*, 64 Wn. App. 510, 827 P.2d 505, *review denied*, 119 Wn.2d 1005 (1992).

i. Pretext Stops/Arrests Prohibited. While the United States Supreme Court has indicated that an officer's subjective reasons for a stop or arrest are irrelevant under the constitution, the Washington Supreme Court held otherwise in *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999):

> [T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to

> enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason.
>
> ....
>
> Article I, section 7, forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one. In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary.
>
> . . . .
>
> When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. *Cf. State v. Angelos*, 86 Wn. App. 253, 256, 936 P.2d 52 (1997) ("When the use of the emergency exception is challenged on appeal, the reviewing court must satisfy itself that the claimed emergency was not simply a pretext for conducting an evidentiary search. To satisfy the exception, the State must show that the officer, both subjectively and objectively, 'is actually motivated by a perceived need to render aid or assistance.' ") (citations omitted) (quoting *State v. Loewen*, 97 Wn.2d 562, 568, 647 P.2d 489 (1982)). We recognize the Court of Appeals has held that the test for pretext is objective only. See *State v. Chapin*, 75 Wn. App. 460, 464, 879 P.2d 300 (1994). But an objective test may not fully answer the critical inquiry: Was the officer conducting a pretextual traffic stop or not?

Ladson, 138 Wn.2d at 838-43.

The full parameters of the *Ladson* holding are still being litigated. In 2012, the Washington Supreme Court addressed the "mixed-motive" traffic stop. If enforcement of the traffic code is only one basis for the stop, the stop may be found to be unconstitutional. A mixed-motive traffic stop is not pretextual, however, so long as the

desire to address a suspected traffic infraction (or criminal activity) for which the officer has a reasonable articulable suspicion is an actual, conscious, and independent cause of the traffic stop. So long as a police officer actually, consciously, and independently determines that a traffic stop is reasonably necessary in order to address a suspected traffic infraction, the stop is not pretextual in violation of Wash. Const. art. I, § 7, despite other motivations for the stop. *State v. Chacon Arreola*, 176 Wn.2d 284, 290 P.3d 983 (2012).

> In a mixed-motive traffic stop, the court will The trial court should consider both subjective intent and objective circumstances in order to determine whether the police officer actually exercised discretion appropriately. The trial court's inquiry should be limited to whether investigation of criminal activity or a traffic infraction (or multiple infractions), for which the officer had a reasonable articulable suspicion, was an actual, conscious, and independent cause of the traffic stop. The presence of illegitimate reasons for the stop often will be relevant to that inquiry, but the focus must remain on the alleged legitimate reason for the stop and whether it was an actual, conscious, and independent cause.

Chacon Arreola, 176 Wn.2d at 299.

More suppression motions can be expected as a result of the *Ladson*. Information that should be included in reports to assist the prosecutor and the defense attorney in evaluating a *Ladson* challenge includes:

- Assigned duties for that day. Whether an officer is on routine patrol is not, however, dispositive of the "pretext" issue. *See State v. Montes-Malindas*, 144 Wn. App. 254, 182 P.3d 999 (2008).

- Whether the officer recognized the defendant prior to initiating the stop.

- Whether the officer was intentionally following the defendant's vehicle prior to the stop. *See State v. Gibson*, 152 Wn. App. 945, 219 P.3d 964 (2009).

- Why this car was chosen for equipment enforcement or for enforcement of infraction law.

The most recent "pretext stop" cases have clarified some things. Specifically:

- *Ladson* does not apply to searches based upon a validly issued warrant. *See State v. Landsen*, 144 Wn.2d 654, 662, 30 P.3d 483 (2001).

- Patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. *State v. Hoang*, 101 Wn. App.732, 6 P.3d 602 (2000).

- An officer with suspicions, who stops a vehicle to enforce the traffic code, should limit himself/herself to the questions that would be asked on a routine traffic stop: Do you have a driver's license? May I see the vehicle registration? May I see the certificate of insurance? *State v. Hoang*, 101 Wn. App.732, 6 P.3d 602 (2000). Note that "[a] stop for a traffic infraction can be extended only when an officer has articulable facts from which the officer could reasonably suspect criminal activity." *State v. Lemus*, 103 Wn. App. 94, 101, 11 P.3d 326 (2000) (internal quotations omitted).

- An officer whose assigned duties include enforcement of traffic laws may be found to have made a pre-text stop if the officer has begun an investigation into criminal behavior prior to stopping the vehicle for a moving violation. *See State v. Myers*, 117 Wn. App. 93, 69 P.3d 367 (2003), *review denied*, 150 Wn.2d 1027 (2004) (officer who recognized driver as a person whose license was suspended one year earlier and who called DOL for license check and who stopped the driver prior to DOL's response based upon the driver failing to signal while changing lanes was found to have made a pretextual stop).

- Police need not issue every conceivable citation as a hedge against an eventual challenge to the constitutionality of a traffic stop allegedly based on pretext. *State v. Hoang*, 101 Wn. App.732, 6 P.3d 602 (2000).

- *Ladson* does not prevent a police officer who subjectively suspects the possibility of criminal activity, but who does not have a suspicion rising to the level to justify a *Terry* stop

from approaching an individual in public and requesting that the individual speak with the officer. *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489, 496 n.1 (2003).

- *Ladson* does not require an officer to ignore a traffic violation simply because the officer's suspicions that the driver is trying to avoid the officer are aroused at the same time the officer observes the traffic violation. *State v. Nichols*, 161 Wn.2d 41, 162 P.3d 1122 (2007) (crossing double yellow line); *contra State v. Montes-Malindas*, 144 Wn. App. 254, 182 P.3d 999 (2008) (stop for failure to turn on headlights was a pretext where the officer was already watching the vehicle because the occupants acted nervously when they noticed the officer speaking to another person in the parking lot).

- The fact that, unless he is responding to a call, a particular police officer stops the majority of the drivers he sees committing a particular traffic infraction is not sufficient to defeat a *Ladson* challenge. *State v. Montes-Malindas*, 144 Wn. App. 254, 182 P.3d 999 (2008).

- A trial court's determination that the officer's subjective intent in stopping a vehicle was solely to enforce the traffic laws does not prevent suppression under *Ladson* if the court finds that the stop was not objectively reasonable. *State v. Montes-Malindas*, 144 Wn. App. 254, 182 P.3d 999 (2008) (officer's stopping of van for driving without its headlights on was objectively unreasonable when the stop occurred after the driver turned his headlights on and there was no evidence to indicate the presence of other traffic on the roadway or the existence of endangerment to pedestrians or property resulting from the driver's brief roadway travel without his headlights on.).

- An officer's decision to proceed with caution in approaching a stopped vehicle and/or the officer's calling for back up "suggests" to a court that the officer is preparing for something other than a traffic stop. *State v. Montes-Malindas*, 144 Wn. App. 254, 182 P.3d 999 (2008).

- An officer's decision to approach a stopped vehicle on the passenger side and to speak to the passengers before the

driver is a factor that might "suggest" the stop was for reasons other than to enforce the traffic laws. *State v. Montes-Malindas*, 144 Wn. App. 254, 182 P.3d 999 (2008) (officer testified that approaching a van from the passenger side provided greater protection from travel, was unexpected by the vehicle's occupants, and provides better visibility of the passenger compartment).

- An officer's decision to stop a vehicle that he observes committing a traffic violation will generally not be found to be an unlawful pretext stop when the officer was not following the vehicle when the officer observed the violation. *State v. Gibson*, 152 Wn. App. 945, 219 P.3d 964 (2009).

- An officer's decision to stop a vehicle after a check of the license plate indicates that the registered owner's license is suspended is not a pretextual stop. *State v. Johnson*, 155 Wn. App. 270, 229 P.3d 824, *review denied*, 170 Wn.2d 1006 (2010).

- The fact that a patrol officer is always on the lookout for lawbreaking, including people driving while under the influence, does not mean that a stop for speeding and failing to stop at a cross-walk is a pretext stop. "Under petitioner's theory, any officer who came upon a car weaving all over the road would be making a pretext stop simply because the officer expected to find an impaired driver behind the wheel. That theory turns training and experience into a basis for not enforcing the law." *State v. Weber*, 159 Wn. App. 779, 790-91, 247 P.3d 782 (2011).

- An officer, who has probable cause to arrest the driver based upon the driver's participation in a prior controlled drug sales, may make an investigatory stop of the driver's vehicle for the purpose of obtaining the driver's name. "Probable cause for the greater intrusion of an arrest encompasses legal justification for the lesser intrusion of a mere stop." *State v. Quezadas-Gomez*, 165 Wn. App. 593, 267 P.3d 1036 (2011), *review denied*, 173 Wn.2d 1034 (2012).

b. **Suspect Specific.** Each individual possesses the right to privacy, meaning that person has the right to be left alone by police unless there is probable cause based on objective facts that the person is committing a crime. Where officers do not have anything to independently connect an individual to illegal activity, no probable cause exists and an arrest or search of that person

is invalid under article I, section 7. *State v. Grande*, 164 Wn.2d 135, 187 P.3d 248 (2008).

Individualized probable cause sufficient for a warrantless arrest requires more than presence, with others, in a vehicle from which the odor of burning marijuana is detected. Individualized probable cause for arrest will require additional evidence, such as ashes on the arrestee's clothing, an admission from the arrestee, and/or statements from others stating that the marijuana belongs to the arrestee. *State v. Grande*, 164 Wn.2d 135, 187 P.3d 248 (2008).

- While the odor of burnt marijuana and/or the presence of marijuana in a vehicle that contains multiple occupants may not provide probable cause to make a warrantless arrest of any of the occupants, this evidence will support the issuance of a search warrant for the vehicle.

- While the odor of burnt marijuana and/or the presence of marijuana in a vehicle that contains multiple occupants may not provide probable cause to make a warrantless arrest, the driver of the vehicle may be successfully prosecuted for possession under a constructive possession theory. The same may be true of one or more of the passengers.

c. **Erroneous Belief**. Because probable cause is generally an objective standard, an officer's erroneous belief that probable cause does not exist is not dispositive. *State v. Rodriguez-Torres*, 77 Wn. App. 687, 693, 893 P.2d 650 (1995). An officer's erroneous identification of the crime for which the arrest is being made will not invalidate the arrest if probable cause exists to arrest for a different criminal law violation. *Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004); *State v. Louthan*, 158 Wn. App. 732, 740, 242 P.3d 954 (2010); *Fondren v. Klickitat County*, 79 Wn. App. 850, 862, 905 P.2d 928 (1995); *State v. Rose*, 175 Wn.2d 10; 282 P.3d 1087 (2012); *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698, *review denied*, 119 Wn.2d 1007 (1992); *Seattle v. Cadigan*, 55 Wn. App. 30, 36, 776 P.2d 727, *review denied*, 113 Wn.2d 1025 (1989).

i. **Error of Law.** An erroneous belief that a statute prohibits the objective facts observed by the officer will invalidate an arrest or detention. *See United States v. King*, 244 F.3d 736 (9th Cir. 2001) (stop ruled invalid where officer mistakenly believed that tag hanging from rear view mirror violated local ordinance prohibiting placement of any sign upon the front windshield); *United States v. Twilley*, 222 F.3d 1092 (9th Cir. 2000) (stop ruled invalid where officer stopped an out-of-state car in which defendant was a passenger because the

car lacked a front license plate when the state that issued the plates only issues a rear license plate); *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000) (stop ruled invalid where officer mistakenly believed that Baja California required motorists to affix a registration sticker on the car so that it would be visible from the rear of the vehicle).

d. **Possible Defense.** Officer's do not have a duty to evaluate the arrestee's self-defense claim or other affirmative defense to determine whether it vitiated the existence of probable cause. *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999).

The mere production of a document purporting to be a marijuana authorization does not negate probable cause. *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010). This result holds true after the adoption of Laws of 2011, ch. 181, § 401. *See State v. Ellis*, 178 Wn. App. 801, 315 P.3d 1170 (2013) (Because the Medical Use of Cannabis Act (MUCA) did not per se legalize marijuana or alter the established elements of the Controlled Substances Act, an affidavit supporting a search warrant presents probable cause to believe a suspect committed a Controlled Substantive Act violation where it sets forth enough details to reasonably infer the suspect is growing marijuana on his or her property. The affidavit need not also show the MUCA exception's inapplicability. "In so holding, we respectfully disagree with *United States v. Kynaston*, No. CR-12-0016WFN, slip op. at 2 (E.D. Wash. May 31,2012) (granting a suppression motion and concluding that under Washington law, an affidavit supporting a search warrant for evidence of a marijuana-based crime "must show probable cause that the criteria of the medical marijuana exception have not been met"), *rev'd on other grounds*, No. 12-30208 (9th Cir. July 24, 2013)."). *Accord State v. Reis*, ___ Wn. App. ___, 322 P.3d 1238 (2014). Nonetheless, the Legislature's intent to limit custodial arrest when a person is otherwise in compliance with the medical cannabis law should generally be honored by a police officer.

Probable cause for arrest for theft is not negated by the suspect's "innocent explanation" that the suspect though the stolen property had been abandoned if the property is of a type that is not generally abandoned and the property was left unattended for only a brief period of time. *State v. Wagner*, 148 Wn. App. 538, 200 P.3d 739 (2009) (casino ticket).

e. **Presence of Potentially Exculpatory Facts.** The fact that a suspect performs well on one or more field sobriety tests will not vitiate the existence of probable cause to arrest for DUI based upon other factors or observations. *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 43 P.3d 43, *review denied*, 147 Wn.2d 1024 (2002).

"Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested. For information to amount to probable cause, it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence. . . police are not required "to believe to an absolute certainty, or by clear and convincing evidence, or even by a preponderance of the available evidence" that a suspect has committed a crime. All that is required is a "fair probability," given the totality of the evidence, that such is the case." *Garcia v. County of Merced*, 639 F.3d 1206 (9th Cir. 2011).

f. **Child Abuse Cases**. While law enforcement officers may obviously rely on statements made by the victims of a crime to identify potential suspects, the Ninth Circuit rejects warrantless arrests based upon statements from very young victims. The Ninth Circuit cautions that such statements are not reasonably trustworthy or reliable to support a warrantless arrest. Before an officer can make an arrest upon such a statement, the officer must conduct further investigation and obtain corroboration of the statements. *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), *cert. denied*, 176 L. Ed. 2d 577 (2010).

Nonetheless, a defendant may be convicted of rape or other sexual offense involving a child, based solely on the child's testimony. *See* RCW 9A.44.020(1) ("In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.")

3. For Searches

For a search, the officer must have probable cause to believe that the items sought are connected with criminal activity and will be found in the place to be searched. Justice Charles W. Johnson and Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law :2013 Update*, 36 Seattle Univ. L. Rev. 1581, 1610 (2013).

"Probable cause to arrest concerns the guilt of the arrestee, whereas probable cause to search an item concerns the connection of the items sought with the crime and the present location of the items." *United States v. O'Connor*, 658 F.2d 688, 693 n.7 (9th Cir. 1981). *Accord Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 98 S. Ct. 1970; 56 L. Ed. 2d 525 (1978) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.").

III. Types of Intrusions

A. Social Contacts

1. Definition. Not every encounter between a citizen and a police officer rises to the stature of a seizure. A police officer does not seize a person by simply striking up a conversation or asking questions. *Florida v. Bostick,* 501 U.S. 429, 115 L. Ed.2d 389, 111 S. Ct. 2382, 2386 (1991); *State v. Mennegar,* 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). Nor is there a seizure where the conversation between citizen and officer is freely and voluntarily conducted. *Mennegar, supra.*

> An encounter between a citizen and the police is consensual or permissive if a reasonable person under the totality of the circumstances would feel free to walk away. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed.2d 497 (1980); *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990).
>
> When a citizen freely converses with a police officer, the encounter is permissive. It is not a seizure; and therefore the Fourth Amendment is not implicated. *Id.* If a person does freely consent to stop and talk, the officer's merely asking questions or requesting identification does not necessarily elevate a consensual encounter into a seizure. *Id.*

State v. Barnes, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999).

Thus, police do not necessarily effect the seizure of a person because they engage the person in conversation, *Mennegar*, *supra*; *Florida v. Royer*, 460 U.S. 491, 75 L. Ed.2d 229, 103 S. Ct. 1319 (1983); *United States v. Mendenhall*, *supra*, or because they identify themselves as officers. *Royer*, 460 U.S. at 498. Nor do police effect a seizure of a person merely by knocking on a door and requesting an opportunity to speak with the occupant. *Kentucky v. King*, ___ U.S. ___, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011).

Washington courts have not set in stone a definition for so-called social contact. It occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying "hello" to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., *Terry* stop). While the term "social contact" suggests idle conversation about, presumably, the weather or last night's ball game -- trivial niceties that have no likelihood of triggering an officer's suspicion of criminality – social contacts in the field may include an investigative component. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009).

An officer's subjective motivation is irrelevant in determining whether the officer's contact was pretextual at its inception. *State v. O'Neill*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003) ("we reject the premise that under article I, section 7 a police officer

cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a *Terry* stop"; *Ladson* does not apply to social contacts).

An officer may make a social contact even after having probable cause to make an arrest. There is no requirement that an officer make an arrest as soon as probable cause is present so that constitutional protections are triggered at the earliest possible moment. *Hoffa v. United States*, 385 U.S. 293, 310, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *United States v. Wynne*, 993 F.2d 760 (10th Cir. 1993) (same).

2. **Restrictions**. The following conduct is beyond the scope of a social contact or consensual encounter:

- The use of language or tone of voice indicating that compliance with the officer's request might be compelled. *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998).

- The use of coercive language to initiate a contact. "Gentlemen, I'd like to speak with you, could you come to my car?" or "Can I talk to you guys for a minute?" is permissive. "Wait right here" is coercive and constitutes a seizure. *State v. Barnes*, 96 Wn. App. 217, 223, 978 P.2d 1131 (1999)

- Insisting upon responses. *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998). An individual's refusal to provide identification or a birth date during a social contact will not provide reasonable suspicion for a *Terry* stop. *See generally State v. Young*, 167 Wn. App. 922, 275 P.3d 1150 (2012). Not allowing an individual to leave presence who does not desire to continue conversation. *See State v. Beito*, 147 Wn. App. 504, 195 P.3d 1023 (2008) (Police unlawfully seized a passenger in a parked car when, during a social contact, they refused to let him leave when he requested to do so); *State v. Coyne*, 99 Wn. App. 566, 570, 995 P.2d 78 (2000) (directing defendants to sit on the hood of the patrol car); *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (officer telling the citizen to"wait right here") .

- Retaining control of identification while verifying information that was given. *See, e.g., State v. Crane*, 105 Wn. App. 301, 19 P.3d 1100 (2001), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) (seizure occurs when an officer retains a person's identification while running a records check because the person is immobilized and thus not free to leave); *State v. Thomas*, 91 Wn. App. 195, 201, 955 P.2d 420, *review denied*, 136 Wn.2d 1030 (1998) (officer, while retaining the defendant's identification, took three steps back to conduct a warrants check on his hand-held radio); *State v. Dudas*, 52 Wn. App. 832, 834, 764 P.2d 1012 (1988), *review denied*, 112 Wn.2d 1011 (1989) (deputy took the defendant's

identification card and returned to the patrol car).

A seizure does not occur where an officer retains possession of the identification, in the presence of the citizen, long enough to write down the name and date of birth or long enough to call in the name and date of birth. *See, e.g., State v. Hansen*, 99 Wn. App. 575, 576, 994 P.2d 855, *review denied*, 141 Wn.2d 1022 (2000) (a seizure did not result where an officer handed the person's identification to a second officer who recorded the suspect's name and birth date and returned the license to the person before conducting a warrants check).

- Placing any of the individual's possessions in a patrol car, or out of the individual's reach. *State v. Armenta*, 134 Wn.2d 1, 12, 948 P.2d 1280 (1997); *State v. O'Day*, 91 Wn. App. 244, 252, 955 P.2d 860 (1998).

- Asking the passenger in a stopped car for identification or the passenger's name and date of birth. *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004); *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005).

- Requesting permission to frisk or search. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009); *State v. O'Day*, 91 Wn. App. 244, 252, 955 P.2d 860 (1998).

- Asking the citizen to turn his or her pockets inside out. *State v. Guevara*, 172 Wn. App. 184, 288 P.3d 1167 (2012).

- Requesting that an individual seated in a parked car exit the vehicle. *State v. Johnson*, 156 Wn.2d 82, 231 P.3d 225 (2010).

- Demanding that an individual in a parked car roll down a window. An officer may ask the individual to roll down the window, but the occupant is free to refuse the request. *State v. O'Neill*, 148 Wn.2d 564, 579, 62 P.3d 489 (2003).

- Activating patrol car lights and/or parking the patrol car very close to the parked car containing the citizens to whom the officer is speaking. *State v. Johnson*, 156 Wn.2d 82, 231 P.3d 225 (2010).

3. Officer safety.

- Requesting that an individual remove his hands from his pockets during a contact is acceptable, but only if the officer uses a tone of voice customary in social interactions. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009). *Accord State v. Barnes*, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999); *State v. Nettles*, 70 Wn. App. 706, 710 n. 6, 855 P.2d 699 (1993);

Duhart v. United States, 589 A.2d 895, 898 (D.C. 1991) (in which officer approached defendant on street, asked him to take his hand out of his pocket, and, when defendant reluctantly complied, officer grabbed his hand; held: no seizure occurred until officer grabbed defendant's wrist; request that defendant remove hand from pocket constituted "merely a pre-seizure consensual encounter"); *United States v. Barnes*, 496 A.2d 1040, 1044-45 (D.C. 1985) (no seizure where officer asked defendant to remove hands from pockets and then asked him two questions, because this was no more intrusive than asking for identification).

- If a citizen, during a social contact, keeps placing his or her hands into an object-laden pocket after being requested not to, or engages in other activities that makes an officer feel uncomfortable, the officer should terminate the encounter and return to his or her patrol car. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009).

4. Conversion into a Seizure

Washington courts will review a social contact for evidence that progressive intrusions have converted the contact into a seizure. A contact that a reasonable person may feel free to discontinue at its inception, may mature into a contact that a reasonable person would not feel free to leave. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009), presents an example of a progressive intrusion that culminated in a seizure in violation of Const. art. I, § 7. The social contact in *Harrington* began with an officer pulling his patrol car into a driveway in a manner that did not block the sidewalk. The officer exited the patrol car, whose lights had not been activated, and moved to the grassy area that was adjacent to the sidewalk, so as to not block the path of anyone who was walking on the sidewalk. The officer then asked an approaching pedestrian "Hey, can I talk to you" or "Mind if I talk to you for a minute?" Upon the pedestrian's affirmative response, the officer, standing five feet from the pedestrian began a conversation that included a question about where the pedestrian was coming from.

The subsequent events that converted this lawful social contact into a seizure included:

- The officer asking the pedestrian if he would remove his hands from his the pedestrian's pockets.

- The coincidental appearance of a state trooper, who made a u-turn, upon noticing an officer speaking alone with an individual. The state trooper parked his patrol car in the northbound lane of travel, 10 to 30 feet, from the on-going social contact. The trooper exited his marked patrol car, and stood, silently, 7 to 8 feet from the pedestrian.

- The officer, upon the arrival of the trooper, asked if he could pat the pedestrian down for officer safety. The officer, at the time of making this request, told the pedestrian that he was not under arrest.

Some non-exhaustive factors that court's will consider in determining whether officers have escalated a consensual encounter into a seizure include:

- the number of officers
- whether weapons were displayed
- whether the encounter occurred in a public or non-public setting
- whether the officer's tone or manner was authoritative, so as to imply that compliance would be compelled
- whether the officers informed the person of his right to terminate the encounter.
- whether the officer physically touched the citizen
- whether the officer asked the citizen perform an act such as removing hands from pockets
- whether a patrol car's overhead lights or sirens are activated

United States v. Washington, 490 F.3d 765, 771-72 (9th Cir. 2007); *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009); *State v. Beito*, 147 Wn. App. 504, 195 P.3d *State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005).

Post *Harrington*, the following encounters were deemed to be lawful social contacts:

- Officer asking a citizen that the officer encountered in a public place whether the citizen, who was on foot, if the citizen had a minute. Once the citizen indicated that he did, the officer asked the citizen where he was going and what he was up to, and was the citizen willing to show the officer his identification. The officer did not use his spotlight, siren, or emergency lights, and his initial question, rather then being a command, was at a volume too low for the citizen to hear. *State v. Bailey*, 154 Wn. App. 295, 224 P.3d 852 (2010).
- An officer's request for identification from a passenger in a vehicle

that was parked in a handicapped spot, without displaying a handicapped permit, was a social contact., where the officer parked his patrol car 10 to 15 feet away from the parked vehicle, did not activate the patrol car's lights, and did not ask the passenger to exit the parked vehicle until after the officer confirmed the existence of an arrest warrant. *State v. Johnson*, 156 Wn. App. 82, 231 P.3d 225 (2010).

Post *Harrington*, the following encounters were deemed to be unlawful seizures:

- Two officers "cornering" a woman against a wall and demanding the last four numbers of her social security number after the woman declined to provide her identification or birth date during an initial suspicion less social contact. *State v. Young*, 167 Wn. App. 922, 275 P.3d 1150 (2012).

- An officer pulling behind a van, which was stopped in front of a driveway, and activating the patrol car's emergency lights. The activation of the lights constituted a display of authority. *State v. Gantt*, 136 Wn. App. 133, 257 P.3d 682 (2011), *review denied*, 173 Wn.2d 1011 (2012). **Note**: *Patrol cars typically have several combinations of lights that can be displayed. The use of yellow "wig-wag" or "hazard" lights to alert traffic to the officer's presence might not constitute a seizure as such lights are standard equipment on passenger vehicles. The use of blue or red lights that are visible from the front of the patrol car will be deemed a show of authority. An officer should specify which lights were used in their police reports*.

B. Community Caretaking

Police officers serve numerous functions in society, some of which are totally divorced from the investigation of crimes. The non-crime related duties are termed "community caretaking functions." *Cady v. Dombroski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed.2d 706 (1973).

1. Citizen-Initiated Contacts. Individuals who flag officers down for assistance are not considered seized for purposes of the Fourth Amendment. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382, 2386 (1991); *State v. Mennegar*, 114 Wn.2d 304, 787 P.2d 1347 (1996). Contacts with citizens pursuant to the community caretaking function will only constitute a seizure if a person's movement is restrained by means of physical force or show of authority. *State v. Thorn*, 129 Wn.2d 347, 351-522, 917 P.2d 108 (1996); *State v. Stroud*, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981), *review denied*, 96 Wn.2d 1025 (1982), citing

United States v. Mendenhall, 446 U.S. 544, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980)).

2. **Officer-Initiated Contacts.** Various statutes require officers to assist certain vulnerable adults. *See, e.g.*, RCW 46.61.266 ("A law enforcement officer may offer to transport a pedestrian who appears to be under the influence of alcohol or any drug and who is walking or moving along or within the right of way of a public roadway, unless the pedestrian is to be taken into protective custody under RCW 70.96A.120"); RCW 13.32A.050 ("(1) A law enforcement officer shall take a child into custody: (b) If a law enforcement officer reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance"); RCW 71.05.150 ("A peace officer may ... take or cause such person to be taken into custody and immediately delivered to an evaluation and treatment facility or the emergency department of a local hospital: ... (b) When he or she has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.").

An officer does not commit a "seizure" by merely contacting a person to inquire about his or her welfare. On the other hand, any action that interferes with a person's freedom of movement is a "seizure," even if carried out pursuant to one of these statutes. The Washington Supreme Court recently placed limits on "seizures" that are carried out pursuant to a community caretaking function. Whether the actions taken during a routine check on safety are reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a community caretaking function. Police officers may approach citizens and permissively inquire as to whether they will answer questions and whether they need aid.

If police officers make a seizure for community caretaking reasons, they must limit their post-seizure questioning to that strictly relevant to the performance of the community caretaking function. The seizure must end when the reasons for initiating the routine check on safety are fully dispelled, unless the officer has a reasonable articulable suspicion of criminal activity. A citizen's statement that he or she does not require aid from the police will serve to terminate the seizure unless objective evidence exists that contradicts the statement. *Compare State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000), *cert. denied*, 121 S. Ct. 843 (2001) (police exceeded the scope of community caretaking when they detained a minor who was standing on a public sidewalk in a high narcotics trafficking area on a school night with several others, including an older person believed by the officers to be associated with narcotics, after the minor demonstrated an unwillingness to speak with the police and there was no evidence of any drug activity at the time the police approached the minor); *with State v. Hutchison*, 56 Wn. App. 863, 867, 785 P.2d 1154 (1990) (police properly searched for the identification of a man they found passed out in a parking

lot); *Gallegos v. City of Colorado Springs*, 114 F.3d 1024, 1029 n.4 (10th Cir. 1997) (police properly stopped a distraught man who was crying, smelled of alcohol, and had his hands over his face as he walked down a street late at night).

3. **Officer Safety**. During the course of a community caretaking contact, law enforcement may, without turning the contact into a seizure, take reasonable steps to ensure the safety and comfort of the participants.

   a. **Visibility of hands.** An office may request that the citizen take his hands out of his pockets and that the citizen keep his hands visible without converting the contact into a seizure or arrest. *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010, 869 P.2d 1085 (1994).

   b. **Weapon frisk.** If during a consensual or community caretaking contact, a citizen behaves in a manner that causes the officer a legitimate concern for his or her safety, that officer is entitled to take immediate protective measures. *Seattle v. Hall*, 60 Wn. App. 645, 652-53, 806 P.2d 1246 (1991) (officer permitted to frisk citizen who exhibited hostile and nervous behavior and kept his hand in his pockets after voluntarily approaching officer).

      Washington case law firmly establishes that an officer has a right to perform a pat down search of an individual prior to transporting that individual in his or her patrol car. *State v. Wheeler*, 108 Wn.2d 230, 235-36, 737 P.2d 1005 (1987). Other states are in accord. *See, e.g., State v. Smith*, 112 Ariz. 531, 533-34, 544 P.2d 213 (1975) (pat-down search of citizen, prior to transporting citizen in police vehicle in non-arrest situation is reasonable, proper, and lawful for protection of officer); *Williams v. State*, 403 So.2d 453, 456 (Fla. App. 1981), *review denied*, 412 So.2d 471 (Fla. 1982) (officer transporting a citizen in a patrol car to a police station for a consensual interview is entitled to pat the citizen down prior to placing the citizen in the patrol car); *People v. Hannaford*, 167 Mich. App. 147, 421 N.W.2d 608, 610-11 (1988), *cert. denied*, 489 U.S. 1029 (1989) (an officer who provides transportation in his patrol car to the passengers of a vehicle whose driver is arrested for DUI is entitled to pat the passengers down for weapons prior to their entering the patrol car even though none of the passengers appeared armed or dangerous); *People v. Otto*, 284 N.W.2d 273, 276 (Mich. App. 1979) (permissible to frisk one hitchhiking illegally before transporting him to site where he could legally hitchhike, despite the lack of particularized concern about the officer's safety because "it is obvious that an officer whose hands are on the wheel of his own vehicle is an easy victim of an armed passenger sitting behind him"); *Commonwealth v. Rehmeyer*, 349 Pa. Super. 176, 502 A.2d 1332, 1336-39 (1985), *appeal denied*, 516 Pa. 613, 531 A.2d 780 (1987) (a police officer who, in a non-arrest situation, properly proposes to take a citizen home in his patrol car may subject that citizen to a pat-down search for weapons despite the fact the officer has no reason to believe the

citizen is armed).

4. **Admissibility of Evidence**. In citizen-police encounters initiated for "noncriminal noninvestigatory purposes", the question of admissibility of evidence gained thereby is determined by "balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" *State v. Mennegar*, 114 Wn.2d 304, 313, 787 P.2d 1347 (1990); *State v. Lynch*, 84 Wn. App. 467, 477, 929 P.2d 460 (1996). The reasonableness of the officer's conduct must be analyzed in light of the particular circumstances facing the officer. *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243, *cert. denied*, 423 U.S. 891 (1975); *State v. Markgraf*, 59 Wn. App. 509, 513, 798 P.2d 1180 (1990). A police officer's actions are not rendered "unreasonable" simply because a defendant, with the luxury of hindsight, can identify other, less-intrusive means of accomplishing the same community caretaking function. *Lynch*, 84 Wn. App. at 478; *accord State v. Franklin*, 41 Wn. App. 409, 415, 704 P.2d 666 (1985) ("judicial review of swift decisions made by officers in the field should not come down to splitting constitutional hairs over alternative courses of action. Rather, the focus should always be on the reasonableness of the action actually taken.").

Case law has found all of the following actions to be lawful pursuant to an officer's community caretaking function:

- Stopping a vehicle to advise a driver that items in the bed of the truck are at risk of blowing away, *State v. Chisholm*, 39 Wn. App. 864, 696 P.2d 21 (1985).

- Searching the purse of a mentally unstable individual who has threatened suicide, *State v. Lowrimore*, 67 Wn. App. 949, 841 P.2d 779 (1992).

- Asking a passenger if the passenger would drive the vehicle away from the scene of a DWI arrest and, if the passenger consents, requesting to see the passenger's driver's license and to the running of a computer check to determine its validity, *State v. Mennegar,* 114 Wn.2d 304, 787 P.2d 1347 (1990).

- Assisting motorists who have been locked out of their vehicles. *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 995-96, 974 P.2d 342 (1999)

- Entering a defendant's bathroom without a warrant to search for drugs that might present a safety hazard to children. *See State v. Angelos*, 86 Wn. App. 253, 936 P.2d 52 (1997), *review denied*, 133 Wn.2d 1034 (1998).

- Impounding of a vehicle that is threatened by theft when neither the vehicle's owner or the owner's acquaintances are available to move the vehicle, *State v. Sweet*, 44 Wn. App. 226, 236, 721 P.2d 560, *review denied*, 107 Wn.2d

1001 (1986).

- Entering, without a warrant, those areas of a parked or stopped car that appears to have been burgled or tampered with in order to identify the owner to determine whether the owner wishes to have the police secure the vehicle, *State v. Lynch,* 84 Wn. App. 467, 929 P.2d 460 (1996).

- Searching a semi-conscious, intoxicated individual's pockets, clothing, and wallet in order to identify the man and to locate any information regarding his health condition, *State v. Hutchison*, 56 Wn. App. 863, 865-66, 785 P.2d 1154 (1990).

- Searching an individual who is being civilly committed on an emergency basis for weapons, drugs, or other harmful items. *State v. Dempsey*, 88 Wn. App. 918, 947 P.2d 265 (1997).

- Searching a purse or lost property for a clue as to the true owner. *See, e.g., State v. Kealey*, 80 Wn. App. 162, 175, 907 P.2d 319 (1995), *review denied*, 129 Wn.2d 1021 (1996); RCW 63.21.020; 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.5(d) (3d ed. 1996).

- Brief detention of juvenile, who was out after midnight on a weeknight without adult supervision, for the purpose of telephoning his mother. *State v. Acrey*, 148 Wn.2d 738, 64 P.3d 594 (2003).

- Checking upon the welfare of an individual who is seated in the driver's seat of a vehicle and who appears to be asleep or unconscious. *See State v. Knox*, 86 Wn. App. 831, 840 n. 1, 939 P.2d 710 (1997); *State v. Zubizareta*, 122 Idaho 823, 839 P.2d 1237 (1992) (no seizure where officer approached parked vehicle and requested motorist to roll down window and turn off engine); *In re Matter of Clayton*, 113 Idaho 817, 748 P.2d 401 (1988) (officer's actions to determine whether driver slumped forward in slumber in vehicle with its motor running and lights on was prudent and within officer's caretaking function); *People v. Murray*, 137 Ill.2d 382, 148 Ill.Dec. 7, 11-12, 560 N.E.2d 309, 313-14 (1990) (no seizure where officer approached a car in which an individual was sleeping and tapped on window or asked the individual to roll down window; request that driver who just woke up provide identification or step out of car for purpose of determining ability to drive is proper); *State v. Kersh*, 313 N.W.2d 566, 568 (Iowa 1981) (survey of cases from other jurisdictions regarding the propriety of police opening a vehicle to determine whether an unconscious or disoriented person is in distress); *Commonwealth v. Leonard*, 422 Mass. 504, 663 N.E.2d 828, *cert. denied*, 117 S. Ct. 199 (1996) (no seizure where officer opened unlocked door of car parked in breakdown area adjacent to highway after driver failed to respond to attempts to get his attention).

- Entering a residence without a warrant when the premises contain persons in imminent danger of death or harm; objects likely to burn, explode or otherwise cause harm; or information that will disclose the location of a threatened victim or the existence of such a threat. *See, e.g. State v. Loewen*, 97 Wn.2d 562, 568, 647 P.2d 489 (1982) (medical emergency); *State v. Cahoon*, 59 Wn. App. 606, 608-09, 799 P.2d 1191 (1990), *review denied*, 116 Wn.2d 1014 (1991) (medical emergency); *State v. Barboza*, 57 Wn. App. 822, 790 P.2d 647, *review denied*, 115 Wn.2d 1014 (1990) (report of possible kidnapping); *State v. Downey*, 53 Wn. App. 543, 544-45, 768 P.2d 502 (1989) (overpowering ether odor); *State v. Bakke*, 44 Wn. App. 830, 833-34, 837-38, 723 P.2d 534 (1986), *review denied*, 107 Wn.2d 1033 (1987) (burglary in progress); *State v. McAlpin*, 36 Wn. App. 707, 716, 677 P.2d 185, *review denied*, 102 Wn.2d 1011 (1984) (search for missing gun); *State v. Nichols*, 20 Wn. App. 462, 465-66, 581 P.2d 1371, *review denied*, 91 Wn.2d 1004 (1978) (fight in progress reported); *State v. Sanders*, 8 Wn. App. 306, 310-11, 506 P.2d 892, *review denied*, 82 Wn.2d 1002 (1973) (entry in response to emergency call and officer's observation of suspicious activity).

- Stopping a care that is registered to a person who has been reported missing by his relatives, and asking all of the occupants of the vehicle for identification where the officer did not have a description of the missing/endangered person. *State v. Moore*, 129 Wn. App. 870, 120 P.3d 635 (2005).

- Entering a residence, without a warrant, to check on an apparently non-responsive person, in order to determine whether the person was breathing and whether the person needed medical assistance. *State v. Hos*, 154 Wn. App. 238, 225 P.3d 389 (2010).

C. Protective Custody

1. Person incapacitated by alcohol or drugs.

a. Protective custody for detoxification. RCW 70.96A.120 provides that:

> "a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, shall be taken into protective custody by a peace officer or staff designated by the county and as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment. If no approved treatment program is readily available he or she shall be taken to an emergency medical service customarily used for incapacitated persons. The peace officer or staff designated by the county, in detaining the person and in taking him or her to an

approved treatment program, is taking him or her into protective custody and shall make every reasonable effort to protect his or her health and safety. In taking the person into protective custody, the detaining peace officer or staff designated by the county may take reasonable steps including reasonable force if necessary to protect himself or herself or effect the custody. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime."

b. **Intoxicated pedestrians.** RCW 46.61.266 provides for something less than protective custody:

> A law enforcement officer may offer to transport a pedestrian who appears to be under the influence of alcohol or any drug and who is walking or moving along or within the right of way of a public roadway, unless the pedestrian is to be taken into protective custody under RCW 70.96A.120.
>
> The law enforcement officer offering to transport an intoxicated pedestrian under this section shall:
>
> (1) Transport the intoxicated pedestrian to a safe place; or
>
> (2) Release the intoxicated pedestrian to a competent person.
>
> The law enforcement officer shall take no action if the pedestrian refuses this assistance. No suit or action may be commenced or prosecuted against the law enforcement officer, law enforcement agency, the state of Washington, or any political subdivision of the state for any act resulting from the refusal of the pedestrian to accept this assistance.

An officer does not incur liability by advising an intoxicated, but not gravely disabled person, to not walk in the street or to at least walk facing traffic. *Weaver v. Spokane County*, 168 Wn. App. 127, 275 P.3d 1184, *review denied*, 175 Wn.2d 1011 (2012).

c. **Intoxicated cyclists.** RCW 46.61.790 provides for something less than protective custody:

> (1) A law enforcement officer may offer to transport a bicycle rider who appears to be under the influence of

alcohol or any drug and who is walking or moving along or within the right of way of a public roadway, unless the bicycle rider is to be taken into protective custody under RCW 70.96A.120. The law enforcement officer offering to transport an intoxicated bicycle rider under this section shall:

(a) Transport the intoxicated bicycle rider to a safe place; or

(b) Release the intoxicated bicycle rider to a competent person.

(2) The law enforcement officer shall not provide the assistance offered if the bicycle rider refuses to accept it. No suit or action may be commenced or prosecuted against the law enforcement officer, law enforcement agency, the state of Washington, or any political subdivision of the state for any act resulting from the refusal of the bicycle rider to accept this assistance.

(3) The law enforcement officer may impound the bicycle operated by an intoxicated bicycle rider if the officer determines that impoundment is necessary to reduce a threat to public safety, and there are no reasonable alternatives to impoundment. The bicyclist will be given a written notice of when and where the impounded bicycle may be reclaimed. The bicycle may be reclaimed by the bicycle rider when the bicycle rider no longer appears to be intoxicated, or by an individual who can establish ownership of the bicycle. The bicycle must be returned without payment of a fee. If the bicycle is not reclaimed within thirty days, it will be subject to sale or disposal consistent with agency procedures.

2. Children

a. When to take a Child into Protective Custody. An officer shall take a child into protective custody when:

i. a law enforcement agency has been contacted by the parent of the child that the child is absent from parental custody without consent;

ii. a law enforcement officer reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance;

A. An older child's statement that she is "okay" and does not need assistance, may preclude further interference by the police. *See State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000), *cert. denied*, 121 S. Ct. 843 (2001) (police exceeded the scope of community caretaking when they detained a 16-year-old minor who was standing on a public sidewalk in a high narcotics trafficking area on a school night with several others, including an older person believed by the officers to be associated with narcotics, after the minor demonstrated an unwillingness to speak with the police and there was no evidence of any drug activity at the time the police approached the minor)

iii. a law enforcement agency is notified by an agency legally charged with the supervision of a child, that the child has run away from placement;

iv. a law enforcement agency has been notified by the juvenile court that the court finds probable cause exists to believe that the child has violated a court placement order issued under the Family Reconciliation Act (at-risk youth), chapter 13.32A or the Juvenile Court Act (dependency and termination of parental rights), chapter 13.34 RCW or that the court has issued an order for law enforcement pick-up of the child under chapter 13.32A or chapter 13.34 RCW.

RCW 13.32A.050.

b. Scope of Protective Custody. An officer who takes a child into protective custody must:

i. Advise the child of the reason for the protective custody.

ii. Not extend the protective custody beyond the amount of time reasonably necessary to transport the child to a destination authorized by law and to place the child at that destination.

A. A detention may be conducted at the scene. *See State v. Acrey*, 148 Wn.2d 738, 64 P.3d 594 (2003) (brief detention of 12-year-old minor, who was out after midnight on a weeknight without adult supervision, for the purpose of telephoning his mother was a reasonable exercise of the community caretaker function)

iii. Provide a written report, within 24 hours of delivering a child to a crisis residential center, that states the reasons the officer took the

child into custody.

iv. Immediately make a report to CPS if the officer has reasonable cause to believe that the child is absent from home because he or she is abused or neglected.

3. Person disabled by a mental illness.

a. A peace officer may take into custody a person whom a designated mental health professional believes, as the result of a mental disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled, for an emergency evaluation. RCW 71.05.150(4); RCW 71.05.153(2)(a).

b. A peace officer may take a person into custody for immediate deliverance to an evaluation and treatment facility or the emergency department of a local hospital, if the officer has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled. RCW 71.05.153(2).

i. "Gravely disabled" means a condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety. RCW 71.05.020(17).

ii. "Likelihood of serious harm" means:

(a) A substantial risk that: (i) Physical harm will be inflicted by an individual upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; or

(b) The individual has threatened the physical safety

of another and has a history of one or more violent acts;

RCW 71.05.020(25).

iii. "Mental disorder" means any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions. RCW 71.05.020(26).

iv. "Imminent" is the " state or condition of being likely to occur at any moment or near at hand, rather than distant or remote." RCW 71.05.020(20).

c. Detentions pursuant to chapter 71.05 RCW have been under the following circumstances:

- The officers had reasonable cause under RCW 71.05.153(2) to take the detained person to a hospital for a mental evaluation where the detained person made paranoid comments to the officers, there were 911 reports that the detained person young son, screaming that someone was trying to kill her and that she would kill herself. The amount of force used to subdue the woman, who tried to bite, scratch, and hit the officers, was reasonable under the circumstances. Once at the hospital, the detained woman was diagnosed with "[a]cute psychosis secondary to cocaine intoxication," and her urinalysis tested positive for cocaine, dislocated shoulder and torn shoulder ligaments, and bruises, swelling, and abrasions on her forearms, abdomen, hip, and lower extremities. *Luchtel v. Hagemann*, 623 F.3d 975 (9th Cir. 2010).

- Officer, who knew of person's past suicide attempts, properly detained man who threatened suicide and who made superficial cuts on his wrists with a knife. *State v. Mason*, 56 Wn. App. 93, 782 P.2d 572 (1989).

d. A peace officer who has probable cause to arrest an individual who suffers from a mental illness for a non-felony crime other than a serious traffic offense, a domestic violence offense, a harassment offense, a violation of Chapter 9.41 RCW (firearms and dangerous weapons), or any crime against persons in RCW 9.94A.411, has the option not take the individual to jail.

RCW 10.31.110 provides that:

> (1) When a police officer has reasonable cause to believe that the individual has committed acts constituting a nonfelony crime that is not a serious offense as identified in

RCW 10.77.092 and the individual is known by history or consultation with the regional support network to suffer from a mental disorder, the arresting officer may:

(a) Take the individual to a crisis stabilization unit as defined in RCW 71.05.020(6). Individuals delivered to a crisis stabilization unit pursuant to this section may be held by the facility for a period of up to twelve hours. The individual must be examined by a mental health professional within three hours of arrival;

(b) Take the individual to a triage facility as defined in RCW 71.05.020. An individual delivered to a triage facility which has elected to operate as an involuntary facility may be held up to a period of twelve hours. The individual must be examined by a mental health professional within three hours of arrival;

(c) Refer the individual to a mental health professional for evaluation for initial detention and proceeding under chapter 71.05 RCW; or

(d) Release the individual upon agreement to voluntary participation in outpatient treatment.

(2) If the individual is released to the community, the mental health provider shall inform the arresting officer of the release within a reasonable period of time after the release if the arresting officer has specifically requested notification and provided contact information to the provider.

(3) In deciding whether to refer the individual to treatment under this section, the police officer shall be guided by standards mutually agreed upon with the prosecuting authority, which address, at a minimum, the length, seriousness, and recency of the known criminal history of the individual, the mental health history of the individual, where available, and the circumstances surrounding the commission of the alleged offense.

(4) Any agreement to participate in treatment shall not require individuals to stipulate to any of the alleged facts regarding the criminal activity as a prerequisite to participation in a mental health treatment alternative. The

agreement is inadmissible in any criminal or civil proceeding. The agreement does not create immunity from prosecution for the alleged criminal activity.

(5) If an individual violates such agreement and the mental health treatment alternative is no longer appropriate:

(a) The mental health provider shall inform the referring law enforcement agency of the violation; and

(b) The original charges may be filed or referred to the prosecutor, as appropriate, and the matter may proceed accordingly.

(6) The police officer is immune from liability for any good faith conduct under this section.

4. Abused or neglected child.

a. RCW 26.44.050 provides in pertinent part that:

"A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order"

i. "'Abuse or neglect' means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section." RCW 26.44.020(1).

ii. "'Sexual exploitation' includes: (a) Allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person." RCW 26.44.020(19).

D. *Mendez* Restrictions

1. Definition. Const. art. I, § 7 prohibits law enforcement officers from restricting the

movements of passengers in lawfully stopped vehicles absent objective rationale predicated upon safety considerations. *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). To satisfy this objective rationale, an officer need not meet *Terry* 's standard of reasonable suspicion of criminal activity. *Terry* must only be met if the purpose of the officer's interaction with the passenger is investigatory. For purposes of controlling the scene of the traffic stop and to preserve safety there, the standard is something less.

2. **Factors to be Considered**. A *Mendez* checklist appears at the end of this section. This checklist takes into account the factors identified by the Washington Supreme Court:

> Factors warranting an officer's direction to a passenger at a traffic stop may include the following: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants. These factors are not meant to be exclusive; nor do we hold that any one factor, taken alone, automatically justifies an officer's direction to a passenger at a traffic stop. The inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop.

State v. Mendez, 137 Wn.2d 208, 220-21, 970 P.2d 722 (1999).

a. **Frisks or Pat-Downs of Passengers**. No officer may search a non-arrested passenger (or items clearly associated with such passenger) unless the officer can provide the "more" set forth in the *Terry* standard which is discussed *infra*. That standard provides that an officer may frisk a passenger if the officer has objective suspicions that the person searched may be armed or dangerous. *Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).

- A trooper's belief that weapon was transferred into non-suspected, non-arrested passenger's jacket by the vehicle's driver during early morning, isolated vehicle stop, satisfied *Terry* standard for a frisk of the passenger. The pat-down was held to not offend the state constitution. *State v. Horrace*, 144 Wn.2d 386, 28 P.3d 753 (2001).

- The mere fact that someone is a passenger in a stolen car does not provide an officer with grounds to conduct a frisk. *State v. Adams*, 144 Wn. App. 100, 181 P.3d 37, *review denied*, 164 Wn.2d 1033 (2008).

- It is improper to frisk a passenger in a vehicle that was stopped for expired tabs when the driver was arrested for DWLS, and both the driver and the passenger were cooperative and cordial and made no furtive movements. *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011) (the vehicle stop occurred in the midst of a territorial conflict between two gangs; officers did not observe the gunshot damage to the vehicle's body until after the frisk).

- The trooper had objectively valid reasons for frisking the defendant after stopping the vehicle in which the defendant was a passenger for speeding. Specifically, the defendant's furtive movements during the time the driver was refusing to comply with the order to stop her vehicle, his evasive and deceptive responses when asked what he was doing at that time, the peculiar way he opened the door with his left hand, and the way he kept his right hand near and reached for his right coat pocket when he got out of the vehicle, would justify an experienced law enforcement officer's belief that the defendant was armed and dangerous. *United States v. Burkett*, 612 F.3d 1103 (9th Cir. 2010).

3. Staying vs. Leaving.

On March 9, 2000, Division III of the Washington Court of Appeals considered whether it was reasonable for the police to seize a passenger in a car stopped for a traffic violation. The case, *City of Spokane v. Hays*, 99 Wn. App. 653, 995 P.2d 88 (2000), arose when police stopped a vehicle they had observed leave a known gang location merge into traffic without signaling. While following the car, the officers observed the driver and the passenger/defendant manipulating clothing on the front bench-style seat. The officers, concerned that the item of clothing might conceal a firearm, approached on both sides.

The officer who pulled the passenger/defendant to ask the passenger to roll down the window was confronted with outright hostility and the sound of the door lock being engaged. The officer explained to the passenger/defendant that he needed to cooperate or risk being arrested for obstruction. The passenger/defendant, guided by the information he gleaned from newspaper articles written after *Mendez* was first decided, insisted that, as a passenger, he was not required to comply with law enforcement at a traffic stop.

After further discussions, the passenger/defendant opened the door and the officer pulled the passenger/defendant out of the vehicle. After the passenger/defendant resisted a frisk, he was arrested for obstruction. The backseat passengers were then requested to leave the vehicle and to sit on the ground, but they were not searched.

In upholding the police officers' actions, Division III indicated that:

> The facts of this case distinguish it from *Mendez* in a couple of important respects. The passenger in *Mendez* did not obstruct the officers in any way. *Mendez* merely tried to leave the scene. Id. at 224. Mr. Hays did not leave. By electing to remain, he subjected himself to the authority of the officers to control the scene. Second, the police in *Mendez* never articulated any reason why the departing passenger aroused fear for officer safety. Here, both Officers Yamada and Dashiell expressed plausible safety concerns based on extrinsic factors as well as Mr. Hays' conduct.

In discussing the factors identified by the Washington Supreme Court in *Mendez* for when a passenger's conduct may be restricted the Court of Appeals indicated that:

> There were three vehicle occupants and two officers. Both officers worried about the apparent interest of those in the front seat to something concealed between them. Mr. Hays was hostile and confrontational for no apparent reason. It was dark. The place was Spokane's 'Charlie sector,' an area known for crime. The record does not reflect the traffic at the scene or whether other bystanders were present. The officers had no direct knowledge of the occupants. The address from which one of the passengers emerged before getting in the car was, however, particularly notorious for crime and gang activity. These same officers had responded to an assault call there earlier that day.
>
> Mr. Hays was sitting in the passenger seat. He was therefore not seized and was free to walk away from the initial stop. He did not. He elected instead to remain in the vehicle. He was then seized when Officer Dashiell ordered him out of the car. *Mendez*, 137 Wn.2d at 222. Officers Dashiell and Yamada were nervous about Mr. Hays' intentions. Their safety concerns were reasonable, and therefore tipped the interest balance from Mr. Hays' privacy to officer and public safety. Id. at 220. It was reasonable to ask Mr. Hays to get out of the car.
>
> The seizure was, therefore, lawful.

4. **Arrest of Occupant**. The arrest of a vehicle's occupant provides officers with an objective basis to ensure their safety by "controlling the scene". If an arrest is being made, officers may order passengers in or out of the vehicle as necessary. *State v. Reynolds*, 144 Wn.2d 282, 27 P.3d 200 (2001).

Mendez Passenger Control Checklist

Under state constitutional right to privacy, officer must have articulable rationale predicated upon safety considerations to order passengers out of car or to remain in car following lawful traffic stop.

To order passengers to remain in car – You must have reasonable suspicion that the officer's safety, the passenger's safety, or someone else's safety will be placed at risk if a passenger who is not being independently cited for a seatbelt violation is asked to remain in car during lawful traffic stop. The suspicion required is less than that required for a *Terry* detention.

Articulable factors justifying request:

___ hour and lighting conditions

___ weather

___ pedestrians restricted from road upon which stop completed

___ age of passenger(s)

___ personal knowledge of violent tendencies of passenger or that passenger has outstanding warrants

___ condition of passenger (*i.e.* intoxicated or high)

___ arrest of one of the occupants

___ high crime neighborhood

___ hand to hand movement

___ number of individuals in car compared to number of officers present at the scene

___ statements of passenger or driver

___ purpose of stop (traffic infraction vs. service of arrest warrant or investigation into recently reported crime)

___ other

To order passengers to exit car – You must have reasonable suspicion that the officer's safety, the passenger's safety, or someone else's safety will be placed at risk if the vehicle is not being searched incident to the arrest of an occupant before a passenger who is not being cited for a seatbelt violation is asked to exit a car during lawful traffic stop. The suspicion required is less than that required for a *Terry* detention.

Articulable factors justifying request:

___ hour and lighting conditions

___ visible weapons or ammunition

___ age of passenger(s)

___ passenger's furtive movements

___ personal knowledge of violent tendencies of passenger or that passenger has outstanding warrants

___ passenger's refusal to keep hands visible

___ arrest of one of the occupants

___ high crime neighborhood

___ hand to hand movement

___ number of individuals in car compared to number of officers present at the scene

___ statements of passenger or driver

___ purpose of stop (traffic infraction vs. service of arrest warrant or investigation into recently reported crime)

___ other

To Frisk Passenger for Weapons– You may frisk outer clothing of passengers for weapons and may search if you reasonably believe you are in danger.

Articulable factors justifying search for weapons:

___high crime neighborhood
___guns common in neighborhood
___feel of weapons
___shape of weapon
___sight of weapon
___sound of weapon
___concerned citizen information
___CI information
___ information from another occupant
___personal knowledge of passenger having weapons
___passenger's movements
___passenger's statements
___sight of ammunition
___other

To QUESTION – You may demand the passenger's name, birth date, and address only if a citation is being issued to the passenger. You may detain the passenger for a reasonable period of time to verify his answers and to check for warrants.

If the passenger is not being cited for any infraction, you may ask the passenger's name and identifying information only if the passenger is a witness to a crime, the passenger wishes to drive the vehicle away from the scene, or the passenger's identity is relevant to a separate criminal investigation, such as a violation of a protection order.

If the driver is suspended or being arrested, you have the right to refuse to allow the passenger to drive the vehicle away from the scene of the stop until it is established that the passenger has a valid operator's license.

BOTTOM LINE – You must be able to articulate reasons for placing restrictions upon individuals who just happen to be in the car that is lawfully stopped.

E. *Terry* Detentions

A *Terry* detention is a seizure for investigative purposes.

> To justify a *Terry* stop under the Fourth Amendment and art. I, § 7, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Probable cause is not required for a *Terry* stop because a stop is significantly less intrusive than an arrest. *Id.*; *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed.2d 357 (1979) (same).

State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999).

1. Washington Specific Limitations.

Terry stops in Washington are limited to crimes, and traffic infractions. A *Terry* stop may not be made to investigate a non-traffic infraction. *See State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002). A *Terry* stop may not be made to investigate a parking violation. *See State v. Day*, 161 Wn.2d 889, 168 P.3d 1265 (2007).

A *Terry* stop may not be made solely upon reasonable suspicion to believe one or more of the following traffic infractions is being committed:

- Sound System Components in Vehicle Not Securely Attached, RCW 46.37.680(2) ("Enforcement of this section by law enforcement officers may be accomplished only as a secondary action when a driver of a vehicle has been detained for a suspected violation of this title or an equivalent local ordinance or some other offense.")

- Intermediate license violation, RCW 46.20.075(6) ("Except for a violation of subsection (4) of this section, [use of wireless communication devise] enforcement of this section by law enforcement officers may be accomplished only as a secondary action when a driver of a motor vehicle has been detained for a suspected violation of this title or an equivalent local ordinance or some other offense."

An officer, who has probable cause to believe that a traffic or non-traffic infraction was committed in his presence, may detain the person receiving the infraction for a reasonable period of time necessary to identify the person and to complete the notice of infraction. *See generally* RCW 7.80.050(2); RCW 7.80.060; Laws of 2012,

ch. 176, § 1(2)(a) (to be codified as RCW 7.84.030(2)(a), effective date June 7, 2012); RCW 46.61.021; RCW 46.64.015; RCW 46.63.030(1)(a). The officer's detention may extend for the period necessary to conduct a warrants check if the infraction is for a violation of Titles 46, 76, 77, 79, or 79A RCW or rules adopted under Titles 76, 77, 79, or 79A RCW. *See* RCW 46.61.021 and Laws of 2012, ch. 176, § 1(2)(b) (to be codified as RCW 7.84.030(2)(b), effective date June 7, 2012).

An officer who did not witness the commission of a traffic infraction may still detain someone for the purpose of issuing a notice of traffic infraction: (1) when the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed; (2) when the officer's on scene investigation of a motor vehicle accident provides probable cause to believe that the driver of a motor vehicle involved in the collision has committed a traffic infraction; (3) when the infraction is detected through the use of a photo enforcement system under RCW 46.63.160; (4) when the infraction is detected through the use of an automated school bus safety camera under RCW 46.63.180; or (5) when the infraction is detected through the use of an automated traffic safety camera under RCW 46.63.170. RCW 46.63.030.

2. Completed Crimes.

a. Felonies. A *Terry* stop may be made to investigate whether a person was involved in or is wanted in connection with a *completed* felony. *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). To be lawful, the officer making the *Terry* stop must have a reasonable suspicion, grounded in specific and articulable facts. *Hensley*, 469 U.S. at 229.

b. Misdemeanors and Gross Misdemeanors. Whether a *Terry* stop may be made to investigate whether a person was involved in or is wanted in connection with a *completed* misdemeanor offense is currently unsettled. The Sixth Circuit has addressed this issue, holding that "[p]olice may . . . make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor." *Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004). State courts in Minnesota and Florida have issued rulings agreeing with the Sixth Circuit. *See Blaisdell v. Comm'r of Public Safety*, 375 N.W.2d 880, 881, 883-84 (Minn. Ct. App. 1985), *aff'd on other grounds*, 381 N.W.2d 849 (Minn. 1986); *State v. Bennett*, 520 So.2d 635, 636 (Fla. Dist. Ct. App. 1988).

The Ninth Circuit, relying upon the policy interests identified by the United States Supreme Court in *Hensley* has held that a *Terry* stop may be made to investigate whether a person was involved in or is wanted in connection with a *completed* misdemeanor offense when there is an indication that the suspect will repeat the misdemeanor offense or the misdemeanor offense is one that could cause a danger to others. *See United States v. Grigg*, 498 F.3d

1070 (9th Cir. 2007). State courts in Louisiana, and North Dakota agree with the Ninth Circuit's analysis.

Decisions from courts that have adopted the Ninth Circuit's analysis indicate that a *Terry* stop to investigate a completed misdemeanor is

- not appropriate for a claim of indecent exposure, *United States v. Jegede*, 294 F. Supp. 2d 704 (D. Md. 2003).

- not appropriate for noise violations, *United States v. Grigg*, 498 F.3d 1070 (9th Cir. 2007).

- not appropriate for a simple trespass, *United States v. Hughes*, 517 F.3d 1013 (8th Cir. 2008) (while a criminal trespass inherently involves some risk of confrontation with a property owner or lessee, this risk, standing alone, is not enough to outweigh the individual's strong security interests).

- appropriate for a completed trespass that is accompanied by a strong threat to public safety, *United States v. Moran*, 503 F.3d 1135, 1142-43, (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2424 (2008) (*Terry* stop justified where there were multiple reports of the same individual trespassing (two on that particular day), the individual was likely armed as he was trespassing to reach hunting grounds, there were previous confrontations between the trespasser and the property owner, and the trespasser had threatened other local property owners); *Bates v. Chesterfield County, Va.*, 216 F.3d 367, 371 (4th Cir. 2000) (*Terry* stop justified where property owner reported juvenile trespassing, acting weird as if on drugs or dunk, and then running into the woods).

- appropriate when dealing with an impaired or non-attentive driver, *State v. Myers*, 490 So.2d 700, 701-03 (La. Ct. App. 1986) (hit and run of stop sign); *accord Floyd v. City of Crystal Springs*, 749 So.2d 110, 117 (Miss. 1999) (reckless driving); *State v. Blankenship*, 757 S.W.2d 354, 357 (Tenn. Crim. App. 1988) (hit-and-run accident).

- appropriate in response to a verbal altercation and/or disorderly conduct, *City of Devils Lake v. Lawrence*, 2002 ND 31, 639 N.W.2d 466, 467, 473 (N.D. 2002); *accord State v. Burgess*, 2001 ME 117, 776 A.2d 1223, 1227-28 (Me. 2001) (threats by drunken man).

3. **Witnesses**.

Police officers may detain a witness if there are exigent circumstances or special officer safety concerns. *State v. Dorey*, 145 Wn. App. 423, 186 P.3d 363 (2008); *State v. Mitchell*, 145 Wn. App. 1, 186 P.3d 1071 (2008), *review denied*, 165 Wn.2d 1022 (2009); *State v. Carney,* 142 Wn. App. 197, 203, 174 P.3d 142 (2007), *review denied*, 164 Wn.2d 1009 (2008).

In reviewing a particular situation, Washington courts will consider the test contained in the American Law Institute Model Code of Pre-Arraignment Procedure § 110.0(1)(b) (1975) (ALI Model Code) to determine whether a witness was properly prevented from leaving the scene. Under the ALI Model Code, an officer may detain a witness when:

> "(i) [T]he officer [has] reasonable cause to believe that a misdemeanor or felony, involving danger or forcible injury to persons or of appropriation of or danger to property, has just been committed near the place where he finds such person, and (ii) the officer [has] reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and (iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime."

City of Kodiak v. Samaniego, 83 P.3d 1077, 1083-84 (Alaska 2004) (quoting the ALI Model Code). *Accord* 4 Wayne R. Lafave, *Search & Seizure: a Treatise on the Fourth Amendment* § 9.2(b), at 289 (4th ed. 2004).

Exigent circumstances are lacking when: (1) a crime has not been reported; (2) there is no ongoing or recently committed unsolved crime; (3) the suspect is already in custody; (4) there is no reason to believe that the potential witness possesses knowledge that would materially aid the investigation; (5) the officer is not acting to ensure the health or safety of a crime victim.

Examples:

- Police officers properly detained the apparent victim of an armed robbery who was being treated for his injuries in a parking lot, until he identified the suspects who were detained so that he could identify the assailants. Factors to be considered in determining the reasonableness of detaining a witness include the seriousness of the crime being investigated, a reason to believe the person detained has knowledge of material aid in the investigation of such crime, and the need for prompt action. *State v. Mitchell*, 145 Wn. App. 1, 186 P.3d 1071 (2008), *review denied*, 165 Wn.2d 1022 (2009).

- An officer responding to a residential area to investigate a citizen report of a reckless motorcyclist improperly detained two occupants in a parked car that the officer had seen speaking with a motorcycle rider that matched the description of the reckless rider. The fact that the motorcyclist ran to his bike and fled, swerving around the patrol car and ignoring the officer's emergency lights and verbal instructions to stop did not create an exigent circumstance sufficient to detain the possible witnesses long enough to complete a records check. *State v. Carney,* 142 Wn. App. 197, 203, 174 P.3d 142 (2007), *review denied*, 164 Wn.2d 1009 (2008).

- A police officer may not stop a potential witness when investigating a disturbance complaint that did not arise to the level of a crime. *State v. Dorey*, 145 Wn. App. 423, 186 P.3d 363 (2008).

a. **Length of Detention**. A multi-hour detention of witnesses to a crime violates the Fourth Amendment and can give rise to civil liability. *See Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013).

b. **Child Witnesses.** The removal of a child from a classroom to interview the child about a crime the child witnessed was held, by the Ninth Circuit, to be a seizure that must either be justified by exigent circumstances, parental consent, or a court order. *See Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009). The United States Supreme Court, however, vacated the Ninth Circuit's opinion as moot. *See Camreta v. Greene*, ___ U.S. ____, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011).

Many factors will determine whether an interview is a seizure, including

- the length of the interview

- the location of the interview (home, school or street)

- who initiated the interview (the victim called police or told someone who called the police vs. police contacting the victim pursuant to an ongoing investigation)

- the number of interview participants and their roles

- the attire of the investigators, including whether a firearm was present or visible

- the language and tone of the investigator/interviewer

- how aggressive or confrontational the questioning (volunteered report or denial followed by questions that challenge the denial)

- physical contact between the investigator and the person being interviewed

- the age of the child (children 12-years of age or older can provide their own consent. *See generally* RCW 13.40.140(10))

- whether the child was told that s/he could refuse to participate in the interview

Officers and CPS workers should document in detail the circumstances of the interview, including the above factors. This documentation may determine whether a subsequent court will decide if the interview was a seizure.

Exigent circumstances permit an officer or caseworker to seize a child without a warrant or parental consent if the investigator "reasonably believes" that:

- medical issues need to addressed immediately, or;

- the child is or will be in danger of harm if the interview or physical exam is not immediately completed.

An argument that "exigent circumstances" exists will be more compelling if the interview is conducted with urgency and before the child returns home to either the alleged abuser or the perceived threat. Law enforcement officers should include language in their report as to why the officer believed there were exigent circumstances to interview of the child without the consent of the parent. Information that the child has been abused, access by the suspect to the child, prior injuries or concerning behavior by or to the child, may justify a warrantless interview of a child. The report should also reference whether a decision was made, following the interview, to place the child into protective custody, and if so, why or why not.

4. Reasonable Suspicion

The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. A reasonable suspicion can arise from information that is less reliable than that required to establish probable cause, but reasonable suspicion, like probable cause, is dependent upon both the content of the information possessed by the officer and the degree of reliability of the information. Both factors—quantity and quality—are considered in the totality of the circumstances, i.e., the “whole picture,” that must be taken into account when evaluating whether the police officer's suspicion of criminal activity is reasonable. *State v. Lee*, 147 Wn. App. 912, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009).

While a police officer's reasonable suspicion may be based on information supplied by an informant, an informant's tip cannot constitutionally provide police with a reasonable suspicion unless the tip possesses sufficient indicia of reliability. Courts generally consider several factors when deciding whether an informant's tip carries sufficient indicia of reliability, primarily (1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip. *State v. Kennedy*, 107 Wn.2d 1, 7, 726 P.2d 445 (1986); *State v. Lee*, 147 Wn. App. 912, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009). This test is less rigorous then the *Aguillar-Spinelli* test used to evaluate informant evidence in the context of search warrants and arrests. *Id.*

Citizen-informants, who witnessed the crime firsthand, are generally considered reliable. *See State v. Vandover*, 63 Wn. App. 754, 759, 822 P.2d 784 (1992). Even an unnamed citizen-informant may be considered reliable. When unnamed, court rely upon the following factors in establishing reliability: (1) whether the tip is provided to the officer during a face-to-face encounter; (2) whether the unidentified informant is a member of a small class of likely sources; (3) whether the unidentified informant's tip is made contemporaneously with a complainant's observations; and (4) whether the unidentified reveals the basis of knowledge of the tip--how the informant came to know the information. *See generally United States v. Palos-Marquez*, 591 F.3d 1272 (9th Cir. 2010). *Accord United States v. Basher*, 629 F.3d 1161, 1165 (9th Cir. 2011) (witnesses in-person reports to officers provided a legitimate basis for a *Terry* stop; officers did not write down the witnesses' names).

Washington courts state that the test for reasonable suspicion is the same in Washington as in federal courts. Recent cases, however, belie this. In the January 7, 2014, Division Two case of *State v. Z.U.E.*, 178 Wn. App. 769, 315 P.3d 1158, *review granted*, 180 Wn.2d 1020 (2014), the court held that a named, but otherwise unknown, citizen informant is not presumed to be reliable and a report from such an informant may not justify an investigative stop. A 911 caller's provision of basic information – name, telephone number and location or address – is insufficient to support a finding of reliability. Cross corroboration of multiple 911 calls is insufficient to support a finding of reliability. Confirming a subject' s description or location or other innocuous facts does not satisfy the corroboration requirement.

Z.U.E. conflicts with the United States Supreme Court's April 22, 2014, decision in *Navarette v. California*, No. 12-9490, ___ U.S. ___, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014). In *Navarette*, the Court held that an anonymous 911 tip from an eyewitness victim of reckless driving provides a sufficient basis for a *Terry* stop of a vehicle that matches the caller's description, location, and direction of travel. The Supreme Court found that a caller's use of the 911 emergency system is an indicator of veracity as "[a] 911 call has some features that allow for identifying and tracing callers ... which provides victims with an opportunity to identify the false tipster's voice and subject him to prosecution."]. Police officers should consult their local

prosecutors for guidance in this area.

Police may also make a *Terry* stop based on information provided by other divisions or agencies. *See State v. Mance*, 82 Wn. App. 539, 542, 918 P.2d 527 (1996); *see also United States v. Hensley*, 469 U.S. 221, 230-31, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). The collective knowledge of law enforcement agencies that gives rise to a dispatch will be imputed to the officers who act on it. *State v. O'Cain*, 108 Wn. App. 542, 544-45, 31 P.3d 733 (2001). However, if the issuing agency lacked the authority to make a *Terry* stop on the information, so did the officer. *State v. Gaddy*, 152 Wn.2d 64, 71, 93 P.3d 872 (2004).

a. Fellow Officer Rule/Collective or Imputed Knowledge Doctrine. Under the collective or imputed knowledge doctrine (also referred to as the "fellow officer" rule), an arrest or search is permissible where the actual arresting or searching officer lacks the specific information to form the basis for probable cause or reasonable suspicion but sufficient information to justify the arrest or search was known by other law enforcement officials initiating or involved with the investigation. *See United States v. Hensley*, 469 U.S. 221 , 230-33 (1985); *United States v. Canieso*, 470 F.2d 1224, 1230 n.7 (2d Cir. 1972). "The rule exists because, in light of the complexity of modern police work, the arresting officer cannot always be aware of every aspect of an investigation; sometimes his authority to arrest a suspect is based on facts known only to his superiors or associates." *United States v. Valez*, 796 F.2d 24, 28 (2d Cir. 1986).

- This rule allows for investigative stops to be made based upon another department's bulletins or flyers if the flyers or bulletins have been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense. *United States v. Hensley*, 469 U.S. 221 (1985). The information that supported the issuance of the flyer or bulletin will have to be produced in court if the defendant challenges the stop or arrest that was made based upon the existence of the bulletin or flyer. *See State v. O'Cain*, 108 Wn. App. 542, 545, 31 P.3d 733 (2001).

- The "fellow officer" rule allows one police officer to conduct a warrantless stop, search or arrest based upon another officer's direction. The officer giving the direction must have facts sufficient to justify the intrusion, but need not convey these facts to the officer who is actually making the contact. *United States v. Ramirez*, 473 F.3d 1026 (9th Cir. 2007).

- Under the "fellow officer" rule, a police agency's collective knowledge of information exonerating a suspect formerly wanted in connection with a crime is imputed to police officers in the field. The

rule imposes on law enforcement the responsibility to disseminate accurate information only. *State v. Mance*, 82 Wn. App. 539, 918 P.2d 527 (1996).

- Case law is split upon whether the "fellow officer" rule extends to police dispatchers who are not commissioned officers. *Compare United States v. Fernandez-Castillo*, 324 F.3d 1114 (9th Cir. 2003) (dispatcher's knowledge that was not communicated to the stopping officer is properly considered as part of the reasonable suspicion analysis), *with United States v. Colon*, 250 F.3d 130 (2nd Cir. 2001) (dispatcher's knowledge which was not communicated to the officer in the field can only be considered in the reasonable suspicion analysis if the dispatcher had sufficient training and ability to make the determination that there was probable cause to support defendant's arrest). Washington law implies, at least, that dispatchers will be treated as "fellow officers" with respect to the accuracy of their dissemination of the information they receive. *See State v. Randall*, 73 Wn. App. 225, 230, 868 P.2d 207 (1994) ("To require an officer under these circumstances to stop and undertake an in-depth analysis of the reliability of the information received by the police dispatcher would greatly impede the officer's discharge of duty and would greatly increase the threat to the public safety. Under such circumstances, the officer should be able to rely on the reliability of information disseminated by police dispatch and, when his or her observations corroborate the information and create a reasonable suspicion of criminal activity, to make an investigatory stop.").

- Case law is split upon whether the "fellow officer" rule extends to situations where no single officer has the requisite knowledge to supply probable cause. *Compare United States v. Edwards*, 885 F.2d 377, 383 (7th Cir. 1989) (allowing knowledge of officers working closely together at the scene to be imputed without requiring proof of actual communication where the officers made the arrest together); *United States v. Nafzger*, 974 F.2d 906, 911 (7th Cir. 1992) ("when officers are in communication with each other while working together at a scene, their knowledge may be mutually imputed even when there is no express testimony that the specific or detailed information creating the justification for a stop was conveyed (though of course the information actually possessed by the officers must be sufficient to justify the stop or arrest)"); *with United States v. Shareef*, 100 F.3d 1491, 1504 & n.5 (10th Cir. 1996) (declining to extend collective knowledge doctrine where evidence showed officers had not communicated with each other; "'information scattered among various officers in a police department cannot substitute for possession of the necessary facts by a single officer

related to the arrest'") (quoting *State v. Cooley*, 457 A.2d 352, 355-56 (Del. 1983)) (internal quotations omitted).

b. **Existence of Probable Cause.** An officer's possession of sufficient facts to support probable cause will not preclude a *Terry* stop. There is no requirement that an officer make an arrest as soon as probable cause is present so that constitutional protections are triggered at the earliest possible moment. *See Hoffa v. United States*, 385 U.S. 293, 310, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *United States v. Wynne*, 993 F.2d 760 (10th Cir. 1993). *Accord State v. Quezadas-Gomez*, 165 Wn. App. 593, 267 P.3d 1036 (2011), *review denied*, 173 Wn.2d 1034 (2012) (an officer, who has probable cause to arrest the driver based upon the driver's participation in a prior controlled drug sales, may make an investigatory stop of the driver's vehicle for the purpose of obtaining the driver's name. "Probable cause for the greater intrusion of an arrest encompasses legal justification for the lesser intrusion of a mere stop.").

c. **Persons.** A checklist for *Terry* stops appears at the end of this section. This checklist identifies some factors that may be considered in deciding whether there are grounds to stop a person. Some factors that are insufficient to stop an individual include:

i. **Racial Incongruity.** It must be noted that Washington law does not permit "racial incongruity" to support a finding of reasonable suspicion. "Racial incongruity" is defined by the Washington Supreme Court as a person of any race being allegedly "out of place" in a particular geographic area. *See State v. Barber*, 118 Wn. 2d. 335, 823 P.2d 1068 (1992).

Other courts have noted that race is of little value in distinguishing one suspect from others, particularly where everyone in the pool of possible suspects is of the same race. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir.), *cert. denied*, 531 U.S. 889 (2000) (observing that where most people who transverse a checkpoint are Hispanic, the fact that a particular person transversing it is Hispanic is of little value in establishing reasonable suspicion); *Morgan v. Woessner*, 997 F.2d 1244, 1245 (9th Cir. 1993) (holding that a tip to look out for a black person, without more, does not give rise to reasonable suspicion to stop anyone).

Race is a trait that, when combined with others, can reasonably lead an officer to zero in on a particular suspect.

> [R]acial or ethnic appearance is one factor relevant to reasonable suspicion or probable cause when a

> particular suspect has been identified as having a specific racial or ethnic appearance, be it Caucasian, African-American, Hispanic or other. We note, however, that a stop based solely on the fact that the racial or ethnic appearance of an individual matches the racial or ethnic description of a specific suspect would not be justified.

Montero-Camargo, 208 F.3d at 1134 n. 21.

ii. **Presence in High Crime Area.** The mere fact that a suspect is in a high-crime area will not justify a *Terry* stop. *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *State v. Seitz*, 86 Wn. App. 865, 867-70, 941 P.2d 5 (1997) (holding that officers lacked reasonable suspicion to stop when they saw occupants of a car speaking to a man on the sidewalk but did not observe drugs, money, or anything else change hands); *State v. Soto-Garcia*, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992) (stating that merely walking in the street in a known drug area late at night does not suggest that someone has committed a crime), *abrogated by State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996).

iii. **Display of a Firearm.** Washington law permits its residents to openly carry firearms. *See generally* RCW 9.41.050 and 9.41.060. "[W]here a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention." *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (finding no reasonable suspicion to stop or frisk the defendant, who was in an area known for robberies and other violent crimes, was in the company of an individual who had oft been arrested for felony drug offenses and another man who was openly carrying a holstered handgun, as authorized by North Carolina). *See also St. John v. McColley*, 653 F. Supp. 2d 1155, 1161 (D.N.M. 2009) (finding no reasonable suspicion where the plaintiff arrived at a movie theater openly carrying a holstered handgun, an act which is legal in the State of New Mexico); *State v. Cardenas-Muratalla*, ___ Wn. App. ___, 319 P.3d 811 (2014) (anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person; where 911 caller did not indicate that he felt intimidated or alarmed when shown the gun, or that the person who was holding the gun discharged it or pointed the gun at anyone the *Terry* stop was unlawful).

The fact that other statutes prevent convicted felons from possessing guns does not allow an officer to detain an armed stranger in their

midst until the officer performs a record check. "Being a felon in possession of a firearm is not the default status." *Id.*

Washington law does restrict the carrying of a concealed firearm to individuals who have a concealed pistol license. *See generally* RCW 9.41.050. There is, however, no presumption that a person carrying a concealed firearm lacks the required permit. *People v. Murrell*, 56 V.I. 796 (2012) (no presumption that person carrying firearm lacks permit); *United States v. Ubiles*, 224 F.3d 213, 217-18 (3rd Cir. 2000) (improper to stop a suspect based solely upon a report that the suspect had a firearm, which could be lawfully possessed under the law, when the authorities had no reason to know that the gun was unregistered or that the serial number had been altered); *Regalado v. State*, 25 So. 3d 600, 601 (Fla. 4th DCA 2009) ("Because it is legal to carry a concealed weapon in Florida, if one has a permit to do so, and no information of suspicious criminal activity was provided to the officer other than appellant's possession of a gun, the mere possession of a weapon, without more, cannot justify a *Terry* stop.").

iv. **Past Reports of Criminal Activity.** The fact that vehicle prowls have been reported in a privately owned parking lot located in a high crime area will not provide an officer with the particularized suspicion necessary to stop an individual who is merely seen walking through the parking lot at night. *State v. Martinez*, 135 Wn. App. 174, 143 P.3d 855 (2006).

Past reports of criminal activity, however, will support a *Terry* stop when coupled with current suspicious behavior. *State v. Bray*, 143 Wn. App. 148, 177 P.3d 154 (2008) (police were justified in stopping the defendant, who was spotted inside enclosed storage units, that were loacted within 1000 feet of recent burglaries, at 2:30 a.m., driving slowly with his car lights off, checking doors).

v. **Proximity to Others Suspected of Criminal Activity**. Officers may not stop an individual merely because the individual is in proximity to others who are suspected of criminal activity. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

vi. **Startled Reaction.** An individual's startled reaction to police, even when coupled with a swift departure from the area, is insufficient to support a *Terry* stop. *State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426 (2008). *See also State v. Walker*, 66 Wn. App. 622, 629, 834 P.2d 41 (1992) (finding that an officer investigating a report of suspicious behavior in a neighborhood inappropriately stopped a man who appeared startled when he saw the officer and turned onto

another street to avoid him); *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (nervousness is not sufficient for a *Terry* stop).

vii. **Closed Businesses.** An individual's walking behind a closed business while talking on a cell phone, and her refusal to provide identification or a birth date during an earlier social contact, did not provide justification for a *Terry* stop. *State v. Young*, 167 Wn. App. 922, 275 P.3d 1150 (2012). A police officer lacked specific and articulable facts to seize a vehicle after the male driver stopped the vehicle in the lane of travel at 10:40 p.m. when no businesses were open, in an area noted for a high level of prostitution, and had a discussion with a female pedestrian that resulted in the pedestrian entering the vehicle. *State v. Diluzio*, 162 Wn. App. 585, 254 P.3d 218, *review denied*, 173 Wn.2d 1002 (2011).

viii. **Motorcyclist.** RCW 43.101.419 prohibits "motorcycle profiling." "Motorcycle profiling" means the "the illegal use of the fact that a person rides a motorcycle or wears motorcycle-related paraphernalia as a factor in deciding to stop and question, take enforcement action, arrest, or search a person or vehicle with or without a legal basis under the United States Constitution or Washington state Constitution."

Some factors that may be considered in forming reasonable suspicion:

ix. **Flight**. "Headlong flight – wherever is occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

There can be innocent reasons for flight from police. If, upon contact, the officer does not learn facts arising to probable cause, the individual must be allowed to go on his way. *Wardlow*, 528 U.S. at 126.

d. **Vehicles**. Officers only need reasonable suspicion, not probable cause, to stop a vehicle in order to investigate whether the driver committed a traffic infraction or a traffic offense. *See State v. Duncan*, 146 Wn.2d 166, 173-75, 43 P.3d 513 (2002). "*Terry* has also been extended to traffic infractions,

'due to the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation.'" *State v. Day*, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007), *quoting State v. Johnson*, 128 Wn.2d 431, 454, 909 P.2d 293 (1996).

A number of older court of appeals decisions indicate that probable cause is required before an officer may stop a vehicle to investigate a traffic infraction. *See, e.g.*, *State v. Chelly* 94 Wn. App. 254, 970 P.2d 376, *review denied*, 138 Wn.2d 1009 (1999); *State v. Cole*, 73 Wn. App. 844, 871 P.2d 656, *review denied*, 125 Wn.2d 1003 (1994). The Washington Supreme court expressly rejected these cases, stating that "probable cause . . . is the wrong standard" for deciding whether an officer properly stopped a vehicle to investigate a traffic infraction. *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012). The correct standard is *Terry*'s reasonable suspicion. In reviewing the propriety of a *Terry* stop for a traffic infraction, a court evaluates the totality of the circumstances. *Id.* The question of a valid stop does not depend upon the motorist actually having violated the statute. Rather, if the officer had a reasonable suspicion that the motorist was violating the statute, the stop was justified. *Id.* (stop for violation of RCW 46.37.020 was lawful, despite the fact that sunset occurred less than 30 minutes prior to the stop, as it was dark, cold, and icy and the vehicle's headlights were off).

Case law contains examples of what will and what will not satisfy this standard:

- A vehicle may not be stopped solely to verify the validity of a trip permit. *State v. Byrd*, 110 Wn. App. 259, 39 P.3d 1010 (2002).

- A vehicle may be stopped if the windshield is cracked and is in such an unsafe condition as to endanger any person. *State v. Wayman-Burks*, 114 Wn. App. 109, 56 P.3d 598 (2002).

- A vehicle may be stopped if items hanging from the rearview mirror obstruct the driver's vision of the highway or are of a type that can distract the attention of the driver so as to make operation of the vehicle unsafe. *See generally State v. Cyrus*, 297 Conn. 829, 1 A.3d 59 (2010). [Note: Washington does not have a specific statute that prohibits hanging items from a rearview mirror, so the conduct must either violate RCW 46.37.010(1)(a) (knowingly drive vehicle on highway that is in such an unsafe condition as to endanger any person) or RCW 46.61.525(1)(a) (operate a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property].

- A vehicle may be stopped based upon DOL records which indicate that the driver's license of the registered owner of the vehicle is suspended. *See State v. McKinney*, 148 Wn. 2d 20, 60 P.3d 46 (2002); *State v. Gaddy*, 152 Wn.2d 64, 93 P.3d 872 (2004); *State v. Lyons*, 85 Wn. App. 268, 932 P.2d 188 (1997). The officer need not affirmatively verify that the driver's appearance matches that of the registered owner before making the stop, but the *Terry* stop must end as soon as the officer determines that the operator of the vehicle cannot be the registered owner. *See State v. Phillips*, 126 Wn. App. 584, 109 P.3d 470 (2005), *review denied*, 156 Wn.2d 1012 (2006); *State v. Penfield*, 106 Wn. App. 157, 22 P.3d 293 (2001).

- A vehicle may be stopped based upon an officer's recognition of the driver as someone whose license is suspended . *State v. Harlow*, 85 Wn. App. 557, 933 P.2d 1076 (1997).

- A vehicle may be stopped based upon the existence of an arrest warrant for the registered owner of the vehicle. The *Terry* stop must end, however, as soon as the officer determines that the operator of the vehicle and any passenger in the vehicle cannot be the registered owner. *State v. Bliss*, 153 Wn. App. 197, 222 P.3d 107 (2009); *State v. Penfield*, 106 Wn. App. 157, 22 P.3d 293 (2001).

- A vehicle may be stopped upon reasonable suspicion that a passenger in the vehicle has an outstanding warrant for his or her arrest. *State v. Bonds*, 174 Wn. App. 553, 299 P.3d 663, *review denied*, 178 Wn.2d 1011 (2013).

- A vehicle may be stopped based upon a radar reading. *Clement v. Department of Licensing*, 109 Wn. App. 371, 35 P.3d 1171 (2001), *review denied*, 146 Wn.2d 1017 (2002) (warrantless *Terry* traffic infraction stop for speeding based upon radar reading valid even though no foundational evidence presented to support the radar reading).

- A *Terry* stop may not be made of a vehicle that weaves within the driver's lane of travel unless the weaving is observed over a lengthy period of time and occurs repeatedly or if the officer identifies some additional conduct associated with drunk drivers. *United States v. Fernandez-Castillo*, 324 F.3d 1114 (9th Cir. 2003) (weaving within lane by a driver who is sitting close to the steering wheel sufficient to support a *Terry* stop where officer testified why sitting very close to the steering wheel and swerving in one's lane may indicate impairment); *United States v. Colin*, 314 F.3d 439 (9th Cir. 2002) (insufficient grounds existed for stopping a vehicle that touched, but

did not cross the lines twice for approximately 10 seconds before making safe lane changes).

- A *Terry* stop may not be made of a vehicle that weaves between lanes unless the weaving is pronounced, is observed over a lengthy period of time and occurs repeatedly. *See State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008) (Washington State's requirement that automobile drivers remain within a single lane of travel "as nearly as practicable," RCW 46.61.140(1), does not impose strict liability. A vehicle crossing over a lane once for one second by two tire widths does not, without more, constitute a traffic violation justifying a stop by a police officer.). *See also State v. Laferty*, 291 Mont. 157, 967 P.2d 363 (1998) (driver's minor crossings of fog line on far right of right lane of travel were insufficient to create particularized suspicion that driver was intoxicated or to authorize investigatory stop); and *Rowe v. State*, 363 Md. 424. 769 A.2d 879 (2001) (observing a vehicle in the early hours of the morning crossing, by about 8 inches, the white edge-line separating the shoulder from the traveled portion of the highway, returning to the traveled portion, and a short time later, touching the white edge line did not provide the officer with sufficient grounds to make an investigatory stop); *State v. Van Kirk*, 306 Mont. 215, 32 P.3d 735, 740-41 (2001) (driver's traveling at 7 to 10 m.p.h. in a 25 m.p.h. zone, and shifting vehicle from the edge of the roadway to the mid-point and across it several times in a manner that would have impeded any oncoming traffic provided sufficient grounds to make an investigatory stop); and *State v. Edwards*, 143 Md. App. 155, 792 A.2d 1197 (2002) (crossing the center line of an undivided, two lane road by as much as a foot and traveling in that manner for approximately 1/4 mile provided a legally sufficient basis to justify a traffic stop).

- A *Terry* stop may be made when a vehicle crosses a fog line under RCW 46.61.670. *See State v. McLean*, 178 Wn. App. 236, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014) (the trooper conducted a lawful traffic stop based on a reasonable suspicion that defendant was driving under the influence of alcohol because the trooper observed defendant's vehicle weave within its lane and cross onto the fog line three times). RCW 46.61.670 states that it is "unlawful to operate or drive any vehicle or combination of vehicles over or along any pavement or gravel or crushed rock surface on a public highway with one wheel or all of the wheels off the roadway thereof, except as permitted by RCW 46.61.428 or for the purpose of stopping off such roadway, or having stopped thereat, for proceeding back onto the pavement, gravel or crushed rock surface thereof." The term "roadway" excludes shoulders. *See* RCW 46.04.500

("Roadway" means that portion of a highway . . . ordinarily used for vehicular travel, exclusive of . . . shoulder even though such . . shoulder is used by persons riding bicycles.") There is no "as nearly as practicable" defense to a violation of RCW 46.61.670. The only "defense" is that contained in RCW 46.61.428 which allows slow-moving vehicles to drive on shoulders where signs are in place that authorize the same.

- A *Terry* stop may be made when a vehicle crosses the center line[13] for a purpose not specified in RCW 46.61.100. This is because there is no "as nearly as practicable" defense to a violation of RCW 46.661.100. RCW 46.61.100 provides that:

> (1) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:
>
> (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
>
> (b) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;
>
> (c) Upon a roadway divided into three marked lanes and providing for two-way movement traffic under the rules applicable thereon;
>
> (d) Upon a street or highway restricted to one-way traffic; or
>
> (e) Upon a highway having three lanes or less, when approaching a stationary authorized emergency vehicle, tow truck or other vehicle providing roadside assistance while operating warning lights with three

[13] "Center line" means the line, marked or unmarked, parallel to and equidistant from the sides of a two-way traffic roadway of a highway except where otherwise indicated by painted lines or markers. RCW 46.04.100.

hundred sixty degree visibility, or police vehicle as described under RCW 46.61.212[(1)(d)(ii)].

(2) Upon all roadways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the right-hand lane then available for traffic, except (a) when overtaking and passing another vehicle proceeding in the same direction, (b) when traveling at a speed greater than the traffic flow, (c) when moving left to allow traffic to merge, or (d) when preparing for a left turn at an intersection, exit, or into a private road or driveway when such left turn is legally permitted. On any such roadway, a vehicle or combination over ten thousand pounds shall be driven only in the right-hand lane except under the conditions enumerated in (a) through (d) of this subsection.

(3) No vehicle towing a trailer or no vehicle or combination over ten thousand pounds may be driven in the left-hand lane of a limited access roadway having three or more lanes for traffic moving in one direction except when preparing for a left turn at an intersection, exit, or into a private road or driveway when a left turn is legally permitted. This subsection does not apply to a vehicle using a high occupancy vehicle lane. A high occupancy vehicle lane is not considered the left-hand lane of a roadway. The department of transportation, in consultation with the Washington state patrol, shall adopt rules specifying (a) those circumstances where it is permissible for other vehicles to use the left lane in case of emergency or to facilitate the orderly flow of traffic, and (b) those segments of limited access roadway to be exempt from this subsection due to the operational characteristics of the roadway.

(4) It is a traffic infraction to drive continuously in the left lane of a multilane roadway when it impedes the flow of other traffic.

(5) Upon any roadway having four or more lanes for moving traffic and providing for two-way movement of traffic, a vehicle shall not be driven to the left of the center line of the roadway except when

> authorized by official traffic control devices designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes, or except as permitted under subsection (1)(b) of this section. However, this subsection shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private road or driveway.

e. **Bicycles.** Officers only need reasonable suspicion, not probable cause, to stop a bicycle in order to investigate whether the driver committed a traffic infraction or a traffic offense. *Cf. State v. Duncan*, 146 Wn.2d 166, 173-75, 43 P.3d 513 (2002).

- A bicycle that is being operated at night must have a front light and a rear red reflector. These requirements apply to bicycles ridden on streets, bike paths, and sidewalks. The absence of a front light or a rear reflector provides a lawful basis for stopping a cyclist. *State v. Rowell*, 138 Wn. App. 780, 158 P.3d 1248 (2007).

f. **Boats.** Officers only need reasonable suspicion, not probable cause, to stop a vessel in order to investigate a violation of a criminal law. *See, e.g., United States v. Todhunter*, 297 F.3d 886 (9th Cir. 2002); *Blair v. United States*, 665 F.2d 500 (4th Cir. 1981); *State v. Bell*, 873 So.2d 476 (Fla. App. 2004); *State v. Baker*, 197 Ga. App. 1, 397 S.E.2d 554 (1990) (police officers had reasonable, articulable suspicion to stop a defendant for violating statute prohibiting operating vessel while under influence of alcohol based upon their observation of beer can in his hand and his failure to keep lookout ahead).

5. **Scope of Seizure.** The scope of an investigatory stop is determined by considering (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect's liberty, and (3) the length of time of the seizure. *See State v. Laskowski*, 88 Wn. App. 858, 950 P.2d 950 (1997), *review denied*, 135 Wn.2d 1002 (1998).

A *Terry* stop of a person or car is justified if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The court takes into account an officer's training and experience when determining the reasonableness of a *Terry* stop. *Id.* Subsequent evidence that the officer was in error regarding some of his facts will not render a *Terry* stop unreasonable. *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44

(1981) ("The Fourth Amendment does not proscribe 'inaccurate' searches only 'unreasonable' ones"). A *Terry* stop is also not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

A *Terry* stop, investigative detention, must last no longer than is necessary to verify or dispel the officer's suspicion, and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. *State v. Williams*, 102 W.2d 733, 738-40, 689 P.2d 1065 (1984). However, the scope of an investigatory stop may be enlarged or prolonged if the stop confirms or arouses further suspicions. *State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990).

The reasonableness of police activity during the *Terry* stop must necessarily depend on the facts of each particular case. An appropriate and reasonable intrusion under one set of facts might be inappropriate under another fact situation. In evaluating the validity of the detention, the court must consider "the totality of the circumstances - - the whole picture". *United States v. Cortez*, 449 U.S. 411, 66 L. Ed.2d 621, 101 S. Ct. 690, 695 (1981); *United States v. Sokolow*, 490 U.S. 1, 104 L. Ed.2d, 1, 109 S. Ct. 1581, 1585 (1989); *State v. Dorsey*, 40 Wn. App. 459, 698 P.2d 1109 (1984), *review denied*, 104 W.2d 1010 (1985). This includes information given the officer, observations the officer makes, and inferences and deductions drawn from his or her training and experience. *Cortez*, 101 S. Ct. at 694-96. Under the totality of the circumstances test for investigatory stops, an officer may rely on combination of otherwise innocent observations to briefly pull over a suspect. *United States v. Arvizu*, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

An important factor comprising the totality of circumstances which must be examined is the nature of the suspected crime; a violent felony crime provides an officer with more lee way to act than does a gross misdemeanor. *State v. Randall*, 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994); *State v. Thierry*, 60 Wn. App. 445, 803 P.2d 844 (1991) ("Officers may do far more if the suspect conduct endangers life or personal safety than if it does not."); *State v. McCord*, 19 Wn. App. 250, 576 P.2d 892, *review denied*, 90 Wn.2d 1013 (1978) (seriousness of suspected crime bears on the degree of suspicion needed to make the stop and the extent of the permissible intrusion after the stop).

a. **Purpose for stop.** A *Terry* stop may be made of a person or vehicle pursuant to objective factors to believe an individual may have been involved in a crime. The information giving rise to such a belief may come from an officer's personal observations, from information known only to a fellow officer, or from citizen or professional informants. (A fuller discussion of informants appears in the discussion of search warrants).

When a stop is made in response to a report of a crime, the following factors

must be considered:

- Similarities between the suspect's or suspect vehicle's appearance and the witness/victim description.

- Temporal proximity to the crime scene. Could the suspect have gotten to the proposed location of the stop since the time when the crime was committed?

- Geographic proximity to the crime scene.

b. **Amount of physical intrusion.** The physical intrusion must be limited to that necessary to effect the stop in a safe and effective manner. Activities that may not be justified at the inception of the stop, may become appropriate as the investigation continues. Actions that have been upheld by courts include:

- **Manipulation of Clothing.** Requesting lifting/opening of jacket to allow for visual inspection for weapons. *See United States v. Baker*, 78 F.3d 135, 138 (4th Cir. 1996).

- **Separating for Questioning**. Separating individuals for questioning. *See, e.g., United States v. Knox*, 839 F.2d 285, 293 (6th Cir. 1988), *cert. denied*, 490 U.S. 1019 (1989); *United States v. Bautista*, 684 F.2d 1286, 1290-91 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983).

- **Transporting.** Transporting suspects for a short distance for identification by crime victims or witnesses. *State v. Wheeler*, 108 Wn.2d 230, 235-36, 737 P.2d 1005 (1987) (frisk and transport in police car); *State v. Lund*, 70 Wn. App. 437, 447-48, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994) (surveying cases in which suspects were moved)

- **Witness Identifications.** Holding suspect at scene of stop to allow victim/suspect to arrive for identification or to receive assistance from other officers. *State v. Moon*, 48 Wn. App. 647, 739 P.2d 1157 (1987); *State v. Mercer*, 45 Wn. App. 769, 727 P.2d 676 (1986); *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985).

- **Securing in Patrol Car.** Holding suspect in patrol car while search is conducted of environs for evidence and other suspects. *State v. Smith*, 115 Wn.2d 775, 787, 801 P.2d 975 (1990) (suspect detained in patrol car without handcuffs while officers searched car and environs for evidence and other suspects).

- **Illuminating.** Placing suspect in front of the police car's headlights for safety purposes and lighting. *State v. Mercer*, 45 Wn. App. 769, 776, 727 P.2d 676 (1986).

- **Removing from Vehicle.** Removing suspect from vehicle. *State v. Watkins*, 76 Wn. App. 726, 729, 887 P.2d 492 (1995).

- **Field Sobriety Tests.** Performance of field sobriety tests. *State v. Mecham*, COA No. 69613-1-I, ___ Wn. App. ___, ___ P.3d ___ (Jun. 23, 2014). *Accord State v. Jones*, 115 Idaho 1029, 772 P.2d 236, 240 (1989); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916, 918-19 (1987); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171, 175-76 (1986); *Romo v. Municipality of Anchorage*, 697 P.2d 1065, 1069 (Alaska App. 1985); *State v. Niles*, 74 Or. App. 383, 703 P.2d 1030 (1985); *State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693, 696 (1984); *State v. Wyatt*, 687 P.2d 544, 552-53 (Hawaii 1984).

- **Displaying Tattoos.** Requiring the detainee to bear his forearms so that his tattoos can be viewed. *State v. Moore*, 129 Wn. App. 870, 120 P.3d 635 (2005).

- **Drawn Guns and Felony Stop Procedures**. Police officers may draw their guns and use felony stop procedures when detaining persons suspected of criminal activity if the specific information known by the officers reasonably makes them fear for their own safety. The decision to draw a gun must be neither arbitrary nor for the purpose of harassment. Among the circumstances that officers may consider are furtive gestures made by the suspects and facts about the crime that the persons were suspected of committing that would support an inference that the persons are armed. *State v. Belieu*, 112 Wn.2d 587, 773 P.2d 46 (1989) (report of numerous burglaries where guns were stolen).

  > An officer may not draw a weapon during a *Terry* detention out of a desire to cow suspects into compliance. Weapons may only be drawn out of a fear for the officer's safety or for the safety of others who are present at the time of the stop. *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159 (9th Cir. 2013).

- **Handcuffing the Detainee**. *See generally State v. Belieu*, 112 Wn.2d 587, 773 P.2d 46 (1989) (full felony stop procedure which included handcuffing); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d

1005 (1987) (police may handcuff a suspect detained pursuant to an investigative stop before transporting him in a police car); *State v. Wakeley*, 29 Wn. App. 238, 243 n.1, 628 P.2d 835, *review denied*, 95 Wn.2d 1032 (1981) ("Although, normally, handcuffing an individual is not within the scope of an investigative stop and *Terry* frisk, in appropriate cases handcuffing may be 'reasonable, as a corollary of the lawful stop.'"; citation omitted). *See also Houston v. Clark County Sheriff Deputy John Does 1-5*, 174 F.3d 815 (6th Cir. 1999) (the use of handcuffs does not exceed the bounds of a *Terry* stop); *United States v. Taylor*, 716 F.2d 701 (9th Cir. 1983) (the use of handcuffs, if reasonably necessary, while substantially aggravating the intrusiveness of an investigatory stop, does not necessarily convert a *Terry* stop into a custodial arrest).

- **Weapons Frisk**. (see fuller discussion *infra*).

- **Checking for Outstanding Warrants**. *See State v. Chelly*, 94 Wn. App. 254, 261, 970 P.2d 376, *review denied*, 138 Wn.2d 1009 (1999); *State v. Williams*, 50 Wn. App. 696, 700, 750 P.2d 278 (1988).

Actions that Washington courts have not yet ruled upon:

- **Car Windows.** Requesting that a motorist roll up windows and turn on or open the vents of his vehicle. *United States v. Ladeaux*, 454 F.3d 1107 (10th Cir. 2006) (indicating that such a request might be a violation of the motorist's Fourth Amendment rights). *But see People v. Bartelt*, 24 Ill.2d 217, 948 N.E.2d 52, *cert. denied* 132 S. Ct. 550 (2011) (the officers' actions in ordering defendant to roll up her windows and turn the blowers on high before conducting a dog sniff of the truck's exterior did not constitute an unreasonable search under the fourth amendment).

- **Photographing.** Photographing a suspect during a *Terry* detention. *Flores v. State*, 120 Md. App. 171, 706 A.2d 628 (1998) (photographing an individual who was suspected of selling drugs to an undercover detective as part of a *Terry* stop was reasonable).

- **Fingerprinting.** Transporting a suspect to a station house, upon reasonable suspicion, in order to collect fingerprints does violate *Terry*. *See Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969). It may, however, be permissible to fingerprint the suspect in the field. *Hayes v. Florida*, 470 U.S. 811, 816-17, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985).

c. **Length of time.** There is no bright line rule for how long is too long for a *Terry* stop. *See State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). Courts, however, begin to get concerned once the stop exceeds the 20 minute maximum suggested by the American Law Institute. Detentions of 20 minutes or longer have, however, been upheld in Washington when the delay was due to investigation/officer safety reason and not merely for harassment. *See, e.g., State v. Bray* , 143 Wn. App. 148, 177 P.3d 154 (2008) (detaining suspect for 30 minutes while officers checked storage units to determine which ones had been burglarized held reasonable); *State v. Moon*, 48 Wn. App. 647, 739 P.2d 1157 (1987) (detaining suspect for 20 minutes while victim of robbery was brought to detention site held reasonable); *State v. Mercer*, 45 Wn. App. 769, 727 P.2d 676 (1986) (20-minute detention of suspect by Trooper who did not feel competent to investigate potential theft until city police officer arrived held reasonable); *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985) (detaining suspects for 10 to 12 minutes until victim arrived to identify them held reasonable).

In determining whether a detention was unreasonably long in duration, courts look at the officer's actions and whether the officer ***diligently*** pursued a means of investigation which would likely confirm or dispel his or her suspicions. "A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.... But `the fact that the protection of the public might, in the abstract have been accomplished by `less intrusive' means does not, itself, render the search unreasonable.'" (citations omitted) *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 1575-76, 84 L. Ed. 2d 605 (1985) (affirming a 30-40 minute long detention). Even a *Terry* detention of less then 20 minutes can be unreasonable, if officers do not use the time to diligently pursue an investigation that is likely to confirm or dispel suspicions of criminal activity. *Liberal v. Estrada*, 632 F.3d 1064, 1080 (9th Cir. 2011). A detention may, however, be prolonged where the defendants' answers "failed to dispel [the officer's] suspicions about illegal activity and actually created new ones.". *See, e.g., United States v. Torres-Sanchez,* 83 F.3d 1123, 1128 (9th Cir. 1996).

The detention must be promptly terminated when the officer has facts sufficient to exclude the detainee from suspicion. Thus, while an officer may make a *Terry* stop of a vehicle if the officer has knowledge that the registered owner of the vehicle is suspended, the *Terry* stop must end as soon as the officer determines that the operator of the vehicle cannot be the registered owner. In *State v. Penfield*, 106 Wn. App. 157, 22 P.3d 293 (2001), the officer violated the Fourth Amendment by asking the male driver

of the stopped vehicle for his license, etc., when the registered owner of the vehicle was a female.

- An officer who stops a vehicle based upon reasonable suspicion that the driver has committed a traffic offenses may question the driver about matters unrelated to the justification of the stop (*i.e.* drugs), so long as the questioning does not prolong the stop. *United States v. Mendez*, 476 F.3d 1077 (9th Cir. 2007) (recognizing that earlier Ninth Circuit cases to the contrary, including *United States v. Chavez-Valenzuela*, 268 F.3d 719 (9th Cir. 2001), were overruled by *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005). *Accord State v. Veltri*, 136 Wn. App. 818, 150 P.3d 1178 (2003) (once the officer concluded his investigation into whether the vehicle was stolen, it was improper for the officer to switch his investigatory purpose towards whether weapons or other contraband was present and to request consent to search the vehicle as the officer lacked reasonable articulable suspicion of such criminal activity). *But see State v. Hoang*, 101 Wn. App.732, 6 P.3d 602 (2000), *review denied*, 142 Wn.2d 1027 (2001) (questions by an officer that are unrelated to the traffic infraction under investigation will be considered by the court in deciding whether the stop was an improper pretext stop).

- An officer who stops a vehicle based upon reasonable suspicion that the driver has committed a traffic offense may expand the questioning to the consumption and/or possession of unlawful drugs when there is objective evidence supporting such questioning. *State v. Santacruz*, 132 Wn. App. 615, 133 P.3d 484 (2006) (the officer's questioning of driver, who was initially stopped for expired vehicle registration, regarding drugs and the subsequent consensual search were justified by the driver's dilated pupils which did not constrict when a flashlight was shined in the eyes and by the absence of any odor of alcohol).

An officer may not prolong a *Terry* detention in the hopes of accomplishing an "attitude adjustment." *Liberal v. Estrada*, 632 F.3d 1064, 1081 (9th Cir. 2011).

Lengthy waits for a drug dog may be appropriate if a timely request was made for the canine and the canine unit proceeds as quickly as possible to the scene. *See, e.g., United States v. Donnelly*, 475 F.3d 946 (9th Cir.), *cert. denied*, 127 S. Ct. 2954 (2007) (90+ minutes can be reasonable while waiting for a K9 unit); *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (a one-hour detention upon reasonable suspicion to wait for a drug dog was reasonable); *United States v. White*, 42 F.3d 457 (8th Cir. 1994) (one hour

and twenty minutes detention while awaiting the arrival of a drug dog was reasonable where the officer acted diligently to obtain the dog and the delay was caused by the remote location of the closest available dog); *State v. Teagle*, 217 Ariz. 17, 170 P.3d 266 (2007) (a public safety officer did not act unreasonably by detaining defendant for one hour and forty minutes pending the arrival of a drug detection dog, when the nearest available canine unit was approximately 60 miles away and arrived 68 minutes after being called to the scene).

d. Identification

While laws requiring persons to provide reliable identification to the police, or face arrest, violate the Fourth Amendment, police may demand to know a suspect's true identity during *Terry* stops so long as the request is reasonably related to the detention. *Hiibel v. Sixth Judicial Dist. Court*, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004); *United States v. Christian*, 356 F.3d 1103 (9th Cir. 2004); *accord State v. Madrigal*, 65 Wn. App. 279, 282, 827 P.2d 1105 (1992) (whn an officer has a reasonable suspicion of criminal activity, he or she may stop a suspect and ask the suspect for identification and an explanation of his or her activities). A suspect's refusal to provide identification may be cause to lengthen a detention. *State v. Cunningham*, 116 Wn. App. 219, 228-29, 65 P.3d 325 (2003) (45-minute wait permissible when it was caused by the defendant's refusal to provide identification).

Determining a suspect's identity is an important aspect of police authority under *Terry*. Neither interrogating a suspect regarding his or her identity nor a request for identification, by itself, constitutes a Fourth Amendment seizure or a Fifth Amendment violation. Ascertaining the identity of a suspect assists officers in relocating the suspect in the future. Ascertaining the identity of a suspect protects the officer from harm, as it allows an officer to determine whether the suspect has an outstanding warrant, or a history of violent crime.

Transporting a suspect to a station house, upon reasonable suspicion, in order to collect fingerprints does violate *Terry*. *See Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969). It may, however, be permissible to fingerprint the suspect in the field. *Hayes v. Florida*, 470 U.S. 811, 816-17, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985).

A suspect who refuses to provide his or her name during a *Terry* stop has not committed a crime. *State v. Steen*, 164 Wn. App. 789, 800, 265 P.3d 901 (2011), *review denied*, 173 Wn.2d 1024 (2012) ("Steen's refusal to provide his name or date of birth, when considered in isolation, is insufficient to support an obstruction conviction."); *State v. Moore*, 161 Wn.2d 880, 169 P.3d 469 (2007) (defendant who was not wearing a seatbelt could not be

arrested for giving a false name as the officer was not affirmatively investigating the traffic infraction when the officer asked the defendant his name). A suspect who gives a false name or other false identifying information may not be arrested for the crime of obstruction, RCW 9A.76.020(1). *See State v. Williams*, 171 Wn.2d 474, 251 P.3d 877 (2011) (theft suspect who gave brother's name and false date of birth could not be prosecuted for obstruction). A suspect who gives a false name or other false identifying information may be arrested for a violation of RCW 9A.76.175, if the suspect acted knowingly. A suspect who knowingly provides false identification information that corresponds to a real person may be arrested for identity theft in violation of RCW 9.35.020(1). *See State v. Presba*, 131 Wn. App. 47, 126 P.3d 1280 (2005), *review denied*, 158 Wn.2d 1008 (2006).

6. Weapons Frisk.

a. When Allowed.

Pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), police officers may make limited searches for the purposes of protecting the officers' safety during an investigative detention. An officer who "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous to stop such person and to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry*, at 30-31.

Law enforcement officers are strictly prohibited from searching for evidence or contraband during a warrantless *Terry* pat-down frisk for weapons. The purpose of the limited warrantless *Terry* pat-down search is not to discover evidence of a crime, but to allow an officer to pursue a *Terry* investigation without fear. *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

An officer need not be absolutely certain that the detained person the officer is investigating at close range is armed or dangerous; the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. *Terry*, 88 S. Ct. at 1883; *State v. Harvey*, 41 Wn. App. 870, 874-75, 707 P.2d 146 (1985); 3 W. LaFave, *Search and Seizure*, § 9.4(a) (2d ed. 1987).

The Washington Supreme Court phrased the principle thusly:

> [C]ourts are reluctant to substitute their judgment for that of police officers in the field. "A founded suspicion is all that is necessary, some basis from which the court can determine

that the [frisk] was not arbitrary or harassing."

(Footnote omitted.) *State v. Collins*, 121 Wn.2d 168, 174, 847 P.2d 919 (1993) (quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989) quoting *Wilson v.Porter*, 361 F.2d 412, 415 (9th Cir. 1966)).

Washington requires the following for a valid frisk: (1) the initial stop is legitimate; (2) there is a reasonable safety concern justifying a protective frisk for weapons; and (3) the scope of the frisk is limited to protective purposes. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

Factors that will support a frisk for weapons include:

- **Suspect refuses to keep hands in plain view.** *See, e.g., State v. Harper*, 33 Wn. App. 507, 655 P.2d 1199 (1982) (frisk justified where defendant thrust his hands into his coat pockets during questioning).

- **Suspect's clothing would allow for concealment of weapon**. *See, e.g., State v. Xiong*, 137 Wn. App. 720, 154 P.3d 318 (2007) (bulge in front pocket of suspect who had no identification and who resembled his brother who had outstanding felony arrest warrants).

- **Departmental policy requires frisk prior to transporting in patrol car**. *State v. Wheeler*, 108 Wn.2d 230, 235-36, 737 P.2d 1005 (1987).

- **Reported crime involved the use of a weapon**. *State v. Belieu*, 112 Wn.2d 587, 773 P.2d 46 (1989) (report of numerous burglaries where guns were stolen); *State v. Harvey*, 41 Wn. App. 870, 873, 707 P.2d 146 (1985) (frisk upheld where detainee was stopped near the scene of a burglary because "[i]t is well known that burglars often carry weapons.").

- **Past experience with suspect**. *See State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (the fact that the officer had two months previously arrested the suspect and at that time discovered the suspect to be in possession of a holster and bullets provides a reasonable basis to believe the suspect is presently armed and dangerous).

- **Discovery of one weapon.** *See, e.g.*, *State v. Olsson*, 78 Wn. App. 202, 895 P.2d 867 (1995) (officer who was informed by a driver that he was carrying a knife had grounds for frisking the driver to determine whether he was carrying additional weapons); *State v.*

Swaite, 33 Wn. App. 477, 481, 656 P.2d 520 (1982) (officer was justified in conducting frisk for additional weapons where detainee had a knife in his belt).

- **Manner of Opening Car Door.** A peculiar way of opening a car door with the farther hand, while keeping the hand closest to the door near his pocket. *United States v. Burkett*, 612 F.3d 1103 (9th Cir. 2010).

- **Hiding Hands.** A suspect's placing his hands in his pockets after being advised to keep his hands visible, turning sideways away from the officer, and entering the officer's space after being advised to step away from the officer provided sufficient grounds for a frisk. *State v. Ibrahim*, 164 Wn. App. 503, 509-510, 269 P.3d 292 (2011) (suspects contacted behind an abandoned motel in Yakima, after they walked away from a vehicle that was registered in Seattle and whose ignition assembly had been broken apart, presumably with the screwdriver that was visible on the floorboard of the vehicle).

- **Time of Day.** The time of day can also contribute to the reasonableness of a protective search. *State v. Horrace*, 144 Wn.2d 386, 398–99, 28 P.3d 753 (2001) (considering "early morning darkness" as a factor justifying a protective search). Not only does "[t]he darkness ma[k]e it more difficult for [the officer] to get a clear view into the car," but "an individual who has been stopped may be more willing to commit violence against a police officer at a time when few people are likely to be present to witness it." *State v. Collins*, 121 Wn.2d 168, 174–75, 847 P.2d 919 (1993).

Factors that will not support a frisk:

- **Close Quarters.** A frisk may not be conducted of a suspect merely because the officer will be confronting the suspect with suspicions that the suspect has engaged in a non-violent offense in a small room. The officer must, in order to conduct a frisk, have a basis to believe that the suspect is armed or dangerous. *United States v. Flatter*, 456 F.3d 1154 (9th Cir. 2006).

- **Presence in Stolen Vehicle**. The mere fact that someone is a passenger in a stolen car does not provide an officer with grounds to conduct a frisk. *State v. Adams*, 144 Wn. App. 100, 181 P.3d 37, *review denied*, 164 Wn.2d 1033 (2008).

- **Presence in High Crime Area.** The fact that a detention occurs in a high-crime area is not in itself sufficient to justify a search. *See*

State v. Smith, 102 Wn.2d 449, 452-53, 688 P.2d 146 (1984) (holding that the inquiry must focus on the defendant and his actions, not the area where he was found).

- **Intoxication.** An officer who encountered an individual who appeared to be under the influence of methamphetamine in a public area of the DSHS building had no basis for conducting a frisk as the intoxicated individual offered no threatening gestures or words and remained seated during the encounter. The fact that the individual seemed nervous and fidgety and lied about his name did not provide a basis for conducting a frisk. *State v. Setterstrom*, 163 Wn.2d 621, 183 P.3d 1075 (2008). *See also Ramirez v. City of Buena Park*, 560 F.3d 1012 (9th Cir. 2009) (being "testy" and suspected of illicit drug use does not support a finding that an individual may be armed or dangerous).

- **Nervousness.** Person appears nervous and lies about his or her name. *State v. Xiong*, 164 Wn.2d 506, 512-13, 191 P.3d 1278 (2008). *See also United States v. I.E.V.*, 705 F.3d 430 (9th Cir. 2012) (fidgeting did not justify a frisk when the teenage suspects were surrounded by officers and were acting in a compliant and non-threatening manner).

b. **Admissibility of Evidence.** Evidence discovered during a frisk will be admissible if (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify a protective frisk for weapons, and (3) the scope of the frisk was limited to the protective purpose. *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007); *State v. Ibrahim*, 164 Wn. App. 503, 508, 269 P.3d 292 (2011).

c. **Persons.** A protective frisk of a person is strictly limited to a pat-down to discover weapons that might be used against the officer. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). This is because "[t]he purpose of the limited pat-down search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence." *United States v. Garcia*, 459 F.3d 1059, 1063 (10th Cir. 2006) (quotations omitted). An officer exceeds the permissible scope of a frisk by squeezing an item once the officer determines that the item does not contain a weapon. *State v. Garvin*, 166 Wn.2d 242, 207 P.3d 1266 (2009). *Accord United States v. Albert*, 579 F.3d 1188, 1195 (10th Cir. 2009) ("Where, in the context of a limited pat-down, an officer continues to explore a defendant's pocket after concluding it does not contain a weapon, the search 'amount[s] to the sort of evidentiary search that *Terry* expressly refused to authorize and that [the Supreme Court] ha[s] condemned in subsequent cases.' *Minnesota v. Dickerson*, 508 U.S. 366, 378, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)

(citation omitted).”).

However, in cases where a pat-down is inconclusive, an officer may reach into a detainee's clothes and may withdraw an object in order to ascertain whether it is a weapon. *See Hudson*, 124 Wn.2d at 112-13. Under this rule, courts have held that it was proper to remove a cigarette pack, a wallet, and a pager. *See State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980); *State v. Horton*, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008); and *State v. Fowler*, 76 Wn. App. 168, 170-72, 883 P.2d 338 (1994), *review denied*, 126 Wn.2d 1009 (1995).

Once a container is removed, an officer may only open the item if it is large enough to contain a small or normal sized weapon. A container that can only accommodate a “miniature weapon” may not be opened. *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2007). A razor blade is properly classified as a “miniature weapon”. *Id.* A container the size of a cigarette pack or smaller is deemed only capable of holding a “miniature weapon.” *Id.* An officer may separate the suspect from containers that are only capable of holding miniature weapons until the conclusion of the stop. *Id.*

Officers may not do a second “more intensive” frisk of a person once the initial pat down is completed and there are no objective grounds for the officer to believe that the suspect, at the time of the second frisk, is presently armed or dangerous. *See State v. Xiong*, 164 Wn.2d 506, 191 P.3d 1278 (2008) (improper for officer to reach into a suspect’s pocket as part of a more intensive frisk, when the initial frisk produced no weapons, and the suspect was handcuffed and cooperative).

d. **Vehicles.** “Under the Washington Constitution, a valid *Terry* stop may include a search of the interior of the suspect’s vehicle when the search is necessary to officer safety. A protective search for weapons must be objectively reasonable, though based on the officer’s subjective perception of events.” *State v. Larson*, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997). This principle survives the recent United States Supreme Court case of *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). *See Gant*, 129 S. Ct. at 1721 (listing *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), which permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons, as an established exceptions to the warrant requirement that authorizes an officer to enter a vehicle); *United States v. Goodwin-Bey*, 584 F.3d 1117 (8th Cir. 2009) (“In reexamining the search incident to arrest exception to the warrant requirement, *Gant* left [the *Michigan v. Long*] exception untouched.”).

In a no-arrest situation, where a contact will conclude with the driver and/or the passengers returning to the vehicle, the officer should consider whether sufficient objective facts support a "frisk" for weapons. *See Arizona v. Gant,* 556 U.S. 332, 129 S. Ct. 1710, 1724, 173 L. Ed. 2d 485 (2009) (Scalia, J., concurring) ("In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed."). *Accord State v. Chang*, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008) (officer may still search the compartment of both occupants of the vehicle are outside the car and do not have access to the passenger compartment so long as the officer intends to return them to the car following the stop.). When a vehicle's sole occupant is arrested, a frisk of the vehicle is not proper. Instead, an officer may only enter the vehicle with a search warrant, consent, or the existence of an emergency.

Factors that will support a "frisk" of the passenger compartment in the area immediately adjacent to the suspect:

- **"Furtive Movements."** Driver or passenger's furtive movements as if placing a weapon under the seat (*i.e.* bending down). *See State v. Horrace*, 144 Wn.2d 386, 395-96, 28 P.3d 753 (2001); *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986); *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997).

- **Prior contacts with suspect**. *See State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (the fact that the officer had two months previously arrested the suspect and at that time discovered the suspect to be in possession of a holster and bullets provides a reasonable basis to believe the suspect is presently armed and dangerous).

- **Visible weapon**, weapon's case (*i.e.* knife sheath), or ammunition. *See State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (the fact that the officer had two months previously arrested the suspect and at that time discovered the suspect to be in possession of a holster and bullets provides a reasonable basis to believe the suspect is presently armed and dangerous).

- **Citizen Report.** Credible report from citizen that an occupant in the vehicle had pointed a gun at the citizen. *State v. Glenn*, 140 Wn. App. 627, 166 P.3d 1235 (2007).

e. **Plain Feel.** If an officer encounters a soft item during a frisk that cannot contain a weapon, the officer may not manipulate the item in order to determine whether the item may be drugs, etc. *See State v. Garvin*, 166

Wn.2d 242, 207 P.3d 1266 (2009) ("it is unlawful for officers to continue squeezing—whether in one slow motion or several—after they have determined a suspect does not have a weapon, to find whether the suspect is carrying drugs or other contraband").

An officer may, however, seize the item under the "plain feel" doctrine if the officer was immediately able to recognize the item as contraband. *See Sate v. Hudson*, 124 Wn.2d 107, 874 P.2d 160 (1994). This burden, however, is virtually impossible for the prosecution to meet.

f. **Return of Weapon.** An officer may, in the interest of protecting personal safety, briefly seize a dangerous weapon found during a lawful frisk or search, render it temporarily unusable by removing ammunition, and retain the weapon during the remainder of the contact. *See generally, State v. Cotten*, 75 Wn. App. 669, 683-84, 879 P.2d 971 (1994), *review denied*, 126 Wn.2d 1004 (1995). If the detainee is lawfully in possession of the weapon, the weapon must be returned to the detainee at the end of the stop. Officer safety concerns are paramount at this point. Possible strategies for preventing an ambush once the officer turns his or her back is to unload any handgun and explain to the driver that the weapon will be placed in one location in the car and the bullets in another for officer safety reasons and request that the driver not reach for the weapon or reload the weapon until both the driver and the officer have left the scene of the stop.

The officer may also explain his or her safety concerns to the detainee and ask the detainee if the detainee would be willing to lock the weapon in the trunk.

An officer may request back-up if the detainee was belligerent or otherwise uncooperative, so that the detainee's movements may be observed until the detainee has traveled far enough from the officer's position so as to eliminate the risk of ambush.

Terry Stop and Search Checklist

To STOP – You must have reasonable suspicion that a suspect is committing, has committed, or is about to commit a crime. Reasonable Suspicion must be based on specific, articulable, rational facts (Less than probable cause but more than a hunch.)

Articulable factors justifying stop. (Need multiple factors, at least one of which must come from the second column.)

___ hour

___ high crime neighborhood

___ appears lost or to not be a resident of the area

___ unusual presence

___ standing on street corner

___ nervousness

___ flight-manner of movement

___ drug trafficking neighborhood

___ other

___hand to hand movement

___eyewitness information

___concerned citizen

___CI information

__co-defendant information

___personal knowledge of d's drug use

___personal knowledge of d's license suspension status

___smell

___defendant statement

To FRISK – You may frisk outer clothing for weapons and may search if you reasonably believe you are in danger.

Articulable factors justifying search for weapons.

___high crime neighborhood
___guns common in neighborhood
___feel of weapons
___shape of weapon
___sight of weapon
___sound of weapon
___concerned citizen information

___CI information
___co-defendant information
___personal knowledge of d having weapons
___defendant's movements
___defendant's statements
___sight of ammunition
___other

To QUESTION – You may demand the suspect's name and address and an explanation of the suspect's actions. You may detain him for a reasonable period of time to verify his answer. If he says nothing or tells you to jump in a lake, that's your tough luck; you cannot do anything to the suspect.

BOTTOM LINE – You must be able to articulate reasons to distinguish the suspect from someone who just may happen to be there.

F. Arrests

1. **Custodial Arrests.** An arrest occurs when police objectively manifest that they are restraining the person's movement, and a reasonable person would have believed that he or she was not free to leave. When this test is met, and the seizure is for later charging and trial, the arrest will be referred to as a "custodial arrest." If a seizure is a custodial arrest, it must be supported by probable cause to believe that a crime has been committed by the arrestee, and probable cause exists "where the facts and circumstances within the arresting officers' knowledge, and of which they had reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that a crime has been committed." *State v. Lund*, 70 Wn. App. 437, 444-45, 853 P.2d 1379 (1993), *review denied*, 123 Wn.2d 1023 (1994), quoting *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1949).

   The following acts will always convert an investigative detention into a custodial arrest:

   - Transporting a suspect to the station house or police interrogation room, *see Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed.2d 229 (1983), *State v. Gonzales*, 46 Wn. App. 388, 396, 731 P.2d 1101 (1986).

     Caution must always be used when interacting with a suspect at a station house or police interrogation room because courts will scrutinize these interactions with extreme care for any evidence of restraint, compulsion, or intimidation. *See, e.g., United States v. Jacobs*, 431 F.3d 99 (3rd Cir. 2005). For a more detailed discussion, see the confessions chapter.

   The following acts do not necessarily, but may, turn an investigative detention into a custodial arrest:

   - An officer's statement that the suspect is under arrest, *see State v. Lyons*, 85 Wn. App. 268, 270, 932 P.2d 188 (1997).

   - Grabbing suspect's arm, *see State v. Lyons*, 85 Wn. App. 268, 270, 932 P.2d 188 (1997).

   - Asking driver to exit car, *see State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995).

   - Use of drawn guns. *State v. Belieu*, 112 Wn.2d 587, 598, 773 P.2d 46 (1989).

- Transporting a suspect from the scene to somewhere other than a police station house. *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987).

- The presence of numerous police vehicles. *State v. Marcum*, 149 Wn. App. 894, 205 P.3d 969 (2009).

- Reading *Miranda* warnings. The reading of *Miranda* rights prior to questioning in some circumstances might indicate a person was not free to leave. *See United States v. Crawford*, 372 F.3d 1048, 1060 (9th Cir. 2004) (en banc) (explaining that when the police officer read defendant his *Miranda* rights the defendant stopped the officer and said, "Oh, I'm under arrest?"). The controlling legal standard requires, however, that we consider the total circumstances and how an objective person would assess if he was free to leave. The issuance of *Miranda* warnings as a cautionary measure does not itself transform the situation into a Fourth Amendment seizure. *United States v. Redlightning*, 624 F.3d 1090, 1105 (9th Cir. 2010).

- Whether the suspect's home is currently being searched. *United States v. Wright*, 625 F.3d 583 (9th Cir. 2010) (concluding that despite being told he was free to leave, the defendant would not have reasonably believed he was free to go because agents were searching his home); *United States v. Lee*, 699 F.2d 466, 467-68 (9th Cir. 1982) (holding defendant would not have felt free to leave where he "was questioned in a closed FBI car with two officers for well over an hour while police investigators were in and around his house").

a. **Arrest of Vehicles.** Stopping an automobile and detaining its occupants without a warrant constitutes a Fourth Amendment seizure. *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007); , *State v. Larson*, 93 Wn.2d 638, 611 P.2d 711 (1980). A seizure is reasonable if the officer has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Larson*, 93 Wn.2d at 644, quoting, *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979).

Washington law authorizes officers to stop a vehicle when the law enforcement officer has a reasonable belief that an infraction has been committed by that vehicle. RCW 46.63.030; *State v. Duncan*, 146 Wn.2d 166, 173-75, 43 P.3d 513 (2002). It is well established that when the officer believes the driver of an automobile has committed a traffic offense, the officer may stop the vehicle and investigate the infraction,

which includes detaining the driver in order to check his driver's license, for the presence of outstanding warrants, and automobile registration. *Delaware v. Prouse*, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 99 S. Ct. 1391, 1401 (1979); RCW 46.61.021(2). The detention is generally terminated upon the completion of the notice of infraction or citation as provided by RCW 46.64.015. Under circumstances discussed more fully in the warrantless arrest section of these materials, the driver or a passenger may be custodially arrested.

The existence of an objective traffic law violation ***may not*** be used as a "pretext" for stopping a vehicle for other investigative purposes. *See State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999) (art. I, § 7 protects against "pretext stops"). "A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop." *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988). An officer does not make an illegal "pretext stop" if the officer has the reasonable suspicion necessary under *Terry* to conduct an investigation into the unrelated serious crime. An officer does not make an illegal "pretext stop" if there is a valid arrest warrant for one or more of the occupants of the vehicle. *See State v. Witherspoon*, 82 Wn. App. 634, 638, 919 P.2d 99 (1996), *review denied*, 130 Wn.2d 1022 (1997).

i. **Passengers**. A lawful seizure of a vehicle does not provide any basis for seizing passengers who have not personally committed any infraction. Passengers who have committed a seatbelt or other infraction need only identify themselves, give a current address, and sign the notice of infraction. *See State v. Cole*, 73 Wn. App. 844, 871 P.2d 656, *review denied*, 125 Wn.2d 1003 (1994). Such a passenger is free to leave once the warrants check is completed.

A passenger who is not being cited for a personal infraction or held under *Terry*, may only have his or her liberty restricted in accordance with *Mendez*. (See prior discussion of the law).

A passenger who wishes to drive the vehicle away upon the arrest of the driver may be required to establish that he or she possesses a valid license. *State v. Mennegar*, 114 Wn.2d 304, 787 P.2d 1347 (1990). If the passenger is unwilling to provide the information necessary to check upon the status of his or her license, alternative arrangements, such as impound, may be made for the vehicle.

A passenger may not be asked for his or her identification unless the passenger is being cited for a separate traffic violation, the passenger is a witness to the crime for which the driver is being arrested, the passenger wishes to drive the vehicle away, or some other similar ground exists. *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004).

A passenger may not be asked his or her name and birthdate unless the passenger is being cited for a separate traffic violation, the passenger is a witness to the crime for which the driver is being arrested, the passenger wishes to drive the vehicle away, or some other similar ground exists. *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005).

2. Arrest Warrants.

a. Who May Issue.

i. Washington Judges. An arrest warrant may be issued by any Washington judge. *See generally* Chapter 2.20 RCW. A warrant issued by any Washington judge, including municipal court judges, are valid throughout the state. *See generally* CrRLJ 2.2; CrR 2.2. A judge normally needs probable cause to issue an arrest warrant. An exception exits, however, for warrants to arrest convicted individuals for violating terms of release pending appeal, and for warrants for probation violations. *See State v. Fisher*, 145 Wn.2d 209, 35 P.3d 366 (2001) (arrest warrant for defendant who was awaiting sentencing for a felony conviction only needed a well-founded suspicion that defendant had violated the condition of her release); *State v. Erickson*, 168 Wn.2d 41, 225 P.3d 948 (2010) (a bench warrant for a defendant's arrest for a probation violation only requires a well-founded suspicion that defendant violated the terms of his probation).

An arrest warrant may not be administratively issued without judicial involvement by a court clerk. *See State v. Walker*, 101 Wn. App. 1, 999 P.2d 1296 (2000).

ii. Governor. The Governor of the State of Washington may also issue a warrant of arrest pursuant to a request for extradition made by the governor of another state. *See* RCW 10.88.260.

iii. Department of Corrections. The Department of Corrections may also issue arrest warrants for offenders who violate the terms of their community custody. *State v. Barker*, 162 Wn. App. 858, 256

P.3d 463 (2011). All police officers are authorized to execute such warrants. *See* RCW 9.95.120; RCW 9.94A.716(1).

An administrative arrest warrant may, however, be issued by the Washington Department of Corrections ("DOC"). *See* RCW 9.94A.716. Any law enforcement of peace officer or community corrections officer of this state or any other state may arrest the offender and place him in total confinement pending disposition of the alleged violation. *Id.* An arrest pursuant to a DOC administrative arrest warrant is constitutionally valid under the Fourth and Fourteenth Amendments. *State v. Barker*, 162 Wn. App. 853, 256 P.3d 463 (2011).

iv. **Out of State Judges.** Arrest warrants may also be issued by judges in other states. Such arrest warrants, however, may not be served or executed upon in Washington. Arrests made pursuant to knowledge that there is a non-Washington state warrant of arrest has been issued for the person are classified as warrantless arrests. *See* RCW 10.88.330.

v. **Tribal Court Judges.** Arrest warrants may be issued by tribal judges. State officers may not serve tribal court arrest warrants on Indians or non-Indians.[14] This is because the Uniform Act on Extraditions does not mention Indian Tribes in the list of jurisdictions to which it applies. *See* RCW 10.88.200. Binding Washington case law indicates that this means Indian Tribes are not covered by the law. *See State v. Moses*, 145 Wn.2d 370, 37 P.3d 1216 (2002); *Queets Band of Indians v. State*, 102 Wn.2d 1, 4-5, 682 P.2d 909 (1984).

vii. **Immigration Authorities.** Civil immigration warrants may not be executed by state officers. State officers may not detain or arrest based upon an ICE warrant for "immediate deportation." *Santos v. Frederick County Board of Commissioners*, 725 F.3d 451 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1541 (2014). Be aware that the NCIC database included civil immigration warrants. Just because an ICE warrant is in the NCIC database does not make the warrant "criminal." *Id.*

b. **Warrants Check.** A check for any outstanding arrest warrants is a

[14] A chart at the end of these materials set out the general rules regarding criminal law jurisdiction regarding Indians and Indian Country.

reasonable routine police procedure during a valid criminal investigation. *See State v. Chelly*, 94 Wn. App. 254, 261, 970 P.2d 376, *review denied*, 138 Wn.2d 1009 (1999); *State v. Williams*, 50 Wn. App. 696, 700, 750 P.2d 278 (1988). A check for any outstanding arrest warrants is statutorily available whenever a person is stopped for a traffic infraction. *See* RCW 46.61.021(2).

Such a check is not statutorily authorized when a person is stopped for a non-traffic infraction. *See* RCW 7.80.060; *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997). It is unclear whether *Rife* prohibits a record check, or merely prohibits detaining the person until the result of the record check is received.

c. Service of Arrest Warrants.

i. Arrest Warrant by telegraph or teletype. RCW 10.31.060

(1) Allows for arrest on a warrant even if the warrant is not in the officer's hand.

(2) Requirements:

- The existence of the warrant must be verified.
- The information on the warrant must be verified.
- The physical description of the wanted person must be verified.
- The identity of the suspect must be confirmed
- Compare the physical description of the wanted person to the suspect.

ii. Where may the warrant be served.

(1) Suspect's Home. An officer in possession of an arrest warrant, whether for a misdemeanor or for a felony, may break open any outer or inner door, or windows of the suspect's dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance. *See* RCW 10.31.040; *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007) (a misdemeanor arrest warrant allows an officer to forcibly enter a residence for arrest). An officer may not break

open any outer or inner door to serve a civil warrant for failure to pay child support. *State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004). The amount of notice that must be given is discussed in more detail in the "knock and announce" section of these materials.

Before breaking down a door, the officer must have probable cause to believe that the building, house, hotel room, etc., that is being entered is the suspect's residence **and** must have probable cause to believe that the named person is actually present at the time of the entry. *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639 (1980); *United States v. Gorman*, 314 F.3d 1105 (9th Cir.2002); *United States v. Diaz*, 491 F.3d 1074 (2007); *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007).

Factors to consider in arriving at probable cause:

- Does the suspect have a lease for the location?
- Is there a phone listing for this location in the suspect's name?
- Does the suspect receive mail at this location?
- Did the suspect provide this address as his/her home address when registering as a sex offender, when booked into jail, when released from court, or to the Department of Licensing?
- Has a reliable informant, such as the suspect's employer, friend, or family member indicated that the suspect resides at this location?
- Have the neighbors observed the suspect living at the location?
- Are multiple vehicles registered to the suspect present at the location?

- Has the suspect when found at the home by police on other days at the same time?

- Has the suspect told police in the past that he is usually at home during the day? During the evening? At night?

- Did police observe a vehicle drive away from the house shortly before they attempted to serve the warrant? Could they see who was driving the vehicle?

- Can police see the suspect in the house through windows?

- Can police hear movement inside of the house?

Specific cases applying the above factors:

Unlawful Entry Into Home. *State v. Ruem*, 179 Wn.2d 195, 313 P.3d 1156 (2013) (Officers had insufficient probable cause to believe the person named in the arrest warrant is an actual resident of the home and that the named person is actually present at the time of entry. Although the address appeared as the fugitive's "address of record" there was no current information that the fugitive lived there and two people had reported that the fugitive had moved to California. Although a car registered to the fugitive was at the property, the fugitive was never observed driving the vehicle and family members stated that the fugitive left the vehicle behind for his girlfriend's use, when the fugitive moved to California.)

Lawful Entry Into Home. *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007) (Officers had "barely enough to suggest to a reasonable person" that the subject of the arrest warrant actually lived in the defendant's residence " where they pursued the named person after observing him purchasing precursor materials for the manufacture of methamphetamine and, after losing sight of him, found his truck parked in the driveway of the home

> they entered. A second vehicle registered to the named person was parked on the front lawn of the home. Both vehicle registrations and the arrest warrant, however, listed a different address for the named person. When questioned, one neighbor thought the named person lived in the house and had seen him there earlier that day and another often saw the named person there. A bystander also told the officers that if the named person's truck truck was there, so was the named person. When officers approached the house and knocked on the door, a resident of the duplex who had been living there for three months told officers that he believed the named person was "'home'" and that the named person had been there "'off and on'" for the last two months.

Even with probable cause to believe that a suspect is present and that the location is where the suspect lives, any evidence found while executing the arrest warrant will be suppressed if the court finds that the police used the arrest warrant as a guise or pretext to otherwise conduct a speculative criminal investigation or a search. *State v. Ruem*, 179 Wn.2d 195, 201, 313 P.3d 1156 (2013) ("An arrest warrant allows law enforcement officers the limited power to enter a residence for an arrest where . . .the entry is not a pretext for conducting other unauthorized searches or investigations"); *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007), citing *State v. Michaels*, 60 Wn.2d 638, 644, 374 P.2d 989 (1962) ("An arrest may not be used as a pretext to search for evidence." (citing *United States v. Lefkowitz*, 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961))). When an officer has an arrest warrant for an individual who is also a suspect in other criminal investigations, it would be prudent for the officer to obtain a search warrant for the suspect's residence rather than entering the residence solely on the basis of the arrest warrant. *See State v. Landsen*, 144 Wn.2d 654, 662, 30 P.3d 483 (2001) (*Ladson* pretext doctrine does not apply to searches based upon a validly issued search warrant.).

(2) **Another's home.** An arrest warrant for a suspect only suffices to allow entry into the suspect's own residence, not the residence of a third person. Absent consent from

the third person or exigent circumstances, such as hot pursuit, entry into the home of a third party to make an arrest is illegal absent issuance of a search warrant. *See Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981); *Hocker v. Woody*, 95 Wn.2d 822, 631 P.2d 372 (1981). One Division of the Court of Appeals has suggested in dicta that a search warrant for a fugitive located in a third person's house will be subjected to a *Ladson*-like pretext analysis. *See State v. Anderson*, 105 Wn. App. 223, 19 P.2d 1094 (2001) (search warrant to look for misdemeanant escapee who was seen watering plants in suspected meth cook's house criticized as pretextual).

(3) Outside the State of Washington

Washington peace officers may not serve a Washington warrant of arrest outside the state boundaries. Only the Governor can extradite a suspect from another state. RCW 10.88.210.

iii. Protective Sweeps. The concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest. Generally officers executing an arrest warrant may search the premises for the subject of that warrant, but must call off the search as soon as the subject is found. However, the risk of danger with in-home arrests justifies steps by the officers "to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." Consequently, "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Maryland v. Buie*, 494 U.S. 325, 334, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990); *State v. Boyer*, 124 Wn. App. 593, 102 P.3d 833 (2004).

To justify a protective sweep beyond immediately adjoining areas, the officers must be able to articulate "facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The sweep is limited to a cursory inspection of places a person may be found and must last no longer than necessary to

dispel the reasonable suspicion of danger or to complete the arrest, whichever occurs sooner. *Buie,* 494 U.S. at 335-36; *Boyer*, 124 Wn. App. at 600-01.

d. **Booking searches.** An inventory search of a person arrested pursuant to an outstanding warrant is invalid if the warrant has not first been read to the person and the person has not been given an opportunity to post bail "directly and without delay," as required by RCW 10.31.030. *State v. Caldera*, 84 Wn. App. 527, 929 P.2d 482 (1997); *State v. Smith*, 56 Wn. App. 145, 783 P.2d 95 (1989), *review denied* 114 Wn.2d 1019 (1990). This rule means that the safety of correctional officers/booking officers is dependent upon the adequacy of the arresting officer's search incident to arrest. The officer making the arrest must conduct a search that is sufficient to detect and remove all weapons from the suspect's possession prior to the suspect's arrival at the booking facility.

In addition, the scope of the booking search is more narrow than the search incident to arrest. While police officers may open and examine all unlocked personal possessions in the possession of the arrestee, correctional staff performing an inventory search on a jacket or other personal items may not open closed containers contained in the personal items. *Cf. State v. Dugas*, 109 Wn. App. 592, 36 P.3d 577 (2001).

Once an item is inventoried and placed into the jail's property room, the arrestee has a diminished expectation of privacy in the item. Thus, law enforcement may take a "second look" at the property without a warrant in connection with the investigation of a crime unrelated to the one for which the defendant was arrested. *See State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003). *Accord United States v. Burnette*, 698 F.2d 1038, 1049 (9th Cir. 1983) ("once an item in an individual's possession has been lawfully seized and searched, subsequent searches of that item, so long as it remains in the legitimate uninterrupted possession of the police, may be conducted without a warrant").

3. **Warrantless Arrests.**

a. **When Allowed.**

A warrantless arrest is lawful under the Fourth Amendment whenever the arrest is based upon probable cause. *Virginia v. Moore*, 553 U.S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008). A state, however, may place additional restrictions upon warrantless arrests.

i. **Felonies.** In Washington, RCW 10.31.100 provides that an officer may make a warrantless when there exists probable cause to

believe a felony has been committed.

ii. **Non-Felonies.** In Washington, RCW 10.31.100 provides an officer may make an arrest for a misdemeanor committed in the presence of an officer. This rule applies to both state statutes and municipal ordinances. *See State v. Kirwin*, 137 Wn. App. 387, 153 P.3d 883 (2007) ("'Misdemeanor' includes misdemeanor violations of municipal codes.").

A. **Minor Traffic Offenses.** There is a judicially created additional requirement for minor traffic offenses. When dealing with one of these offenses, a warrantless arrest may only be made if there are other reasonable grounds for the arrest, *i.e.* suspect does not have a stable address, suspect has a number of FTAs on his driver's record, suspect's identification information cannot be verified, etc. *Cf. State v. Hehman*, 90 Wn.2d 45, 578 P.2d 527 (1978).

This exception was subsequently codified by the legislature. *See* RCW 46.64.015 ("Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. . . .The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances: (1) Where the arresting officer has probable cause to believe that the arrested person has committed any of the offenses enumerated in RCW 10.31.100(3); [or] (2) When the arrested person is a nonresident and is being detained for a hearing under RCW 46.64.035.").

This exception generally applies to any non-felony traffic offenses not listed in RCW 10.31.100(3). Factors that may give rise to reasonable grounds to believe that the driver will not respond to a citation, include:

- The defendant has no license and gives a false name. *State v. Johnson*, 65 Wn. App. 716, 829 P.2d 796 (1992).

- An identification check reveals that the defendant

has FTA's on record with DOL. *State v. Reeb*, 63 Wn. App. 678, 821 P.2d 84 (1992).

- The circumstances surrounding the arrest dictate transferring the violator to another location for completion of the arrest process. *See State v. LaTourette*, 49 Wn. App. 119, 125, 741 P.2d 1033 (1987) (finding that the officers' decision to move arrestee to another location to complete arrest for reckless driving was proper when a hostile crowd gathered in parking lot).

B. **Issuance of Citation**. An officer may issue a complaint for a misdemeanor even if the officer did not personally witness the crime. *See State v. Crouch*, 12 Wn. App. 472, 530 P.2d 344 (1975).

iii. **Out of State Crimes.** RCW 10.88.330 permits a warrantless arrest (*i.e.* without a warrant issued by a Washington state court) of an individual who stands charged with a crime punishable by death or imprisonment for a term exceeding one year in another states' court.

b. **When Prohibited.**

i. **Immigration Enforcement.** State and local officers do not enforce immigration laws. State and local officers may not make warrantless arrests of aliens suspected of being removable. *Arizona v. United States*, ___ U.S. ___, 132 S. Ct. 2492; 183 L. Ed. 2d 351 (2012).

ii. **Traffic Infractions**. The vast majority of traffic violations are civil infractions and not crimes. The few traffic violations that are crimes are listed in RCW 46.63.020. Crimes include DUI, reckless driving, DWLS. All other traffic offenses are infractions. Arrest is not allowed for civil infractions.

Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction. *See generally* RCW 46.61.021 and 46.64.015.

All citations must be filed within five days of the issuance of the

notice, excluding Saturdays, Sundays, and holidays. In the absence of good cause shown, a notice of infraction not filed within the five days shall, upon notice, be dismissed with prejudice. IRLJ 2.2(d).

iii. **Civil Infractions.** Violations of certain state laws, local laws, ordinances, and regulations are designated as "infractions." Infractions are punishable by a fine only. As a general rule, a person who is to receive a notice of infraction is required to identify himself or herself to the enforcement officer by giving his or her name, address, and date of birth. Upon the request of the officer, the person shall produce reasonable identification, including a driver's license or identicard. RCW 7.80.060.

"A person who is unable or unwilling to reasonably identify himself or herself to an enforcement officer may be detained for a period of time not longer than is reasonably necessary to identify the person for purposes of issuing a civil infraction." *Id.*

A person who has been stopped for a non-traffic infraction may only be detained while an officer completes a warrant check when the statute governing that type of infraction authorizes a warrant check. *See generally State v. Rife*, 133 Wn.2d 140, 943 P.2d 266 (1997), *superseded in part by* Laws of 1997 1st Ex. Sess., ch. 1, § 1. Detentions pending warrant checks are specifically authorized for natural resource infractions. *See* RCW 7.84.030. Fish and wildlife infractions and recreational vessel infractions are all issued pursuant to RCW 7.84.030. *See generally* RCW 77.15.160, RCW 79A.60.020(2).

c. Misdemeanor Presence Rule

An offense is effectively committed in the presence of an officer when he acquires knowledge of it through one of his senses or inferences properly drawn from the testimony of the senses. 5 Am. Jur. 2d *Arrest* §49. Washington has adopted this "sensory perception" rule. *See Tacoma v. Harris*, 73 Wn.2d 123, 436 P.2d 770 (1968). The *Harris* Court found that probable cause which would justify a warrantless arrest for a misdemeanor *must be judgment based on personal knowledge acquired at the time through the senses or inferences properly drawn from the testimony of the senses. Harris*, 73 Wn.2d at 126 [emphasis added].

Whether the officer must be physically present when making the necessary observations is not yet established in Washington. However, one unpublished decision, held that "presence" within the contemplation of RCW 10.31.100 requires actual physical presence or proximity of an

officer and that an officer's observation of a crime while monitoring a remote surveillance camera is insufficient. *See City of Everett v. Rhodes*, COA No. 48098-7-I, 2002 Wash. App. LEXIS 3168 (Div. I, Dec. 23, 2002) (unpublished).

Although the Washington Supreme Court held in *State v. Ortega*, 177 Wn.2d 116, 297 P.3d 57 (2013), that the arresting officer must be ***the*** officer who observed the misdemeanor, RCW 10.31.100 was amended by Laws of 2014, ch. 5, to allow ***an*** officer to make the warrantless arrest based upon the crime occurring in another officer's presence. Laws of 2014, ch. 5 will apply to all arrests made on or after June 12, 2014.

i. Continuing vs. non-continuing offenses

A law enforcement officer cannot generally make a warrantless arrest for a misdemeanor unless the crime is committed in the officer's presence. Some offenses, for purposes of determining when they are committed, can be considered continuing offenses. But the doctrine of continuing offenses should be employed sparingly, and only when the legislature expressly states the offense is a continuing offense, or when the nature of the offense leads to a reasonable conclusion that the legislature so intended. For those offenses where the legislature does not expressly state that the offense is continuing, the offense is deemed to have been committed at the earliest time on which the person was supposed to perform the act. *State v. Green*, 150 Wn.2d 740, 82 P.3d 239 (2004).

- The crime of bail jumping in violation of RCW 9A.76.170 is completed on the date the court hearing was held for which the defendant failed to appear. *State v. Klump*, 61 Wn. App. 911, 914, 813 P.2d 131 (1991).

A 2004 case held that the offense of failure to transfer title was not a continuing offense. *See State v. Green*, 150 Wn.2d 740, 743-44, 82 P.3d 239 (2004). On June 12, 2008, amendments to the failure to transfer title statute went into effect. Laws of 2008, ch. 316, § 1. Now the offense of failing to transfer title , RCW 46.61.650, continues each and every day beyond the 45th day. *State v. Bonds*, 174 Wn. App. 553, 299 P.3d 663, *review denied*, 178 Wn.2d 611 (2013).

d. Timing of Warrantless Arrest for Misdemeanor.

While there is no express time limit for making the arrest in RCW

10.31.100, the rule of reasonableness under the circumstances has been read into similar statutes by an overwhelming number of out of state courts. The question of what is a reasonable time, within the meaning of the above rule, is one of law.

- Officer "must act promptly" in making the arrest and "as soon as possible under the circumstances" and "before he transacts other business." *Oleson v. Pincock*, 68 Utah 507, 251 P. 23 (1926).

- Five hour delay between observing offense and warrantless arrest renders arrest illegal where officer did not spend time attempting to effectuate arrest, but instead attended to other duties. *See Wahl v. Walton*, 30 Minn. 506, 16 N.W. 397 (1883) ("While it is said that an arrest must be made at the time of or immediately after the commission of the offense, *the reference is not merely to the time but also the sequence of the events*. The officer may not be able, at the exact time of the offense, to make an arrest…but it is essential that the officer must at once set about the arrest, and follow up the effort until the arrest is effected.").

- Forty minute gap between observing the defendant commit a misdemeanor and his arrest did not invalidate the arrest as the officers' spent the time investigating the incident and in waiting for the defendant to return to the scene of the crime. *State v. Hawkins*, 7 Wn. App. 688, 690, 502 P.2d 464 (1972).

e. **Exceptions to the Presence Requirement.** RCW 10.31.100 provides that an officer may also make a warrantless arrest for certain crimes committed outside the officer's presence. The legality of this practice was upheld by the Washington Supreme Court under Const. art. I, § 7. *See State v. Walker*, No. 157 Wn.2d 307, 138 P.3d 113 (2006). An officer may currently make a warrantless arrest for any of the following crimes regardless of whether the officer witnessed the offense:

i. **Harm or Threats of Harm.** "Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property. . ." RCW 10.31.100(1).

ii. **Unlawful Taking of Property.** "Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving . . . the unlawful taking of property. . ." RCW 10.31.100(1).

iii. **Use or Possession of Cannabis.** "Any police officer having

probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, . . . involving the use or possession of canna." RCW 10.31.100(1).

A. Drug Paraphernalia. Mere possession of drug paraphernalia does not provide probable cause for arrest under state law. *State v. Rose*, , 175 Wn.2d 10; 282 P.3d 1087 (2012); *State v. O'Neill*, 148 Wn.2d 564, 584 n. 8, 62 P.3d 489 (2003); *State v. Neeley*, 113 Wn. App. 100, 52 P.3d 539 (2002). The presence of residue, however, may provide probable cause to arrest for possession of a controlled substance. *See generally*, *State v. Rose*, , 175 Wn.2d 10; 282 P.3d 1087 (2012) (residue in glass pipe sufficient to support an arrest); *State v. Malone*, 72 Wn. App. 429, 439, 864 P.2d 990 (1994) (possession of cocaine residue in a baggie, in amount neither measurable nor usable was sufficient to sustain a conviction for possession of a controlled substance); *State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991) (citing *State v. Larkins*, 79 Wn.2d 392, 394, 486 P.2d 95 (1971)), *review denied*, 118 Wn.2d 1019 (1992) ("[t]here is no minimum amount of narcotic drug which must be possessed in order to sustain a conviction"; sustaining a conviction for possession of a controlled substance based upon possession of cocaine residue in crack pipe bowl).

Some counties and cities have local ordinances which make mere possession of drug paraphernalia a crime.

B. "Medical Marijuana." Laws of 2011, ch. 181, § 401 amended RCW 69.51A.040 to prohibit warrantless arrest in certain circumstances:

> The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and ***a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested***, prosecuted, or subject to other criminal sanctions or civil consequences, ***for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law,*** or have real or personal property

seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, and investigating peace officers and law enforcement agencies may not be held civilly liable for failure to seize cannabis in this circumstance, if:

(1)(a) The qualifying patient or designated provider possesses no more than fifteen cannabis plants and:

(i) No more than twenty-four ounces of useable cannabis;

(ii) No more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or

(iii) A combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis.

(b) If a person is both a qualifying patient and a designated provider for another qualifying patient, the person may possess no more than twice the amounts described in (a) of this subsection, whether the plants, useable cannabis, and cannabis product are possessed individually or in combination between the qualifying patient and his or her designated provider;

(2) The qualifying patient or designated provider presents his or her proof of registration with the department of health, to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;

(3) The qualifying patient or

designated provider keeps a copy of his or her proof of registration with the registry established in section 901 of this act and the qualifying patient or designated provider's contact information posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence;

(4) The investigating peace officer does not possess evidence that:

(a) The designated provider has converted cannabis produced or obtained for the qualifying patient for his or her own personal use or benefit; or

(b) The qualifying patient has converted cannabis produced or obtained for his or her own medical use to the qualifying patient's personal, nonmedical use or benefit;

(5) The investigating peace officer does not possess evidence that the designated provider has served as a designated provider to more than one qualifying patient within a fifteen-day period; ***and***

(6) The investigating peace officer has not observed evidence of any of the circumstances identified in section 901(4) of this act.

No medical cannabis users will be able to satisfy all of the above conditions as the section 901 of the act that created a registry was vetoed. Nonetheless, the Legislature's intent to limit custodial arrest when a person is otherwise in compliance with the medical cannabis law should generally be honored by a police officer.

iv. **Minors and Alcohol.** "Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor . . .

involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270." RCW 10.31.100(1).

RCW 66.44.270 prohibits the furnishing of alcohol to a person under the age of 21. The statute also prohibits a person under the age of 21 from possessing or consuming alcohol. A person under the age of 21 may also not appear in a public place while exhibiting the effects of having consumed alcohol.

A. **Alcohol Poisoning.** A person under the age of 21 who experiences alcohol poisoning and is in need of medical assistance shall not be prosecuted for possessing or consuming alcohol. A person under the age of 21, who seeks medical assistance for someone experiencing alcohol poisoning, shall not be prosecuted for possessing or consuming alcohol. *See* RCW 66.44.270(6).

B. **Presence Required.** The presence rule remains in effect for violations of RCW 66.44.270 by persons over the age of 21. The presence rule remains in effect for other crimes contained in Chapter 66.44 RCW, including obtaining liquor for ineligible person (RCW 66.44.210), minor purchasing or attempting to purchase liquor (RCW 66.44.290), and minors frequenting off-limits area or misrepresenting his or her age (RCW 66.44.310).

v. **Trespass.** "Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, . . .involving criminal trespass under RCW 9A.52.070 or 9A.52.080." RCW 10.31.100(1). This exception is limited to criminal trespass in the first degree and criminal trespass in the second degree.

The presence rule is not expressly waived for other trespass offenses. *See, e.g.,* RCW 9A.52.120 (computer trespass in the second degree). Arrest may still be possible when these offenses did not occur in the officer's presence if the offense involved physical harm or threats of physical harm to property. *See* RCW 10.31.100(1).

vi. **Indecent Exposure.** There exists probable cause to believe that a person has committed or is committing any act of indecent exposure (RCW 9A.88.010). RCW 10.31.100(8).

vii. **Traffic Offenses.** There exists probable cause to believe that a person has committed or is committing certain specified traffic offenses:

- Duty on Striking a Vehicle or Person ("Hit and run", attended or unattended) (RCW 46.52.010 and .020)
- DUI or physical control (RCW 46.61.502 and .504)
- Driver under twenty-one consuming alcohol or marijuana (RCW 46.61.503)
- Commercial Vehicle DUI (RCW 46.25.110)
- Driving while license suspended or revoked (RCW 46.20.342)
- Negligent driving in the 1st degree (RCW 46.61.5249)
- Reckless driving or racing of vehicles (RCW 46.61.500 or .530)

RCW 10.31.100(3).

viii. **Violations of Protection Orders, No Contact Orders, and Foreign Protection Orders.** An officer having probable cause to believe that a person has knowledge of orders issued under RCW 26.44.063, or chapter 7.92, 7.90, 9A.46, 10.99, 26.09, 26.10, 26.26, 26.50, and 74.34 RCW. *See* RCW 10.31.100(2)(a).

An officer may also make an arrest for a knowing violation of a foreign protection order. *See* RCW 10.31.100(2)(b). A "foreign protection order" is

> an injunction or other order related to domestic or family violence, harassment,

sexual abuse, or stalking, for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to another person issued by a court of another state, territory, or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, or any United States military tribunal, or a tribal court, in a civil or criminal action.

RCW 26.52.010(3).

ix. **Anti-Harassment Orders.** There exists probable cause to believe that a person has violated the terms of a anti-harassment order issued under Chapter 10.14 RCW and the person has knowledge of the issuance of the order. RCW 10.31.100(9).

Currently, the pattern forms used by the courts for orders issued under Chapter 10.14 RCW are entitled

- Temporary Protection Order and Notice of Hearing (Harassment) (TMORAH)
- Order for Protection - Harassment (ORAH)
- Reissuance of Temporary Order for Protection and Notice of Hearing (Harassment) (ORRTPO)
- Order on Renewal of Order for Protection
- Order Modifying/ Terminating Order for Protection - Harassment (ORMTOA)

A. **Presence Required When Offender is a Juvenile.** When the restrained person under a Chapter 10.14 RCW order is under the age of 18, and the restrained person's conduct does not fall within another RCW 10.31.100 exception, the officer **must** witness the violation in order to make a warrantless arrest. This is because a violation of the order by a restrained person under the age of 18 is only punishable as contempt and criminal contempt is not a crime included in RCW 10.31.100. *See* RCW

10.14.120. The pattern forms currently used by the courts will generally bear the following captions when issued to a respondent who is under the age of 18:

- Order for Protection - Respondent Under Age 18 - Harassment (ORAH18)

- Temporary Protection Order and Notice of Hearing - Respondent under Age 18 (Harassment) (TORAH18) 10.14

x. **Boating.** An officer may arrest the operator of a motor vessel involved in a collision if the law enforcement officer has probable cause to believe that the operator has, in connection with the collision, committed a criminal violation of chapter 79A.60 RCW. This authority, however, may be limited to when the operator is still at the scene of the collision. *See* RCW 10.31.100(5)(a) ("A law enforcement officer investigating at the scene of a motor vessel accident").

A person who operates a vessel in a reckless manner or while under the influence of intoxicating liquor, marijuana or any drug may be arrested upon probable cause. *See* RCW 79A.60.040. These offenses need not occur in the officer's presence. RCW 10.31.100(6).

xi. **Interference with a Health Care Facility.** A person who recklessly or willfully disrupts the normal functioning of a health care facility (RCW 9A.50.020) may be arrested without a warrant and without an officer personally seeing the offense for up to 24 hours. RCW 10.31.100(10).

xii. **Weapons and Schools.** A police officer having probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon on private or public elementary or secondary school premises shall have the authority to arrest the person. RCW 10.31.100(11).

xiii. **Invasive Species.** An officer may make a warrantless arrest upon probable cause to believe a person is failing to comply with the statutes designed to limit the spread of invasive species. *See* RCW 77.15.809 and .811. The

officer does not have to personally observe the violation.

f. Whether to Make a Warrantless Arrest.

i. Officer's Discretion. Where RCW 10.31.100 specifically authorizes an arrest, an officer may make the custodial arrest and then may exercise his discretion regarding whether to release the defendant with a citation or to book the defendant into jail after completing the search incident to arrest. *State v. Pulfrey*, 154 Wn.2d 517, 111 P.3d 1162 (2005).

In exercising his or her discretion, an officer should consider the factors that contained in CrRLJ 2.1(b)(2):

> In determining whether to release the person or to hold him or her in custody, the peace officer shall consider the following factors:
>
> (i) whether the person has identified himself or herself satisfactorily;
>
> (ii) whether detention appears reasonably necessary to prevent imminent bodily harm to himself, herself, or another, or injury to property, or breach of the peace;
>
> (iii) whether the person has ties to the community reasonably sufficient to assure his or her appearance or whether there is substantial likelihood that he or she will refuse to respond to the citation and notice; and
>
> (iv) whether the person previously has failed to appear in response to a citation and notice issued pursuant to this rule or to other lawful process.

Ford v. City of Yakima, 706 F.3d 1188 (9th Cir. 2013).

An officer may not make book someone solely because the arrestee complained about the officer's actions. *See Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013) (arrestee's First Amendment right was violated when the officers booked and jailed him in retaliation for his protected speech; the arrestee's criticism of the

police for what he perceived to be an unlawful and racially motivated traffic stop fell squarely within the protective umbrella of the First Amendment).

ii. **Mandatory Arrest or Booking.** RCW 10.31.100 provides that an officer ***shall*** make a warrantless arrest when:

A. **Repeat DUIs.** Laws of 2013, 2nd Sp. Sess. Ch. 35, sec. 22 (effective September 28, 2013), added a provision to RCW 10.31.100 that removed an officer's discretion with respect to repeat DUI and physical control offenders. The mandatory arrest provision applied when "the police officer has knowledge that the person has a prior offense as defined in RCW 46.61.5055 within ten years."

The 2014 Legislature made minor changes to the repeat DUI provision in Laws of 2014, ch. 100, sec. 2, to clarify that officers must book the offender. The modified mandatory booking language states that:

> A police officer shall arrest and keep in custody, until release by a judicial officer on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that the person has violated RCW 46.61.502 or 46.61.504 or an equivalent local ordinance and the police officer has knowledge that the person has a prior offense as defined in RCW 46.61.5055 within ten years.

What constitutes a "prior offense" in this area goes well beyond a prior conviction for DUI or physical control. RCW 46.61.5055 (14) makes all of the following a "prior offense":

- A conviction for a violation of RCW 46.61.502 (DUI) or an equivalent local ordinance
- A conviction for a violation of RCW 46.61.504 (physical control) or an equivalent
- A conviction for a violation of RCW 46.61.520 (vehicular homicide) committed under the DUI prong or under the reckless manner or disregard for

the safety of others prong if the DUI prong was originally included in the information

- A conviction for a violation of RCW 46.61.522 (vehicular assault) committed under the DUI prong or under the reckless manner or disregard for the safety of others prong if the DUI prong was originally included in the information

- A conviction for a violation of RCW 46.61.5249 (negligent driving in the first degree), 46.61.500 (reckless driving), or 9A.36.050 (reckless endangerment) or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a DUI, physical control, vehicular homicide, or vehicular assault

- An out-of-state conviction for a violation that would have been a violation of DUI, physical control, negligent driving, reckless driving, reckless endangerment, vehicular homicide, or vehicular assault, when the conviction stems from a prosecution that was originally filed as the equivalent of our DUI, physical control, vehicular homicide, or vehicular assault

- A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502 (DUI) or 46.61.504 (physical control), or an equivalent local ordinance

- A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249 (negligent driving in the first degree), or an equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a DUI, physical control, vehicular homicide, or vehicular assault.

- A deferred prosecution granted in another state for a violation of driving or having physical control of a vehicle while under the influence of intoxicating liquor or any drug

- A deferred sentence imposed in a prosecution for a

violation of negligent driving in the first degree, reckless driving, or reckless endangerment when the charge was originally filed as a DUI, physical control, vehicular homicide or vehicular assault

- A conviction for commercial vehicle DUI. RCW 46.25.110. (Added by Laws of 2014, ch. 100 (effective June 12, 2014)).

- A conviction for operating a vessel under the influence of intoxicating liquor, marijuana or any drug. RCW 79A.60.040. (Added by Laws of 2014, ch. 100 (effective June 12, 2014)).

- A conviction for operating an aircraft while under the influence of intoxicating liquor, narcotics, or other habit-forming drug. RCW 47.68.220. (Added by Laws of 2014, ch. 100 (effective June 12, 2014)).

- A conviction for operating a nonhighway vehicle while under the influence of intoxicating liquor or a controlled substance. RCW 46.09.470(2). (Added by Laws of 2014, ch. 100 (effective June 12, 2014)).
- A conviction for operating a snowmobile while under the influence of intoxicating liquor or narcotics or habit-forming drugs. RCW 46.10.490(2). (Added by Laws of 2014, ch. 100 (effective June 12, 2014)).

An officer has a duty to inquire of dispatch regarding whether the defendant has a prior conviction. An officer may also wish to inquire of the defendant prior to deciding whether to book or release. Both steps are important because the list of what constitutes a "prior offense" keeps expanding and neither Department of Licensing (DOL) records nor district and municipal court records are forward looking. This means that while codes are created to keep track of future "priors", neither DOL nor the courts will go back and code past "priors." In addition out-of-state "prior offenses," particularly the deferred prosecution or deferred sentence ones, may not appear on an multi-state "rap sheet."

B. Domestic Violence Assaults. Probable cause exists to

believe that (i) a felony assault occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, regardless of whether it is observable; or (iii) physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury is defined as "physical pain, illness or an impairment of physical condition" has occurred within the preceding 4 hours committed by a suspect who is 16 years or older against a "family or household member." (RCW 10.31.100(2)(c))

"Family or household member" includes:

- Spouses or people in a state registered domestic partnership;
- Former spouses or people whose state registered domestic partnership has been dissolved, invalidated, or terminated;
- Child in common regardless of marriage or have lived together;
- Adult persons related by blood or marriage;
- Adult persons who are presently residing together or who have resided together in the past;
- Persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have had a dating relationship;
- Persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship;
- Persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020(1); RCW 26.50.010(2).

The intent of the mandatory DV assault arrest provision is to protect the victims of domestic violence.

> When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical

> aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse.

RCW 10.31.100(2)(c).

C. Court Orders Other Than Those Issued Pursuant to Chapter 10.14 RCW. Probable cause exists to believe that a person has violated the provisions of a no-contact order or restraining order issued under RCW 7.90 (sexual assault protection order), RCW 7.92 (Stalking and Harassment protection orders), RCW 9A.46, RCW 10.99, RCW 26.09, RCW 26.10, RCW 26.44, RCW 26.26, RCW 26.50, RCW 26.52, and RCW 74.34 (vulnerable adult order), restraining the person from a provision restraining the suspect from: (1) acts of threats of violence; (2) from going onto the grounds of or entering a residence, workplace, school, or day care; and (3) from knowingly coming within, or knowingly remaining within, a specified distance of a location such as the victim's residence, workplace, school, or day care acts. In the case of an order issued under RCW 26.44.063, arrest is also mandatory for the violation of any other restrictions or conditions placed upon the person if the person has knowledge of the issuance of the order. In the case of an foreign order of protection (any order issued by a tribe or another state), arrest is also mandatory for a violation of any provision that the foreign protection order specifically indicates that a violation of such provision will be a crime. (RCW 10.31.100(2)(a) and (b)).

RCW 26.50.110(2) also includes a "mandatory arrest" provision. This section includes one type of order that is not listed in RCW 10.31.100(2)(a) and (b):

> A peace officer shall arrest without a

warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.92, chapter 84, sec. 33), 7.90, 9A.46 ***9.94A***, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order. [Emphasis added.]

1. **Establishing Probable Cause for Arrest.** Probable cause exists to believe that a person has violated the provisions of a foreign protection order (an order issued by another state court, federal court, or tribal court) restraining the person from contacting or communicating with another person, or of a provision excluding the person under restraint from a residence, workplace, school, or day care, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime and the person has knowledge of the issuance of the order.

   Probable cause will depend upon verification that the order exists, that the order has not expired, that the defendant knows about the order, that the person to be restrained knowingly went to or knowingly remained at a protected place or had contact with a protected person.

   Knowledge of an order may be established by the existence of a return of service, but service of the order is not a prerequisite to enforcement of the order. *See City of Auburn v. Solis-Marcial*, 79 P.3d 1174 (2003).

Proof of the order's existence can be established by: (1) the victim actually showing the officer a copy of the order; (2) through the Washington computer records if the order was registered in Washington, through the issuing state's computerized protection order database; (3) by calling the issuing court; (4) by the victim's oral representations; and (5) by the defendant's admissions. These same sources can establish whether the order has expired and/or whether the defendant had knowledge of the order. While the order's presence in a computerized data base tends to provide the greatest comfort to a responding officer, the fact that the order has not been entered into WASIS/WASIC is not grounds for not arresting the suspect. If the victim has a copy of the order but it is the victim's sole copy, the officer should not deprive the victim of the order for any longer than it takes to photocopy the order. After the photocopy is made, the original certified copy of the order should generally be returned to the victim. An exception to this rule arises if the person whose conduct is restrained by the order claims to have never been served. In that case, the officer should serve the original certified copy of the order upon the suspect ***and*** the officer should promptly complete and file a proof of service with the court that originally issued the order and, if the order is a foreign protection order, with the Washington court where the order was filed. If an officer serves suspect with the victim's sole certified copy of the order, the officer should provide the victim with a uncertified copy of the order and should take steps, such as contacting a victim advocate, to assist the victim in obtaining a new certified copy.

A person is deemed to have knowledge if the existence of an order if: (1) the order recites that the person to be restrained appeared in person before the court; (2) the person to be restrained signed the order; (3) the order was served upon the person to be restrained; or (4) the peace officer read from the order, thereby giving the person oral or written evidence of the order or by handing to the person a certified copy of the original order, certified to be

an accurate copy of the original by a notary public or by the clerk of the court. Actual service of the order is not a prerequisite to its enforcement if the restrained person knows about the order and knows its contents. *See City of Auburn v. Solis-Marcial*, 119 Wn. App. 398, 79 P.3d 1174 (2003).

When a victim indicates that an order exists that precludes the suspect from contacting her, the suspect should always be asked if there are any court orders that prohibit him or her from contacting the victim. In the case of foreign protection orders, if the suspect initially says no, the officer should inquire about whether an order was issued in any other state (or tribal) court. The expected answer to foreign orders will probably be something along these lines-- "Yeah, a Delaware judge told me not to contact the victim, but this ain't Delaware." Such a statement will not prevent an officer from establishing probable cause. To constitute a knowing violation, the suspect need not know that his conduct is illegal. In other words, the suspect does not need to know that the Delaware order is valid in Washington, he must merely know that the Delaware order exists and that it restricts his conduct.

In determining probable cause to arrest, an officer may not rely upon the victim's statement regarding the contents of the order. If the suspect contends that the order does not preclude him from engaging in the particular conduct. Instead, the officer must actually view the protection order or must have the terms of the order read to the officer by dispatch. *Beier v. City of Lewiston*, 354 F.3d 1058 (9th Cir. 2004).

2. **Officer Liability**. An officer may not be held liable criminally or civilly for making a domestic violence arrest, so long as the officer acts in good faith. *See, e.g.,* RCW 10.31.100(15); RCW 10.99.070; RCW 26.50.140; RCW 26.52.050.

An office could be held liable for not making an arrest as required by the statute. *See, e.g., Roy v.*

Everett, 118 Wn.2d 352, 823 P.2d 1084 (1992).

3. **No Defense That Protected Person Initiated or Agreed to the Contact.** It is not a defense to arrest that the person protected by the order initiated the contact or invited the person whose conduct is restrained to a protected place. *See State v. Dejarlais*, 136 Wn.2d 939, 969 P.2d 90 (1998). While Washington courts have yet to rule on this issue, the Eighth District Court of Appeals of Ohio held in *City of North Olmsted v. Bullington*, 139 Ohio App. 3d 565, 744 N.E.2d 1225 (2000), that the victim/protected person cannot be prosecuted for aiding and abetting an offender in the violation of a court order. The Ohio Court's reasoning, which is likely to be adopted by our state's courts, is that the placement of "non-waivability language" in the law, the legislature chose to focus absolutely on the behavior of the offender with intent to punish the offender's behavior and not the behavior of the victim for whom the order is designed to protect. As a protected person under these laws, the victim/protected person cannot be charged with violating this law. *City of North Olmsted v. Bullington*, 139 Ohio App. 3d 565, 744 N.E.2d 1225 (2000); *cf. State v. Megan R.*, 42 Cal. App. 4th 17, 49 Cal. Rptr. 2d 325, 332 (1996) (a child victim of statutory rape cannot be charged as an aider and abettor to the crime of statutory rape). These decisions are consistent with RCW 9A.08.020(5)(a) which provides that: "[A] person is not an accomplice in a crime committed by another person if: (a) He is a victim of that crime."

4. **Differences Between the Orders.** The various types of court orders are described in the following chart. Key facts to recall regarding all of the various orders are:

MANDATORY ARREST COURT ORDERS

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
Chapter 7.90 Sexual Assault Protection Orders "SAPOS"	These orders are available in cases involving non-consensual sexual contact between individuals who are not family or household members. A SAPO can be entered in the context of criminal prosecutions. In these cases the caption will read "State of Washington v. [defendant]" or "City of _____ v. [defendant]. Felony cases filed in the superior courts will have a cause number that begins with the year of the case followed by the number "1". *E.g.* 13-1– _____-_. Cases in which the restrained individual was charged as a juvenile will have a cause number that begins with the year of the case followed by the number "8". *E.g.* 13-8–_____-_. A SAPO can be obtained by a victim in a civil proceeding, regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties. A superior court SAPO will have a cause number that begins with the year of the case followed by the number "2". *E.g.* 13-2-_____-__.	In criminal cases, the restrained person will receive oral and written notice of the SAPO in open court. In civil cases, the restrained person will receive notice of the SAPO in open court, if the restrained person attends the hearing, or through service of the order and/or the petition for the order. An officer who serves the restrained person with a copy of the SAPO must promptly complete a Return of Service (RTS). Service may also be accomplished by mail or publication.	Sexual Assault Protection Order (ORSXP) Reissuance of Temporary Sexual Assault Protection Order and Notice of Hearing (ORRTPO) Order on Respondent's Petition to Reopen Temporary Sexual Assault Protection Order (ORPRSXP) Order Modifying/Terminating Sexual Assault Protection Order (ORMTSP) Temporary Sexual Assault Protection Order and Notice of Hearing (TMORSXP) Order Transferring Sexual Assault Protection Order Case and Setting Hearing (ORTRSP) Sexual Assault Protection Order (Criminal/Felony)

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
Chapter 7.92 Stalking and Harassment Protection Orders	These orders are available in stalking and harassment incidents that do not involve family or household members. A Stalking and Harassment Protection Order can be obtained by a victim in a civil proceeding, regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties. A superior court Stalking and Harassment Protection Order will have a cause number that begins with the year of the case followed by the number "2". E.g. 13-2-_____-__.	The restrained person will receive notice of the Stalking and Harassment Protection Order in open court, if the restrained person attends the hearing, or through service of the order and/or the petition for the order. An officer who serves the restrained person with a copy of the stalking or harassment order must promptly complete a return of service. Service may also be accomplished by mail or publication.	Order for Protection – Stalking Temporary Protection Order and Notice of Hearing – Stalking Temporary Protection Order and Notice of Hearing - Stalking - Respondent Under age 18 Order for Protection - Stalking - Respondent Under Age 18
Chapter 9.94A Felony No-Contact Order RCW 9.94A.637	This order replaces a no contact provision in a felony judgment and sentence when the felon obtains a discharge of sentence upon the completion of his or her terms of confinement, post-release supervision, and legal financial obligations. These orders will have a cause number that begins with the year the felon was discharged followed by the number "2". *E.g.* 13-2– _____-_.	The restrained person is required to apply for this order personally. The restrained person will learn about the order's issuance in open court.	Certificate and Order of Discharge (CRORD) [ ] and Order re Issuance of Separate No-Contact Order (CRORDN) No-Contact Order (Reissued Pursuant to a Certificate and Order of Discharge)(CORNC)

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
Chapter 9A.46 Stalking and Harassment No Contact Orders	A stalking or harassment no contact order can only be entered in the context of criminal prosecutions. In these cases the caption will read "State of Washington v. [defendant]" or "City of _____ v. [defendant]." Felony cases filed in the superior courts will have a cause number that begins with the year of the case followed by the number "1". *E.g.* 13-1–_____-_. Cases in which the restrained individual was charged as a juvenile will have a cause number that begins with the year of the case followed by the number "8". E.g. 13-8– _____-_.	The restrained person will receive oral and written notice of the stalking or harassment no contact order in open court.	Harassment No-Contact Order Stalking No-Contact Order
Chapter 10.99 Domestic Violence No Contact Orders	A domestic violence no contact order can only be entered in the context of criminal prosecutions in which the defendant and the victim are family or household members. In these cases the caption will read "State of Washington v. [defendant]" or "City of _____ v. [defendant]. Felony cases filed in the superior courts will have a cause number that begins with the year of the case followed by the number "1". *E.g.* 13-1–_____-_. Cases in which the restrained individual was charged as a juvenile will have a cause number that begins with the year of the case followed by the number "8". *E.g.* 13-8– _____-_.	The restrained person will receive oral and written notice of the domestic violence no contact order in open court.	Domestic Violence No-Contact Order Pre-Charge Domestic Violence No-Contact Order Order re Motion to Modify/ Rescind Domestic Violence No-Contact Order

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
Chapter 26.09 Dissolution (Divorce) and Separation Restraining Orders	The caption in these cases will generally begin "In re the Marriage of _____." or "In re the Domestic Partnership of _____." The protected person under these orders can be either the respondent or the petitioner. These orders provide protection from unwanted contact during and post-divorce or separation. The orders will also address numerous other items, such as bank accounts. Police officers only make arrests for violations of the no contact provisions and the provisions that establish a protected zone around a residence, school, workplace and daycare. The other provisions are enforced through civil contempt proceedings. These superior court restraining orders will have a cause number that begins with the year the action was filed, followed by the number "3". *E.g.* 13-3-_____-_.	The restrained person receives a copy of the order if in court. A copy may also be provided to the restrained person by the restrained person's attorney. A police officer or a non-party may also serve a copy of the order on the restrained person. The order may also be served by mail or publication.	Ex Parte Restraining Order/Order to Show Cause (TPROTSC/ORTSC) Temporary Order (TMO) Decree of Dissolution (DCD)/Legal Separation (DCLGSP)/Concerning the Validity of the Marriage (DCINMG) Restraining Order (TMRO/RSTO)

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
Chapter 26.10 Nonparental Custody Action Restraining Orders	These cases arise when someone other than a parent, such as a stepparent or grandparent, seeks to obtain custody of a child. The caption in these cases will generally begin "In re the Custody of _____." The protected person in these actions may be the petitioner or the respondent. These orders provide protection from unwanted contact during and after litigation over who will obtain custody of the children. The orders will also address numerous other items, such as visitation with the child and transportation of the child. Police officers only make arrests for violations of the no contact provisions and the provisions that establish a protected zone around a residence, school, workplace and daycare. The other provisions are enforced through civil contempt proceedings. These superior court restraining orders will have a cause number that begins with the year the action was filed, followed by the number "3". *E.g.* 13-3-_____-_.	The restrained person receives a copy of the order if in court. A copy may also be provided to the restrained person by the restrained person's attorney. A police officer or a non-party may also serve a copy of the order on the restrained person. The order may also be served by mail or publication.	Temporary Custody Order (Nonparental Custody) (TCO/TMO/TMRO) Ex Parte Restraining Order/Order to Show Cause (Nonparental Custody) (TPROTSC/ORTSC) Nonparental Custody Decree (DCC)

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
Chapter 26.26 Uniform Parentage Act Restraining Orders	These cases arise when the government or a private person is seeking to establish the identity of a child's parents. The caption in these cases will generally begin "In re Parentage of _____." The protected person in these actions may be the petitioner or the respondent. These orders provide protection from unwanted contact during and after litigation to establish the identity of a child's father(s) or mother(s). The orders will also address numerous other items, such as visitation with the child, transportation of the child, and child support. Police officers only make arrests for violations of the no contact provisions and the provisions that establish a protected zone around a residence, school, workplace and daycare. The other provisions are enforced through civil contempt proceedings. These superior court restraining orders will have a cause number that begins with the year the action was filed, followed by the number "5". *E.g.* 13-5-_____-_.	The restrained person receives a copy of the order if in court. A copy may also be provided to the restrained person by the restrained person's attorney. A police officer or a non-party may also serve a copy of the order on the restrained person. The order may also be served by mail or publication.	Ex Parte Restraining Order/Order to Show Cause (TPROTSC/ORTSC) Judgment and Order Determining Parentage and Granting Additional Relief (JDOEP) Temporary Order (Parentage) (TMO/TMRO) Judgment and Order on Challenge to Denial of Paternity and Granting Other Relief (JDOEP) Judgment and Order on Petition for Establishment of Parentage Pursuant to RCW 26.26.540(2) and Granting Other Relief (JDOEP) Judgment and Order on Petition to Disestablish Parentage Based on Presumption and Granting Other Relief (JODRDP)

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
RCW 26.44.063 Abused Child Restraining Order	An Abused Child Restraining Order is available in any judicial proceeding in which it is alleged that a child has been subjected to sexual or physical abuse. These orders are generally entered in the context of a state action to have the child removed from the abuser's custody. These cases are frequently referred to as a "dependency proceeding". The superior court cause numbers on these orders will generally have a cause number that begins with the year of the case followed by the number "7". E.g. 13-7– _____-_.	The restrained person will receive notice of the Abused Child Restraining Order in open court, if the restrained person attends the hearing, or through service of the order and/or the application for the order. An officer who serves the restrained person with a copy of the Abused Child Restraining Order must promptly complete a return of service. Service may also be accomplished by mail or publication.	There are no pattern forms.

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
Chapter 74.34 Vulnerable Adult Protection Orders	A vulnerable adult, or interested person on behalf of the vulnerable adult, may seek relief from abandonment, abuse, financial exploitation, or neglect, or the threat thereof, by filing a petition for an order for protection in superior court. A Vulnerable Adult Protection Order will have a cause number that begins with the year of the case followed by the number "2". E.g. 13-2-_____-__.	The restrained person will receive notice of the Vulnerable Adult Protection Order in open court, if the restrained person attends the hearing, or through service of the order and/or the petition for the order. An officer who serves the restrained person with a copy of the Vulnerable Adult Protection Order order must promptly complete a return of service. Service may also be accomplished by mail or publication.	Temporary Order for Protection and Notice of Hearing – Vulnerable Adult Order for Protection – Vulnerable Adult Reissuance of Temporary Order for Protection and Notice of Hearing – Vulnerable Adult Denial Order – Vulnerable Adult Order Modifying/Terminating Order for Protection – Vulnerable Adult
Chapter 26.52 Foreign Protection Orders	These are court orders issued by the court of another state (i.e. Oregon), the federal government, a territory (i.e. Puerto Rico) or a tribe (i.e. Yakima Nation Tribal Court). These court orders may be issued in criminal or civil cases. These orders may be filed with a Washington state court.	The restrained person may have received notice of the order in open court, through personal service, or through service by mail or publication.	There are no pattern forms.

Type of Order	Description of the Order	How Restrained Person Learns of Order	Titles Used on Pattern Forms
Chapter 26.50 Domestic Violence Protection Orders	These orders are available in cases involving family or household members. A Domestic Violence Protection Order can be obtained by a victim in a civil proceeding, regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties. A superior court Domestic Violence Protection Order will have a cause number that begins with the year of the case followed by the number "2". E.g. 13-2-_____-__.	The restrained person will receive notice of the Domestic Violence Protection Order in open court, if the restrained person attends the hearing, or through service of the order and/or the petition for the order. An officer who serves the restrained person with a copy of the Domestic Violence Protection order must promptly complete a return of service. Service may also be accomplished by mail or publication.	Temporary Order for Protection and Notice of Hearing Order for Protection Reissuance of Temporary Order for Protection and Notice of Hearing Ex Parte Temporary Order for Renewal of Order for Protection and Notice of Hearing Order for Renewal of Order for Protection Denial Order Order Modifying/Terminating Order for Protection Order Granting Respondent's Motion to Modify/Terminate Order for Protection Effective More Than Two Years (ORGRMT2)

g. Where Warrantless Arrests Are Allowed.

Residences. Probable cause to make a warrantless arrest does not provide a basis for a non-consensual entry into a residence. *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639 (1980). The prohibition upon entry into the residence will preclude an arrest while a suspect is standing within the doorway of the residence or in a garage. *State v. Holeman*, 103 Wn.2d 426, 693 P.2d 89 (1985); *Altshuler v. Seattle*, 63 Wn. App. 389, 395, 819 P.2d 393 (1991), *review denied*, 118 Wn.2d 1023 (1992).

Police may, however, make a warrantless arrest of a suspect who voluntarily exits the residence to speak to officers on an unenclosed front porch. *State v. Solberg*, 122 Wn.2d 688, 861 P.2d 460 (1993).

Police may also make a warrantless arrest within a defendant's home if the defendant invites the officers into the home. *State v. Williamson*, 42 Wn. App. 208, 710 P.2d 205 (1985), *review denied*, 105 Wn.2d 1012 (1986). Such consent may need to be preceded by *Ferrier* warnings.

Police may make a warrantless arrest of a suspect who is barricaded in a residence by surrounding the home. Regardless of how long the standoff occurs, police need not obtain an arrest warrant before taking the suspect into full physical custody, so long as the police are actively engaged in completing the suspect's arrest. This remains true regardless of whether the exigency that justified the seizure of the house has dissipated by the time the suspect is taken into full physical custody. *See Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) (officers did not need an arrest warrant to take an intoxicated man, who had threatened to shot police officers if they attempted to enter his property in response to a uniformed security guard's report that the intoxicated man threatened to shot him, into custody, when the man left his apartment and peaceably surrendered following a 12-hour long standoff).

Businesses. Police may enter a business to make an arrest without a warrant, so long as the officer does not access any area of the commercial premises that is restricted to employees of owners. *Dodge City Saloon v. Wa State Liquor Control Board*, 168 Wn. App. 388, 288 P.3d 343, *review denied*, 176 Wn.2d 1009 (2012) (government officials do not conduct a search by entering those portions of a commercial premise that is held open to the public). *Accord Biagini v. Shoemaker*, 122 Wash. 204, 210 P. 193 (1922) (owners of a commercial premises may not bar police officers from entering the public portion of a business so long as the police officer are not interfering with the merchant's legitimate business).

Hospitals. Most courts hold that police may enter a hospital emergency room without a warrant to make an arrest. *See, e.g., Buchanan v. State*, 432 So. 2d 147, 148 (Fla. App. 1983) (defendant did not have reasonable expectation of privacy in curtained area of hospital emergency room where

medical personnel constantly walking in and out and where he could have expected to stay a few hours at the most); *People v. Torres*, 144 Ill. App. 3d 187, 494 N.E.2d 752, 755, 98 Ill. Dec. 630 (Ill. App. 1986) (defendant had no objectively reasonable expectation of privacy in hospital emergency room); *State v. Rheaume*, 2005 VT 106, 179 Vt. 39, 889 A.2d 711 (2005) (defendant had no objectively reasonable expectation of privacy in hospital emergency room); .*State v. Thompson*, 222 Wis. 2d 179, 585 N.W.2d 905, 908-09 (Wis. App. 1998) (defendant had no reasonable expectation of privacy in hospital emergency room or operating room).

Hospital rooms, on the other hand, should be treated the same as a residence, with an officer only able to gain access in order to make a warrantless arrest with the consent of the patient or a search warrant. *See generally Jones v. State*, 648 So. 2d 669, 677-78 (Fla. 1994) (hospital room is not necessarily a public place for Fourth Amendment purposes); *State v. Stott*, 171 N.J. 343, 794 A.2d 120, 127-28 (N.J. 2002) ("[W]e accept as a basic premise that a hospital room is more akin to one's home than to one's car or office."). *Contra People v. Courts*, 205 Mich. App. 326, 517 N.W.2d 785, 786 (Mich. Ct. App. 1994) ("No one who had ever spent any time in a hospital room could continue to harbor any false expectations about his personal privacy or his ability to keep the world outside from coming through the door").

h. Pursuit

i. Felony Pursuit Within Washington State

The Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest without exigent circumstances. *See generally Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Thus, a felony pursuit into a private dwelling is presumptively unreasonable.

Officers may make a non-consensual entry into a suspect's home when exigent circumstances exist. The government bears the burden of demonstrating the existence of exigent circumstances.

Factors to be considered in determining whether exigent circumstances exist to justify a warrantless entry into a home include:

- whether a grave offense, particularly a crime of violence, is involved
- whether the suspect is reasonably believed to be armed
- whether there is reasonably trustworthy information that the suspect is guilty
- whether there is strong reason to believe that the suspect is on the premises

- whether the suspect is likely to escape if not swiftly apprehended
- whether the warrantless entry may be made peaceably
- whether police are in hot pursuit or fresh pursuit of the suspect ("Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay." RCW 10.93.120(2)).
- whether the suspect is fleeing
- whether the suspect poses a danger to arresting officer or the public if not immediately apprehended
- whether the suspect has access to a vehicle
- whether evidence associated with the crime is mobile or subject to destruction if the suspect is not immediately apprehended

See State v. Steinbrunn, 54 Wn. App. 506, 775 P.2d 55, *review denied*, 113 Wn.2d 1015 (1989). *State v. Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10 (1989); *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986), citing *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983) and *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970).

None of these factors is dispositive and every factor need not be present. *See, e.g., State v. Patterson*, 112 Wn.2d at 736 ; *State v. Flowers*, 57 Wn. App. 636, 644, 789 P.2d 333, *review denied*, 115 Wn.2d 1009 (1990); *State v. Machado*, 54 Wn. App. 771, 777, 775 P.2d 997 (1989), *review denied*, 114 Wn.2d 1009 (1990).

Specific Examples. The Washington appellate courts have upheld warrantless entries/arrests in the following circumstances:

- In *State v. Carter*, 127 Wn.2d 836, 904 P.2d 290 (1995), the court found exigent circumstances existed where the police just conducted a drug deal in a motel room. The arrest team was called and approached the room with their weapons drawn. As the officers approached the room, an unidentified woman opened the door and came out into the hallway. When she saw the arrest team, she slammed the door behind her and tried to run away. The arrest team detained the woman, announced their presence and forced open the door. The court held the officers had exigent circumstances justifying entry of the motel room without a warrant.

- In *State v. Flowers*, 57 Wn. App. 636, 644, 789 P.2d 333, *review denied*, 115 Wn.2d 1009 (1990), the Court upheld the warrantless entry into a motel room shortly after two suspects in an armed robbery were traced to the hotel and when one of the suspects exited the hotel room pursuant to a ruse, she called out "police" to the other suspect.
- In *State v. Machado*, 54 Wn. App. 771, 775 P.2d 997 (1989), *review denied*, 114 Wn.2d 1009 (1990), the court held that exigent circumstances justified warrantless arrest of defendant at accomplice's home where defendant was wanted for a first-degree robbery committed just a few hours earlier and there was reason to believe that he was armed, similarity of descriptions given by witnesses and police officer who had stopped vehicle which defendant was driving shortly after robbery pointed emphatically to defendant as man who committed robbery, there was strong reason to believe that defendant was in apartment based upon presence of his car outside home and information received from witness, and entry itself was peaceful, made in early morning and was not part of preplanned operation.

Officers may pursue a felon into the public portions of a private business or institution without a warrant. Officers who have exigent circumstances or the consent of the business owner, etc., may pursue a felon into the non-public portions of the building. In making any pursuit through a business or other non-residence, the safety of the officer and any members of the public is of primary concern.

ii. Misdemeanor Pursuits Within Washington State

A nonconsensual warrantless entry into a home to make a warrantless arrest for a misdemeanor is considered presumptively unreasonable. In this context, "home" includes garages, enclosed porches, and other such structures. *See, e.g., Seattle v. Altschuler*, 53 Wn. App. 317, 766 P.2d 518 (1989) (garage). While exigent circumstances can render some such entries acceptable, the gravity of the underlying offense tends to be the linchpin. Hot pursuit alone is not sufficient exigent circumstances. *State v. Altschuler*, 53 Wn. App. 317, 321, 766 P.2d 518 (1989).

Alcohol/Drug Dissipation Insufficient. DUI is not a grave offense that will allow for a warrantless entry into a home to effect an arrest. The risk of losing blood-alcohol evidence is not a sufficient exigency that will justify a warrantless entry to effect an arrest. *State v. Hinshaw*, 149 Wn. App. 747, 205

P.3d 178 (2009). A warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

Odor of Burning Marijuana Insufficient. The odor of burning marijuana will not justify a warrantless entry. *Cf. State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885 (2010) (while the odor of marijuana will provide probable cause for a search, the odor of marijuana does not present exigent circumstances that will permit a warrantless search of a motor vehicle); *People v. Torres*, 205 Cal. App. 4th 989, 140 Cal. Rptr. 3d 788 (2012) (odor of marijuana does not, in itself, provide authority for a warrantless entry into a hotel room.

iii. Pursuits Outside Washington

Canada. There is no pursuit into Canada. An officer who enters Canada has the same power as a private citizen.

Idaho. Idaho Code § 19.701 allows a Washington police officer to enter Idaho when in fresh pursuit of a person who is believed to have committed a felony in Idaho. The Washington officer must work with Idaho police officers to take the arrested person, without unnecessary delay, before a magistrate of the county in which the arrest was made. If the magistrate determines that the arrest was lawful, the arrested person will be held for a reasonable period of time to allow for extradition proceedings. Idaho Code § 19-702.

Idaho Code § 49-1404 governs eluding a police officer. The offense is a misdemeanor except when the driver: (a) Travels in excess of thirty (30) miles per hour above the posted speed limit; (b) Causes damage to the property of another or bodily injury to another; (c) Drives his vehicle in a manner as to endanger or likely to endanger the property of another or the person of another; or (d) Leaves the state. If any of these four circumstances are present, the offense is a felony.

Washington officers may generally not make an arrest in Idaho for non-felonies. *City of Clarkston v. Stone*, 63 Wn. App. 500, 820 P.2d 518 (1991). An exception exists, however, for crimes such as DUI, that RCW 10.31.100 treats like felonies for purposes of arrest. *In re License Suspension of Ritchie*, 127 Wn. App. 935, 113 P.3d 1045 (2005); *State v. Ruhter*, 107 Idaho 282, 283-84, 688 P.2d 1187 (1984).

iv. **Oregon.** ORS § 133.430 permits a Washington officer to pursue someone into Oregon if the officer has probable cause to believe the person has committed a felony in Washington. A Washington officer may detain the person until an Oregon officer can respond if the person is believed to have committed a felony inside Oregon. The Washington officer must work with Oregon police officers to take the arrested person, without unnecessary delay, before a magistrate of the county in which the arrest was made. If the magistrate determines that the arrest was lawful, the arrested person will be held for a reasonable period of time to allow for extradition proceedings. ORS § 133.440.

Oregon makes it a felony for a person operating a motor vehicle to use his or her vehicle to knowingly flee or attempt to elude a pursuing police officer when the police officer is in uniform and prominently displaying the police officer's badge of office or operating a vehicle appropriately marked showing it to be an official police vehicle gives a visual or audible signal to bring the vehicle to a stop, including any signal by hand, voice, emergency light or siren. ORS 811.540. It is only a misdemeanor, however, for a person to exit the motor vehicle and to flee on foot.

v. **Pursuits Into Washington**

Officers of other states may continue a fresh pursuit into Washington if there is probable cause to believe that the person they are chasing committed a felony in the such other state or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving. RCW 10.89.010. The out-of-state officer may hold the individual in custody if there are grounds to believe that the person has committed a felony or a violation of the laws of such other state relating to driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, or reckless driving in this state. *Id.*

> A driver who is chased into Washington by an out-of-state officer may be prosecuted for felony elude if the driver continues to flee in a reckless manner. *State v. Malone*, 106 Wn.2d 607, 724 P.2d 364 (1986) (Idaho deputy).

Some Idaho and Oregon police officers may make arrests within Washington's borders as a "specially commissioned Washington peace officer," RCW 10.93.020(5), for more offenses then those identified in RCW 10.89.010. The State must prove that the Idaho or Oregon officer "has successfully completed a course of basic

training prescribed or approved for such officers by the Washington state criminal justice training commission." RCW 10.93.090. Failure to produce proof that of the completion of the training can result in the suppression of all evidence. *See State v. Barker*, 143 Wn.2d 915, 25 P.3d 423 (2001). The scope of these Idaho and Oregon police officer's expanded authority will be set out in a mutual law enforcement assistance agreement. RCW 10.93.090(2). The prosecutor should be prepared to file a copy of the agreement in the trial court.

Whenever an out-of-state officer makes an arrest within the borders of Washington, the arrested person must be promptly taken before a magistrate in the county of arrest. RCW 10.89.020. If charges are not going to be filed for Washington crimes, the person may still be held a reasonable time to allow for the issuance of an extradition warrant by the governor of the other state. *Id.*

vi. Tribal Officers

Tribal officers may stop and detain non-Indians who commit offenses within the reservation. The tribal officers must promptly transfer the non-Indian offender to a commissioned state officer. *See State v. Schmuck*, 121 Wn.2d 373, 850 P.2d 1332 (1993).

Tribal officers do not possess the inherent authority to pursue a violator beyond the borders of the reservation. *State v. Ericksen*, 172 Wn.2d 506, 259 P.3d 1079 (2011). A tribal police officer of an agency that has complied with the requirements of RCW 10.92.020 may pursue and detain an individual outside the reservation only under the following circumstances:

- Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs;
- In response to an emergency involving an immediate threat to human life or property;
- In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority; or
- When the officer is in fresh pursuit, as defined in RCW 10.93.120.

RCW 10.92.020(5); RCW10.93.070.

4. Use of force in making an arrest.

a. Constitutional Limitations.

Use of deadly force is unreasonable if used against a non- dangerous suspect. Deadly force can never be used to simply arrest a suspect for committing a misdemeanor.

Deadly force may be used only:

- When the officer is threatened with a weapon.
- The officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others.

Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

b. Statutory Authority.

An officer may use all necessary means to effect an arrest. *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986). RCW 10.31.050 which only applies to police officers, allows for the use of force if after notice of intention to arrest defendant, the defendant either flees or forcibly resists.

- The officer may use all necessary force to effect the arrest.
- Person arresting another cannot use unnecessary force or resort to dangerous means if arrest can be accomplished otherwise.
- Reasonable force depends upon all facts and circumstances as they appear at the time. *Palmer v. Hall*, 380 F.2d 1974 (1975)
- The person making the arrest is not required to gauge the exact amount of force necessary at his/her peril--it is only the use of **unreasonable excessive** force that is condemned

RCW 9A.16.020, which applies to citizens and to the police, allows for the use of force:

- When necessary in performance of a legal duty.
- When necessary to arrest a felon.
- When used by a party about to be injured.
- When used to detain a person who remains unlawfully in a building.
- When used by a carrier of passengers to expel a passenger .
- When used to prevent a mentally ill person from committing a dangerous act.

c. Arrestee's Use of Force to Resist Arrest

The use of force to prevent even an unlawful arrest which threatens only a loss of freedom is not reasonable. It is a Class C Felony (Assault in the Third Degree) to assault a peace officer with intent to resist unlawful arrest or detention. *State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997).

"In a lawful arrest, the arrestee may not use physical force against the arresting officer, unless the use of excessive force by the officer places the arrestee in actual danger of serious injury." *State v. Westlund*, 13 Wn. App. 460, 536 P.2d 20, *review denied*, 85 Wn.2d 1014 (1975).

d. Sample Cases

The use of drawn guns is appropriate whenever police have a "reasonable apprehension" of fear. *State v. Hudson*, 56 Wn. App. 490, 784 P.2d 553 (1990).

When officers have a reasonable belief a car's occupants are armed and dangerous, they may make a stop at gunpoint. *State v. Belieu*, 112 Wn. 2d 587, 773 P.2d 46 (1989).

The issue is whether a reasonable and prudent person would believe his/her safety was in danger in like circumstances.

A "specific fear" (crime of armed robbery) will support the use of drawn weapons. *State v. Thornton*, 41 Wn. App. 506, 705 P.2d 271, *review denied*, 104 Wn.2d 1022 (1985).

A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

5. Post-arrest control of suspect

After making a lawful arrest, the officer may conduct a limited search of the detainee and the area immediately under the detainee's control. *See* search incident to arrest, *infra.*

An arrest allows the officer to promptly take the detainee to a custodial center for booking or to a magistrate for a determination of probable cause and the setting of bail. Many jurisdictions have bail schedules which reflect the range generally imposed in that community for various crimes. Deviations from the bail schedule normally require a prosecutor or supervisor's approval.

An arrest does not allow the officer to accompany the detainee into another room. An arrest does not allow the officer to accompany a friend or relative of the detainee

when that person leaves the officer's sight to retrieve property belonging to the detainee. *State v. Kull*, 155 Wn.2d 80, 118 P.3d 307 (2005) (officer who arrested defendant in the laundry room on a misdemeanor warrant violated the defendant's right to privacy when they accompanied her and her friend into her bedroom so the defendant could retrieve her purse which held her bail money; cocaine located on top of the defendant's dresser and in her purse was suppressed); *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (campus police officer who arrested an underage college student for the offense of minor in possession of alcohol violated the student's privacy rights by entering the student's dorm room after the officer who accompanied the student into the dorm room to retrieve his identification noticed what the officer believed to be marijuana).

- Result might be different if the crime for which the defendant was arrested is a felony.
- Result might be different if the residence is on the ground floor and the detainee might be able to escape out of a back door.
- Result might be different if the detainee was armed at the time of arrest.

Bottom Line for Police Officers: Think carefully before deciding to be a "good guy".

An officer who wishes to assist a detainee in obtaining clothing or other items prior to departing the place of arrest should request the detainee's consent to accompany him or her. There is always a risk that the court will find the detainee's consent to be involuntary. In a pre-*Ferrier* case, the court of appeals held the defendant's consent was voluntary and uncoerced, when tendered after the arresting officer gave the defendant, who had been arrested on the porch of his home in midwinter wearing only pants and a t-shirt, the alternative of proceeding to the police station "as is" or allowing the officer to accompany the defendant into his home to obtain other clothing. *State v. Nelson*, 47 Wn. App. 157, 163-64, 734 P.2d 516 (1987).

6. Arrestees with Special Needs.

Title II of the Americans with Disabilities Act (ADA) provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C.S. § 12132. Courts have broadly construed the "services, programs, or activities" language in the Americans with Disabilities Act to encompass anything a public entity does. *See, e.g., Bahl v. County of Ramsey*, 695 F.3d 778, 787 (8th Cir. 2012).

Accommodations may have to be made if the person under arrest has a physical challenge. The degree of accommodation will depend upon the circumstances. Public safety remains the preeminent concern.

> The duties of police officers during a traffic stop call for the exercise of significant judgment and discretion, and we will not second guess

> those judgments, where, as here, an officer is presented with exigent or unexpected circumstances. In these circumstances, it would be unreasonable to require that certain accommodations be made in light of overriding public safety concerns. *See Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2009) ("We rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter. Imposing a stringent requirement under the ADA is inconsistent with that expectation, and impedes their ability to perform their duties."); *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) ("Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.").

Bahl v. County of Ramsey, 695 F.3d 778, 785-86 (8th Cir. 2012).

Accommodation may require modifications in the manner of handcuffing. *See, e.g., Ryan v. Vt. State Police*, 667 F. Supp. 2d 378, 389 (D. Ver. 2009).

a. Deaf Suspects.

The steps that are reasonably necessary to establish effective communication with a hearing-impaired person at the roadside and at a police station depends on all of the factual circumstances of the case, including but not limited to:

- the abilities of, and the usual and preferred method of communication used by, the hearing-impaired arrestee;
- the nature of the criminal activity involved and the importance, complexity, context, and duration of the police communication at issue;
- the location of the communication and whether it is a one-on-one communication; and
- whether the arrestee's requested method of communication imposes an undue burden or fundamental change and whether another effective, but non-burdensome, method of communication exists.

Bircoll v. Miami-Dade County, 480 F.3d 1072, 1087 (11th Cir. 2007); *Bahl v. County of Ramsey*, 695 F.3d 778, 785-86 (8th Cir. 2012).

At the roadside, an officer may reasonably use simple communication and gestures rather than honoring an arrestee's request to communicate in writing or arrange for an interpreter. *Bahl v. County of Ramsey*, 695 F.3d 778, 784 (8th Cir. 2012).

An officer may administer field sobriety tests to a profoundly deaf suspect at the roadside if the officer can give directions in a manner that the deaf suspect can understand. *Bricoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007).

An officer is not required to secure a deaf person's hands in front of their body so the deaf person can write notes. *See Seremeth v. Bd. of County Comm'rs Frederick County*, 673 F.3d 333, 339 (4th Cir. 2012) (domestic violence investigation).

Once at the station, an officer must take appropriate steps to ensure the his or her communication with the deaf arrestee is as effective as with other individuals arrested for DUI. In many circumstances, oral communication plus gestures and visual aids or note writing will achieve effective communication. In other circumstances, an interpreter will be needed. There is no bright-line rule, and the inquiry is highly fact specific.

- An officer cannot forgo an interview with a deaf arrestee solely out of a desire to avoid the cost of an ASL interpreter. *Bahl v. County of Ramsey*, 695 F.3d 778, 788-89 (8th Cir. 2012).
- An officer need not delay giving implied consent warnings until an ASL interpreter arrives. The officer must, however, use those methods that will reasonably convey the necessary information to the arrestee. *State v. Piddington*, 214 Wis.2d 754, 623 N.W.2d 528, *cert. denied*, 534 U.S. 826 (2001) (arrestee, who had told an officer with a working knowledge of ASL that he had graduated from high school and could read, was given a form with the written warnings and asked to initial each paragraph).

If a deaf arrestee wishes to speak with an attorney, efforts should be made to provide the arrestee with access to a TDD phone or other relay system. *Bricoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007).

7. Judicial Review of Warrantless Arrests

A person arrested without a warrant is entitled to a post-arrest probable cause determination. *Westerman v. Cary*, 125 Wn.2d 277, 295, 892 P.2d 1067 (1994); *see Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) ("Once the suspect is in custody . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate."). A neutral and detached magistrate must make the probable cause determination, but the hearing may be ex parte. *See Gerstein*, 420 U.S. at 119–23, 95 S. Ct. 854. Courts have not resolved the issue of whether a violation of the *Gerstein* rule requires suppression of evidence seized after the arrest.

See 3 Wayne R. LaFave, *Search and Seizure* § 5.1(g), at 62-64 (5th ed. 2012).

The judicial determination of probable cause must occur within 48 hours of arrest. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991); CrR 3.2.1(a); CrRLJ 3.2.1(a). The determination of probable cause may be based upon an affidavit of probable cause or a declaration of probable cause. *See* CrR 3.2.1(b); CrRLJ 3.2.1(b). It is preferable that the arresting officer, rather than the prosecuting attorney, complete the affidavit of probable cause. *See Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (a prosecutor who completes a certificate for determination of probable cause is not protected by absolute prosecutorial immunity). Courts have not resolved the issue of whether a violation of the *Riverside* rule requires suppression of statements made more than 48 hours after arrest. *See Lawhorn v. Allen*, 519 F.3d 1272, 1290-92 (11th Cir. 2008), *cert. denied*, 131 S. Ct. 252 (2010).

IV. SEARCHES

A. General Rule.

A warrantless search is presumed unreasonable except in a few established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The State bears the burden of proving that a warrantless search falls under an established exception. *State v. Johnson*, 128 Wn.2d 431, 451, 909 P.2d 293 (1996). The defendant bears the burden of proving that a search conducted pursuant to a search warrant was improper. *State v. Mance*, 82 Wn. App. 539, 544, 918 P.2d 527 (1996).

Just as not every police-citizen encounter is an arrest or detention, not every inspection by police of an item of property is a search. The relevant inquiry for determining when a search has occurred under Const. art. I, § 7 is whether police unreasonably intruded into the defendant's private affairs. The following "searches" do not implicate a constitutionally protected zone of privacy:

1. Abandoned Property. Police may retrieve voluntarily abandoned property without violating the expectation of privacy of the person who discarded the property. *See, e.g., State v. Reynolds*, 144 Wn.2d 282, 27 P.3d 200 (2001) (coat discarded by passenger onto the pavement of the lawfully stopped vehicle was legally searched by police); *State v. Hepton*, 113 Wn. App. 673, 54 P.3d 233 (2002) (refuse placed in a neighbor's garbage can); *State v. Young*, 86 Wn. App. 194, 935 P.2d 1372 (1997) (drugs thrown into the bushes by defendant before the defendant was actually seized by police were lawfully searched without a warrant); *State v. Nettles*, 70 Wn. App. 706, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994) (drugs dropped by defendant before the defendant was actually seized by police were lawfully searched without a warrant). However, property cannot be deemed voluntarily abandoned (and thus subject to search) if a person abandons it because of unlawful police conduct. *State v. Whitaker*, 58 Wn. App. 851, 853, 795 P.2d 182 (1990).

- In *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004), a passenger,

riding in a vehicle that was stopped and searched pursuant to the driver's valid consent, was deemed to have involuntarily abandoned a baggy containing methamphetamine when officers ordered the passenger to raise his or her hands at gunpoint when the driver brought the vehicle to a stop.

- Abandonment does not occur when the property is located in an area that retains privacy protections, even if the individual denies ownership of the property. *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007).
- Lost or mislaid property is not considered abandoned. *State v. Kealey*, 80 Wn. App. 162, 173, 907 P.2d 319 (1995).

2. **Department of Licensing Records**. A police officers' search of Department of Licensing database using a license plate number obtained from a vehicle without the officer stopping it, did not violate the driver's expectation of privacy such that officers were precluded from searching those records without an individualized suspicion of a driver's involvement in criminal activity. *State v. McKinney*, 148 Wn.2d 20, 60 P.3d 46 (2002); *accord United States v. Diaz-Castaneda*, 494 F.3d 1146 (9th Cir. 2007). A police officer's suspicionless review of a jail visitor's driver's license records did not violate either Const. art. I, § 7 or the Fourth Amendment. *State v. Hathaway*, 161 Wn. App. 634, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011).

3. **Private Commercial Records.** A customer has no expectation of privacy in the entry and exit records at a storage unit. *See State v. Duncan*, 81 Wn. App. 70, 912 P.2d 1090, *review denied*, 130 Wn.2d 1001 (1996). A customer has no expectation of privacy in receipts kept at a store, at least as to transactions that the customer discloses to a third party, such as an insurance company. *See State v. Farmer*, 80 Wn. App. 795, 911 P.2d 1030 (1996).

   This exception, however, should not be read too broadly as the Washington Supreme Court recently held that information contained in a motel registry constitutes a private affair under article I, § 7 of the Washington Constitution. Random viewing of a motel registry violates article I, § 7. *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007). The questioning of a motel desk clerk regarding the occupant of a room will not violate Const. art. I, § 7 when any examination of the registry is based upon current or recent individualized suspicion regarding criminal activity in the hotel room. *In re Personal Restraint of Nichols*, 171 Wn.2d 370, 256 P.3d 1131 (2011).

4. **Telephones and Pagers.** An individual has no expectation of privacy in the incoming calls to the pager of a third person. *See State v. Wojtyna*, 70 Wn. App. 689, 855 P.2d 315 (1993), *review denied*, 123 Wn.2d 1007 (1994). An individual has no expectation of privacy in the incoming telephone calls, and police who are lawfully in a residence pursuant to a search warrant may lawfully answer such calls. *See, e.g., State v. Goucher*, 124 Wn.2d 778, 881 P.2d 210 (1994); *State v. Gonzales*, 78 Wn. App. 976, 900 P.2d 564 (1995).

- This exception should not be read too broadly as the Washington Supreme Court held that an individual has an expectation of privacy in his or her unopened text messages to the cell phone of a third person. *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014) (the sender of an unopened text message has a Const. art. I, sec. 7 privacy right in the message).

5. **Letters and Mail.** Senders and receivers of United States mail have only a minimal expectation of privacy as to the information on the outside of the mail and no reasonable expectation of privacy that the air immediately around the mail in transit will not be sniffed by specially trained canines. *State v. Stanphill*, 53 Wn. App. 623, 769 P.2d 861 (1989). Inmates of jails and prisons have no expectation of privacy in the contents of their non-legal mail. *See generally Robinson v. Peterson*, 87 Wn.2d 665, 669, 555 P.2d 1348 (1976) ("We have upheld the right of jail officials to examine the letters and packages, incoming and outgoing, of all inmates. *State v. Hawkins*, 70 Wn.2d 697, 425 P.2d 390 (1967), *cert. denied*, 390 U.S. 912 (1968). We said there that there can be no claim of an invasion of privacy under such circumstances.")

6. **Pharmacy Records.** Patients who purchase prescription narcotics from pharmacists have a limited expectation of privacy in the information compiled by pharmacists regarding their prescriptions. Because patients know or should know that their purchase of such drugs will be subject to government regulation and scrutiny, and because dispensers of prescription drugs have kept similar records open to government scrutiny throughout this state's history, prescription records maintained by pharmacies may be accessed by the pharmacy board without a warrant. *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003).

7. **Second Looks.** Inmates whose possessions have been inventoried and placed in a property room upon their arrival in a correctional facility have a diminished expectation of privacy in those possessions. Law enforcement may examine the possessions without a warrant in connection with the investigation of a crime unrelated to the crime for which the defendant was arrested. *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003).

8. **Fraudulently Obtained or Stolen Goods.** The Fourth Amendment does not protect a defendant from a warrantless search of property that he stole, because regardless of whether he expects to maintain privacy in the content of the stolen property, such an expectation is not one that "society is prepared to accept as reasonable." *See Rakas v. Illinois*, 439 U.S. 128, 143 n.12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). This same rule has been extended to fraudulently obtained goods. *United States v. Caymen*, 404 F.3d 709 (9th Cir. 2005). The applicability of this rule to a Const. art. I, § 7, claim is not fully established.

   - **Hotel Rooms**. An individual who fraudulently procures a hotel room has no reasonable expectation of privacy in the unlawfully obtained suite. *United States v. Cunag*, 386 F.3d 888 (9th Cir. 2004).

   - **Stolen Cars.** Defendant had no legitimate expectation of privacy in stolen

car by virtue of his wrongful presence in car. *State v. Zakel*, 61 Wn. App. 805, 812 P.2d 512, *review granted*, 117 Wn.2d 1023, 820 P.2d 511 (1991), *aff'd*, 119 Wn.2d 563, 834 P.2d 1046 (1992). *Please be aware that the lawful owner of the car still has an expectation of privacy in the car and evidence seized from the car without the lawful owner's consent or a warrant will not be admissible into evidence against the lawful owner of the car.*

- **Computers.** An individual who fraudulently obtained a computer from a business supply store has no reasonable expectation of privacy in the contents of the computer's hard drive. *United States v. Caymen*, 404 F.3d 709 (9th Cir. 2005) (computer purchased with someone else's credit card). A person who steals a computer lacks a reasonable expectation of privacy in the contents of the stolen computer. *United States v. Wong*, 334 F.3d 831 (9th Cir. 2003). *Please be aware that the lawful owner of the computer still has an expectation of privacy in the computer and evidence seized from the hard drive without the lawful owner's consent or a warrant will not be admissible into evidence against the lawful owner of the computer.*

9. **Saliva**. A citizen has no expectation of privacy in saliva that the citizen voluntarily relinquishes by licking an envelope, by smoking a cigarette, by spitting on the sidewalk, or in some other manner. *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007). The State may perform DNA testing on the saliva without violating a citizen's privacy interests, provided the DNA testing is limited to identification purposes. *Id.*

10. **Commercial Premises**. The state and federal constitutions afford no privacy protection to the common area of a gated commercial storage facility. *State v. Lakotiy*, 151 Wn. App. 699, 214 P.3d 181 (2009), *review denied*, 168 Wn.2d 1026 (2010). Government officials do not conduct a search by entering those portions of a commercial premise that is held open to the public. A warrant is only required to access commercial premises or portions of such premises restricted to all by employees or owners. *Dodge City Saloon v. Washington Liquor Control Board*, 168 Wn. App. 388, 288 P.3d 343, *review denied*, 176 Wn.2d 1009 (2012).

11. **Jail Phone Calls.** A pre-trial detainee has no reasonable expectation of privacy in jail telephone conversations. *State v. Modica*, 164 Wn.2d 83; 186 P.3d 1062 (2008); *State v. Archie*, 148 Wn. App. 198, 199 P.3d 1005*, review denied*, 166 Wn.2d 1016, 1018 (2009). The recording of a detainee's phone conversations did not violate Const. art. I, § 7. *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (2012).

12. **Computers with File Sharing Software**. An individual who installs file sharing software on his computer does not have a reasonable expectation of privacy in the files stored on his computer. The Fourth Amendment does not require police to obtain a search warrant before viewing files via a file sharing software program. *United States v. Ganoe*, 538 F.3d 1117 (9th Cir. 2008).

The following "searches" have been held to implicate a constitutionally protected zone of privacy:

1. **Canine Sniffs**. A police officers use of a trained narcotics dog to detect the presence of a controlled substance in a locked dwelling or associated structure under circumstances in which the presence of the controlled substance cannot be detected by the police officers using one or more of their own senses from a lawful vantage point constitutes a search for purposes of Const. art. I, § 7. *State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998), *review denied*, 137 Wn.2d 1032 (1999). The Fourth Amendment is also offended by police officers bringing a trained narcotics dog into the curtilage of a home. *See Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). The Fourth Amendment may be offended by an officer directing a canine to touch a suspect's belongings. *See United States v. Thomas*, 726 F.3d 1086, 1093 (9th Cir. 2013) ("it is conceivable that by directing the drug dog to touch the truck and toolbox in order to gather sensory information about what was inside, the border patrol agent committed an unconstitutional trespass or physical intrusion").

   a. Prior to *Dearman*, the Court of Appeals held that the warrantless use of a trained dog in certain public places did not constitute a search. *See generally*, *State v. Stanphill*, 53 Wn. App. 623, 769 P.2d 861 (1989) (package at post office); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (safety deposit box at bank); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980) (parcel in bus terminal). The *Dearman* court specifically did not overrule the prior holdings in *Stanphill*, *Boyce*, and *Wolohan*; it distinguished them as not involving a private residence.

   b. Post *Dearman*, the Court of Appeals held that a canine sniff, by a dog that is outside the vehicle, of air coming from the open window of a vehicle is not a search that requires a search warrant. *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010).

2. **Global Positioning Satellites.** A warrant is needed prior to installing a GPS device on a suspect's vehicle. *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003).

3. **Infrared Detection Devices**. A warrant is needed prior to utilizing a device to determine who much heat a certain building is releasing into the atmosphere. *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994).

4. **Trash.** A citizen has an expectation of privacy in his or her trash. This expectation of privacy protects the citizen's trash from a warrantless search while it sits on the curb awaiting pick-up. *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). The citizen's privacy interest is violated when officers arrange to have the trash collected from the curbside by the municipal garbage collector in a manner that keeps it segregated from all other garbage to facilitate police examination. *State v. Sweeney*, 125 Wn. App. 881, 107 P.3d 110 (2005). There is, however, no expectation of privacy in trash placed in a community dumpster serving an apartment complex or in trash placed on a neighbor's property. *State v. Rodriguez*, 65 Wn. App. 409, 828 P.2d 636 (1992); *State v. Hepton*, 113 Wn. App. 673, 54 P.3d 233 (2002), *review*

denied, 149 Wn.2d 1018 (2003).

5. **Hotel Registries.** A citizen has an expectation of privacy in the information contained in a hotel registry. Law enforcement may not access hotel registry information without a warrant, unless a valid exception to the warrant requirement exists or the officer has current or recent individualized suspicion regarding criminal activity in the hotel room. *In re Personal Restraint of Nichols*, 171 Wn.2d 370, 256 P.3d 1131 (2011); *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007).

6. **E-mails.** The Fourth Amendment requires a search warrant before the government can obtain email messages from an internet service provider (ISP). *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

B. Sanctions for Unreasonable Searches

1. **Exclusionary Rule** – Illegally obtained evidence is not admissible in court. *Mapp v. Ohio*, 367 U.S. 643, 82 S. Ct. 23, 7 L. Ed. 2d 72 (1961). The primary objective underlying the exclusionary rule is first and most important, to protect privacy interests of individuals against unreasonable government intrusions; second to deter the police from acting unlawfully in obtaining evidence; and third to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010); *State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983).

   a. **Fruits of the Poisonous Tree** – Legal evidence derived from illegally obtained evidence is not admissible in court. *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

      - Example: An officer makes an illegal arrest and, in the course of the search incident to arrest, finds drugs. The drugs will be inadmissible, even though a search incident to arrest is an exception to the warrant requirement, because the underlying arrest was unlawful and the search stemmed from that arrest.

   b. **Officer's Good Faith is Irrelevant** – Unlike its federal counterpart, Washington's exclusionary rule is "nearly categorical." State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). This is due to the fact that article I, section 7 of our state constitution "clearly recognizes an individual's right to privacy with no express limitations." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Accordingly, a police officer's reliance on subsequently invalidated legal authority to conduct a search will not preclude suppression of evidence. *State v. Afana*, 169 Wn.2d 169, 179-184, 233 P.3d 879 (2010).

2. **Criminal Liability** – Absent consent or other exception to the warrant requirement, it is unlawful for an officer to search a residence without a warrant. Violation of this law is a gross misdemeanor. *See* RCW 10.79.040; RCW 10.79.045.

3. **Civil Liability** – An illegal search may violate an individual's civil rights.

- An individual whose Fourth Amendment rights are violated may have a cause of action under 42 U.S.C. § 1983.
- Washington Constitution art. I, § 7 will not support a private cause of action for damages. *See Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333, 342 (1998) (stating that Washington courts do not recognize a private cause of action for State constitutional violations); *Spurrell v. Block*, 40 Wn. App. 854, 701 P.2d 529, 534-35 (1985) (same); *Sys. Amusement, Inc. v. State*, 7 Wn. App. 516, 500 P.2d 1253, 1254-55 (1972) (same).

C. Search Warrants[15]

1. **Defined.** An order in writing (or telephonically made) in the name of the state, signed by a neutral and detached magistrate who has authority to issue such an order, directing a law enforcement officer to search for personal property (or for a the body of a person) and to bring the same before the court.

2. **Authority.**

The authority for search warrants is derived from the Constitution, statutes, and court rules. *See, e.g.* U.S. Constitution Amendment IV. Washington's Court rules specifically authorize search warrants for: (1) evidence of a crime; (2) contraband, the fruits of crime, or things otherwise criminally possessed; (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; and (4) person for whose arrest there is probable cause, or who is unlawfully restrained. CrR 2.3(b); CrRLJ 2.3(b). Laws of 2014, chapter 93, sec. 3(1) substantially mirrors the court rules:

> (1) Any magistrate as defined by RCW 2.20.010, when satisfied that there is probable cause, may upon application supported by oath or affirmation, issue a search warrant to search for and seize any: (a) Evidence of a crime; (b) contraband, the fruits of crime, or things otherwise criminally possessed; (c) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or (d) person for whose arrest there is probable cause or who is unlawfully restrained.

When the State seeks a warrant for "mere evidence" of a crime, rather than contraband or instrumentalities of a crime, the State must show probable cause to believe that the evidence will aid in apprehending or convicting a suspect. *State v. Bullock*, 71 Wn.2d 886, 890-91, 431 P.2d 195 (1967). There is no requirement that

[15] The section of the manual devoted to search warrants is greatly expanded in this edition. Many of the additions and improvements were made through the generosity of Steve Cooley, the Los Angeles District Attorney. Mr. Cooley authorized the incorporation of sections of the Los Angeles County District Attorney's Office Search Warrant Manual that was prepared by Robert Schirn, Head Deputy District Attorney (Retired) and Richard J. Chrystie, Deputy District Attorney (Retired).

the things to be seized must relate to a crime committed within Washington state.

A search warrant must be obtained to serve an arrest warrant upon a person that officers have probable cause to be within the residence of a third party (someone other than the person named in the arrest warrant). *See Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Search warrants may be issued for evidence of both misdemeanors and felonies. An action for a search warrant, however, is a civil action in rem. It is distinct from a criminal prosecution against an individual. A private person cannot maintain an action for a search warrant. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 304 P.3d 914, *review denied*, 178 Wn.2d 1022 (2013).

Search warrants may be obtained after charges have been filed. No prior notice must be given to the defense before obtaining or serving the search warrant. *See State v. Kalakosky*, 121 Wn.2d 525, 533-37, 852 P.2d 1064 (1993).

- **CrR 4.7 and CrRLJ 4.7.** While CrR 4.7(b)(2)(vi) and CrRLJ 4.7(c)(1)(vi) permit "the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof", *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010), held that any order under this court rule must satisfy all the requirements of a search warrant:

  > a CrR 4.7(b)(2)(vi) order must be entered by a neutral and detached magistrate; must describe the place to be searched and items to be seized; must be supported by probable cause based on oath or affirmation; and there must be a clear indication that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner.

  Garcia-Salgado, 170 Wn.2d at 186.

  The requirements identified in *Garcia-Salgado* for collection of biological samples would apply to any other item listed in CrR 4.7(b)(2) or CrRLJ 4.7(b)(2) that involve a "search" under either the Fourth Amendment or Const. art. I, § 7.

  Since the requirements of *Garcia-Salgado* is the same as for search warrants, the prudent prosecutor will utilize search warrants rather than the court rule.

3. Components.

a. Person Issuing Warrant. The proper official must issue a search warrant. In Washington, the following individuals are considered "magistrates": (1) the justices of the supreme court; (2) the judges of the court of appeals; (3) the superior judges, and district judges; and (4) all municipal officers authorized to exercise the powers and perform the duties of district judges.

See RCW 2.02.020.

Superior Court Judges and Commissioners. A superior court judge may issue a warrant for virtually anywhere in Washington (some exceptions may apply for property located within an Indian reservation), including another county. This authority stems from the Washington State Constitution. *See* Const. art. 4, sec. 6 ("their process shall extend to all parts of the state."). The term "process" includes search warrants. *Nevada v. Hicks*, 533 U.S. 353, 364, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) ("'Process' is defined as 'any means used by a court to acquire or exercise its jurisdiction over a person or over specific property,' Black's Law Dictionary 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id.* at 1085.)."

A superior court commissioner appointed pursuant to Const. art. 4, sec. 23 or RCW 2.24.010(2)(a) possesses the same authority as a superior court judge. *See State v. Goss*, 78 Wn. App. 58, 895 P.2d 861 (1995).

A superior court judge may also issue a warrant for the production of records that are located outside the state of Washington. *See generally* Chapter 10.96 RCW.

District and Municipal Court Judges and Commissioners. As of June 12,2014, district and municipal court judge may issue a warrant for virtually anywhere in Washington (some exceptions may apply for property located within an Indian reservation), including another county. The Washington Constitution provides that "[t]he legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution." Const. art. 4, sec. 11. The appellate courts have, thus, looked to statutes in order to determine whether a search warrant issued by a district court judge or municipal court judge was valid. *See generally State v. Uhthoff*, 45 Wn. App. 261, 724 P.2d 1103, *review denied*, 107 Wn.2d 1017 (1986); *State v. Stock*, 44 Wn. App. 467, 474-75, 722 P.2d 1330 (1986); *State v. Davidson*, 26 Wn. App. 623, 613 P.2d 564, *review granted*, 94 Wn.2d 1020 (1980), *review dismissed*, 95 Wn.2d 1026 (1981).

In Laws of 2014, chapter 93, the legislature added a new section to chapter 2.20 RCW. This new section provides that:

> Any district or municipal court judge, in the county in which the offense is alleged to have occurred, may issue a search warrant for any person or evidence located anywhere within the state.

Laws of 2014, ch. 93, § 2. This new provision applies to any search warrant issued on or after June 12, 2014. This statute is consistent with RCW 3.50.115, which already provided for statewide process from municipal courts.

District court commissioners may issue a warrant, but only if their office was properly created. *See State v. Moore*, 73 Wn. App. 805, 814, 871 P.2d 1086 (1994); RCW 3.42.020 ("Each district court commissioner shall have such power, authority, and jurisdiction in criminal and civil matters as the appointing judges possess and shall prescribe, except that when serving as a commissioner, the commissioner does not have authority to preside over trials in criminal matters, or jury trials in civil matters unless agreed to on the record by all parties.").

Municipal court commissioners possess the same authority to issue search warrants as municipal court judges. *See generally* RCW 3.50.045(3) (municipal court "judicial officer" means a judge, judge pro tempore, or court commissioner"); RCW 3.50.075 (authorizing appointment of municipal court commissioners and authorizing the commissioner to hear all matters except for trials without the consent of all parties); RCW 35.20.155 ("A [municipal court] commissioner has such power, authority, and jurisdiction in criminal and civil matters as the appointing judge possess and may prescribe.").

Pro Tem Judges. As a general rule, a superior court pro tempore judge may not issue a warrant as the owner of the property to be searched will not have tendered the written consent to the pro tempore's service that is required by Const. art. 4, § 7. *See generally, National Bank v. McCrillis*, 15 Wn.2d 345, 356, 130 P.2d 901, 144 A.L.R. 1197 (1942); *Mitchell v. Kitsap County*, 59 Wn. App. 177, 797 P.2d 516 (1990). An exception to the written consent requirement *may* apply to an elected judge who is sitting as a superior court pro tempore judge pursuant to Const. art. 4, § 7, Superior Court Administrative Rule 6 and RCW 2.08.180(2).

District court and municipal court pro tempore judges are not subject to Const. art. 4, § 7. *See generally State v. Hastings*, 115 Wn.2d 42, 793 P.2d 956 (1990). A district court pro tempore may issue a valid warrant, but only if the office in which the pro tempore judge is sitting was validly created. See, e.g., *State v. Canady*, 116 Wn.2d 853, 809 P.2d 203 (1991) (warrant issued by a judge pro tempore sitting in a municipal court department that was not validly created was void); *State v. Hill*, 17 Wn. App. 678, 682-83, 564 P.2d 841 (1977) (warrant signed by a district court pro tempore judge upheld); *State v. Franks*, 7 Wn. App. 594, 501 P.2d 622 (1972) (warrant signed by a district court pro tempore judge upheld).

Out-of-State Judges. A judge from another state may not issue a warrant to search a location within Washington state. When an officer from another jurisdiction believes that there is evidence within Washington that relates to the crime in the officer's jurisdiction, the out-of-state officer will need to obtain a search warrant from an appropriate Washington superior court, district court, or municipal court judge. While the out-of-state officer may serve as the affiant for the search warrant, a Washington commissioned

police officer will have to apply and execute the search warrant.

A judge from another state may issue a search warrant for records that are located within Washington. *See* RCW 10.96.040.

i. Special Restrictions.

- **Judicial Conflicts of Interest.** A judge should not issue a warrant if the judge has any special relationship (*i.e.* family relationship, employer/employee, personal friendship, ownership) to a victim, an alleged suspect, the informant, the affiant, a member of the prosecutor's officer, or the place to be searched. *See, e.g. Commonwealth v. Brandenburg*, 114 S.W.3d 830 (Ky. 2003) (a trial commissioner's marriage to an employee in the Commonwealth Attorney's office created an appearance of impropriety, which destroyed the trial commissioner's character as a neutral and detached issuing authority for a search warrant); *State v. Edam*, 281 Conn. 444, 915 A.2d 857 (2007) (judge's prior relationship with the defendant that included personal discussions regarding career development, family, finances, and health concerns, golf games, and sitting at the same table at various dinner receptions was sufficient to undermine his ability to act as the neutral and detached magistrate guaranteed by the fourth amendment); *Grimes v. Superior Court of Madera County*, 120 Cal. App. 3d 582, 174 Cal. Rptr. 623 (1981) (judge who was defendant's landlord was not a neutral and detached magistrate).
- **Multiple Applications.** A warrant application may be presented to a second magistrate following a judge's refusal to issue the warrant. This is because a magistrate's initial probable cause determination is not a final order that is subject to the principles of collateral estoppel or res judicata. Justice Charles W. Johnson and Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law :2013 Update*, 36 Seattle Univ. L. Rev. 1581, 1638 (2013) (citing 2 Wayne R. LaFave, *Search and Seizure* § 4.2(e), at 631-33 (5th ed. 2012)); *United States v. Pace*, 898 F.2d 1218, 1230-31 (7th Cir 1990) ("The Fourth Amendment on its face does not prohibit the government from seeking a second magistrate's approval to search when another magistrate denies a search warrant. The Fourth Amendment commands only that a 'neutral and detached magistrate' determine that probable

cause exists. Thus, the important questions, from a Fourth Amendment standpoint, are whether the magistrate really was 'neutral and detached,' and whether probable cause actually existed, not how many magistrates the government applied to before finally obtaining a warrant."). The second magistrate should always be informed of the prior application. *United States v. Rettig*, 589 F.2d 418, 422 (9th Cir. 1978) (finding the second warrant valid but expressing disapproval that the second judge had not been informed of the prior attempt); *People v. Bilsky*, 95 N.Y.2d 172, 712 N.Y.S.2d 84, 734 N.E.2d 341 (2000) ("We emphasize that disclosure of a prior warrant application is the proper and preferred practice; it ought to be followed in the presentation of any successive warrant application to another neutral Magistrate. Forthright disclosure lessens the potential for inappropriate 'Judge shopping' and alerts the different Magistrate fully to earlier developments, or nondevelopments, so that appropriate inquiry and consideration may be given for a fully informed judgment and decision on the matter at hand."). Courts are less likely to uphold a search warrant application that is presented, without any additional facts, to a third magistrate. *United States v. Czuprynski*, 8 F.3d 1113, 1115 (6th Cir. 1993), *on reh'g en banc*, 46 F.3d 560 (6th Cir. 1995), *supplemented*, 65 F.3d 169 (6th Cir. 1995) (condemning prosecutor who took the case to two district court judges before taking it to a magistrate who he knew had hard feelings for the defendant).

- **Indian Country.** A warrant issued by a state judge for property located within an Indian reservation will be valid, so long as the property to be searched is not owned by the tribal government, itself. *See generally Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (state warrants effective within the geographic boundaries of a reservation); *State v. Clark*, 178 Wn.2d 19, 308 P.3d 590 (2013) (when the evidence being sought relates to an offense that the State has jurisdiction over, state courts have the authority to issue a search warrant for a residence located on trust property within the exterior boundaries of an established Indian reservation).

  - One Washington Tribe, the Yakama Nation, has taken the position that State officers may not enter trust property on the reservation to execute a warrant without first seeking permission from the Yakama Nation. Litigation regarding this claim is on-going.

See, e.g., Confederated Tribes & Bands of the Yakama Nation v. Holder, No. CV-11-3028-RMP (E.D. Wash. Mar. 15, 2012 and Apr. 4, 2012) (orders denying motions for temporary restraining order or preliminary injunction).

Washington tries to be respectful of Tribal Governments. *See generally* Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington (Aug. 4, 1989). When the integrity of the State's investigation will not be unduly compromised, state officers should consider coordinating with Tribal police officers prior to executing warrants. State officers may also wish to consider obtaining a parallel Tribal search warrant. Officers should consult their supervisors and/or legal advisors for guidance in this sensitive area.

b. Place/Person to be Searched. The warrant must describe the place or person to be searched with specificity. The general rule is that descriptions in a search warrant should be of sufficient particularity so that if an officer with no knowledge of the case were to serve the warrant, the officer would have no difficulty in locating the place, recognizing the vehicle, or identifying the person to be searched. *See, e.g., Steele v. United States*, 267 U.S. 498, 503, 45 S. Ct. 414, 69 L. Ed. 757 (1925) ("It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended.").

A structure is usually distinguished by its address, a vehicle by its license plate, and a person by his or her name. But if the warrant is to search a black Volkswagen Beetle and the license number and year are unknown, then some other distinguishing characteristic should be included in the description such as a broken headlight, a dented fender, a missing chrome strip, a particular primer spot, etc. Analogous distinguishing characteristics can be used to describe structures, persons, or any other things to be searched if the more conventional ways of describing them cannot be used or are insufficient.

If for some reason it is impossible to get a thorough description of the place, vehicle, or person to be searched, then state in the body of the affidavit the reason for the lack of specificity. One common reason is the investigating officer's inability to get close enough to get a good description without compromising the investigation.

It is important for descriptions to be accurate. An incorrect address or mistaken description may invalidate the search warrant. Thus, it is

recommended the affiant personally observe the place, vehicle, and person to be searched in order to ensure an accurate description or have another reliable person do so.

The use of photographs and diagrams to supplement a written description should be considered if an adequate written description would be difficult to formulate or would be excessively lengthy.

> . . . the premises of a large, dilapidated red barn located on the south side of Mulholland approximately 2.8 miles west of Half day Road in the Chelan County area east of Lake Chelan as shown on the photograph attached hereto and incorporated as Exhibit No. 1; and all rooms, attics, cellars, lofts, storage areas, and other parts therein, and the surrounding grounds and any storage areas or outbuildings of any kind located thereon.

The photograph marked Exhibit No. 1 should be attached to both the search warrant affidavit and a copy of the photograph should be attached to the actual search warrant.

> . . . a small wooden shack, and all rooms and parts therein, and the surrounding grounds consisting of approximately 20 acres, located just west of the Highway 101 and south of Rhody Drive (near Chimacum Cafe) as marked on page 123 of the Thomas Bros. Map attached hereto and incorporated as Exhibit No. 1 and as outlined in red on the aerial photograph attached hereto and incorporated as Exhibit No. 2.
>
> . . . a silver gray 2005 Cadillac Deville Sedan as shown on the photograph attached hereto and incorporated as Exhibit No. 1 and believed to be parked at 1132 Daniels Drive, Bellingham.
>
> . . . the person known as "Angel," a male/Caucasian, approximately 30-40 years, 5'5", 180 lbs., as shown on the photograph attached hereto and incorporated as Exhibit No. 1 and believed to be residing within the premises described above.

In the case of vehicles and persons, it is still desirable to give their probable location as discussed *infra*.

i. **Homes**. Generally, the description of a dwelling should include the complete address and a brief description of its outer appearance. For the search of a house, the description might be as follows:

> . . . the premises at 11301 East Main Street, Spokane Valley, further described as a single-story dwelling

> house with a tan brick exterior, dark brown wooden trim, and a green roof; and all rooms, attics, basements, and other parts therein and the surrounding grounds and any garages, storage areas, trash containers, and out-buildings of any kind located thereon.

A detailed description of the premises can save a search warrant that contains a typographical error with respect to the house or apartment number. *State v. Fisher*, 96 Wn.2d 962, 967, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982); *State v. Andrich*, 135 Wash. 609, 612, 238 P. 638 (1925); *State v. Smith*, 39 Wn. App. 642, 648-49, 694 P.2d 660 (1984), *review denied*, 103 Wn.2d 1034 (1985).

- The better practice when a typographical error is found in the search warrant is to contact the issuing magistrate for permission to correct the error. *See State v. Bohan*, 72 Wn. App. 335, 340 n.8, 864 P.2d 26 (1993), *review denied*, 124 Wn.2d 1002 (1994).
- The burden of proving that a mistaken search would occur based upon an erroneous street address of the house to be searched lies with the defendant. *State v. Fisher*, 96 Wn.2d 962, 967 -68, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982) (defendant, who produced a picture of the residence that was searched but not of the other alternative addresses did not satisfy his burden of proof that a reasonable person could not ascertain the correct location from the physical description of the premises).

In giving a street address it is important to specify "North," "South," "East," or "West," if that is part of the address. Also, it is important to specify "Street," "Avenue," "Boulevard," "Way," etc. This avoids any ambiguity as to whether the address "212 Maple" refers to 212 South Maple Street or 212 Maple Circle, which may be nearby and have a similar appearance. Another method of avoiding ambiguity that can arise when a subdivision of similar homes contains streets with similar names (*i.e.* South Maple and Maple Circle) is by reference to the cross-streets.

> . . . the premises at 210 West Maple Street, Leavenworth, further described as a single story dwelling house, tan in color with green trim and a brown roof, located on the south side of Maple Street between Spruce and Pine Streets; including all rooms, attics, basements, and other parts therein, the

> surrounding grounds, and any garages, storage rooms, storage areas, trash containers, and outbuildings of any kind located thereon.

A warrant authorizing the search of a residence will not authorize entry into outbuildings not specifically mentioned in the warrant. *State v. Kelley*, 52 Wn. App. 581, 762 P.2d 20 (1988). A warrant's incorporation by reference of the affidavit in support of issuance of the warrant will authorize entry into the outbuildings and vehicles, but only if the affidavit is actually attached to the warrant. *See State v. Riley*, 121 Wn.2d 22, 29-30, 846 P.2d 1365 (1993). Entry into outbuildings may only be authorized when probable cause exists to believe that evidence may be found in that location and if the outbuildings are under the control of the occupants of the main residence. *See State v. Gebaroff*, 87 Wn. App. 11, 17, 939 P.2d 706 (1997) ("probable cause to search outbuildings does not furnish probable cause to search a house -- and vice versa, if the outbuildings are under the control of other persons").

A warrant issued to search a defendant's premises may include the defendant's automobile if it is located on the premises. *State v. Claflin*, 38 Wn. App. 847, 853, 690 P.2d 1186 (1984) (a search warrant authorizing search of defendant's house and premises includes search of his car located on the premises).

- A warrant to search a house does not include authority to search a vehicle that is under the control of other persons. *Cf. State v. Gebaroff*, 87 Wn. App. 11, 17, 939 P.2d 706 (1997) (premises warrant does not authorize a search of outbuildings that are under the control of someone other than the suspect); *State v. Worth*, 37 Wn. App. 889, 683 P.2d 622 (1984) (search of purse on chair next to female occupant of residence was improper because female occupant was not named in the warrant and the purse was "an extension of her person").

- A warrant to search a house will does not include authority to search a vehicle that is not within the curtilage—the area contiguous to the occupant's home. *State v. Graham*, 78 Wn. App. 44, 51-52, 896 P.2d 704 (1995). A vehicle that is parked next to, and slightly in, a public street is not within the curtilage of a house. *Id. See also State v. Pourtes*, 49 Wn. App. 579, 581, 744 P.2d 644 (1987) (the street and the shoulder of a roadway are not within the curtilage of a house). A vehicle that is parked in a space that lawfully could be used by anyone coming to the adjoining house on legitimate business is not within the curtilage of the house.

State v. Niedergang, 43 Wn. App. 656, 662, 719 P.2d 576 (1986).

ii. **Apartments.** Be certain to limit the description to the apartment unit in question and not the entire apartment building, unless the affidavit justifies a search of the entire building. Thus, include the apartment number or its location within the building.

A warrant authorizing the search of an apartment may support a search of a storage locker related to that apartment that is located in the same building of the apartment despite the warrant's failure to specifically mention "and any storage lockers or rooms connected with apartment 2B at 500 Smith Place, Tacoma, Washington". *See, e.g., State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992) (search of padlocked locker located in storage room next to defendant's apartment upheld). The better practice, of course, is to expressly mention storage lockers, etc., in the search warrant.

> . . . the premises at 1725 Main Street, Apartment No. 228, Tacoma, further described as an apartment unit within a four-story multi-unit apartment house, dark green in color with light green trim, and bearing the name "LaMer Apartments," and all rooms, attics, and other parts within Apartment No. 228, which is located in the NE corner of the second floor, and all garages, trash containers, and storage areas designated for the use of Apartment No. 228.

iii. **Other Shared Living Situations.** A search warrant for a multiple-occupancy building will be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately. Exceptions to this specificity rule include the "multiple-unit" rule and the "community living rule."

Under the multiple-unit exception, if the building in question appears to be a single occupancy structure rather than a multiple occupancy structure, and neither the affiant nor the investigation officers knew or had reason to know of the building's actual multiple-occupancy character until execution of the warrant was under way. Under this circumstance, the warrant is not defective for failure to specify a subunit within the named building. *State v. Chisholm*, 7 Wn. App. 279, 499, P.2d 81 (1972). Upon discovery of the multiple occupancy, the police should immediately cease their search, should attempt to determine which subunit is most likely connected with the criminality under investigation and should then confine their search to that subunit. *State v. Alexander*, 41 Wn. App. 152, 154, 704 P.2d

618 (1985). A particularly prudent officer may wish to recontact the magistrate and obtain a new warrant for the particular subunit.

The community living unit exception applies when several persons or families occupy the premises in common rather than individually, as when they share common living quarters but have separate bedrooms. In a common living unit situation, a search warrant describing the entire premises is valid and will justify a search of the entire premises. *State v. Alexander*, 41 Wn. App. 152, 155, 704 P.2d 618 (1985). If an officer knows that a building is occupied by multiple people in a community living situation, the officer should alert the issuing magistrate to this fact.

In determining whether a shared living situation constitutes a multiple-occupancy or a communal living situation, courts will consider whether the building is a boarding house or other divided building, and whether the bedrooms or other independently lived in areas are separately locked. *State v. Alexander*, 41 Wn. App. 152, 155-57, 704 P.2d 618 (1985).

iv. **Store or Business.** The name of the business, the address, and a brief description of its outer appearance should be stated.

> . . . the premises known as the "Katsiganis Coffee Shop" located at 415 West Ocean Boulevard, Ocean Shores, including all rooms, dining areas, service areas, kitchens, pantries, stoves, refrigerators, restrooms and other parts within the business including an office and a safe contained within the office in the rear of the premises, and any storage rooms, storage areas and trash containers, attached or unattached, located thereon. This location is a coffee shop on the first floor of a multi-story commercial building and the words, "Katsiganis Coffee Shop -- Greek Dishes a Specialty," appear in gold letters on the front window.

This description makes it clear the affiant is requesting and the magistrate is authorizing a thorough search of all parts of the business, including the safe.

v. **Places – Address Unknown**. If the specific address is unknown or the location is not marked with an address, special particularity should be used in describing it.

> . . . a green stucco two-story dwelling house with a red roof and boarded up windows located on the north side of 91st Place, between Yakima Avenue and First

> Street in Yakima, and all rooms, attics, basements, and other parts therein, including a compartment located within the west living room wall, and the surrounding grounds, and any garages, storage areas, trash containers, or outbuildings of any kind located thereon. This house is the fourth structure west of the northwest corner of Yakima Avenue and 91st Place. It is extensively marked with graffiti and the words "Little Chico" appear in large block letters on the front door.

This description is sufficiently detailed to avoid mistaking this house from other similar abandoned ones on the same block. Also, the specific reference to the wall compartment makes it unmistakable that the searching officers may go into the structure of the wall itself, if necessary.

> . . . a large, dilapidated two-story barn, approximately one hundred feet on each side, faded red in color, and located on the south side of Mulholland Highway approximately 2.8 miles west of Half day Road in the Chelan County area east of Lake Chelan, and all rooms, attics, cellars, lofts, storage areas, and other parts therein, and the surrounding grounds and any storage areas or outbuildings of any kind located thereon, including the two junked cars and the farm implements. The roof of the barn bears faded white letters reading "Chew Mail Pouch Tobacco." The structure is located approximately two hundred feet off the road and there are several old farm implements and two junked cars in front of the structure; one of the cars appears to be a white, 1975 Chevrolet.

These descriptions are more detailed than those in which an address is known. This is because sufficient detail must be given to avoid any possibility that the description could apply to other nearby locations.

vi. **Vehicles**. Generally, the color, year, make, model, and license number of the vehicle to be searched will constitute an adequate description.

> . . . a maroon 2005 Mercury Grand Marquis four-door sedan bearing Washington license number 2ABC123.

If the license number of the vehicle in unknown, other details of its appearance should be given to distinguish it from other similar vehicles. Also, in such a case, the probable location of the vehicle

should be given.

> . . . an approximately 2005 Chrysler two-door hard-top, dark green vinyl top, white body, "mag" wheels, license number unknown, believed to be parked at or near 849 Tremont Avenue, Port Orchard, 98366.

The expression "believed to be at or near" is preferable to a definite statement of the vehicle's location and allows a search of the vehicle even if it is not found where it was "believed to be" so long as it is otherwise recognizable.

If the affiant has information that the item he is searching for could possibly be found secreted within an unusual hiding place in the car which may require partial disassembly of the car, it is better practice for this hiding place to be specifically mentioned in the description.

> . . . a white 2005 Cadillac Deville, Washington license number 2ABC123, believed to be parked at or near the south side of Pier B, Long Beach Harbor and all parts and compartments therein including the area within the front passenger door.

The body of the affidavit must contain information justifying the belief the contraband is within the front passenger door.

It is also good practice to list the probable location of a car in any case in which the car is not being searched in conjunction with a nearby structure also listed in the warrant. Thus, a car alone parked at the docks should be described as above.

A warrant authorizing search of any vehicle on described premises and its curtilage will not satisfy the particularity requirement of the Fourth Amendment. *See State v. Rivera*, 76 Wn. App. 519, 888 P.2d 740 (1995).

> **Installing a Tracking Device.** Warrants are needed to "seize" a person's route of travel through the use of technology, including the use of a global positioning device. *See State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003). The exact rules governing the issuance of such a judicial order, including how to describe where the search will be conducted, have not yet been established.
>
> It appears, though, that the "place" to be searched would be the travel pattern of the vehicle. *Jackson*, 150 Wn.2d at 268. A simple description in the warrant of the vehicle to which the tracking device would be attached, e.g. "A blue 2010

Toyota Camry, license number ABC123," coupled with the following description of what is to be seized should satisfy the particularity requirement:

> This search warrant authorizes the installation of a tracking device on the above-described vehicle within ten days following the issuance of the warrant; further, this warrant authorizes the monitoring and recording of the movements of the vehicle as shown by the tracking device for a period of ____ days following the issuance of this warrant, probable cause having been shown for the monitoring of the tracking device for that length of time."

A search warrant is presumed to be valid for ten days after issuance. If ten days is sufficient time for both the installation and monitoring of the tracking device, then no request for additional time is necessary. But if officers are seeking to continue monitoring beyond ten days after the warrant has been issued, then the affidavit in support of the warrant must establish justification for doing so. Otherwise the officers may have to reapply for a new search warrant at the end of the 10 day period. *See State v. Jackson*, 150 Wn.2d 251, 266, 76 P.3d 717 (2003) (authorizing an extension of 10 days of surveillance as an addendum to the original warrant).

- If monitoring extends beyond ten days after the issuance of the warrant, officers should consider filing a conditional return every ten days to inform the issuing magistrate on the progress of the investigation.

viii. **Person.** The description of a person should include the name, sex, race, age, height, weight, hair color, eye color, and distinguishing marks to the extent they are known. Again, as with a vehicle, if only the person is to be searched (not in conjunction with a place) or if the description is incomplete or uncertain, then his or her probable location should be given.

> . . . the person known as "Stubbs," male/black, approximately 25-30 years, 4'11", 140 lbs., black hair and eyes, with a mustache and goatee, and believed to be residing at 8640 California Avenue, Kelso.

If the search of the person is being conducted in conjunction with the search of his location or residence, he may be described as being at

that location.

> . . . the person of "Richard," a male/Caucasian, approximately 70 years old, 5'11", 200 lbs., brown hair and eyes, tip of middle finger on left hand missing, and believed to be within the above described premises.

It is sometimes difficult to obtain a complete description of the person to be searched. However, even a partial description may satisfy the requirement of reasonable particularity, especially if a probable location is indicated and the person is later found and searched within the location. A bare minimum description should include sex, race, approximate age, and probable location. If additional distinguishing characteristics are known, they should be included. *See State v. Martinez*, 51 Wn. App. 397, 753 P.2d 1011, *review denied*, 111 Wn.2d 1010 (1988) (a warrant describing two persons who sold cocaine as "(1) Mexican/Male, 20's, 5'7, med. build blk curly hair. (2) Mexican/Male, 20's, 5'6, heavy build, blk hair" residing at a certain address was sufficiently specific to reduce the likelihood of misidentification).

"John Doe" warrants which merely indicate that the person is known to be in the vicinity of a certain described premise are inadequate in Washington. *See State v. Douglas S.*, 42 Wn. App. 138, 709 P.2d 817 (1985); *State v. Rollie M.*, 41 Wn. App. 55, 701 P.2d 1123 (1985).

A warrant for a person authorizes a search of the entire person, including such private areas as the space between a man's penis and scrotum. A more specific warrant should be obtained, however, before entering any body cavities. *See State v. Hampton*, 114 Wn. App. 486, 60 P.3d 95 (2002). If a strip search will be conducted in conjunction with a warrant for a person, the search must be conducted in a reasonably private place, without unnecessary touching, by persons of the defendant's gender. *Id.*, at 494. *See also State v. Colin*, 61 Wn. App. 111, 114-15, 809 P.2d 228 (1991) (court utilized RCW 10.79.080 and RCW 10.79.100 by analogy in determining standards of reasonableness).

A warrant for "any and all persons present" will generally violate the particularity requirement of the Fourth Amendment. *State v. Garcia*, 140 Wn. App. 609, 166 P.3d 848 (2007).

ix. **Searches of Other Than Places, Vehicles and Persons.** Anything that is capable of containing a sought-after item may be seized and searched pursuant to a warrant. The search warrant and affidavit must contain a "reasonably particular" description of the thing or container to be searched and its location. For example, if a suitcase reasonably

believed to contain cocaine is in the Alaska Airlines Air Freight warehouse at SeaTac International Airport, the description of the "place" to be searched would be as follows:

> . . . a blue and green suitcase bearing Alaska Airlines Baggage Tag No. AA-171-48, presently located within the secured baggage room of the Alaska Airlines Air Freight warehouse, Seattle Tacoma International Airport, 17801 International Blvd, Seattle.

c. **Crime Under Investigation.** The warrant must state with specificity the crime being investigated. Naming the crime acts to place scope limitations on the search. The failure to state the crime in the body of the warrant cannot be cured by the personal knowledge of the officer executing the warrant. *State v. Riley*, 121 Wn.2d 22, 29-30, 846 P.2d 1365 (1993).

The specificity with which the search warrant must identify the crime depends upon the items being sought. The greatest specificity is required when the items sought are protected by the First Amendment or are not patently illegal (*i.e.* stolen televisions vs. controlled substances).

i. **Identifying Wrong Controlled Substance.** A search warrant for evidence of manufacturing of a controlled substance is valid if supported by probable cause even if an incorrect controlled substance is named. *See State v. Dodson*, 110 Wn. App. 112, 39 P.3d 324 (2002) (warrant form for marijuana, but telephonic approval given for methamphetamine and probable cause for methamphetamine).

ii. **Pretext**. Where a valid warrant is issued, the result reached in *State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999), of prohibiting stops or seizures on a mere pretext to dispense with a warrant is not applicable. *State v. Lansden*, 144 Wn.2d 654, 30 P.3d 483 (2001).

iii. **Alternative Means.** When a crime can be committed in more than one way, an officer who chooses to cite the statute that defines the offense, must specify the applicable alternatives means of committing the offense in the search warrant and in the search warrant affidavit. *See State v. Higgins*, 136 Wn. App. 87, 147 P.3d 649 (2006) (a search warrant which did not list the items to be seized and which identified the crime under investigation as "'Assault 2nd DV' RCW 9A.36.021" without specifying which alternative means of second degree assault applied did not satisfy the constitutional particularity requirement).

d. **Describing the Items that May be Seized.** The warrant clause of the Fourth Amendment expressly provides that no warrant may issue except those

"particularly describing the place to be searched, and the person or things to be seized." (U.S. Constitution, Fourth Amendment.) A good test of "particularity" is whether or not an officer with no knowledge of the facts underlying the warrant and looking only at the description of the property on the face of the warrant would be able to recognize and select the items described while conducting the search. For example, an officer with no knowledge of a particular case would be able to recognize and seize a "Smith & Wesson .38 caliber revolver, serial No. 18-205", if it were listed on the warrant. However, an officer executing a warrant describing the items sought only as "stolen property" would not know what to seize unless he was familiar with the facts underlying the warrant. Since search warrants are directed to "any peace officer," the description of the property sought must be clear and specific enough for any officer serving the warrant to recognize and select the items described. It will not be presumed that officers serving the warrant have knowledge of the case.

Descriptions should be as specific and complete as possible. Model numbers and serial numbers should be included, if known. Warrants which fail to describe property with reasonable particularity are considered "general exploratory warrants" and are forbidden by both the United States and Washington Constitutions. General warrants are invalid and any items seized during their execution are subject to suppression. A warrant must be for specifically authorized objects or people, i.e. any property that constitutes evidence of a criminal offense.

- An officer who executes a search warrant that does not list the items to be seized is not entitled to qualified immunity in any civil action arising from the service of the invalid search warrant. *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004).

The particularity requirement serves to prevent general searches by limiting the places that may be invaded to those areas of the premises large enough to hold the item sought. In other words, a search warrant for seizure of a stolen elephant would not authorize the opening of a dresser drawer or bread box while a search warrant for marijuana will authorize an officer to inspect virtually every aspect of the premises. *See State v. Chambers*, 88 Wn. App. 640, 645, 945 P.2d 1172 (1997). The particularity requirement also serves to prevent general searches as once the listed items are located the search must end unless an expanded or new search warrant is obtained.

In general, the degree of specificity required varies according to the circumstances and the type of items involved. *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992). A description is valid if it is as specific as the circumstances and the nature of the activity, or crime, under investigation permits. *Perrone*, 119 Wn. 2d at 547; *State v. Riley*, 121 Wn. 2d 22, 27-28, 846 P.2d 1365 (1993). Impossible degrees of particularity are not required, but officers should always strive to be as specific as possible under the

circumstances (*i.e.* marijuana vs. controlled substances; 19-inch televisions, model numbers, manufactured by Panasonic, Zenith, etc. vs. electronic equipment). Ultimately, the search warrant is to be tested and interpreted in a common sense, practical manner, rather than in a hypertechnical sense. *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997), *cert. denied*, 523 US. 1008 (1998).

The required degree of particularity depends upon the nature of the materials sought and the circumstances of each case. When the nature of the underlying offense precludes a descriptive itemization, generic classifications such as lists are acceptable. *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). For instance, a warrant for "trace evidence" is valid when it would be impossible to know what type of trace evidence could be present beforehand. *See State v. Clark*, 143 Wn.2d 731, 754, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001). When using a generic classification, the search must be circumscribed by reference to the crime under investigation. *Riley*, 121 Wn.2d at 28. Washington courts have upheld search warrants with the following generic language:

- specific items plus "'any other evidence of the homicide.'" *State v. Reid*, 38 Wn. App. 203, 211-12, 687 P.2d 861 (1984) ((quoting language of warrant))
- "'any and all evidence of assault and rape including but not limited to'" specified items. *State v. Lingo*, 32 Wn. App. 638, 640-42, 649 P.2d 130 (1982) ((quoting language of warrant)).

When a warrant lists items protected by the First Amendment, courts demand the highest degree of particularity. If items such as books or films are the subject of the search, the particularity requirement takes on special importance. Thus, in *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992), a case involving child pornography, the court applied the higher standard of "scrupulous exactitude" to a warrant authorizing the seizure of "photographs, movies, slides, video tapes, magazines or drawings of children or adults engaged in sexual activities or sexually suggestive poses" and held the warrant to be overbroad. A search warrant that authorizes the officer to seize evidence of "child sex" is also insufficient to satisfy the particularity requirement of the Fourth Amendment. *State v. Reep*, 161 Wn.2d 808, 167 P.3d 1156 (2007).

A search warrant for documents generally is given closer scrutiny than one for physical objects because of the potential for intrusion into personal privacy. *Andresen v. Maryland*, 427 U.S. 463, 482 n. 11, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976); *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997), *cert. denied*, 523 US. 1008 (1998). A search warrant that describes particular documents authorizes the seizure of a computer when the searching agents reasonably believes that documents specified in the warrant

would be found stored in the computer. In this respect, computers are treated no differently than traditional file cabinets or home libraries. *United States v. Giberson*, 527 F.3d 882 (9th Cir. 2008).

A search warrant authorizing the seizure of property that is "inherently innocuous" (*i.e.* stolen television sets) must contain sufficient information to allow an officer to distinguish between a television set that is believe to have been stolen and a legally obtained television set. Information such as serial numbers, make, model, size, age, color, etc. of the sought after "inherently innocuous" items must be included in the search warrant itself.

A search warrant for property that is "inherently illegal" (*i.e.* controlled substances) may be adequate without specifying specific illegal drugs. *See State v. Chambers*, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997). This practice, however, should be avoided as nothing is lost by specifying the controlled substance believed to be present (*i.e.* crack cocaine). Any other controlled substances found during the search for the specific named substance is lawfully seized under the plain view doctrine discussed *infra*.

i. **Evidence of Dominion and Control.** Houses and vehicles ordinarily contain evidence identifying those individuals occupying or controlling them. Evidence identifying those in control of premises where stolen property, drugs, or a murder weapon is found tends to aid in conviction of the guilty party. A warrant may authorize seizure of evidence establishing a nexus between the suspect and the crime. *See Warden v. Hayden*, 387 U.S. 294, 307, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967). The section of the warrant that authorizes the seizure of such evidence is often referred to as a "dominion and control" clause. A dominion and control clause must be carefully written to avoid overbreadth challenges. *See, e.g., State v. Kealoha*, 62 Haw. 166, 613 P.2d 645 (1980) (language authorizing seizure of "property" tending to establish identity of persons in control of the premises too closely resembles wording of a forbidden general warrant and invites strong intrusion into private papers and other personal effects).

As a general rule, courts have upheld dominion and control clauses where the general catch-all phrase follows or precedes a list of specific items. *See Andresen v. Maryland*, 427 U.S. 463, 479-482, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976). Permissible language includes the following:

- **For Premises**: Articles of property tending to establish the identity of persons in control of the premises, including but not limited to rent receipts, utility bills or receipts, canceled mail envelopes, keys, identification cards, and mortgage documents.

- **For Vehicles:** Articles of property tending to establish the identity of persons in control of the vehicle, including but not limited to traffic tickets, insurance papers, car repair invoices or receipts, vehicle registration, keys, identification cards, and canceled mail envelopes.

See, e.g., United States v. Alexander, 761 F.2d 1294, 1302 (9th Cir. 1985) (collecting cases); *United States v. Honore*, 450 F.2d 31, 33 (9th Cir. 1971).

Do not incorporate or consolidate the provision authorizing the seizure of "dominion and control" evidence with a provision authorizing the seizure of other evidence. "Even if some of the items could relate to dominion and control of the premises, [an appellate court] will not engage in 'extensive "editing"'" of a warrant clause to identify potentially valid parts." *State v. Higgs*, 177 Wn. App. 414, 429, 311 P.3d 1266 (2013), *review denied*, 179 Wn. 2d 1024 (2014) (quoting *State v. Perrone*, 119 Wn.2d 538, 540, 834 P.2d 611 (1992). In *Higgs*, a rental agreement, a ed by probable cause, and therefore seizure of the rental agreement, the Department of Licensing document, and the driver's license were suppressed because the provision that authorized their seizure included permission to seize bank records and there was insufficient evidence to support a finding of probable cause for distribution or trafficking in controlled substances versus simple possession. *Higgs*, 177 Wn. App. at 428-29 ("'bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, pay stubs, tax statements, cashiers checks, bank checks, safe deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of money and/or dominion and control over assets and proceeds'" are unrelated to dominion and control (quoting warrant)).

ii. **Telephone Calls.** Valuable and relevant evidence may often be obtained by answering a suspect's telephone and conversing with the caller during a search. Officers having probable cause to believe the telephone at a location that is being used for illegal purposes may answer incoming phone calls even though the warrant does not include "phone calls" among the items to be seized. *State v. Goucher*, 124 Wn.2d 778, 881 P.2d 210 (1994).

It is recommended that officers wishing to answer the phone during the execution of a search warrant specifically request such authority in the warrant. If the officer wishes to record any such conversations, the officer should also obtain an order pursuant to Chapter 9.73 RCW.

It is unlikely that a search warrant will be for phone calls only. Usually, the phone call evidence will be sought in addition to other described items. Language describing phone calls as an item to be seized might be as follows:

A. In Affidavit or in Statement of Probable Cause

> . . . and all incoming telephone calls (searching officers request authorization to answer the phone and converse with callers who appear to be calling in regard to [state nature of crime] and note** the conversation without revealing their true identity).
>
> > ** When a Chapter 9.73 RCW order is also sought, the following language should be inserted at this point:
> >
> > > . . .and record pursuant to the contemporaneously sought RCW 9.73.130 intercept order. . .

B. In Warrant

> . . . and all incoming telephone calls (searching officers are authorized to answer the phone and converse with callers who appear to be calling in regard to [state nature of crime] and note** the conversation without revealing their true identity).
>
> > ** When a Chapter 9.73 RCW order is also granted, the following language should be inserted at this point:
> >
> > > . . .and record pursuant to the contemporaneously issued RCW 9.73.130 intercept order. . .

iii. **E-Mail and Text Messages.** Valuable and relevant evidence may often be obtained by answering a suspect's text messages or e-mails. A search warrant should be sufficient to review e-mails and text messages contained on a seized device. Officers, however, will need to obtain an RCW 9.73.130 intercept order if they wish to respond to the e-mail or text messages. *See State v. Roden*, 179 Wn.2d 893, 321 P.3d 1183 (2014) (a police officer reading an unopened text message on the recipient's devise is an "intercept" under Chapter 9.73 RCW); *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014) (the sender of an unopened text message has a Const. art. I, sec. 7 privacy right in the message).

iv. **Stolen Property.** The description should specify the stolen property

involved. Merely stating that "stolen property" is being sought will make the search warrant fatally defective as a general exploratory warrant.

Whenever possible, the description should include the type, make or manufacturer of the stolen item, serial number, size, color, height, weight, shape, etc.

> . . . one Sony brand, 42-inch color television set, gloss black finish, bearing serial number NG2828 4600.
>
> . . . one .32 caliber, Smith & Wesson revolver, bearing serial number RJC 6519.

If the list of the stolen items is extensive, a copy of a crime report containing an inventory of the stolen property can be attached to ***both*** the search warrant application and the search warrant.

> . . . the items of personal property designated Item No. 1 through Item No. 25 on the three page Stolen Property Report bearing DR. No. 10-5431 attached hereto and incorporated as Exhibit No. 1.

If an item of stolen property cannot be adequately described, a photograph or drawing of the item can be attached to ***both*** the search warrant application and the search warrant.

> . . . a gold ring with a four-carat diamond in the center, surrounded by three-leaf clusters of smaller diamonds, as shown on the hand of the woman in the photograph attached hereto and incorporated as Exhibit No. 1.

Crime victims may assist the police in the execution of a valid search warrant. "Where the civilian participating in the execution of a search warrant is the victim of a theft who has been requested by police to point out property that has been stolen from the victim, the courts have unanimously held that the civilian's presence did not affect the propriety of the search." Diane Schmauder Kane, *Civilian Participation in Execution of Search Warrant as Affecting Legality of Search*, 68 A.L.R. 5th 549 § 3(b) (1999) (collecting cases). *See also United States v. Robertson*, 21 F.3d 1030, 1034 (10th Cir. 1994) (carjacking victim's presence in defendant's residence was permitted to help identify items covered by warrant); *People v. Superior Court*, 25 Cal. 3d 67, 598 P.2d 877, 878, 157 Cal. Rptr. 716 (Cal. 1979) (participation of burglary victim to identify stolen property was a highly effective technique); *People v. Boyd*, 123 Misc. 2d 634, 474

N.Y.S.2d 661, 665 (Sup. Ct. 1984) (participation of crime victim is a demonstration of police efficiency and provides a fair method of assuring that the search is not executed in excess).

The search warrant application must explain the need for the crime victim's assistance and the search warrant must expressly authorize the crime victim's presence during the execution of the search warrant. Finally, the civilian's role is limited to identifying the objects. The police officer must make the actual seizure.

e. **Oath**. The Fourth Amendment specifies that warrants may only be issued "upon probable cause, supported by Oath or affirmation". No particular ceremony is necessary to constitute the act of swearing.

The question whether a statement is made under oath or affirmation turns on whether the declarant expressed the fact that he or she is impressed with the solemnity and importance of his or her words and of the promise to be truthful, in moral, religious, or legal terms. The Wisconsin Supreme Court has recently provided an eloquent explanation for the role that an oath or affirmation plays in a probable cause determination:

> The purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth. An oath or affirmation to support a search warrant reminds both the investigator seeking the search warrant and the magistrate issuing it of the importance and solemnity of the process involved. An oath or affirmation protects the target of the search from impermissible state action by creating liability for perjury or false swearing for those who abuse the warrant process by giving false or fraudulent information. An oath preserves the integrity of the search warrant process and thus protects the constitutionally guaranteed fundamental right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

State v. Tye, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473, 478 (Wis. 2001) (footnotes omitted). The Second Circuit has expressed the purpose of the oath or affirmation similarly:

> An "Oath or affirmation" is a formal assertion of, or attestation to, the truth of what has been, or is to be, said. It is designed to ensure that the truth will be told by insuring that the witness or affiant will be impressed with the solemnity and importance of his words. The theory is that those who have been impressed with the moral, religious or legal significance of formally undertaking to tell the truth are more likely to do so than those who have not made such an undertaking or been so impressed.

Turner, 558 F.2d at 50.

United States v. Bueno-Vargas, 383 F.3d 1104, 1110-11 (9th Cir. 2004), *cert. denied*, 543 U.S. 1129 (2005).

Ultimately, the "true test" of whether the required "oath or affirmation" was made is whether the procedures followed were such that perjury could be charged therein if any material allegation contained therein is false. *United States v. Bueno-Vargas*, 383 F.3d 1104, 1111 (9th Cir. 2004), *cert. denied*, 543 U.S. 1129 (2005).

In Washington, a oath for purposes of a perjury prosecution includes

- **Oral Oath.** An oral oath administered by a judge, notary public or other person authorized by law to administer an oath. *See* RCW 9A.72.010(2) and (3). (When obtaining a telephonic search warrant in the middle of the night, it is the officer's responsibility to ensure that the semi-awake judge remembers to administer the oath prior to hearing the testimony.

- **Affidavits.** A written statement is "under oath" if the statements recites that it was made under oath, the declarant was aware of such recitation at the time of making the sentence, and the declarant intends the statement to be treated as a sworn statement, and the statement is signed by an officer authorized to administer an oath. *See* RCW 9A.72.010(2)(b) and (3).

- **Declarations.** A written statement is "under oath" if the document (1) Recites that it is certified or declared by the person to be true under penalty of perjury; (2) Is subscribed by the person; (3) States the date and place of its execution; and (4) States that it is so certified or declared under the laws of the state of Washington. The certification or declaration may be in substantially the following form:

  "I certify (or declare) under penalty of perjury under

> the laws of the State of Washington that the foregoing is true and correct":
>
> . . . . . .
>
> (Date and Place) (Signature)

RCW 9A.72.085. *See also* RCW 9A.72.010(2)(c); GR 13.

Laws of 2014, ch. 93, sec. 4, amends RCW 9A.72.085 to allow a police officer to "sign" a declaration "that is electronically submitted to a court, a prosecutor, or a magistrate from an electronic device that is owned, issued, or maintained by a criminal justice agency if he or she is a law enforcement officer" by affixing or logically associating "his or her full name, department or agency, and badge or personnel number to the document." Ideally the signature block on such a document will be substantially similar to this:

> I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
>
> This declaration was submitted to a court, a prosecutor, or a magistrate from an electronic device that is owned, issued, or maintained by the below-identified criminal justice agency on this _____ day of 20____, at _____, Washington.
>
> /s/ Officer's Full Name
>
> Officer's badge or personnel number
>
> Officer's agency

The Ninth Circuit has determined that a signed declaration that is faxed to the magistrate will satisfy the Fourth Amendment "oath" requirement. *United States v. Bueno-Vargas*, 383 F.3d 1104, 1111 (9th Cir. 2004), *cert. denied*, 543 U.S. 1129 (2005); *Jones v. City of Santa Monica*, 382 F.3d 1052, 1056 (9th Cir. 2004).

f. **Record**. A record must be made of the testimony given to the issuing magistrate. The record is generally generated through the production of a written affidavit or declaration in support of the issuance of a search warrant. The record may also be generated through the production of live witnesses. When live testimony is tendered either in addition to the written submission or in lieu of the written affidavit, such as during a telephonic search warrant, the office must ensure that the testimony is being recorded by a court reporter or electronic device. Officers who obtain telephonic search warrants

should always personally check the recording device to ensure that the testimony was received prior to disconnecting from the judge, or should request that the judge check the recording device prior to ending the call to ensure that the testimony was collected.

Laws of 2014, chapter 93, section 3 allows officers to submit an application for a search warrant to a magistrate by e-mail. The magistrate may communicate his or her permission to sign the search warrant by e-mail. In such cases, a copy of the e-mails must be preserved and filed with the issuing court.

i. Completeness/Accuracy. All material information, both inculpatory and exculpatory, must be contained in an affidavit. Information known to the officer that supports probable cause that is not included in the affidavit in support of search warrant may not be considered in a subsequent challenge to the search warrant.

The material must be as accurate as possible. A hearing may be held by a judge to determine if there are material omissions from the affidavit. If an omission was made knowingly or intentionally or with a reckless disregard for the truth, the court will add the information and retest the affidavit in support of a warrant for probable cause. The same test applies to material misrepresentations. *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978); *State v. Garrison*, 118 Wn.2d 870, 827 P.2d 1388 (1992).

- **Criminal history of informants.** A known informant's criminal history, including all convictions for crimes of dishonesty (theft, forgery, etc.), should always be included in the search warrant affidavit. *See United States v. Elliott*, 322 F.3d 710 (9th Cir. 2003).

- **Alibi.** Law enforcement should disclose information known to them about the whereabouts of the suspect at the time of the commission of the crime. *See generally Bravo v. City of Santa Maria*, 665 F.3d 1076 (9th Cir. 2011) (the Fourth Amendment was violated by the issuance and execution of a search warrant whose application failed to disclose that the suspect, a known gang member, was at the time of obtaining the warrant, and for over six months prior, had been incarcerated in the California prison system and therefore not only was not present at the home but also could not have been involved in the shooting or storage of weapons used in the shooting).

- **Suspect's Version of Events.** While best practices may dictate that the police obtain both sides of a story where practicable, the law simply does not mandate such diligence.

There is no requirement that officers obtain both sides of a story where practicable prior to applying for a search warrant, and the fact that a suspect denies an essential element of a crime does not automatically negate probable cause. *See Cameron v. Craig*, 713 F.3d 1012, 1019 (9th Cir. 2013). Nonetheless, an officer who is aware of the suspect's version of events should include that information in the search warrant application.

- **Ulterior motivations.** Law enforcement officers must ordinarily disclose information regarding whether an informant has ulterior motivations for providing information for a search warrant affidavit. This information includes biases for or against the suspect, and inducements such as financial rewards or leniency with respect to an informant's pending charges. *See, e.g., United States v. Martinez-Garcia*, 397 F.3d 1205, 1216 (9th Cir. 2005).
- **Computers.** An affidavit's failure to provide general information about hacking, IP Spoofing, or internet hijacking does not constitute a "deliberate or reckless omission of facts" that will support a *Franks* hearing. *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008).
- **Medical Cannabis.** A police officer is not required to establish probable cause to believe that marijuana is being maintained in violation of the "medical marijuana" laws codified in Chapter 69.51A RCW. *See State v. Reis*, ___ Wn. App. ___, 322 P.3d 1238 (2014); *State v. Ellis*, 178 Wn. App. 801, 315 P.3d 1170 (2014).

g. **Probable Cause.** The warrant must be issued upon probable cause. This probable cause is slightly different than the probable cause to make an arrest. Probable cause to arrest concerns the guilt of the arrestee, whereas probable cause to search an item concerns the connection of the items sought with crime and the present location of the items. Probable cause to search or seize may exist even though probable cause to arrest does not. *See generally United States v. O'Connor*, 658 F.2d 688, 693 n.7 (9th Cir. 1981). *Accord Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.").

Conclusory statements must be avoided in providing probable cause for a search warrant. Instead, detailed information about the investigation, the training, knowledge and experience of the affiant, and other factors must be

given.

i. **Factors.** In determining the accuracy of probable cause the courts consider two factors:

- Basis of Information
- Credibility of Information

ii. **Basis of Information.** Information contained in an affidavit in support of a search warrant can include first person observations and hearsay (statements made to the affiant by another person). The source of hearsay offered in support of a search warrant can include other police officers, victims, citizen witnesses, and professional informants. Such hearsay will only be adequate to support probable cause if it is demonstrated that the informant had the opportunity to collect the information that was provided, that the informant had the knowledge necessary to understand what was seen (*i.e.* past exposure to marijuana), and that there is reason to believe the informant. These two concerns stem from the United States Supreme Court cases of *Aguillar-Spinelli*.

Information contained in an application for issuance of search warrant that is obtained illegally, such as through a warrantless entry onto property, will be struck from the application upon later review and the warrant will be declared invalid if the remaining evidence does not support review.

While some cases indicate that evidentiary rules which would bar consideration of testimony at trial does not always preclude the consideration of such evidence in determining whether there is probable cause for the issuance of a search warrant, an careful officer should limit his or her inclusion of statements from clergy regarding statements made to him or her by a penitent, etc. *See, e.g., State v. Cahoon*, 59 Wn. App. 606, 611-12, 799 P.2d 1191 (1990), *review denied*, 116 Wn.2d 1014 (1991) (physician/patient privilege did not preclude consideration of statements contained in application for search warrant); *State v. Bonaparte*, 34 Wn. App. 285, 289, 660 P.2d 334, *review denied*, 100 Wn.2d 1002 (1983). (spousal testimonial privilege did not preclude consideration of statements contained in application for search warrant); *State v. Osborne*, 18 Wn. App. 318, 569 P.2d 1176 (1977) (spousal testimonial privilege did not preclude consideration of statements contained in application for search warrant).

An informant's personal observations can satisfy the basis of knowledge prong of *Aguilar-Spinelli*. *State v. Wolken*, 103 Wn.2d 823, 827, 700 P.2d 319 (1985).

iii. **Reliability of Information**. Information will only be considered reliable if the application for search warrant supports an inference that the person who made the observations had an opportunity to observe the information and that the person who made the observations had sufficient experience or training to know what they saw.

- Example: "Informant X has told affiant that heroin is located at ...." would be insufficient. The correct way would be "Informant X has told affiant that he observed heroin at ..... on .... date. Informant X knows what heroin looks like because .... or Informant X believes that the substance he observed is heroin because ....., the owner of the address to be searched, told Informant X that the substance was heroin and the owner was packaging the heroin for sale."

If the information contained in an application for search warrant concerns the results of a scientific test, *i.e.* portable breath test, the application for search warrant must contain some reason why the test should be believed (*i.e.* a reading of .095 was obtained on my departmental issued PBT that has been certified in accordance with the regulations promulgated by the state toxicologist). *See, e.g., Bokor v. Department of Licensing*, 74 Wn. App. 523, 874 P.2d 168 (1994) (PBT results could not be used in consideration of whether the Trooper has probable cause to arrest absent evidence that would permit the trier of fact to conclude that the test was reliable). Test results, however, do not have to meet courtroom admissibility standards to be considered by a magistrate in deciding whether or not probable cause has been established. *See, e.g. State v. Clark*, 143 Wn.2d 731, 749-50, 24 P.3d 1006 (2001) (polygraph test administered by FBI agent had corroborative value); *State v. Cherry*, 61 Wn. App. 301, 810 P.2d 940, *review denied*, 117 Wn.2d 1018 (1991) (court permitted results of polygraph tests to be used to determine existence of probable cause).

h. **Informants.** Informant testimony must satisfy both the veracity and the knowledge prongs of *Aguillar-Spinelli*. If an informant's tip fails one or the other prong, probable cause may yet be established by independent police investigation the corroborates the tip. The additional investigation must do more than merely verify innocuous details, commonly known facts, or easily predictable events. The police investigation must point to indications of criminal activity along the lines suggested by the informant. *State v. Kennedy*, 72 Wn. App. 244, 864 P.2d 410 (1993); *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110, *review denied*, 124 Wn.2d 1029 (1994).

Washington courts have divided informants into a number of "types". The degree of corroboration necessary to satisfy the "credibility" prong of

probable cause varies with the type of informant used. The degree of corroboration necessary to satisfy the "credibility" prong may be increased for a particular informant if the informant has been convicted of any "crimes of dishonesty" such as theft, forgery, and fraud. *See, e.g., United States v. Elliott*, 322 F.3d 710 (9th Cir. 2003).

i. **Anonymous Informant**. An anonymous informant is someone who is not even known to the police. Wholly anonymous informants will never, by their tip alone, satisfy the two prong requirement of *Aguillar-Spinelli*. Independent police investigation is necessary to obtain a search warrant where the investigation was initiated by an anonymous informant. Merely verifying innocuous facts or events that are not per se illegal will not support the issuance of a search warrant. *Compare State v. McPherson*, 40 Wn. App. 298, 698 P.2d 563 (1985) (increased power usage insufficient to remedy deficiencies in *Aguillar-Spinelli*), *with State v. Ladvik*, 40 Wn. App. 257, 698 P.2d 1064 (1985) (heavy foot traffic and exchange of bag for money cured deficiencies in *Aguillar-Spinelli*) and *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110, *review denied*, 124 Wn.2d 1029 (1994) (increased power usage and a "plain sniff" by police cured deficiencies in *Aguillar-Spinelli*).

ii. **Citizen Informant.** When the informant is an ordinary citizen, as opposed to a criminal or professional informant, and his identity is revealed to the magistrate, the veracity prong of *Aguillar-Spinelli* is relaxed. Such citizens will rarely have a "track record" of prior tips with which to show reliability, instead, reliability will be inferred from the details of the affidavit setting forth the basis of knowledge, and from the citizen's willingness to come forward and be identified. *See, e.g., State v. Tarter*, 111 Wn. App. 336, 44 P.3d 899 (2002). The information must still satisfy the independent basis of knowledge test. This can generally be done by showing that the informant has personally seen the facts asserted and is passing on firsthand information. *State v. Smith*, 110 Wn.2d 658, 663, 756 P.2d 722 (1988); *State v. Jackson*, 102 Wn.2d. 432, 437, 688 P.2d 136 (1984); *State v. Wible*, 113 Wn. App. 18, 23, 51 P.3d 830 (2002).

A different analysis applies when the identify of the citizen informant is made known to police to police, but withheld from the affidavit and the magistrate for fear of discovery and reprisal In such cases, it is necessary for the police to interview the citizen and independently verify background information, such as lack of criminal record and ties to the community. The affiant should then set forth in the affidavit the extent of the background check and legitimate reasons why the citizen informant wishes to remain anonymous:

i.e. The citizen informant is a shopkeeper who has

> lived in Seattle for the last 20 years and who has no criminal history. The citizen informant does not wish his/her name to be disclosed in court documents as the informant has observed the suspect, Really Bad, brandishing a firearm and the citizen informant is aware that the suspect, Really Bad, has prior convictions for assault.

Legitimate reasons for keeping an informant's identity confidential include: (1) to retain his/her usefulness to law enforcement; and (2) because of danger to the informant's life or health.

Do not promise to keep the informant's identity totally confidential since the defendant may eventually be entitled to disclosure of the informant's identity. To obtain such a disclosure, the defendant must demonstrate the "materiality" of the informant. *See, e.g. State v. White*, 50 Wn. App. 858, 865, 751 P.2d 1202 (1988). If the State declines to reveal the informant's identity after the defendant makes the required showing, charges will be dismissed.

- If police merely have the name of a citizen informant, and no information regarding the citizen informant's background or ties to the community, then the court will apply the anonymous informant test to the information on the grounds that anyone can provide a name and the name given may not have even been the informant's true name. *See, e.g. State v. Hopkins*, 128 Wn. App. 855, 117 P.3d 377 (2005); *State v. McCord*, 125 Wn. App. 888, 106 P.3d 832, *review denied*, 155 Wn.2d 1019 (2005). It is a good idea to review the informant's picture identification or to obtain an address from the informant and an employer's name, etc.

The Department of Licensing (DOL) is treated as a citizen informant with respect to the information it provides law enforcement regarding enforcement regarding an individual's licensing status. *State v. Gaddy*, 152 Wn. 2d 64, 93 P.3d 872, (2004). DOL's basis of knowledge arises from its statutory obligation to regulate drivers' licenses in this state. DOL's records are presumptively reliable. A defendant may rebut that presumption, but to do so, the defendant must show that DOL's records are affected by systemic problems in maintaining accurate and reliable records of the millions of drivers DOL oversees. Mere proof that the defendant's driving records were inaccurate will not rebut the presumption. *Id.*

iii. **Professional Informant**. The most common way to satisfy the veracity prong when dealing with a "professional informant" is to evaluate the informant's "track record," *ie.,* the number of times he or she has provided accurate information to police in the past. A

mere conclusion that the confidential informant has been reliable in the past is insufficient. *State v. Woodall,* 100 Wn.2d 74, 666 P.2d 364 (1983). But some information that the informant's tips have led to arrests or convictions in the past may be enough to prove a credible track record. *State v. Fischer*, 96 Wn.2d 962, 639 P.2d 743 (1982); *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977).

Controlled buys are another way to establish an informant's reliability. The controlled buy must, however, be closely supervised with pre- and post- buy searches regarding both money and controlled substances so that the possibility that the drugs could have come from a source other than the suspect building or the suspect person is greatly reduced.

- **Canines**, such as drug dogs, are a type of professional informant. Evidence collected pursuant to a search warrant predicated upon a canine's alert, will be inadmissible if the issuing magistrate is not provided with sufficient evidence of the drug dog's reliability. A conclusory statement that the dog was "[t]rained to recognize the odor of illegal narcotics" is insufficient to establish reliability. *State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008).

  On the other hand, a strict evidentiary checklist to assess a drug-detection dog's reliability is not required to establish probable cause for arrest or a warrant. A probable-cause hearing focusing on a dog's alert should proceed much like any other, with the court allowing the parties to make their best case and evaluating the totality of the circumstances. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. *See Florida v. Harris*, ___ U.S. ___, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013).

  A canine need not give a final indication before probable cause is established. *United States v. Thomas*, 726 F.3d 1086 (9th Cir. 2013). Probable cause for a search warrant or arrest may be found even when a canine does not alert on a package or container. *See, e.g., United States v. Lakoskey*, 462 F.3d 965, 976 (8th Cir. 2006); *United States v. Ramirez*, 342 F.3d 1210, 1212-13 (10th Cir. 2003). The fact that a controlled substance is found that the canine was not trained to detect does not vitiate probable cause. *See, e.g. United States v.*

Outlaw, 319 F.3d 701, 704 (5th Cir. 2003) ("That the suitcase the canine alerted to later turned out to contain PCP, a drug the dog was not trained to detect, simply does not vitiate the agent's reasonable suspicion under these facts."); *United States v. Robinson*, 707 F.2d 811, 815 (4th Cir. 1983) ("[The dog's] initial detection [ ] was sufficient to establish probable cause for a search for controlled substances — the fact that a different controlled substance was actually discovered does not vitiate the legality of the search.").

An officer seeking a search warrant based , in part, upon a narcotic canine's alert, must disclose to the magistrate the limitations of the canine due to its pre-Initiative 502 training. It is recommended that all post-December 6, 2012, search warrants based, in part, upon a canine that was trained to detect marijuana include the following language:

> Canine _____ was trained and certified prior to the effective date of Initiative 502. Canine _____ is trained to detect the presence of marijuana, heroin, methamphetamine, crack cocaine, and cocaine. Canine _____ cannot communicate which of these substances s/he has detected. Canine _____ can detect minuscule amounts of these five substances. Canine _____ cannot communicate whether the detected substance is present as residue or in measurable amounts. Despite these limitations, canine _____'s alert provides probable cause to believe that evidence of a Violation of a Uniform Controlled Substance Act may be found in (Describe location to be searched) when added to these additional facts . . .

iv. **Criminal Informant**. There are generally two types of criminal informants. The first groups involves those individuals who are providing information to the police in order to avoid criminal punishment for his/her own crimes ("working off a beef"). Courts have determined that since a reduction of charges is not likely for false information, that such informants have a strong incentive to provide accurate information. *See, e.g., State v. Bean*, 89 Wn.2d 467, 469-71, 572 P.2d 1102 (1978) (an informant who trades information for a favorable sentencing recommendation has a strong motive to be accurate); *State v. Estorga*, 60 Wn. App. 298, 305, 803 P.2d 813

(1991) (offer to drop charges in exchange for accurate information established strong motive to be truthful); *State v. Smith*, 39 Wn. App. 642, 647–48, 694 P.2d 660 (1984) (offer of reduction in charge from felony to misdemeanor gave informant strong motive to be truthful).

When an informant's statements are against the informant's penal interest, the probability that the information is accurate is heightened. *State v. Chamberlin*, 161 Wn.2d 30, 42, 162 P.3d 389 (2007) (informant's confession of driving under the influence of narcotics, supported by his willingness to be a named informant, established reliability); *State v. Merkt*, 124 Wn. App. 607, 613-14, 102 P.3d 828 (2004); *State v. Shaver*, 116 Wn. App. 375, 380–81, 65 P.3d 688 (2003) (confidential informant relayed comments against penal interest made by suspected drug dealer). When preparing an application for search warrant predicated upon statements against penal interest, be sure to identify any information regarding the crime that the informant disclosed that was not generally known to the public at the time of the statement (*i.e.* individual who admits to murder who indicates the type of weapon that was used, or the location of the wounds, etc. when such information has not yet been released to the press).

The second group of criminal informants are the unknown and generally unwitting middlemen. An example of such an "informant" occurs when a CI arranges to purchase drugs from an unknown source through a middleman and the middleman is observed by the police leaving the CI, entering the defendant's house and returning to the CI and delivering cocaine. Police do not need to establish the middleman's veracity in order to establish probable cause to search the defendant's home. *See State v. Mejia*, 111 Wn.2d 892, 766 P.2d 454 (1989).

v. Police Officer Informant. Police officers and other law enforcement officers are considered credible by virtue of their occupation. The affiant need only state that the person from whom he received information is a police officer in order to satisfy the requirement of reliability. The affiant must still identify the police officer informant's basis of knowledge.

Reference by the affiant to another officer should clearly establish the latter's identity and status as a law enforcement officer.

> . . . On [DATE], I was told by my fellow officer, Sgt. Dudley Doright, No. 112204, Walla Walla Police Department, that he had observed . . .

Obviously, a police officer acting as a conduit cannot transform information that is unreliable into information that is reliable. Information from a source that is unreliable retains its original

character as unreliable information, even if it is given to a police officer who then passes it on to a police officer-affiant.

vi. **Informant Sworn Before Magistrate.** If an informant can give factual information but does not fit within any of the previous categories of reliable informants and the information cannot be shown reliable by other corroboration, the informant may nevertheless be deemed reliable if he personally swears to the truth of his information before the issuing magistrate. *See, e.g., McLaughlin v. State*, 818 P.2d 683, 686 (Alaska App. 1991) ("As with any other similarly situated witness, the informant's willingness to submit to an oath, and his personal presence and the availability for questioning by the magistrate [provide] adequate procedural safeguards to assure a sound basis for assessing veracity and reliability."); *Latham v. State*, 790 P.2d 717, 720 (Alaska Ct. App. 1990) ("When an informant appears before a judge or magistrate and testifies under oath concerning personal observations, there is no comparable need for extrinsic corroboration of the informant's veracity: the presiding judge or magistrate is able to observe the informant's demeanor, is capable of questioning the informant, and is provided further assurance by the fact that the informant's testimony is under oath "); *State v. Roth*, 269 N.W.2d 808 (S.D. 1978) (informant's physical presence before the magistrate was sufficient to establish credibility); *Polston v. Commonwealth*, 24 Va. App. 738, 485 S.E.2d 632 (1997) (informer's credibility can be established for Fourth Amendment purposes by the informer's personal appearance before the issuing magistrate and his testimony under oath); *Rainey v. State*, 74 Wis. 2d 189, 246 N.W.2d 529 (1976) (a police informant's desire to remain anonymous had no affect on the validity of a search warrant where the unnamed informant personally appeared before the magistrate and testify under oath; magistrate was in a position to personally observe the informant and to evaluate for himself, first hand, the informant's reliability and credibility).

In a sense, this procedure is analogous to a witness testifying in court and a judge basing his verdict upon his assessment of that testimony. Just as a judge can find a defendant guilty of a crime based upon the testimony of a single witness, so can a magistrate find probable cause to search based upon the sworn statement of an informant appearing before him. If the magistrate does not believe the informant to be credible, he or she then will not issue the requested search warrant.

In taking an informant directly to the issuing magistrate, the following procedure is suggested:

A. The statement of the informant should be set forth in the form of an affidavit on a separate piece of paper. It should be

headed "Statement of (informant's name)." The statement should include the identity of the informant, his information, and the manner in which he obtained his information. It should be as detailed and factual as possible, and demonstrate that he is speaking from personal knowledge. It should be written in the first person, i.e., "I saw . . ."

B. The police officer/affiant will prepare his own affidavit in support of the warrant. He will attach and incorporate by reference in his affidavit the informant's statement and describe the manner in which he obtained that information from the informant. The following is an example:

> . . . On [DATE], at 2:10 PM, your affiant was introduced to Mr. Lee Stokes who was then in the custody of the Tacoma Police Department. Your affiant was informed by fellow officer Doreen Taras, No. 12642, that Mr. Stokes had been arrested earlier that day for possession of heroin. Your affiant spoke to Mr. Stokes. He stated he would assist your affiant in locating narcotics dealers in the Hilltop area. He then related the information set forth in the "Statement of Lee Stokes" which is attached hereto as Exhibit No. 1 and incorporated as if fully set forth herein.

The affiant will then complete his own affidavit. The statement of the informant will be plainly marked Exhibit No. 1 and attached to the officer's affidavit.

C. Both the affiant and the informant will then appear before the magistrate. The magistrate should read the entire affidavit, including the informant's statement. The informant should be introduced to the magistrate, the informant should be placed under oath, and the magistrate should be permitted to question the informant, if he wishes, and make additions or corrections to the informant's statement. The last line of the informant's statement should read, "I swear under penalty of perjury that this statement is true." He should then affix his signature and the date. Underneath the informant's signature, the magistrate should write, "I have examined (informant's name) under oath and find his/her statement to be truthful." This should be followed by the magistrate's signature and the date.

It is helpful to advise the informant of what will be required of him prior to his appearance before the magistrate.

The exchange between the magistrate and the informant must be recorded by some reliable method. *See generally* CrR 2.3(c). The recording of the interaction becomes part of the search warrant application and may be considered by courts in responding to a challenge to the search warrant.

The use of informants sworn before magistrates may appear cumbersome but the procedure forecloses later attacks upon the reliability of the informant or upon the reasonableness of the affiant/officer relying upon the informant. Thus, this procedure should be used whenever appropriate.

i. **Staleness of the Information**. The warrant affidavit must set forth sufficient facts and circumstances to establish a reasonable probability that criminal activity is occurring or is about to occur. The passage of time between the known criminal activity and the issuance of the warrant is one factor to be considered by the magistrate in the probable cause determination. Timeliness is measured from when an informant observed the criminal activity, not from when the officer received the tip from an informant. *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012).

The test for staleness is one of common sense. The nature and scope of criminal activity are the primary factors to be considered in determining if too much time has passed for the information to be reliable. Whereas a two week lapse between the informant's observations and the warrant request was too long where the criminal activity was drug sales, it was not too long where the activity observed was an extensive marijuana growing operation. While time is only one factor in resolving a staleness challenge, case law identifies some time periods that should be taken into consideration:

i. **Intoxication / Breath or Blood Alcohol Test** – Within 6 hours of the traffic stop. *State v. Dugas*, 296 S.W.3d 112 (Tex. Crim. App. 2009).

- Careful officers will always include the time of the stop in a search warrant application for blood. *See generally Crider v. State*, 352 S.W.3d 704 (Tex. Crim. App. 2011) (blood alcohol suppressed as the affidavit in the case did not explicitly state when the officer stopped the defendant and there could have been a twenty-five-hour gap between the time the officer first stopped appellant and the time he obtained a search warrant for blood; affidavit stated that "On or about 6-06-2008" the officer stopped the suspect vehicle and the search warrant was issued at 1:07 a.m. on June 7, 2008); *with State v. Jordan*, 342 S.W.3d 565 (Tex. Crim. App. 2011) (blood alcohol test admissible where, despite the officer's failure to explicitly state when the defendant was stopped, it was obvious from the context that less than 4 hours had elapsed before the search warrant was issued; affidavit states that the

officer had " "good reason to believe that heretofore, on or about the 6th day of June, 2008" and the warrant was issued at 3:54 a.m. on June 6, 2008).

ii. Odor of Methamphetamine — 48 to 72 hours

See, e.g., United States v. Morrison, 594 F.3d 626 (8th Cir. 2010) (three to four day period between the police drive-by during which chemical odors associated with Methamphetamine production and the execution of the warrant did not render the information obtained via the drive-by presumptively stale)

iii. Odor of Burning Marijuana – 24 to 48 hours if there is evidence that this is not a single isolated event.

The odor of burning marijuana emanating from the open front door of a single home would lead a reasonable officer to believe that marijuana was probably present in the residence. If an officer had only the evidence of the odor of burning marijuana and knew nothing more about the circumstances concerning the detection of the odor, the involved dwelling and its occupants, then the reasonableness of believing the marijuana remained in the dwelling would dissipate quickly with the passage of time. *United States v. Harwell*, 426 F. Supp. 2d 1189 (D. Kan. 2006) (odor of burning marijuana, suspicious behavior toward the management company's employees, time of day, and recent prior drug arrests of two residents of the home, supported an inference that the use of controlled substances was not a single isolated event, thus search warrant issued 48 hours after the odor was detected was not stale).

iv. Marijuana Grow/Odor of Fresh Marijuana — 2 weeks. Longer periods may be sustained if the evidence supports an extremely large grow.

See, e.g., State v. Dobyns, 55 Wn. App. 609, 779 P.2d 746, *review denied*, 113 Wn.2d 1029 (1989) (information contained in search warrant affidavit alleging growing marijuana at a residence not stale, even after lapse of six weeks, in light of the ongoing nature of growing operations); *State v. Payne*, 54 Wn. App. 240, 246-47, 773 P.2d 122, *review denied*, 113 Wn.2d 1019 (1989) (informant's tip about marijuana growing operation, three weeks old on date of search warrant affidavit, not too stale to establish probable cause, where reported extensive growing operation allowed magistrate to reasonably infer that operation was continuing); *State v. Hall*, 53 Wn. App. 296, 766 P.2d 512, *review denied*, 112 Wn.2d 1016 (1989) (lapse of two months since informant had been present in house to make marijuana purchase did not render information stale for purpose of search warrant affidavit because it was reasonable to

believe that established growing operation was still in existence based on the number of plants found at another location and informant's comment regarding size of plants remaining at house.); *State v. Petty*, 48 Wn. App. 615, 621-22, 740 P.2d 879, *review denied*, 109 Wn.2d 1012 (1987) (information in affidavit in support of a search warrant based on an informant's observation of marijuana plant growing in house two weeks earlier was not stale, given nature and scope of activity and fact that police officer detected odor of marijuana from doorway of house on day before he sought warrant).

v. **Controlled Buys** – 2 weeks if suspect is a "known drug dealer". Mere days if not.

See, e.g., United States v. Jeanetta, 533 F.3d 651, 655 (8th Cir.), *cert. denied*, 129 S. Ct. 747 (2008) ("two week period between the controlled buy and issuance of the warrant did not render the informant's information presumptively stale"); *United States v. Formaro*, 152 F.3d 768, 771 (8th Cir. 1998) (" [T]he two and one-half weeks lapse did not negate the existence of probable cause . . . .") (quoting *United States v. LaMorie*, 100 F.3d 547, 552 (8th Cir. 1996)); *United States v. Ortiz*, 143 F.3d 728, 732-33 (2d Cir. 1998) ("In investigations of ongoing narcotics operations, 'intervals of weeks or months between the last described act and the application for a warrant [does] not necessarily make the information stale.'" *quoting Rivera v. United States*, 928 F.2d 592, 602 (2d Cir. 1991)); *see also United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) ("With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity.") (*quoting United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986)); *State v. Perez*, 92 Wn. App. 1, 963 P.2d 881 (1988), *review denied*, 137 Wn.2d 1035 (1999) (4-day interval with know drug dealer sufficient to defeat a staleness challenge); State v. Bittner, 66 Wn. App. 541, 547, 832 P.2d 529 (1992), review denied, 120 Wn.2d 1031, 847 P.2d 481 (1993) (because the affidavit did not state that the defendant was a known drug dealer and the single, unobserved transaction was not corroborated by any other evidence, a one-week delay rendered the warrant invalid)State v. Higby, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980) (one sale of a small amount of marijuana did not establish probable cause to search two weeks later).

vi. **Child pornography** – Several months.

See, e.g., United States v. Estey, 593 F.3d 836, 840 (8th Cir. 2010) (search warrant issued five months after discovering information linking the defendant's residence with child pornography valid); *United States v. Horn,* 187 F.3d 781, 786-787 (8th Cir 1999) (warrant not stale three or four months after child pornography information

was developed); *United States v. Davis,* 313 Fed. Appx. 672, 674, (4th Cir. 2009) (holding that information a year old is not stale as a matter of law in child pornography cases); *United States v. Hay*, 231 F.3d 630, 636 (9th Cir. 2000) (warrant not stale for child pornography based on six-month old information); *United States v. Lacy*, 119 F.3d 742, 745-46 (9th Cir. 1997) (warrant upheld for child pornography based on ten month old information); *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009), *review denied*, 168 Wn.2d 1027 (2010) (5 months okay, citing cases that upheld time periods as long as 2 years).

vii. Computers

"Staleness" is rarely relevant when a computer file was the subject of the search as a "deleted: file will remain on a computer and will normally be recoverable by computer experts until overwritten. *United States v. Seiver*, 692 F.3d 774 (2012), *cert. denied*, 184 L. Ed. 2d 703 (2013). *Accord State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009) (evidence in the form of metadata can likely be found on computer hardware even if the contraband itself can no longer be viewed on the computer).

viii. Firearms – 10 days

See, e.g., United States v. Perry, 531 F.3d 662 (8th Cir. 2008) (four month-old information indicating that a suspect possessed firearms was not stale because survivalists and firearm enthusiasts retain their weapons for a long period of time); *United States v. Shomo*, 786 F.2d 981, 984 (10th Cir. 1986) (search warrant issued ten days after the defendant was observed leaving his residence carrying a pistol in his pocket not stale, as people generally keep pistols and other weapons at their homes or on their persons); *United States v. Rahn,* 511 F.2d 290 (10th Cir.) (warrant to search for guns issued on information eighteen months old not stale when affidavit showed the defendant had said guns would appreciate in value if kept, had been seen making personal use of one gun, and search of records of area pawnshops revealed no sales by the defendant); *United States v. Foster*, 897 F. Supp. 526 (1995) (3 week gap in time between when informant traded guns to defendant in exchange for drugs and issuance of search warrant to look for the guns at the defendant's home did not invalidate the search warrant); *Allen v. State*, 798. N.E.2d 490 (Ind. Ct. App. 2003) (holding that the information upon which the warrant was based was not stale because the type of evidence sought (handguns and rifles) were the type of property that a person reasonably could be expected to keep for over one month).

j. Nexus. To establish probable cause, the affidavit supporting the search warrant must "set[ ] forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal

activity and that evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The affidavit must establish "'a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

i. Link to Place to Be Searched. The application for search warrant must establish a factual link between the place to be searched and the crime. Boilerplate generalizations in affidavits regarding the habits and practices of drug dealers, child pornographers, etc., will be insufficient to produce probable cause without a specific factual nexus (*i.e.* where grow operation is at an open field a warrant will not be obtainable for the suspect's house merely by indicating that drug dealers tend to keep detailed grow records in their homes).

It is, however, reasonable to believe when the crime in question is theft, burglary or robbery in which valuable property was obtained by the perpetrator to infer that the criminal would have the fruits of his crime in his residence, vehicle or place of business. This assumption will only be valid for a reasonable period of time after the commission of the crime and only if there is some evidence that the perpetrator had an opportunity to reach his vehicle, home, or place of business between the commission of the crime and the issuance of the search warrant. *See State v. McReynolds*, 104 Wn. App. 560, 17 P.3d 608 (2000).

Exceptional scrutiny will be given to search warrants for the contents of a home computer. The nexus that must be shown between the crime and the computer in sex offenses must include more than a general statement that sex offenders "often keep notes, newspaper clippings, diaries and other memorabilia of their crimes" and that such items were found on suspects' computers in other sexual assault cases. *State v. Nordlund*, 113 Wn. App. 171, 53 P.3d 520 (2002). Even proof that an individual has a subscription to a website service that provides access to child pornography may not be support a search warrant for the individual's computer. *United States v. Gourde*, 382 F.3d 1003 (9th Cir. 2004). Search warrants for home computers have been upheld where a computer technician notified the police that the suspect's computer files had names suggesting pornographic images and that some of the reviewed videos appeared to involve children younger than 18. *See State v. Wible*, 113 Wn. App. 18, 51 P.3d 830 (2002).

A nexus to search a drug dealer's home can be established by evidence that the drug dealer left from and returned to the home before and after selling drugs. *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006).

ii. **Link to Item to Be Seized.** The link between the criminal activity and the item to be seized does not require that the item to be seized was an instrument used in the crime or proceeds of the crime A sufficient link is demonstrated if the evidence can assist in identifying persons of interest. *See State v. Powell*, COA No. 43585-3-II, ___ Wn. App. ___, ___ P.3d ____ (Jun. 10, 2014) (sufficient nexus between a woman's disappearance and presumed murder and the woman's journals– journals would assist in identifying the date of her disappearance, could provide information as to the relationship between the victim and a person of interest in the presumed murder, could assist police in determining the existence of any additional persons involved romantically with the victim, and could provide information as to the victim's state of mind).

k. Anticipatory Search Warrants

An "anticipatory search warrant" is one issued with the expectation that it will not be served unless a specific event occurs.

> *i.e.* UPS discovers that there are drugs in one of the packages they have received for delivery. UPS calls police. Police obtain search warrant for package, determines that yes it is drugs. Police then obtain a search warrant for the location where the package is to be delivered, to only be executed upon once UPS delivers the package to that address.

Any warrant requires the issuing magistrate to determine:

> (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed.

United States v. Grubbs, 547 U.S. 90, 164 L. Ed. 2d 195, 203, 126 S. Ct. 1494 (2006).

When dealing with an anticipatory search warrant, two prerequisites of probability must be satisfied:

> It must be true not only that *if* the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place," but also that there is probable cause to believe the triggering condition *will occur*. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination. [Citations omitted.]

United States v. Grubbs, 547 U.S. 90, 164 L. Ed. 2d 195, 204, 126 S. Ct. 1494 (2006).

While there is no requirement that the triggering condition appear on the face of the warrant, *Grubbs*, 164 L. Ed. 2d at 204-205, the better practice is to

include the triggering condition on the face of the warrant to avoid misunderstandings.

Washington law is not clear on whether "anticipatory search warrants" are authorized under Const. art. I, § 7, but if one is obtained any search conducted prior to the condition being met will be considered to be a warrantless search. *State v. Nusbaum*, 126 Wn. App. 160, 107 P.3d 768 (2005).

l. Protecting the Integrity of the Investigation

All documents filed with a court are presumptively open to the public. *See generally* Const. art. I, § 10; GR 15. Applications for search warrants and search warrants may be sealed up until the filing of charges by the court when necessary to protect an investigation. *See Seattle Times v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986); *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981).

A motion to seal the affidavit in support of the warrant, the warrant, the return of service, and the inventory of items that were seized, must be presented to the issuing magistrate when the warrant is obtained. The motion must contain specific reasons, supported by facts, demonstrating that a substantial threat exists to the interests of effective law enforcement or individual privacy and safety and that these interests cannot be protected by deletion of the harmful material rather than sealing the entire file. The motion to seal can be made part of the affidavit for the issuance of the search warrant.

The order granting the motion to seal, a transcript of the hearing on the motion to seal, and the judge's written finding of fact and conclusions of law explaining the reasons for sealing the documents must be made available for public inspection.

m. Other Issues to Consider

i. Refusal to Grant Consent. An individual's refusal to grant consent to a search may not be used to establish probable cause to search. *See, e.g., United States v. Hyppolite*, 65 F.3d 1151, 1157 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1558 (1996); *State v. McGovern*, 111 Wn. App. 495, 501 n. 18, 45 P.3d 624 (2002). An exception to this rule exists when the individual does not have a constitutional right to refuse the search. *See, e.g., State v. Mecham*, COA No. 69613-1-I, ___ Wn. App. ___, ___ P.3d ___ (Jun. 23, 2014) (because a defendant does not have a constitutional right to refuse to perform FSTs as part of a lawful *Terry* stop, the trier of fact may consider the defendant's refusal to perform tests).

ii. Prior Convictions and Prior Arrests. Prior convictions are properly considered in determining whether probable cause exists, but prior arrests may not be. *State v. Tarter*, 111 Wn. App. 336, 44

P.3d 899 (2002). *But see United States v. Conley*, 4 F.3d 1200, 1207 (3d Cir. 1993), *cert. denied*, 510 U.S. 1177 (1994) ("The use of prior arrests and convictions to aid in establishing probable cause is not only permissible, . . ., but is often helpful. This is especially so where, as in the matter presently before the court, the previous arrest or conviction involves a crime of the same general nature as the one which the warrant is seeking to uncover." (citations omitted.)).

iii. **Attorney's Offices.** A search warrant for an attorney's office will require the appointment of a special master or the creation of a "taint team" or "privilege team". *See, e.g., United States v. Law Offices of Brown and Norton (In re Search of Law Office, Residence, and Storage Unit)*, 341 F.3d 404 (2003); *DeMassa v. Nunez*, 747 F.2d 1283 (9th Cir. 1984); *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955 (3rd Cir. 1984). No search warrant should ever be sought for an attorney's office without the specific approval of a supervisor.

iv. **Medical Procedures or Tests.** A search warrant may issue for a search warrant for an x-ray or for other intrusion into a suspect's body. *See Schmerber v. California*, 384 U.S. 757, 770, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966); *United States v. Allen*, 337 F. Supp. 1041 (E.D. Pa. 1972). Such a search warrant must reveal a "clear indication" that the sought evidence will be found. *See, e.g., People v. Thompson*, 820 P.2d 1160 , 1163 (Colo. App. 1991). In addition, the court must consider whether the requested procedure will present a risk to the suspect's life or health. *Winston v. Lee,* 470 U.S. 753, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985). And, it must weigh the "individual's dignitary interests in personal privacy and bodily integrity" against the "community's interest in fairly and accurately determining guilt or innocence" in light of the other means of proof of guilt that may be available. *Winston v. Lee, supra*. Thus it is harder to get a search warrant for surgery than for a blood test. *Compare Winston v. Lee* (surgery), *with Schmerber*, 384 U.S. at 771 (discussing how common blood tests have become). Finally, the bodily intrusion must be performed by a properly trained medical personnel in a proper setting. *Schmerber,* 384 U.S. at 771. The search warrant must identify the non-police persons that will help in executing the search warrant.

v. **Claimed Defenses.** A suspect's claim of a defense, even if supported by evidence, does not negate probable cause and does not prevent the execution of a search warrant by officers. *See State v. Fry*, 168 Wn.2d 1, 228P.3d 1 (2010) (the production of a document purporting to be a medical marijuana use authorization did not negate probable cause; officers properly continued their search of the defendant's home as authorized in the warrant). This result holds true after the adoption of Laws of 2011, ch. 181, § 401. *See See State v. Reis*, ___ Wn. App. ___, 322P.3d 1238 (Mar. 31, 2014) (The 2011

amendments to the Medical Use of Cannabis Act, chapter 69.51A RCW, do not require that a search warrant for violation of marijuana laws establish probable cause of a violation of medical marijuana laws. "Qualifying patients" and "designated providers" under the Act are able to assert only an affirmative defense at trial to a charge of a violation of marijuana laws); *State v. Ellis*, 178 Wn. App. 801, 315 P.3d 1170 (2014) (Because the Medical Use of Cannabis Act (MUCA) did not per se legalize marijuana or alter the established elements of the Controlled Substances Act, an affidavit supporting a search warrant presents probable cause to believe a suspect committed a Controlled Substantive Act violation where it sets forth enough details to reasonably infer the suspect is growing marijuana on his or her property. The affidavit need not also show the MUCA exception's inapplicability.).

vi. **Officer Liability.** A police officer's exposure to liability for an illegal search is lessened when the police officer obtains a search warrant. When the alleged violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or in "objective good faith." An exception to this principle allows suit when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." The threshold for this exception is extremely high. *Messerschmidt v. Millender*, ___ U.S. ___, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012).

n. **Computers**

Computers have become a principal means of storing both personal and business information for many people. For criminals, computers provide an excellent means of collecting and storing information that pertains to the criminal's unlawful activities. A criminal's computer may contain items such as a drug dealer's list of suppliers and/or customers, a bookmaker's records of gambling transactions and moneys owed, a street gang's membership roster, child pornography, financial records supporting a fraud scheme, identity theft software, and the list goes on and on.

For law enforcement officers, the critical issue is how to lawfully retrieve this information. Cases issued by the courts regarding computer searches are frequently contradictory, and the rules announced in them are subject to further consideration by the appellate courts. An officer who is seeking a search warrant for a computer should discuss these cases with his or her department's legal advisor and the local prosecutor.

i. **Staleness**. Evidence supporting the issuance of a search warrant for

a computer was not stale, even though the detective did not seek the search warrant until five months after a known video of child pornography publicly available for download from the IP address assigned to the defendant. The presence of 21 other files available for download that had titles strongly suggestive of child pornography supported an inference that the defendant was a "collector" and the detective's training and experience allowed him to state that collectors of child pornography often retain the contraband. Most importantly, the detective was able to declare that evidence of the defendant's contraband, in the form of metadata, would likely be found on his computer hardware, even if the contraband itself could no longer be viewed on his computer. *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009). *See also* United *States v. Schesso*, 730 F.3d 1040 (9th Cir. 2013) (20 month delay between when defendant sent child pornography images through a peer-to-peer networking site and issuance of a search warrant did not render the information stale)

ii. **Exculpatory Evidence.** An affidavit's failure to provide general information about hacking, IP Spoofing, or internet hijacking does not constitute a "deliberate or reckless omission of facts" that will support a *Franks* hearing. *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008).

iii. **Describing the Hardware to Be Searched**

The search warrant must particularly describe the hardware to be searched. If the warrant is based on firsthand knowledge that the incriminating data is stored in a computer or removable storage device, the requirement can be satisfied rather easily because the source of the information will usually have seen the type of equipment on which the data was stored.

If, however, probable cause is based on reasonable inferences that the data is stored on a computer or removable storage device, officers will probably not know exactly how the data was stored. The courts appreciate this problem and, consequently, have developed a rule that the description of the hardware need only be as specific as is reasonably possible. *See United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997), *cert. denied*, 523 U.S. 1101 (1998). This means that the degree of specificity will depend on how much information officers possessed about the equipment and how much information they could have obtained with reasonable effort.

One effective way of dealing with the problem of describing hardware when the type of hardware is unknown is giving a fairly detailed description of the ***data*** to be seized, then inserting language in the warrant that specifically authorizes a search for the data in any hardware on which the data may be stored.

> . . . [list documents to be seized] whether stored on paper or on electronic or magnetic media, such as internal or external hard drives, diskettes, backup tapes, cassette tapes, compact disks (CD's), digital video disks (DVD's), optical disks, electronic note books, video tape, audio tape, or flash drives.

iv. Describing the Data to be Seized

A warrant to search a computer must contain a description of the data to be seized and the description must be reasonably particular. In many cases, however, law enforcement officers do not have enough information about the data to describe it with much specificity. Officers should still be able to satisfy the particularity requirement by describing the data as best they can. The description should be as specific as is reasonably possible under the circumstances.

In situations where officers have little or no information about the nature of the data to be seized, they might describe it as pertaining to a certain person, occurring between certain dates, or data pertaining to a certain drive. For example, if officers are writing a warrant to search the home of a suspected cocaine dealer, they may have probable cause to believe that there are files in the suspect's computer containing records pertaining to the suspect's drug business. In most cases, however, they will not know exactly what these documents will be, so it would probably be sufficient to describe the documents in a way that would permit only the seizure of documents pertaining to the suspect's drug business, such as "drug trafficking records, ledgers, or writings identifying cocaine customers and suppliers."

Similarly, officers who have probable cause that the suspect stores child pornography in his computer may not know exactly what types of graphics they will find. If so, it would probably be sufficient to describe the documents to be seized as "minors engages in sexually explicit conduct as defined in RCW 9.68A.011."

v. Specific Protocol Regarding Service of Warrant. In *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009), an 11 judge panel set forth specific requirements that must be included in every federal search warrant for a computer. The case was subsequently reheard by the Ninth Circuit. The later opinion does not require the government to forswear reliance on the plain view doctrine. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010). The final opinion in the *Comprehensive Drug Testing* saga still requires government agents to attempt a process to cull the seizable data from the non-seizable data in a sensitive manner.

Other courts have rejected the Ninth Circuit's approach. Given the unique problem encountered in computer searches, and the practical difficulties inherent in implementing universal search methodologies, the majority of federal courts have eschewed the use of a specific search protocol and, instead, have employed the Fourth Amendment's bedrock principle of reasonableness on a case-by-case basis. *United States v. Richards*, 659 F.3d 527, 538 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 2726 (2012). "While officers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant, . . . a computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable cause." *United States v. Burgess*, 576 F.3d 1078, 1092 (10th Cir.), *cert. denied*, 558 U.S. 1097 (2009).

The Tenth Circuit succinctly makes the case against imposition by the court of a search protocol:

> it is folly for a search warrant to attempt to structure the mechanics of the search and a warrant imposing such limits would unduly restrict legitimate search objectives. One would not ordinarily expect a warrant to search filing cabinets for evidence of drug activity to prospectively restrict the search to "file cabinets in the basement" or to file folders labeled "Meth Lab" or "Customers." And there is no reason to so limit computer searches. But that is not to say methodology is irrelevant.
>
> A warrant may permit only the search of particularly described places and only particularly described things may be seized. As the description of such places and things becomes more general, the method by which the search is executed become[s] more important — the search method must be tailored to meet allowed ends. And those limits must be functional. For instance, unless specifically authorized by the warrant there would be little reason for officers searching for evidence of drug trafficking to look at tax returns (beyond verifying the folder labeled "2002 Tax Return" actually contains tax returns and not drug files or trophy pictures).
>
> Respect for legitimate rights to privacy in papers and effects requires an officer executing a search warrant to first look in the most obvious places and as it becomes necessary to progressively move from the obvious to the obscure. That is the purpose of a

> search protocol which structures the search by requiring an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches.
>
> But in the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files. It is particularly true with image files.

United States v. Burgess, 576 F.3d 1078, 1094 (10th Cir.), *cert. denied*, 558 U.S. 1097 (2009) (footnote omitted).

The absence of precautionary search protocols in a search warrant for a computer is not fatal to the validity of the warrant. *United States v. Schesso*, 730 F.3d 1040 (9th Cir. 2013) (a camera memory card was properly seized pursuant to a search warrant that authorized the seizure of "digital data storage devices . . . capable of being used to commit or further" the crimes of possession of and dealing in child pornography).

- When searching a computer for records identified in a search warrant, officers must seek additional warrants before seizing other papers and records. *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir. 2013) (a search warrant that authorized seizure of "records of financial transactions and communications" between October 1997 and February 2003 pertaining to specified named individuals and entities, did not authorize officers to seize evidence of motive).

- The off-site review of mirror images of the computer is subject to the rule of reasonableness. The Fourth Amendment does not permit officials executing a warrant for the seizure of particular data on a computer to seize and indefinitely retain every file on that computer for use in future criminal investigations. Non-responsive data cannot be retained after the responsive files are identified. *See generally United States v. Ganias*, No. 12-240-cr, ___ F.3d ___ (2nd Cir. June 17, 2014) (government's retention of all the data on the suspect's computer for two-and-a-half years deprived him of exclusive control over the nonresponsive date for an unreasonable amount of time; remedy is suppression of any of the non-responsive records).

vi. Hidden Land Mines

Attorney/client communications stored on phone or computers. Once

an officer becomes aware that such information is contained on the device, the officer must stop his or her review of the contents of the device. The review cannot resume until a special master or a "taint team" has been appointed. Failure to take appropriate steps after being notified that privileged information is on the device being searched can result in the dismissal of charges. *State v. Perrow*, 156 Wn. App. 322, 231 P.3d 853 (2010).

vii. Exceptional Levels of Scrutiny

Possibly because of the stigma that attaches when an individual's name becomes linked with a child pornography investigation, the Ninth Circuit recently held that individuals whose house was searched pursuant to a search warrant may maintain a civil rights lawsuit against the officers who obtained the search warrant. The claimed constitutional violation was the officers' allegedly deliberate falsehood or reckless disregard for the truth in their search warrant application. The false statements included: (1) that the suspect had downloaded images, as the evidence only indicated that the suspect's credit card had been billed for hosting fees and there was no evidence that anyone downloaded anything; and (2) that the suspect's credit card was used to purchase images of child pornography from the web site, as the evidence only indicated that the credit card was charged a hosting fees for the sites to which illegal images were uploaded at some unknown time, date, and location. "Serious omissions" included: (1) that the IP addresses that were used to open the offending Yahoo! user accounts and websites were traced to people other than the suspect; (2) a third IP address was used to log in to both the first and second user accounts, and that this IP address was never traced; (3) the credit card was shared by 2 people, and the non-suspect's name was associated with the two user accounts; and (4) the user accounts contained nonsensical identifying information. *See Chism v. Washington State*, 661 F.3d 380 (9th Cir. 2011), *cert. denied*, 132 S. Ct.1916 (2012).

viii. Encryption.

The Fifth Amendment protects an individual from being forced to decrypt hard drive contents. *United States v. Doe (In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011)*, 670 F.3d 1335 (11th Cir. 2012). The Fifth Amendment does not, however, prevent the defendant from being compelled to provide his key to seized encrypted digital evidence when the the defendant's act of decryption would not communicate facts of a testimonial nature to the government beyond what the defendant already has admitted to investigators. Compelling the decryption falls within the "foregone conclusion" exception to the Fifth Amendment privilege against self-incrimination where the facts conveyed already are known to the

government, such that the individual "adds little or nothing to the sum total of the Government's information." *Fisher v. United States*, 425 U.S. 391, 411, 96 S.Ct. 1569, 48 L. Ed. 2d 39 (1976). For the exception to apply, the government must establish its knowledge of (1) the existence of the evidence demanded; (2) the possession or control of that evidence by the defendant; and (3) the authenticity of the evidence. *Commonwealth v. Gelfgatt*, No. SHC 11358, ___ N.E.2d ___ (Mass. Jun. 25, 2014).

o. Cell Phones

i. Historical Cell Site Location Information. Law enforcement may only obtain from a cellular telephone service provider (cellular service provider) historical cell site location information (CSLI) with a search warrant supported by probable cause. *See United States v. Davis*, No. 12-1212928, ___ F.3d ___ (11th Cir. Jun. 11, 2014) (cell site location information is within the subscriber's reasonable expectation of privacy; the obtaining of that data without a warrant is a Fourth Amendment violation); *Commonwealth v. Augustine*, 467 Mass. 230, 4 N.E.3d 846 (2014). "Probable cause" in the context of CSLI means "probable cause to believe that a particularly described offense has been . . . committed" and that the CSLI sought will "produce evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed . . . such offense." *See Commonwealth v. Connolly*, 454 Mass. 808, 825, 913 N.E.2d 356 (2009).

Note: The term "cell site location information" (CSLI) refers to a cellular telephone service record or records that contain "information identifying the base station towers and sectors that receive transmissions from a [cellular] telephone." *In re Application of the U.S. for an Order Authorizing the Release of Historical Cell Site Info*., 736 F. Supp. 2d 578, 579 n.1 (E.D.N.Y. 2010) (In re Application for an Order I). "Historical" CSLI refers to CSLI relating to and generated by cellular telephone use that has "already occurred at the time of the order authorizing the disclosure of such data." *Id. See In re Application of the U.S. for an Order Directing a Provider of Elec. Communication Serv. to Disclose Records to the Gov't*, 620 F.3d 304, 308 (3d Cir. 2010).

4. How to Obtain a Warrant.

There is no legal requirement that affidavits or search warrants be prepared by attorneys. Some counties, however, have policies whereby every warrant must be approved by the prosecuting attorney's office prior to being presented to a magistrate.

Regardless of the manner used to obtain the search warrant, the affiant should determine in advance how many copies of the approved search warrant will be

needed. Generally, the officer will want a copy for his or her file, a copy for the prosecutor's file, and a copy for each location or person to be searched under the warrant.

a. **In person** – The affiant officer may appear in person before a judge in order to obtain a search warrant. In such cases, the affiant officer may present a written affidavit or declaration and/or may provide oral testimony under oath. Informants or other witnesses may also testify during an in person presentation. The mere act of bringing an informant or witness before the magistrate to testify under oath can satisfy the credibility prong of *Aguillar/Spinelli*.

i. The declaration or affidavit should be typed or printed legibly.

ii. The officer who signs the declaration or affidavit must fill out the declaration or affidavit in its entirety.

iii. Layout of affidavit or declaration:

A. Detailed description of the place, person, or vehicle that the officer is requesting to search and of the person or things to be seized.

B. Introduction

1. Who the officer is.

2. Violation of what laws.

3. Summary of probable cause.

C. Three part narrative for the affidavit or declaration.

1. Affiant/Officer's Background and Experience

a. How long has the affiant/officer been in continuous employment with the agency?

b. Has the affiant/officer been employed by any other law enforcement agency? If so, for how long?

c. Basic training?

d. All training pertaining to the violation being charged.

e. All training and experience pertaining to the facts at hand.

2. Facts and circumstances supporting probable cause.

a. Stick to facts, not conclusions

i. Specific evidence exists at a particular location.

ii. Reasons for believing evidence exists.

b. List primarily facts which support probable cause

i. Possession of evidence already discovered

ii. Facts indicating there is more contraband or evidence elsewhere.

3. List facts which support why you believe the specified evidence or contraband is in the place you are seeking to search.

4. List facts which describe exactly what you are seeking in the greatest possible detail. These are the items you want to take with you after you execute the search warrant.

5. If a non-police officer will be assisting in the execution of the search warrant, identify the individual by name or if name not yet known, by occupation, and explain why this assistance is necessary.

a. The withdrawal of blood pursuant to this warrant will be performed by a physician, a registered nurse, a license practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood. *See* RCW 46.61.506(5).

b. If the affidavit indicated that the officer would be assisted in executing the warrant by a civilian or an officer from another state, the warrant should include an explanation of why the civilian's or officer's assistance is needed.

6. If the affidavit or declaration is based on any information from an informant, always:

a. State what information was received.

b. State when the informant learned of the information.

c. State where the informant was when he made

this observation and where the property sought was seen or where he was told the property is located.

d. State why the informant was in a position to acquire his information.

e. State how he got the information.

f. State when the information was related to you.

g. State why the judge should believe the informant is credible.

7. When the officer meets with the judge, the meeting should be recorded by a court reporter or by other means. The judge should administer an oath to the officer, so that any answers the officer may give to the judge during the meeting are under the penalty of perjury.

a. If the officer's written application is in the form of a declaration, the failure to administer an oath will not be fatal to the search warrant.

b. If the judge relies solely upon the written application, the lack of a record of any discussions between the officer and the judge will not be fatal to the search warrant.

b. **Telephonic** – The actual process each county utilizes for a telephonic search warrant may differ, but the following elements/steps should be included in every procedure:

i. An affidavit or declaration and warrant is written out by the officer. The written affidavit should contain the same information discussed in the in person section. Failure to complete a written warrant will result in the suppression of all evidence obtained pursuant to the warrant. *See State v. Ettenhofer*, 119 Wn. App. 300, 73 P.3d 478 (2003).

ii. The affiant (officer) must talk directly with the judge on the telephone. Some counties require the officer to review his or her warrant application with the on-call deputy prosecuting attorney prior to speaking with the judge.

iii. The conversation must be electronically recorded by the judge, the officer, or by communications by way of a telephone patch.

1. Turn the recorder on as soon as everyone is on the phone.

2. Announce the time and date when you begin recording.

3. Announce that you are a law enforcement officer, give your rank, personal number , and state what agency you are with.

4. Ask for the judge's consent to record the affidavit and search warrant conversations.

5. Do not turn the tape recorder off until the end of the conversation. Leaving the recorder on avoids questions concerning gaps or omissions in the recording.

6. Announce the time and date before you finish recording and end the conversation.

iv. The judge must administer an oath to the affiant on the recording.

v. The affiant (officer) will read the affidavit and warrant to the judge.

vi. Once the judge is satisfied probable cause exists, the judge will direct the officer to sign the judge's name to the search warrant. If the judge does not direct this to be done, ask the judge for authority to sign the judge's name to the search warrant.

vii. Before ending the call, the person who is operating the recording device checks to ensure that the conversation was fully recorded. If the recording device failed in any way, steps iii through vii must be repeated.

- If a tape recording fails, a reconstructed record of the information given to the magistrate is only acceptable by courts if the officer's testimony regarding what the officer told the magistrate is corroborated by detailed and specific evidence from a disinterested party, such as the issuing magistrate. *See, e.g., State v. Garcia*, 140 Wn. App. 609, 166 P.3d 848 (2007).

viii. Print the case number and other necessary information on the tape.

ix. Remove the cassette tape from the recorder, seal it in an envelope, and place it in a safe place with a copy of the search warrant.

- If communications records the conversation, be certain to instruct the operator on tape preservation methods. The officer must promptly order a copy of the recording when the warrant is made or the next day. *Waiting too long to order a copy can result in the recording being destroyed.*

x. Execute the warrant as described below.

xi. Provide a copy of the affidavit, search warrant, inventory, and return of service to the deputy prosecutor who was involved in obtaining the search warrant as soon as possible.

xii. File the original search warrant, affidavit, audio tape, return or

service, and inventory with the court clerk's office the day following service of the warrant. (In some counties, the deputy prosecuting attorney will handle this for the officer).

c. E-mail or Other Electronic Means

The actual process each county utilizes for an e-mail search warrant may differ, but the following elements/steps should be included in every procedure:

i. A declaration is written out by the officer. The written declaration should contain the same information discussed in the in person section.

A. The declaration may be printed out, physically signed by the officer and then scanned as a .pdf document to be attached to the e-mail; or

B. The declaration may be typed and signed as described in the oath section of these materials. *See also* Laws of 2014, chapter 93, sec. 4(2)(d). This option allows the declaration to be sent directly from a computer, without the need to print out the document prior to transmitting the document to a judge.

ii. A proposed written or typed search warrant must be prepared. Failure to complete a written warrant will result in the suppression of all evidence obtained pursuant to the warrant. *See State v. Ettenhofer*, 119 Wn. App. 300, 73 P.3d 478 (2003).

iii. The affiant (officer) must communicate directly with the judge. The affiant should first notify the judge, in accordance with local procedures, that a search warrant application will be sent by e-mail. The affiant should then send the search warrant application and the proposed warrant to the judge using "an electronic device that is owned, issued, or maintained by a criminal justice agency." Laws of 2014, chapter 93, sec. 4(2)(d).

iv. Once the judge is satisfied probable cause exists, the judge will direct the officer to sign the judge's name to the search warrant. The judge may provide this authorization in a responsive e-mail or by some other means.

If the judge is not satisfied that probable cause exists or the judge determines that the items to be seized or the place(s) to be searched need to be edited, the judge should communicate directly with the affiant.

A. If the communication is made by e-mail, the officer should indicate in his responsive e-mails that the officer is aware that he is still under oath. The easiest way to do this is to sign the

response as described in the oath section of these materials. See also Laws of 2014, chapter 93, sec. 4(2)(d).

B. If the communication is by phone, the call must be recorded and the officer should request that the judge administer an oath so the officer's responses are under the penalty of perjury. *See* Telephonic Section *supra*.

v. Execute the warrant as described below.

vi. Promptly print out a copy of all e-mails that were exchanged between the affiant and the judge, along with all attachments. Provide a copy of the e-mails, the search warrant, inventory, and return of service to the deputy prosecutor who was involved in obtaining the search warrant as soon as possible.

vii. File the original search warrant, a copy of all e-mails that were exchanged between the affiant and the judge, along with all attachments, the audio tape of any discussions between the judge and the officer, the return of service, and inventory with the court clerk's office the day following service of the warrant. (In some counties, the deputy prosecuting attorney will handle this for the officer).

5. Execution of Warrant.

a. Time of Service. Once a search warrant is issued, service must be started within 10 days and the return must be filed within 3 days after service. Waiting to the last day for service, however, is dangerous because if the information upon which the search warrant was issued has "dissipated" in the interim, the evidence may be suppressed. *See State v. Maddox*, 152 Wn.2d 499, 98 P.3d 1199 (2004). Dissipation will depend upon whether information acquired after issuance of the search warrant but before execution, if believed, negates probable cause. If the answer to this question is yes, then a magistrate must redetermine whether probable cause exists. *Id.*

i. Blood Alcohol. When a search warrant is for a substance that will dissipate quickly, i.e. for blood alcohol, then the court may restrict the time within which to serve the warrant to less than 10 days. Failure to comply with this restriction will result in the search being considered a warrantless search.

ii. Bank Records. When the search warrant is for bank records, etc., the warrant must be provided to the bank within 10 days of issuance. The collection of the authorized information may, however, extend long past the 10 day period. *See, e.g., State v. Kern*, 81 Wn. App. 308, 914 P.2d 114, *review denied*, 130 Wn.2d 1003 (1996) (search warrant executed in a proper manner where warrant was given to

bank officials and the bank took several months to compile the information and return the records to the police).

iii. **Computers.** A forensic examination of information stored on copies of a hard drive may extend beyond the 10-day deadline specified in CrR 2.3(c), provided the computer is seized within the 10-day period. A delay in analyzing the information stored on a hard drive will only result in the suppression of evidence if: (1) the delay caused a lapse in probable cause; (2) the delay created unfair prejudice to the defendant; or (3) the officers acted in bad faith. *State v. Grenning*, 142 Wn. App. 518, 174 P.3d 706 (2008).

iv. **Automobiles**. When a search warrant is issued for a vehicle, the vehicle may be towed to a police crime laboratory for forensic processing. The Fourth Amendment was not violated when the police crime laboratory retained a vehicle for 12 days in order to complete the search for trace evidence. *People v. Superior Court (Nasmeh)*, 151 Cal. App. 4th 85, 59 Cal. Rptr. 3d 633 (2007).

b. **Control of Individuals Outside the Place to be Searched.**

Police may not seize and detain for investigation individuals who appear at a location where officers are serving a search warrant unless: (1) the individuals are named in the search warrant; (2) the vehicle the individuals are in is named in the warrant; (3) there is probable cause to believe the individuals have committed a crime; or (4) there are specific and articulable objective facts that give rise to a reasonable suspicion that the individuals have been or are about to be involved in a crime. *See State v. Smith*, 145 Wn. App. 268, 187 P.3d 768 (2008) (officers' seizure at gunpoint and detention for investigation the two occupants of a car who appeared in the driveway of a residence at which officers were preparing to execute a search warrant violated the Fourth Amendment when neither the vehicle nor any woman was named in the warrant).

Police may not seize a person beyond the immediate vicinity of a residence for which the officers possess a search warrant, solely because that person was a recent occupant of the residence. "Immediate vicinity" means within or immediately outside a residence at the moment the police officers are executing the search warrant. "In closer cases courts can consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." *Bailey v. United States*, ___ U.S. ___, 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013).

c. **Entry Into Building**.

i. **Knock and Announce Rule**.

RCW 10.31.040 provides:

> To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance.

The knock and announce rule exists to:

- Reduce the potential for violence to all parties from unannounced entry
- Prevent unnecessary property damage
- Protect the privacy rights of occupants.

Strict compliance with the statute is required unless exigent circumstances are present or compliance with the dictates of the rule would be futile. The validity of an entry under the knock and announce rule depends upon the facts of a particular case.

The rule requires that police must:

- Have a warrant.
- Announce their identity. This is especially critical when officers are in plain clothes.
- Demand Admittance.
- State the purpose of their demand.
- Be explicitly or implicitly denied admittance.

Failure to expressly demand admittance. The failure to expressly demand entrance may not always be fatal. When the actions of the police effectuate the purpose of the knock and announce rule the failure to specifically request entry will not bar the admission of evidence. *See, e.g., State v. Schmidt*, 48 Wn. App. 639, 740 P.2d 351, *review denied*, 109 Wn.2d 1013 (1987) (the failure to demand admittance did not increase the likelihood of physical destruction of property as the door was not closed, and did not impact the reasonableness of the intrusion as the deputies' announcement – "Sheriff's Office with a search warrant" – implied that they intended to enter to search); *State v. Lehman*, 40 Wn. App. 400, 404, 698 P.2d 606 (1985) (a statement by police identifying themselves and advising that they possess a search warrant is implicitly a demand for admission into the house); *State v. Hilliard*, 18 Wn. App. 614, 616, 570 P.2d 160 (1977) (failure to demand admittance did not require suppression as (1) there was an announcement of the presence of the officers to the occupants; (2) the occupants communicated with the uniformed officers through an open door, and (3) the officers advised

the occupants that they were under arrest for a felony before entering).

A. Length of Wait

Objective evidence of refusal include attempts by the suspect to close the door after becoming aware that the persons seeking entry are police officers, or the suspect running back inside the building.

No bright line rule exists for how long police need to wait after knocking and announcing their purpose. Cases have repeatedly held 10 seconds to be adequate. A five second delay was approved where the police heard commotion inside after knocking. As a general rule, officers should wait 30 seconds, unless there are affirmative indications that the occupants are aware of the officer's presence, or other specific facts demonstrating an unusual degree of danger to officers or of destruction of evidence.

The reasonableness of the delay will depend upon two primary factors: (1) how easily the sought evidence can be destroyed; and (2) whether the suspects are likely to be armed or dangerous. *See generally United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003). If the search warrant is for controlled substances, 10 seconds may be sufficient as drugs may be easily flushed down a toilet. If the search warrant is for a grand piano or other less fungible evidence, the wait should be longer.

Factors that may support a shorter wait time include:

- Someone looking out of a window at the officers. *State v. Edwards*, 20 Wn. App. 648, 581 P.2d 154 (1978).
- Barking dogs that may have alerted the occupants to the officer's approach. *State v. Schmidt*, 48 Wn. App. 639, 646, 740 P.2d 351, *review denied*, 109 Wn.2d 1013 (1987).
- A relatively small building, indicating that a very short time would be required to answer the officers' knock. *State v. Schmidt*, 48 Wn. App. 639, 646, 740 P.2d 351, *review denied*, 109 Wn.2d 1013 (1987) (a shed vs/ a residence with multiple rooms).
- A bystander announces the officers' presence. *See, e.g., State v. Garcia-Hernandez*, 67 Wn. App. 492, 837 P.2d 624 (1992) (as detectives exited their cars, one officer heard "someone yelling something").

- Specific information that the suspect kept drugs rolled into condoms and that the suspect had previously disposed of heroin stored in that manner by swallowing it when confronted by police. *See, e.g., State v. Beason*, 13 Wn. App. 183, 534 P.2d 44 (1975).

ii. Exemptions from the rule.

A. No Knock Warrants. An officer may be able to obtain a "no knock" warrant based upon specific information that the defendant may have weapons and that the defendant has a history of violence. A generalized statement of potential danger (*i.e.* drug dealers are known to carry firearms) will not support the issuance of a "no knock" warrant. *See United States v. Ramirez*, 523 U.S. 65, 118 S. Ct. 992, 140 L. Ed. 2d 191 (1998).

"No knock" warrants are disfavored (and possibly prohibited) in Washington, and a challenge to the entry will consider both the facts that were presented to the magistrate who issued the "no knock" warrant and the facts and circumstances that were actually encountered during the service of the warrant. *See State v. Allyn*, 40 Wn. App. 27, 29, 696 P.2d 45, *review denied*, 103 Wn.2d 1039 (1985); *State v. Spargo*, 30 Wn. App. 949, 639 P.2d 782 (1982); *State v. Jeter*, 30 Wn. App. 360, 634 P.2d 312 (1981), *review denied*, 96 Wn.2d 1027 (1982).

Timely and specific intelligence that residents of the place to be searched keep weapons in the residence and have a propensity to use them is required for a no knock entry. *Compare State v. Allyn*, 40 Wn. App. 27, 29, 696 P.2d 45, *review denied*, 103 Wn.2d 1039 (1985) (the no knock entry was supported by (1) the presence of multiple firearms at the target residence mere days before the service of the warrant; (2) statements made by both occupants of the target residence , in the 18 days prior to the service of the warrant, that they would like to torture or kill some police officers; (3) the suspect's arming himself with a second handgun after providing his co-participant in a prior drug delivery with a handgun that he told his co-participant to use; and (4) suspect's conviction one year earlier of the federal crimes of conspiracy to possess an unregistered firearm when that crime concerned the bombing of a police car, police officer's garage and the Chelan County Courthouse), *with State v. Spargo*, 30 Wn. App. 949, 639 P.2d 782 (1982) (the fact that the affiant had arrested the suspect on a prior occasion for

carrying a loaded pistol in a car and the pistol was returned to the suspect, coupled with another officer's report that the suspect had stated to a third person on prior occasions that "if any cops try to take him the cops will be sorrow [sic]" was too "ambiguous, stale, and inherently unreliable" to support a no-knock entry).

Specific intelligence will not support a no knock entry if the fears of danger are dispelled prior to entry. *See, e.g., State v. Johnson*, 11 Wn. App. 311, 522 P.2d 1179 (1974) (forceable no-knock entry impermissible "when the officer in charge was able to observe [the suspect] through the partially open door and was in a peculiarly advantageous position to observe [the suspect's] reaction to compliance with the knock and announce rule"); *State v. Hatcher*, 3 Wn. App. 441, 475 P.2d 802 (1970) (forceable no knock entry was improper when the officers were able to observe through a window that none of the occupants was doing anything suspicious).

B. **Use of Ruse.** The general rule is that entry by ruse is permissible if no force is used. *See State v. Myers*, 102 Wn.2d 548, 689 P.2d 38 (1984). Officers need not announce their identity, authority, and purpose when useing deception and no force. *See State v. Huckaby*, 15 Wn. App. 280, 549 P.2d 35, *review denied*, 87 Wn.2d 1006 (1976). The ruse used must not, however, "shock fundamental fairness".

Case law has found the following ruses to be acceptable:

- Officers convinced defendant to open the door to allow them to serve a search warrant for drugs by claiming to have a fictitious arrest warrant for the defendant's arrest for a traffic offense.

C. **Equivalent notice given.** Officers were not required to physically knock on the door where they had already announced their identity and the reason for their presence over the police car's public address system. *United States v. Combs*, 394 F.3d 739 (9th Cir. 2005).

D. **Consent.** The knock and announce rule is applicable whenever police enter without valid permission, but it does not apply to consensual entries. Such consent probably need not be preceded by *Ferrier* warnings, but case law already establishes that an occupant's "Yeah" in response to a knock did not eliminate the officer's duty to comply with the knock and announce rule. *See State v. Johnson*, 104 Wn. App. 489, 505-06, 17 P.3d 3 (2001); *State v. Sturgeon*, 46 Wn. App. 181, 730 P.2d 93 (1986). Finally, consent given by someone

who is not home (*i.e.* at the station house) will probably not excuse compliance with the knock and announce rule if someone is at the home when the warrant is served. *Cf. State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989).

iii. **Reasonableness of Entry.** Officers may be liable for the use of excessive force in the execution of a search warrant. A court will look to three factors in assessing whether excessive force was used: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. When crimes are relatively minor and non-violent and officers have not reason to suspect that the target or the target's roommates would pose a safety threat to officers, the use of "SWAT-like" tactics can be constitutionally excessive. *See, e.g., Cameron v. Craig*, 713 F.3d 1012 (9th Cir. 2013) (a jury could find that having 6 to 10 officers enter the residence with guns drawn to execute a search warrant for stolen property was excessive).

d. **Who May Serve Warrant.** As a general rule only those officers involved in the investigation of the particular crime and/or officers from the local jurisdiction if the officers who obtained the warrant are executing it outside their territory (*i.e.* Kitsap County Sheriff Department obtained warrant being executed in Pierce County) may participate in the service of a warrant. Police officers from another jurisdiction cannot "tag along" with officers who are executing a warrant in their jurisdiction. *See State v. Bartholomew*, 56 Wn. App. 617, 784 P.2d 1276 (1990) (improper for police agents from Seattle to "tag along" with officers from Tacoma who were serving a search warrant in Tacoma in the hope that evidence of a crime committed in Seattle would be visible). Reporters, television cameras, and other citizens may not accompany officers in the execution of a search warrant upon a home, business, etc. *See Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (bringing reporters into home during attempted execution of warrant violated Fourth Amendment). Disinterested citizens may, however, assist the police in gathering bank records or other similar records pursuant to a search warrant. *State v. Kern*, 81 Wn. App. 308, 914 P.2d 114, *review denied*, 130 Wn.2d 1003 (1996) (appropriate to delegate execution of the search warrant for bank records to disinterested third persons (bank official)).

i. **Qualified person to collect blood**. Most police officers are not qualified to withdraw blood. An officer may (and should) delegate the actual collection to one of the persons specified in RCW 46.61.506(5):

> . . . the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, a

licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood.

The inventory and the return of service must identify, by name, the person who assisted in executing the search warrant for blood. The return of service should identify the profession (physician, nurse, etc.), licensure, and/or training of the person who withdrew the blood.

As a courtesy, you should provide the person who actually withdrew the blood with a copy of the search warrant and the return of service.

ii. **Out-of-State Police Officers**. When the crime occurred in another state and officers from the jurisdiction where the crime occurred are present in Washington, the search warrant should specifically authorize such officers to accompany the Washington officers who obtained the search warrant. The presence of the out-of-state officers is needed to allow the prosecutor to establish the chain of custody without having to call the Washington officers at trial

iii. **Indian Country.** State police officers may serve state search warrants at locations within an Indian Reservation. Whether the state police officers need to take any special steps will depend upon whether the offense under investigation occurred within the reservation or off reservation. The following "rules" should be observed:

- **State Warrant for Off Reservation Offense.** State search warrants for evidence located within the reservation on trust property for off reservation offenses may be served the same way as they are served anywhere else in the state.
- **On Reservation Offense Committed By Non-Indian.** State search warrants for evidence located within the reservation on trust property for an on reservation offense committed by a non-Indian may be served the same way as they are served anywhere else in the state.
- **On Reservation Offense Committed By An Indian.** State search warrants for evidence located within the reservation on trust property for an on reservation offense committed by an Indian are valid, but officers may be required to comply with tribal procedures governing the execution of state court process. Tribal procedures may not require state officers to obtain a tribal court search warrant. Tribal procedures may

not "meaningfully frustrate[] the State's ability to punish those who break the law." Tribal procedures that require state officers to notify tribal police officers prior to or contemporaneously with the service of the warrant should be valid. *State v. Clark*, 178 Wn.2d 19, 31 n. 6, 308 P.3d 590 (2013).

e. **Protective Sweeps.** The concept of protective sweeps has generally not been extended to the service of a search warrant. *State v. Boyer*, 124 Wn. App. 593, 102 P.3d 833 (2004). This is probably because a search warrant already authorizes an officer to look in any container that is large enough to hold the items being sought. This means that if the search warrant is for drugs or anything else that is smaller than a human being, the officers serving the warrant already have the necessary authority to check closets, under beds, and other locations where a person might be concealed.

f. **Detention and Search of Individuals Inside the Residence**

Once inside, police may search authorized portions of the premises, occupants described in the warrant, and their personal effects. Individuals present at the location to be searched may be detained and even handcuffed while the search of the premises is conducted. The length of the detention and any force used must, however, be reasonable under the circumstances. A reasonableness inquiry includes the following factors:

- the severity of the suspected crime
- whether the person being detained is the subject of the investigation
- whether the person poses an immediate threat to the security of the police or others
- the type of contraband that is being sought
- whether the person is actively resisting arrest
- number of officers in relationship to the number of persons present in the building

See Muehler v. Mena, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005).

Officers encountering naked individuals may conduct an initial sweep of the area for officer safety, provided they allow the naked individuals to cover themselves as soon as possible. *Los Angeles County v. Rettele*, 550 U.S. 609, 127 S. Ct. 1989, 167 L. Ed. 2d 974 (2007).

Officers encountering children during the execution of a warrant should tread carefully. *See Avina v. United States*, 681 F.3d 1127 (9th Cir. 2012) (11-year-old and 14-year-old girls, who were handcuffed for approximately 30 minutes and who had guns pointed at them while agents executed a search

warrant upon their residence, may proceed with their excessive force claims; the girls' parents' claims were properly dismissed on summary judgment); *Tekle v. United States*, 511 F.3d 839 (9th Cir. 2006) (11-year-old barefoot boy, who was handcuffed for 10 to 15 minutes while officers executed a search warrant and arrest warrant for his parents for narcotics trafficking and tax-related offenses, may proceed upon his excessive force claim; 20 officers were present, the child did not flee, and the child did not resist the officers' instructions).

Persons who are not named in the warrant may not be searched without some independent facts tying those persons to illegal activity. *See State v. Broadnax*, 98 Wn.2d 289, 654 P.2d 96 (1982).

Mere presence at the place being searched cannot justify a search, or even a *Terry* pat down. There must be some additional circumstances indicating illegal activity by that person to justify a search of a non-occupant. In order to find probable cause based on association with persons engaging in criminal activity, courts have focused on factors such as:

- Whether the known criminal activity was contemporaneous with the association; and
- Whether the nature of the criminal activity is such that it could not normally be carried on without the knowledge of all persons present.

Thus, a person's presence with other suspected of criminal activity together with additional circumstances reasonably implying knowledge of, or participation in, the criminal activity establishes probable cause to arrest. *State v. Dears*, 40 Wn. App. 459, 698 P.2d 1109 (1985). This standard is known as the "presence plus" rule. The "plus" can be provided by the defendant's conduct, such as grabbing a pocket. *See, e.g., State v. Pimentel*, 55 Wn. App. 569, 779 P.2d 268 (1989) (defendant who was one of seven people detained inside a residence during the execution of a narcotics search warrant and who reached for his shirt pocket properly had the pocket searched as the movement aroused a suspicion that he was attempting to destroy the heroin that was ultimately retrieved from his pocket.).

Generally, personal effects and clothing worn by persons present but not named in the warrant cannot be searched pursuant to the search warrant. *See State v. Worth*, 37 Wn. App. 889, 683 P.2d 622 (1984) (search of purse on chair next to female occupant of residence was improper because female occupant was not named in the warrant and the purse was "an extension of her person"). The prohibition upon searching personal effects and clothing of persons present but not named in the warrant will probably extend to items that officers know or should know belong to such persons. *Cf. State v. Parker,* 139 Wn.2d 486, 987 P.2d 73 (1999) (search of items located in car of arrested driver is improper if the officer knows or should know that the item belongs to one of the passengers). A generalized concern for "officer safety" does not permit a search of belongings that are readily recognizable

as belonging to a visitor who is not named in the warrant. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287 (2011) (police improperly searched a purse that was found at the premises for weapons, when the purse was readily recognizable as belonging to a female visitor who was not named in the warrant).

g. Use of Force to Overcome Resistance.

The Fourth Amendment permits the use of reasonable force to overcome a defendant's resistance to the execution of a warrant for the extraction of blood. *See, e.g., United States v. Bullock*, 71 F.3d 171, 177 (5th Cir. 1995) (suspect's refusal to comply with a search warrant for blood and hair samples created need for forceful execution but does not entitle him to exclusion of the evidence sought); *Hammer v. Gross*, 932 F.2d 842, 845 (9th Cir. 1991) (police may use force in some circumstances to extract a blood sample from a resistant suspect); *State v. Clary*, 196 Ariz. 610, 2 P.3d 1255 (2000) (blood alcohol sample). As a California court held,

> absent a clear legislative mandate giving a defendant absolute control of whether a blood alcohol test maybe obtained, the lack of such evidence should not turn on the degree of a defendant's cooperation with a premium given to the more obstreperous drunk driver who is more successful in forcibly resisting the withdrawal of a blood ample.

Carleton v. Superior Court, 170 Cal. App. 3d 1182, 1191, 216 Cal. Rptr. 890 (Cal Ct. App. 1985).

h. Paperwork

i. Presenting the Warrant to the Occupant or Person to Be Searched

If the occupant is present, the officer must show the occupant the original warrant and must provide the occupant with a copy of the warrant. There is no requirement that the officer show the occupant the affidavit used to obtain the search warrant.

The warrant should generally be served upon any occupants of the location to be searched at the "outset" of the search. Courts will not, however, suppress the fruits of a search for a "several-minute" delay if the delay is caused by the need to secure the residence and to identify all occupants. *State v. Aase*, 121 Wn. App. 558, 89 P.3d 721 (2004). Failing to give the occupant a copy of the search warrant until the search is concluded will not result in suppression of evidence absent a showing of prejudice. *State v. Temple*, 170 Wn. App. 156, 161-62, 285 P.3d 149 (2012). This is because nothing in the language of CrR 2.3(d) says that a copy of the warrant must be provided before the search is begun. The court rule is complied with by the officer posting a copy of the warrant at the search location

before the officer leaves. *State v. Ollivier*, 178 Wn.2d 813, 851-52, 312 P.3d 1 (2013).

- Officers confronted with occupants who do not speak English may delay serving the warrant upon the occupants until a translator can be brought to the scene. *See, e.g.*, *United States v. Martinez-Garcia*, 397 F.3d 1205 (9th Cir. 2005).
- Officers confronted with a volatile methamphetamine lab may delay presenting the search warrant to the occupant until the fire/explosion hazard has been mitigated and/or all of the occupants have been evacuated from the site. *United States v. Mann*, 389 F.3d 869 (9th Cir. 2004), *cert. denied sub nom*, 161 L. Ed. 2d 537 (2005).
- When multiple people are present at the location to be searched, officers should show each of them the actual warrant.
- When a search warrant authorizes the seizure of blood for alcohol or drug testing, the officer may, but need not, advise the person being searched that s/he may obtain independent tests. *See State v. Entzel*, 116 Wn.2d 435, 443-44, 805 P.2d 228 (1991) ("We perceive no statutory or case law foundation on which a duty could reasonably be imposed on the State to inform DWI suspects of the right to a breath or blood test in the absence of the State's use of the testing authorized by the implied consent statute. Absent any statutorily imposed duty in that regard, we decline to impose such a duty.").

If no one is present when the search warrant is executed, a copy of the warrant must be posted or left in a conspicuous place.

Failure to provide the occupant of the searched location with a written copy of the warrant can turn a judicially authorized search into a "warrantless search." *See generally State v. Ettenhofer*, 119 Wn. App. 300, 79 P.3d 478 (2003).

ii. Inventory of Items Seized

An inventory of all items seized must be completed prior to leaving the premises. The inventory must be made in the presence of at least one person other than the searching officer. CrR 2.3(d); CrRLJ 2.3d). This requirement is designed to prevent error in the inventory and is satisfied by the presence of another police officer. *State v. Temple*, 170 Wn. App. 156, 161, 285 P.3d 149 (2012) (citing *State v. Wraspir*, 20 Wn. App. 626, 628, 581 P.2d 182 (1978)).

If the occupant is present, the occupant should sign the inventory and a copy of the inventory should be left with the occupant. If no one is home when the warrant is executed, a copy of the inventory must

be left in a conspicuous place.

- It is recommended that at least one officer (and preferably two) be designated "evidence collectors" and be able to testify to observing each seized item before it is moved. The evidence collector(s) should also be able to testify to the recovery, packaging, and marking of all seized items.

  Documentation of the exact place from which each item is recovered is important and is best done during the search. Consideration should also be given to the use of videotapes, photographs, a fingerprint kit, and scientific analysis at the scene of the search. This may prove extremely helpful in later court proceedings. Also, it is important to maintain the chain of custody and the integrity and security of the items seized.

iii. Return of Service

Immediately after serving the search warrant, a return of service form must be completed. The return of service form and inventory should be filed with the court that issued the warrant as soon as possible, and generally within 3 days of the execution of the warrant. *See* CrR 2.3(d).

i. Securing Premises While Obtaining Search Warrant.

Buildings. A residence may be secured from the outside while officers seek a search warrant if the probable cause for the search is developed at the scene. *See Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001); *State v. Ng*, 104 Wn.2d 763, 771, 713 P.2d 63 (1985); *State v. Solberg*, 66 Wn. App. 66, 77-78, 831 P.2d 754 (1992), *rev'd on other grounds*, 122 Wn.2d 688, 861 P.2d 460 (1993). The period of time during which officers will bar entry into the house while obtaining the warrant must be as short as possible, preferably less than 2 hours.

While awaiting the search warrant, officers may not order individuals who are inside the residence to exit the building. If the occupants voluntarily exit the house, they may not be detained unless there is probable cause to arrest them for a crime or there are some independent facts tying those persons to illegal activity. *See State v. Broadnax*, 98 Wn.2d 289, 654 P.2d 96 (1982). Facts in support of a *Terry* stop must give rise to believe that the individual, as opposed to the place where he was found, is involved in criminal activity. Further guidance can be obtained from cases governing the search of unnamed individuals who are present when a warrant is executed.

Washington officers should obtain consent or at least give an officer-entry warning before allowing a resident who has voluntarily exited the premises to reenter the building prior during the wait for the warrant. The warning by the officer should include a statement that the officer will not allow the

person to reenter the building without the officer at his or her side. The officer will not enter any rooms that the resident does not enter. Nor will the officer look into any closed containers, cabinets, or drawers that the resident does not access while inside the building. In addition to this warning, a prudent officer should obtain permission from the resident to accompany him or her inside the building. *Cf. State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (officer who had arrested a student for minor in possession did not have automatic authority as an incident of the arrest to accompany the student into the student's dorm room into which the officer allowed the student to go to obtain identification).

Officers may not stop and identify every person who attempts to enter the building while the search warrant is obtained. *See State v. Crane*, 105 Wn. App. 301, 19 P.3d 1100 (2001).

Automobiles. "A car may be lawfully impounded as evidence of a crime if an officer has probable cause to believe that it was stolen or used in the commission of a felony." *State v. Terrovona*, 105 Wn.2d 632, 647, 716 P.2d 295 (1986). Furthermore, an officer who has probable cause to believe a vehicle contains contraband or evidence of a crime may seize and hold the car for the reasonable time needed to obtain a search warrant, and the car may be towed to an impound yard during seizure. *State v. Huff*, 64 Wn. App. 641, 653, 826 P.2d 698 (1992).

There are no Washington cases that address how long an officer may hold a vehicle pending issuance of a search warrant. Officers are encouraged to contact a magistrate for issuance of the warrant:

- the day the vehicle is seized, when the seizure occurs during normal court hours; or
- by 10:00 a.m. the day following seizure (including weekends and holidays) when seizure occurs outside normal court hours.

Officers must present their probable cause to a magistrate within 48 hours of seizing the vehicle. *Cf.* CrR 3.2.1(a) ("A person who is arrested shall have a judicial determination of probable cause no later than 48 hours following the person's arrest"); CrRLJ 3.2.1(a) (same); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991) (a judicial probable cause determination must occur within 48 hours of a warrantless arrest). The 48 hour period is consistent with decisions from states that follow a rule similar to that announced in *State v. Huff*. *See State v. Guzman*, 965 A.2d 544, 184 Vt. 518 (2008) (a delay from seizure of car on Saturday to the next business day on a Monday was not an unreasonable delay in obtaining the search warrant); *Edlin v. State*, 523 So.2d 42, 48 (Mississippi 1988) (one day delay in obtaining search warrant for seized car not unreasonable).

j. Expanding or Renewing the Search

When conducting the search, law enforcement should be thorough as this may be the only chance to search the specific location. Law enforcement may seize any evidence that is material and relevant to the case and is either specifically mentioned in the warrant or falls within one of the categories of evidence listed in the warrant.

Law enforcement may also seize any contraband that they find. The smartest thing to do when an officer is executing a search warrant for possession of stolen property and in the course of examining the building the officer stumbles upon a marijuana grow is to obtain an additional search warrant covering the new crime.

During the execution of the search warrant, if the officer discovers evidence that provides probable cause to believe that additional evidence may be located in a building (i.e. detached garage) or vehicle not covered by the original warrant, the officer should obtain an additional search warrant covering the new crime.

Once the officer concludes his or her processing of the scene, he may only reenter the location to conduct a further search with a new search warrant. *Compare United States v. Squillacote*, 221 F.3d 542, 557-58 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001) (where "the search could not have been completed in a single day," "the subsequent entries were not separate searches requiring separate warrants, but instead were simply reasonable continuations of the original search"), *with State v. Trujillo*, 95 N.M. 535, 624 P.2d 44, 48 (1981) (citing cases from other jurisdictions in support of "the rule that a warrant is executed when a search is conducted, and its legal validity expires upon execution," so that "after execution, no additional search can be undertaken on the same warrant").

An officer generally does not need an additional search warrant to examine the contents of items that are properly seized in the execution of the warrant, including, but not limited to cellular telephones. *See, e.g., State v. White*, 707 S.E.2d 841 (W. Va. 2011).

k. Damage to Property from the Execution of a Search Warrant.

A trespass claim may be asserted against a city alleging that law enforcement officers exceed the scope of their lawful authority to enter property to execute a search warrant. To be successful, the plaintiff must establish that the officers executing the search warrant unnecessarily damaged the property while conducting their search, that is, that they damaged the property to a greater extent than is consistent with a thorough investigation. *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008).

No compensation was owed to a property owner for damage to doors and door jambs that was caused when law enforcement officers used a battering ram to gain entry to a suspected methamphetamine laboratory. The battering ram was utilized after the property owner's son ran from an outdoor area into the mobile home and attempted to barricade himself and another suspect in

the home by placing a dowel in the sliding glass door. The property owner's son ran from the officers into the mobile home "despite an announcement, repeated three times over the loud speaker from one of the vehicles, that the police had arrived and had a search warrant." *Id.*

Police need not pay compensation for damage caused during the execution of a search warrant under a taking of private property theory. *See Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008) (father was not entitled to compensation for the $4000 worth of damage to his property from the proper execution of a search warrant for evidence of his son's offenses); *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003) (a mother, whose house was rendered unstable and uninhabitable after police removed two walls, pursuant to a search warrant, as evidence in her son's prosecution for murder , was not entitled to compensation under Wash. Const. art I, § 16).

l. Terminating the Search

The search must be terminated when all the described items have been found or it is clear they are not on the premises, vehicle, person, or other things to be searched.

m. Releasing Property Seized Pursuant to a Search Warrant

An officer should not release property seized pursuant to a search warrant unless a valid court order, either oral or written, authorizes him to do so. When dealing with computer searches, an officer should seek an order authorizing the return of the non-responsive data once the responsive data has been seggregated. *See generally United States v. Ganias*, No. 12-240-cr, ___ F.3d ___ (2nd. Cir. Jun. 17, 2014).

There have been isolated instances of attorneys obtaining ex parte court orders for the return of property prior to the disposition of the case and without any legal authority to do so. If there is any doubt regarding the validity of such an order, particularly if the case has not yet been filed or is still pending, the property should not be returned until the legality of the court order is thoroughly reviewed. Such orders are usually not valid.

5. Administrative Search Warrants

The rules governing administrative search warrants are significantly different then those that govern criminal investigations. The following brief summary should be supplemented with consideration of the Washington State Attorney General Office's Access to Property Workgroup, *Access to Private Property by Administrative Agencies Deskbook* (June 2009). A copy of this Deskbook may be found on the Washington Association of Prosecuting Attorney's website: www.waprosecutors.org.

a. Definition. An administrative search warrant is an order allowing for searches directed at fulfilling an inspection program that is designed to prevent the unintentional development of conditions which are hazardous to public health and safety. *See generally*, *Camara v. Municipal Court*, 387

U.S. 523, 535, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). In other words, these are orders entered to allow various municipal inspectors to enforce building codes, fire codes, and other health and safety regulations.

Administrative search warrants must be distinguished from administrative subpoenas. Certain regulatory agencies, such as the Division of Financial Institutions, have statutes that authorize them to require the production of any book, paper, etc., that the director deems relevant or material to an inquiry into a violation of the chapter that they are mandate to enforce. These administrative subpoenas are not a substitute for a search warrant. Evidence collected pursuant to these administrative subpoenas may not be utilized in a criminal investigation or prosecution, unless the subpoena was issued by a court upon a finding of probable cause. *See State v. Miles*, 160 Wn. 2d 236, 156 P.3d 864 (2007).

b. **When Must They Be Obtained.** Anytime a code enforcement officer wishes to make a non-consensual entry into a home or business, or beyond the curtilage of private property to ascertain whether the structure or property complies with various building, fire, zoning and health codes. *Camara v. Municipal Court*, 387 U.S. 523, 535, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (private residences); *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967) (fire department inspection of commercial warehouse).

c. **Who May Issue.** Washington state courts have no inherent authority to issue administrative search warrants. *State v. Landsen*, 144 Wn.2d 654, 663, 30 P.3d 483 (2001); *City of Seattle v. McCready*, 124 Wn.2d 300, 309, 877 P.2d 686 (1994). Therefore, they must rely on an authorizing statute or court rule for such authority. Until 2006, no court rule or state statute authorized the issuance of administrative search warrants. *See* RCW 10.79.015, CrR 2.3(b), and CrRLJ 2.3(b) provide for the issuance of warrants to search for evidence of a *crime*. A search conducted pursuant to an administrative search warrant that was issued by a court without express statutory or court rule authority to issue the warrant is a violation of the Fourth Amendment and will result in 42 U.S.C. § 1983 liability. *See Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005).

Beginning with the 2006 legislative session, a number of statutes have been enacted that authorize courts to issue administrative search warrants. *See, e.g.,* RCW 49.17.070 (Washington Industrial Safety and Health Act); RCW 15.36.111 (dairy farming and milk production); RCW 84.56.075 (distraint or property); RCW 64.44.020 (health regulations related to hazardous chemical contamination, a/k/a meth houses); RCW 59.18.150 (safety of rental properties). Counties may also pass local ordinances that allow for the issuance of administrative search warrants pursuant to Const. art. XI, § 11. Care should be taken to strictly comply with all of the statutory requirements.

d. **When May They Issue.** Under Const. art. I, § 7, an administrative search warrant must be supported by probable cause to believe that a violation of a

building, fire, zoning, or other safety code violation that constitutes a civil infraction. *City of Seattle v. McCready*, 123 Wash. 2d 260, 280, 868 P.2d 134 (1994). In addition, any special statutory restrictions must be satisfied. *See, e.g.* RCW 64.44.020 (only permitting a warrant to issue if access to the property has been denied).

The Fourth Amendment, however, allows for administrative search warrants to issue upon less than probable cause. *See, e.g., City of Seattle v. McCready*, 131 Wn.2d 266, 272, 931 P.2d 156 (1997). In *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), the Supreme Court held that administrative warrants can be issued based on a less than traditional probable cause standard. For purposes of administrative searches conducted to enforce local building, health, or fire codes, the Court stated:

> "'probable cause' to issue a warrant to inspect . . . exists if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e. g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."

Camara, 387 U.S. at 538; 4 Wayne R. LaFave, *Search & Seizure* § 10.1(b) (3d ed. 1996).

e. **Who May Execute the Warrants.** Generally, the code enforcement officer should be the individual who executes the administrative search warrant. The code enforcement officer may request police to accompany him or her if the code enforcement officer anticipates that his or her safety or the safety of others might be jeopardized in the execution of the administrative search warrant.

f. **Gaining Entry to Execute the Administrative Search Warrant.** An administrative search warrant does not authorize the code enforcement officer to batter down doors in order to gain entry. *Camara v. Municipal Court*, 387 U.S. 523, 540, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) ("Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect."); *State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004) (RCW 10.31.040 does not allow forcible entry into dwellings to execute civil warrants). If a property owner refuses to comply with a properly issued administrative warrant, the remedy is to obtain a show cause contempt hearing. If, at the hearing, the property owner still refuses to comply with the judicial order, coercive contempt sanctions,

including incarceration may be imposed as authorized by Chapter 7.21 RCW.

D. EXCEPTIONS TO THE WARRANT REQUIREMENT

A search and a seizure which is not pre-authorized by a neutral and detached magistrate through the warrant process is per se unreasonable unless it falls within a carefully delineated exception. The exceptions fall "into six categories: (1) consent; (2) exigent circumstances; (3) search incident to a valid arrest; (4) inventory searches; (5) plain view; and (6) *Terry* investigative stops, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." *State v. White*, 135 Wn.2d 761, 769 n. 8, 958 P.2d 982 (1998). The burden of establishing a valid exception rests upon the prosecution.

1. Consent.

a. General Rule. The government has the burden of proving a voluntary consent to search. Voluntariness is determined by a totality of the circumstances. A consent to search should be upheld where the consent is voluntarily given and that the defendant had authority to give consent to search. The burden on the State is to demonstrate that the consent was voluntary and not the product of coercion by clear and convincing evidence. In addition, a consent search may not exceed the scope for which the consent was given.

- Mere acquiescence to an officer's entry is not consent and is not an exception to our state's constitutional protection of the privacy of the home. *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011).

b. Voluntariness. A totality of the circumstances test is used to determine the voluntariness of a consent to search. Factors to look at include (a) whether *Miranda* warnings have been given; (b) whether the defendant has been told he has the right to refuse to consent; (c) whether a written waiver of rights has been used; and, (d) the experience of the defendant with the criminal justice system. Many of the same factors that a court considers in determining the voluntariness of a confession, including claims of authority, coercive surroundings, prior illegal police action, police deception as to identity or purpose, will also be considered. *See generally* Justice Charles W. Johnson and Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law :2013 Update*, 36 Seattle Univ. L. Rev. 1581, 1714-19 (2013).

An express or implied claim by the police that they will proceed immediately to conduct the search even without the individual's consent is likely to indicate that the subsequent consent was involuntary. *See Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 803 (1968); *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489, 503-04 (2003) (consent not validly given when officer stated that he could simply arrest the defendant and search incident to arrest); *State v. Browning*, 67 Wn. App. 93, 97-98, 834 P.2d 84 (1992) (acquiescence to a claim of authority is not equivalent to free and voluntary consent to a search).

A threat to seek a warrant if the person refuses to allow a search does not, however, automatically invalidate consent. *See State v. Smith*, 115 Wn.2d 775, 790, 801 P.2d 975 (1990) (no coercion where the defendant was told officers would *request* a

search warrant if consent was not given to search the trunk of car). On the other hand, police misrepresentation regarding the existence of a search warrant may invalidate consent to a search or seizure under the Fourth Amendment. *See Bumper*, 391 U.S. at 548; *Rental Owners Ass'n v. Thurston Cnty*., 85 Wn. App. 171, 183, 931 P.2d 208 (1997) (threats to obtain a search warrant may invalidate consent when grounds for obtaining a warrant do not exist).

Consent to Search Warning

1. You have the right to refuse to consent.

2. If you consent to the search, you have the right to withdraw the consent at any time.

3. You have the right to limit the scope of the consent to certain areas of the premises or vehicle.

4. Evidence found during the search may be used in court against you or any other person.

Under Const. art. I, § 7, when the goal of the police is to search for contraband without first obtaining a warrant, consent to search a residence ***requires*** that prior to the person consenting, s/he must be advised that she can refuse to consent, that s/he can revoke consent at any time, and that s/he can limit the scope of consent to certain portions of the home. *See State v. Ferrier*, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998). Most jurisdictions have added a fourth statement to create what has come to be known as *Ferrier* warnings:

The case that announced the requirement for *Ferrier* warnings indicated that its holding only applied to homes, but subsequent case law has extended the rule to hotel rooms. *See generally State v. Kennedy*, 107 Wn. App. 972, 29 P.3d 746 (2001). In addition, the November 1999, decision of *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999), indicates that the right to be free from unreasonable governmental intrusion into one's "private affairs" encompasses automobiles and their contents. The Washington Supreme Court reaffirmed this position in *State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012) ("A privacy interest in vehicles and their contents is recognized under article I, section 7."). It is, therefore, strongly recommended that *Ferrier* warnings be given when consent to search a vehicle is

being sought.

Failure to give the "right to refuse" warning will not preclude a finding that consent was properly tendered in certain circumstances. *See State v. Ruem*, 179 Wn.2d 195, 206, 313 P.3d 1156 (2013) (entry to serve an arrest warrant on a person who might not live at the home); *State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002) (entry to serve an arrest warrant on a guest); *State v. Williams*, 142 Wn.2d 17, 11 P.3d 714 (2000) (entry to serve an arrest warrant on a guest; opinion indicates that *Ferrier* warnings need not be given when officers enter a house to inspect an alleged break-in, vandalism, and "other routine responses"); *State v. Bustamante-Davila*, 138 Wn.2d 964, 983 P.2d 590 (1999) (entry to serve presumptively valid deportation order); *State v. Overholt*, 147 Wn. App. 92, 193 P.3d 1100 (2008), *review denied*, 165 Wn.2d 1047 (2009) (suspect displayed evidence to officers, without the officers asking for consent to search); *State v. Dodson*, 110 Wn. App. 112, 124, 39 P.3d 324 (2002)), *review denied*, 147 Wn.2d 1004 (2002) (to inquire into the whereabouts of a suspect and to request permission to search outbuildings for a stolen 3-wheel vehicle); *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001) (consent from individual who is already in custody); *State v. Leupp*, 96 Wn. App. 324, 980 P.2d 765 (1999), *review denied*, 139 Wn.2d 1018 (2000) (sweep for injured persons when responding to a 911 hang-up call).

Ferrier warnings need not be given when officers request consent to enter a home for some legitimate, non-search, investigatory purpose, such as interviewing a witness or suspect. If, after the officer enters the residence circumstances change and the officer wishes to conduct a search, the officer must obtain a search warrant. *See State v. Khounvichai*, 149 Wn.2d 557, 564-66, 69 P.3d 862 (2003).

Ferrier warnings should generally be given when an officer requests a resident's consent to search a home for a person. *Ferrier* warnings may, however, be dispensed with when the officer reasonably suspects that the wanted person is on the premises. *Compare State v. Westvang*, 174 Wn. App. 913, 301 P.3d 64 (2013), *review granted and remanded by* 179 Wn.2d 1014 (2014) (the officers improperly failed to give *Ferrier* warnings to homeowner where only an uncorroborated tip from an untried informant supported the search for a hidden guest), *with State v. Dancer*, 174 Wn. App. 666, 300 P.3d 475 (2013), *review denied*, 179 Wn.2d 1014 (2014) (the officer's failure to provide *Ferrier* warnings did not render consent invalid where the officers had independent corroborating evidence, a K-9 track, that the person could actually be found in the home).

Ferrier warnings need not be given when officers have a search warrant in hand, but still decide to seek consent to search from the buildings occupants. *See State v. Johnson*, 104 Wn. App. 489, 17 P.3d 3 (2001) (police officers seeking consent to search a private dwelling are not required to inform the resident that consent may be lawfully refused, limited, or revoked if the officers already have probable cause to arrest the resident and have in their possession, but not disclosed to the resident, a valid search warrant or what they in good faith believe to be a valid search warrant).

Ferrier warnings are not required when the officer is in fresh pursuit of the suspect and the officer does not enter into the home or any other building on the property

with the intent of seeking consent to search. *State v. Overholt*, 147 Wn. App. 92, 193 P.3d 1100 (2008), *review denied*, 165 Wn.2d 1047 (2009).

Ferrier warnings need not be provided to a property owner who is being asked to grant permission for officials to enter his property in order to monitor the property owner's compliance with a conditional land use permit. *Bonneville v. Pierce County*, 148 Wn. App. 500, 202 P.3d 309 (2008), *review denied*, 166 Wn.2d 1020 (2009).

Ferrier warnings need not be provided when requesting consent to search a person's purse or bag in a public place. *State v. Tagas*, 121 Wn. App. 872, 90 P.3d 1088 (2004).

In all but emergencies, a cautious officer, however, should consider advising the person from whom consent is being sought that the person has the right to refuse to give consent. *See State v. Ruem*, 179 Wn.2d 195, 214-15, 313 P.3d 1156 (2013) (Wiggins, J., concurring) (four justices stating that, while "not propos[ing] to expand *Ferrier* to every contact between citizens and police, nor to adopt a rule that would 'unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry'", they would not allow evidence collected from a home following a consensual entry that was not accompanied by *Ferrier* warnings to be used against a resident of the home).

c. **Authority to Consent**. Only the defendant can consent to a search if the defendant is the sole owner or has exclusive possession of the premises. A party having equal use of the object, or equal right to occupation of the premises, may ordinarily give consent to the officer's entry and search that is effective against non-present cohabitant's privacy interest.

i. **Multiple People Present**. If two or more individuals who share control over certain premises, such as roommates, are present when authority to search is requested, each individual must separately consent to the search or the search will be illegal as to the non-consenting individual. *State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989). The evidence found, however, will be admissible as to the consenting individual and as to casual visitors. *See, e.g., State v. Walker*, 136 Wn.2d 678, 965 P.2d 1079 (1998) (evidence obtained in violation of the husband's constitutional rights was still admissible against his wife); *State v. Libero*, 168 Wn. App. 612, 277 P.3d 708 (2012) (while one tenant's consent to search was invalid as to another tenant, the tenant's consent was valid as to the visitor).

In order for the *Leach* rule to apply, both individuals must be "co-occupants". To qualify as a co-occupant, it must be shown that each person has equal control over the premises. *See State v. Thompson*, 151 Wn.2d 793, 806, 92 P.3d 228 (2004) (adult son, who lived in a travel trailer on his parent's property, was not a co-occupant with his parents in the boathouse which was located on another part of his parent's property for which the son did not pay rent and over which he never exercised exclusive control). "Equal control" does not require legal ownership or actual possession. *See State v. White*,

141 Wn. App. 128, 168 P.3d 459 (2007) (neighbor's consent to search the defendant's mother's property was ineffectual as the defendant had equal access to his mother's property and he objected to the police's warrantless entry into the building on his mother's property; both neighbor and defendant had keys to the defendant's mother's property, neither lived on the property, and both had permission from the defendant's mother to access the property); *State v. Williams,* 148 Wn. App. 678, 201 P.3d 371, *review denied*, 166 Wn.2d 1020 (2009) (consent to enter and search hotel room from the person who paid for the room was ineffectual as to defendant, who was traveling with the person who paid for the room, as both individuals had stored items in the hotel room).

A. What is "present"?

"'Present' is defined as "being in one place and not elsewhere: being within reach, sight, or call or within contemplated limits.'" *State v. Morse*, 156 Wn.2d 1, 14 n. 4, 123 P.3d 832 (2005), quoting Webster's Third New International Dictionary at 1793 (1993). Officers must make an effort to ascertain whether a co-occupant is "present" before acting upon consent:

> A person is not absent just because the police fail to inquire, are unaware, or are mistaken about the person's presence within the premises. If the police choose to conduct a search without a search warrant based upon the consent of someone they believe to be authorized to so consent, the burden of proof on issues of consent and the presence or absence of other cohabitants is on the police.

Morse, 156 Wn.2d at 15.

The Washington Supreme Court recognizes that the question of "presence" does not lend itself to bright line rules, but it is unsympathetic about the problems that law enforcement may face:

> We recognize that issues of "common authority" and "presence" will not always be simple and straightforward. It may be difficult to determine, for example: (1) whether a child has "common authority" over her parent's home sufficient to authorize that child to consent to a warrantless search, (2) whether a farmer operating a tractor on his back forty is "present" when the police arrive at the front door of his farmhouse, or (3) whether an employee at a factory has authority to consent for an employer who is on the factory's campus, but in a another building at the time. However, such difficulties may be avoided

> by the police by obtaining either a search warrant or the consent of the person whose property is to be searched.

State v. Morse, 156 Wn.2d at 15 n. 5.

The only clear guidance from the Washington Supreme Court is that an individual who is in a bedroom that is located approximately 10 feet from the entrance to the apartment is "present" for the purposes of obtaining a valid consent to search. *Morse*, 156 Wn.2d at 14 n. 4.

B. **Consent to Enter**. Case law prior to *Morse* indicated that a co-occupant had the authority, even if other co-occupants are present, to allow an officer into those portions of a premise into which customers or guests are customarily received without the permission of the other individuals who share control. *See State v. Hoggatt*, 108 Wn. App. 257, 30 P.3d 488 (2001). Whether this case survives *Morse* is uncertain.

It is clear, however, that a co-occupant's invitation to enter is ineffectual as to a co-occupant who is present and who is expressly objecting to the officer's entry. *Georgia v. Randolph*, 547 U.S. 103, 164 L. Ed.2d 208, 126 S. Ct. 1515 (2006). Law enforcement may not remove the potentially objecting tenant from the premises for the sake of avoiding a possible objection. *Id.*, at 164 L. Ed. 2d at 226-27.

I. **Mere Acquiescence.** Mere acquiescence to an officer's entry is not consent and is not an exception to our state's constitutional protection of the privacy of the home. *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011).

II. **Emergency Doctrine Still Exists.** Police may still enter the house without a warrant when there are objective grounds to believe that there is reason to fear for the safety of the occupant issuing the invitation or of someone else inside. *See, e.g., Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (warrantless entry into house after police observed, through a window, a juvenile punch another person in the face), *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001) (entry into house in DV situation justified under the emergency exception); *State v. Raines*, 55 Wn. App. 459, 778 P.2d 538 (1989), *review denied*, 113 Wn.2d 1036 (1989) ("police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants" of a home);. *State v. Lynd*, 54 Wn. App. 18, 771 P.2d 770 (1989) (entry into house over batterer's objections justified under the emergency exception).

As stated by the United States Supreme Court in *Georgia v. Randolph*, 164 L. Ed. 2d at 224-25:

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a residence from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.

III. Look the Gift Horse in the Mouth. In *Georgia v. Randolph*, 547 U.S. 103, 164 L. Ed.2d 208, 224, 126 S. Ct. 1515 (2006), the Court indicated that the consenting co-tenant acting on his own initiative may be able to deliver evidence to the police. This is problematic in Washington as the burden of proving that the police did not turn the consenting co-tenant into an agent is high. Also, if the consenting co-tenant is married to the objecting co-tenant or is in a civil union with the objecting co-tenant, the spousal testimonial privilege will preclude the government from calling the consenting co-tenant to the stand at trial or in response to a suppression motion. *See generally* RCW 5.60.060(1).

The better practice is to submit the information provided by the consenting co-tenant to a neutral and detached magistrate in order to obtain a search warrant. *Georgia v. Randolph*, 164 L. Ed. 2d at 224. This works even if the consenting co-tenant is married to the objecting co-tenant, as out-of-court statements made by one spouse or partner to a civil union regarding another spouse may be relied upon in an affidavit for search warrant, in determining probable cause, and in determining whether the corpus delicti has been established. *See State v. Bonaparte*, 34 Wn. App. 285, 660 P.2d 334, *review denied*, 100 Wn.2d 1002 (1983); *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979); *State v. Osborne*, 18 Wn. App. 318, 569 P.2d 1176 (1977).

A co-occupant does have the authority, even if other co-occupants are present, to allow an officer into those portions of a premise into which customers or guests are customarily

received without the permission of the other individuals who share control. *See State v. Hoggatt*, 108 Wn. App. 257, 30 P.3d 488 (2001).

- An officer may rely upon a co-tenants consent to remove firearms from the home of a suspect who has been arrested for a domestic violence assault, when the officer's actions are being taken for a non-investigative, community caretaking purpose. *See generally Feis v. King County Sheriff's Dept.*, 165 Wn. App. 525, 267 P.3d 1022 (2011), *review denied*, 173 Wn.2d 1036 (2012).

C. Consent to Search a Vehicle. Where individuals who have equal right of access and authority over a vehicle are present, consent need only be obtained from one individual. *See State v. Cantrell*, 124 Wn.2d 183, 875 P.2d 1208 (1994). This consent, however, will probably not justify a search of the possessions (*i.e.* purses, jackets, gym bags), that the officer "knows or should know" belongs to someone other than the person who gave the consent. *See State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). Consent from one individual will probably not be sufficient as to an express objection from the other individual. *Cf. Georgia v. Randolph*, 547 U.S. 103, 164 L. Ed.2d 208, 126 S. Ct. 1515 (2006).

ii. Third Person Consent. When consent is sought from someone other than the defendant, the courts look to two factors, both of which must be satisfied, in order for the consent to be valid.

- The consenting party must be able to permit a search in his own right. In Washington this means that the consenting party must have the actual, not just apparent, authority to consent to the search. *See State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005).
- It must be reasonable to find that the defendant assumed the risk that a co-occupant might permit a search.

These factors will be reviewed against an objective standard. An officer's subjective belief made in good faith about the scope of the consenting party's authority to consent cannot be used to validate a warrantless search under Const. art. I, § 7. *State v. Morse*, 156 Wn.2d 1, 12, 123 P.3d 832 (2005).

There are no post-*Morse* cases yet that discusses when a consenting party may tender a valid consent to search. Pre-*Morse* cases generated the following general rules that may serve as a starting point in the officer's quest for a valid consent to search:

- **Spouse.** A spouse, having an equal right to use an object or occupy the property, may consent to a search of the object or premises, regardless of whether the area is kept for the exclusive use of the

non-consenting spouse. *See State v. Gillespie*, 18 Wn. App. 313, 317, 569 P.2d 1174 (1977). But, the consent of a spouse is only valid against the non-consenting spouse if the non-consenting spouse is not present at the time of the search. *State v. Walker*, 136 Wn.2d 678, 679, 965 P.2d 1079 (1998). A spouse, who has been excluded from the premises by a DV order or other court order, may not consent to a search of the premises. *See generally Osborne v. Seymour*, 164 Wn. App. 820, 828 n.3, 265 P.3d 917 (2011); *State v. Jacobs*, 101 Wn. App. 80, 2 P.3d 974 (2000).

- **Parents.** Parents can generally consent to a search of a child's room where the child is "essentially dependent" on the parent. If the child is independent of the parent and/or paying rent, a parent may lack the authority to give a valid consent. *See, e.g., State v. Summers*, 52 Wn. App. 767, 764 P.2d 250 (1988), *review denied*, 112 Wn.2d 1006 (1989).

- **Children.** A child of sufficient age and maturity such that s/he is not overly influenced by police presence may give a valid consent to search those portions of the house to which the child generally enjoys access. *See, e.g., State v. Jones*, 22 Wn. App. 447, 451-52, 591 P.2d 796 (1979) (reasoning that a minor child may consent to entry but declining to rule on the legal question of consent to search). Minimum age in Washington is 12 years old. *See* RCW 13.40.140(10). Children cannot generally consent to search of a parent's bedroom or home office.

- **Co-Tenant or Roommate.** A co-tenant or joint occupant of the defendant's dwelling with common authority over or other sufficient relationship to the premises or effects sought to be inspected may give valid consent to a search of the premises or effects. *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); *see State v. Mathe*, 102 Wn.2d 537, 543, 688 P.2d 859 (1984); *see also State v. Jeffries*, 105 Wn.2d 398, 414, 717 P.2d 722 (1986) (common authority rule applicable to validate consent to search a "hobo" camp located outside the city of Wenatchee). A cohabitant cannot give consent if a non-consenting cohabitant, who has equal or greater control over the premises, is present. *State v. Morse*, 156 Wn.2d 1, 13, 123 P.3d 832 (2005). Although a cohabitant cannot give valid consent to bedrooms or private areas when a non-consenting cohabitant is present, a cohabitant can give valid consent to police officers to enter the living room or an area that customarily receives visitors. *State v. Hoggatt*, 108 Wn. App. 257, 269, 30 P.3d 488 (2001).

- **Private Business Owner or Employer.** A business owner may consent to a search of his business, but this consent may not be effective as to an employee's desk, computer, or locker if the desk,

computer, or locker are reserved for the employee's exclusive use. *See, e.g., United States v. Hand*, 516 F.2d 472 (5th Cir. 1975) .

- **Government Employer.** A government employer generally may not grant consent to a search of the employee's work area. *See United States v. Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951) (concluding that a government supervisor cannot consent to a law enforcement search of a government employee's desk); *United States v. Taketa*, 923 F.2d 665, 673 (9th Cir. 1991); United States v. Kahan, 350 F. Supp. 784, 791 (S.D.N.Y. 1972), *rev'd in part on other grounds*, 479 F.2d 290 (2d Cir. 1973), *rev'd with directions to reinstate the district court judgment*, 415 U.S. 239 (1974). The rationale for this result is that the Fourth Amendment cannot permit one government official to consent to a search by another. *See Blok*, 188 F.2d at 1021 ("Operation of a government agency and enforcement of criminal law do not amalgamate to give a right of search beyond the scope of either.")

- **Houseguest.** A houseguest generally cannot provide valid consent to the search of a host's home. If, however, the houseguest has been left in sole possession of the house (*i.e.* house sitter) the consent may be valid. *See State v. Ryland*, 120 Wn.2d 325, 840 P.2d 197 (1992).

- **Host.** A host generally has the authority to consent to a search of his or her home, including areas where a guest is staying. A host's consent to a search would not, however, allow an officer to open a guest's locked bag. *See, e.g., State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002).

- **Landlord**. A landlord has no authority to consent to a search while the tenancy is still valid. *State v. Birdsong*, 66 Wn. App. 534, 537-39, 832 P.2d 533 (1992). However, the lessor or manager of an apartment building may consent to a search of an area that is not within the lessee's exclusive possession. *State v. Talley*, 14 Wn. App. 484, 487, 543 P.2d 348 (1975) (finding the common areas of a property were not under exclusive control of the lessee-defendant). *See generally State v. Kreck*, 86 Wn.2d 112, 123, 542 P.2d 782 (1975) (finding that the rental manager could consent to a search of an unrented half of a garage). When the lease expires, however, the tenant assumes the risk that the landlord will exercise the right to joint control and permit a search. *See State v. Christian*, 95 Wn.2d 655, 628 P.2d 806 (1981). Tread carefully here, as courts generally will act to protect tenants unless there is evidence that the tenant agreed to be out of the residence on the date the lease expires, or there is evidence that the tenant has abandoned the property, or the landlord has obtained an order of eviction.

- **Tenant.** A tenant may consent to searches of common areas of an apartment building and the tenant's own unit, even over the objection of the landlord. *City of Seattle v. McCready*, 124 Wn.2d 300, 307,

877 P.2d 686 (1994) ("Landlords in Washington assume the risk tenants might permit a search of common areas."); *State v. Cranwell*, 77 Wn. App. 90, 103-04, 890 P.2d 491 (1995).

- **Motel/Hotel Owner or Manager.** A motel owner has no authority to consent to a search of a guest's room while the tenancy is still valid. If the motel owner has accepted late payment and/or tolerated overtime stays in the past, the motel owner cannot give consent once the tenancy has expired. *State v. Davis*, 86 Wn. App. 414, 419, 937 P.2d 1110, *review denied*, 133 Wn.2d 1028 (1997). A limited exception will apply if the motel owner has clearly indicated that the authorized overtime stay is of limited duration. *See United States v. Dorais*, 241 F.3d 1124 (9th Cir. 2001) (defendant had no expectation of privacy in hotel room at 12:40 p.m. where hotel's 10 a.m. reminder of the checkout time, and the housekeeper's noon visit, put defendant on notice that any extension past noon would be of limited duration).

- **Rental Car Company.** A rental car company has no authority to consent to a search of a vehicle while the rental agreement is still in effect. If the rental car company has not taken steps to recover (repossess) the car after the rental agreement has expired, then the rental company cannot consent to a search of the vehicle. *See United States v. Henderson*, 241 F.3d 638 (9th Cir. 2000).

- **Repairman.** A repairman or contractor may not consent to a search of the home where they are working. *State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008).

- **Bailee.** A bailee (a person to whom personal property is entrusted for a particular purpose by another) may consent to a search of the bailor's belongings when the bailee has a sufficient relationship to or degree of control over the personal property. *See State v. Smith*, 88 Wn.2d 127, 139-40, 559 P.2d 970 (1977) (when hospital had joint control over patient-defendant's clothing, hospital ward clerk could consent to police seizure of the clothing); *see also State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000) (manager of storage units facility could give police permission to enter; officers subsequently viewed contraband through existing hole in container).

In deciding whether a third person has the authority to consent to a search on a particular occasion, the following factors should be considered:

- Residence:

  1. Does the address on the person giving consent's driver's license (or other ID) match the residence?

  2. Do records on the person giving consent from DOL match the residence?

  3. Does the person giving consent have a key or other access device (alarm code, access code, garage door opener…)?

4. Does the person giving consent have mail with the listed address on it?

5. Is the name of the person giving consent on the mailbox?

6. Does the consenting person know the layout of the inside of the house?

7. Is the person tending consent already in the home?

8. Does the person tendering consent have his or her own room?

9. Do the neighbors (or landlord) of the residence know the person who is giving consent?

10. Can the person who is consenting to the search give a coherent description of his or her present connection to the residence?

- Vehicle:

  1. Is the person who is consenting to the search driving the car?

  2. Do DOL records match up?

- In general:

  1. What is the person's motive for giving the officer consent?

  2. Has the consenting person lied to the officer?

  3. Did the consenting person sign the consent form listing them as the owner?

  4. Does the consenting person's criminal history include any crimes of dishonesty?

  5. If any of the above factors are not established, does the consenting person's explanation for it make sense? (example: different name on mailbox because "just moved 2 days ago", coupled with signs of a recent move)

  6. Focus should be on the person's current connection with the residence or car. *If the situation is ambiguous, the officer must continue to make inquiries until the officer is convinced the person has authority to consent.*

d. **Scope of Consent**. A consent search is limited to those areas for which consent is granted. Consent may be withdrawn at any time. If an officer acts in a manner that prevents the consenting individual from monitoring the search, the officer's actions might be found to have coerced the individual into believing that he cannot withdraw his consent. If coercion is found, the fruits of the search will be suppressed. *United States v. McWeeney*, 454 F.3d 1030 (9th Cir. 2006).

"A general and unqualified consent to search an area for a particular type of material permits a search of personal property within the area in which the material could be

concealed." *State v. Mueller*, 63 Wn. App. 720, 722, 821 P.2d 1267 (1992). An officer who encounters a locked container should, however, separately request consent to search the container, as a general consent to search the location where the container is found will not be extended to the locked container. *See, e.g. State v. Monaghan*, 165 Wn. App. 782, 266 P.3d 222 (2012) (driver's consent to search the passenger compartment and the trunk did not extend to the warrantless search of the locked container found in the trunk).

When a person gives consent to search an area under joint control, such as a living room, the consent may be ineffectual as to items that belong to someone else who resides at the place being searched or who is a guest at the place being searched. *See, e.g., State v. Rison*, 116 Wn. App. 955, 69 P.3d 362 (2003), *review denied*, 151 Wn.2d 1008 (2004) (tenant's consent to search the apartment did not authorize the police to search a closed eyeglass case belonging to a guest); *United States v. Davis*, 332 F.3d 1163 (9th Cir. 2003) (lessee's consent to a search of the apartment did not provide officer's with the authority to search the lessee's roommate's boyfriend's gym bag which was located under the bed of the room where the boyfriend sometime slept); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (although a third party may have had authority to consent to a general search of a jointly-used computer, that authority did not extend to another user's password-protected files).

Factors to consider in determining whether a particular item may be searched pursuant to consent given by one who has joint authority over an area include:

- Does the officer know or have reason to know that the closed container to be searched belongs to someone other than the person who provided the consent to search?
- Is there a monogram or luggage tags on the container which indicate that it belongs to someone else?
- Does the consenting person indicate that the container belongs to someone else?
- Would a reasonably respectful housemate/host/spouse feel comfortable opening the container without the express permission of the owner?
- Did the container's owner manifest a desire to keep the container private?
    - Keeping the container close to the owner
    - Telling other people to not enter the container
    - Trying to remove the container from the house/apartment/car when police are present

A person's consent to a search of their body for narcotics reasonably includes the groin area. *United States v. Russell*, 664 F.3d 1279 (9th Cir. 2012). The person being searched, of course, may verbally withdraw consent as to his or her groin area or by actively shielding the groin area from the officer's search. *See, e.g., United States v. Sanders*, 424 F.3d 768, 776 (8th Cir. 2005) (granting a motion to suppress where the suspect consented to a search of his person but then withdrew consent by actively shielding his groin area from the officer's search).

A person's consent to search a cell phone does not allow an officer to answer incoming calls. *United States v. Lopez-Cruz*,730 F.3d 803 (9th Cir. 2013).

e. **Prior Consents.** The general rule is that an individual can withdraw consent at any time. This rule, however, may not be applicable where the consent to search is tendered as part of a pre-trial release order, furlough order, electronic home detention ("EHD") program agreement or similar document. In such cases, the individual who consented to the search probably must return to court to rescind his or her consent.

- In *State v. Cole*, 122 Wn. App. 319, 93 P.3d 209 (2004), the defendant signed an EHD program agreement, which included a consent to search, when her roommate entered the EHD program. The court held that the fruits of a warrantless search of the residence that was conducted while the EHD was in full force were admissible at trial.

f. **Special Limitations to Consent.**

A suspect may voluntarily consent to a blood test for alcohol or drugs, but only in cases where the implied consent statute is inapplicable. *See State v. Avery*, 103 Wn. App. 527, 13 Wn. P.3d 226 (2000).

Laws of 2013, 2nd Special Session, chapter 35, section 36, amends RCW 46.20.308. The new law, which will apply to arrests occurring on or after September 28, 2013, removes blood tests from the implied consent statute. Thus, the implied consent statute will not apply to cases in which there is probable cause to believe the suspect is impaired, at least in part, by a drug other than alcohol.

A suspect may consent to a blood draw, even when arrested for DUI, provided that the implied consent warnings for breath were not read to the suspect. *See* Laws of 2012, 2nd Special Session, chapter 35, section 36(4) ("If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath, no test shall be given except as authorized by a search warrant.").

A prudent officer may, when requesting consent to a blood draw for alcohol and/or drug testing, wish to use a form that provides the suspect with the following information :

> I, _____, voluntarily permit officer _____ to obtain a sufficient amount of my blood to test it to determine its alcohol and/or drug content.
>
> > I understand that I have the right to refuse to give consent to a voluntary blood draw and that I may require the officer(s) to obtain a search warrant.
> >
> > I understand that the blood will be extracted by a physician, a registered nurse, a licensed practical nurse, a nursing assistant, a physician assistant, a health care assistant, a first responder, an emergency medical technician, or a technician who is trained in withdrawing blood.

> I realize that if the test of my blood reveals the presence of any alcohol and/or drugs, that the concentration of alcohol and/or drugs in my blood may be used as evidence against me in subsequent legal proceedings.
>
> I understand that I have right to additional tests administered by a qualified person of my choosing.
>
> If I wish to consult with an attorney before giving consent, reasonable efforts will be made to put me in telephonic contact with a public defender or an attorney of my choice.
>
> My consent has been given knowingly, freely, and voluntarily, without threats of duress against my person or promise of reward.

g. Refusal to Consent.

Consent is actually a waiver of the warrant requirement. Consent in the constitutional sense is only required where the defendant has a legal right to refuse. Consent in the constitutional sense may be withdrawn or revoked by a person at any time prior to the completion of the search. *See, e.g., Jones v. Berry*, 722 F.2d 443, 448-49 (9th Cir. 1983). *Accord State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998) (a person who consents to a search should be informed that she has the right to revoke her consent at any time).

A person cannot be penalized for demanding a warrant when a warrantless search is not authorized by the Fourth Amendment. *Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967) (defendant could not be convicted of refusing to consent to a warrantless administrative search of his residence where the defendant had a constitutional right to insist that the inspector obtain a warrant); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) ("because the Fourth Amendment gives individuals a constitutional right to refuse consent to a warrantless search it is privileged conduct that cannot be considered as evidence of criminal wrongdoing"); *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013) (a defendant's refusal to consent to a warrantless search and seizure of his DNA is inadmissible at court and may not be argued as substantive evidence of guilt). *But see* Kenneth Melilli, *the Consequences of Refusing Consent to a Search or Seizure: the Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. Cal. L. Rev. 901 (2002).

A suspect's refusal to grant consent to a search, when a warrantless search is not authorized by the Fourth Amendment, may also not be used to establish probable cause for the issuance of a search warrant. *See, e.g., United States v. Hyppolite*, 65 F.3d 1151, 1157 (4th Cir. 1995), *cert. denied*, 517 U.S. 1162 (1996); *State v. McGovern*, 111 Wn. App. 495, 501 n. 18, 45 P.3d 624 (2002). *Accord Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991) (a suspect's assertion of his constitutional rights cannot be the sole basis for probable cause to search). A few courts have suggested that, while the refusal to consent to a search is constitutionally off limits, the form of that refusal may not be so privileged. *See, e.g., United States v. Carter*, 985 F.2d 1095 (D.C. Cir. 1993) (the defendant's "offer to show the detective the contents of his bag and his peculiar way of retracting that

offer gave rise to a reasonable suspicion that he was concealing drugs in his bag").

A suspect's refusal to grant consent or to cooperate with an officer may be considered as to probable cause for a search warrant and as to guilt when the Fourth Amendment's warrant requirement is inapplicable. *See, e.g., State v. Mecham*, COA No. 69613-1-I, ___ Wn. App. ___, ___ P.3d ___ (Jun. 23, 2014) (because a defendant does not have a constitutional right to refuse to perform FSTs as part of a lawful *Terry* stop, the prosecution may comment on the defendant's refusal to perform the tests); *McCormick v. Municipality of Anchorage*, 999 P.2d 155, 160 (Alaska App. 2000); .*State ex rel. Verburg v. Jones*, 121 P.3d 1283 (Ariz. App. 2005) (In DUI trial, officer could testify about, and prosecutor could comment on, defendant's refusal to perform field sobriety tests because, under the Fourth Amendment, field sobriety tests were a lawful search and defendant did not have the right to refuse the tests); *State v. Greenough*, 216 Ore. App. 426, 173 P.3d 1227 (Or. App. 2007) (Defendant's conviction for driving under the influence of intoxicants was proper under Or. Const. art. I, § 9 because defendant's right to be free from unreasonable searches did not grant him the constitutional right to refuse a breath test or a field sobriety test when requiring those tests would have been supported by probable cause); *City of Seattle v. Stalsbroten*, 138 Wn.2d 227, 978 P.2d 1059 (1999) (refusal to perform field sobriety tests was proper); Kenneth Melilli, *the Consequences of Refusing Consent to a Search or Seizure: the Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. Cal. L. Rev. 901, 921 (2002). *Cf. Salinas v. Texas*, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013) (prosecutors may comment on pre-custodial silence of accused in the face of official suspicion as *Miranda* did not relieve the accused of expressly asserting the privilege against self-incrimination).

2. Open View.

"Open view" is the first cousin of plain view. Open view occurs when an observation is made from outside a constitutionally protected area while at a location where the observer has a right to be. An example of an "open view" search is an aerial overflight of a field looking for marijuana. The observation of contraband from a lawful vantage point, however, does not justify the warrantless physical intrusion of police officers into a constitutionally protected area to seize the evidence. *See, e.g., State v. Jones*, 163 Wn.2d 354, 259 P.3d 351 (2011), *review denied*, 173 Wn.2d 1009 (2012) (an officer's observations of pills in the defendant's vehicle was not a search, but the observations did not provide a basis for the warrantless entry into the vehicle to collect the pills). *Accord* In other words, Charles E.Moylan, Jr., *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 Mercer L. Rev. 1047, 1096 (1975) ("[w]herever the eye may go, the body of the policeman may not necessarily follow"). Instead, an officer must take his or her open view observations to a magistrate for issuance of a search warrant *State v. Swetz*, 160 Wn. App. 122, 134-35, 247 P.3d 802 (2011); *State v. Lemus*, 103 Wn. App. 94, 11 P.3d 326 (2000); *State v. Ferro*, 64 Wn. App. 181, 182, 823 P.2d 526 (1992), *review denied* 119 Wn.2d 1005 (1992). Entry into the constitutionally protected area, pending the arrival of a search warrant, must be authorized by some other exception to the warrant requirement. *See, e.g., State v. Gibson*, 152 Wn. App. 945, 219 P.3d 964 (2009) (officer, who observed chemicals and other methamphetamine manufacturing supplies through the windows of a vehicle, following the arrest of the vehicle, lawfully entered the vehicle solely to secure the

hazardous items, prior to obtaining a search warrant for the vehicle).

Binoculars and flashlights that merely enhance an officer's own senses will not render an open view illegal. *See State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996) (held illumination through uncurtained window of the interior of a mobile home by a flashlight at night satisfied the open view doctrine); *State v. Manly*, 85 Wn.2d 120, 124, 530 P.2d 306, *cert. denied*, 423 U.S. 855 (1975) (view through open window enhanced by binoculars). An officer's utilization of a preexisting crack in a wall or knothole will not render an open view illegal. *See State v. Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000) (police officer peering through a pre-existing peephole in a storage unit from an adjacent empty storage unit). The use of a device that detects heat or something else that would not be detectable by the ordinary senses, however, is improper without a warrant. *See, e.g., State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994) (infrared heat detector); *State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998), *review denied* 137 Wn.2d 1032 (1999) (trained narcotic dog).

While an open view does not become illegal solely because an officer is at the location to deliberately look for evidence of a crime, the entry onto the property will be found to be improper if the officer is not conducting a care-taking function such as investigating an abandoned car, if the officer makes no attempt to contact the resident of the house, if the officer has entered the curtilage solely to collect information for a search warrant and/or if the officer enters the property at an unduly late or early hour. *See, e.g., State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000); *State v. Maxfield*, 125 Wn.2d 378, 397-99, 886 P.2d 123 (1994).

a. **Curtilage**. The "curtilage" of residential premises consists of "all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling, and is habitually used for family purposes." *United States v. Potts*, 297 F.2d 68, 69 (6th Cir. 1961). *See also Oliver v. United States,* 466 U.S. 170, 180, 80 L. Ed. 2d 214, 104 S. Ct. 1735 (1984) ("the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life'"; *quoting Boyd v. United States,* 116 U.S. 616, 630, 29 L. Ed. 746, 6 S. Ct. 524 (1886)).

To determine whether an area is part of the curtilage, we look at four factors which indicate how intimately the area is tied to the home itself: (1) the area's proximity to the home, (2) whether the area is included within an enclosure surrounding the home, (3) whether the area is being used for the intimate activities of the home, and (4) the steps taken by the resident to protect the area from observation by passersby. *United States v. Dunn,* 480 U.S. 294, 301, 94 L. Ed. 2d 326, 107 S. Ct. 1134 (1987).

It is permissible for officers to approach a home to contact the inhabitants. *See, e.g., State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996) (officer entitled to walk up onto porch, which was the usual access route to the house); *State v. Dodson*, 110 Wn. App. 112, 123, 39 P.3d 324 (2002) (an officer may access that portion of the curtilage "apparently open to the public, such as the driveway, the walkway, or any access route leading to the residence."); *State v. Gave*, 77 Wn. App. 333, 337, 890 P.2d 1088 (1995) (driveway, walkway, or access routes leading to residence or to porch or residence are all areas of "curtilage" impliedly open to the public). The constitutionality of entries into the curtilage hinge on whether the officer's actions

are consistent with an attempt to initiate consensual contact with the occupants of the home. *United States v. Perea-Rey*, 680 F.3d 1179 (9th Cir. 2012). In making contact, an officer need not approach a specific door if there are multiple doors accessible to the public. *United States v. Titemore*, 335 F. Supp. 2d 502, 505-06 (D. Vt. 2004), *aff'd*, 437 F.3d 251 (2d Cir. 2006) ("the law does not require an officer to determine which door most closely approximates the Platonic form of 'main entrance' and then, after successfully completing this metaphysical inquiry, approach only that door. An officer [initiating] a 'knock and talk' visit may approach any part of the building . . . where uninvited visitors could be expected."). Once an attempt to initiate a consensual encounter with the occupants of a home fails, the officers should leave and either get a warrant or return at a later time when the occupants may reasonably be expected to be at home. *United States v. Perea-Rey*, 680 F.3d 1179 (9th Cir. 2012).

Actions taken by an officer that deviates substantially from what a respectful citizen would have done will violate the homeowner's Fourth Amendment rights. *See, e.g., Florida v. Jardines*, __ U.S. ___, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (police may not introduce a trained police dog into the curtilage without a warrant); *State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000) (evidence suppressed when officers entered driveway at 12:10 a.m., walked toward the garage, and then left without approaching the front door of the residence or attempting to contact the residents); *State v. Boethin*, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (evidence suppressed when, in traversing from the stairs to the garage, the officers put their noses close to the garage door).

When a police officer enters a property through an impliedly open curtilage area and discovers evidence, a court will consider a combination of factors to analyze the admissibility of evidence, including whether the officer (1) spied into the residence; (2) acted secretly; (3) acted after dark; (4) used the most direct access route; (5) tried to contact the resident; (6) created an artificial vantage point; or (7) made the discovery accidently. *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991) (citing *State v. Seagull*, 95 Wn.2d 898, 905, 632 P.2d 44 (1981)). A court will also consider whether the defendant manifested a desire for privacy. *See, e.g., State v. Jesson*, 142 Wn. App. 852, 177 P.3d 139, *review denied*, 164 Wn.2d 1016 (2008) (observations made by an officer when he drove to the defendant's home in the middle of the day to interview the defendant regarding a theft reported by his neighbor were inadmissible under the open view doctrine, where the defendant had manifested a desire for privacy by securing his rural property, which was only reachable by a private easement road and primitive driveway, with an unlocked gate and "No Trespassing" and "Private Keep Out" signs).

While it is not improper for an officer to request permission from a defendant's neighbor to enter onto the neighbor's property so as to get closer to the defendant's property, care must be taken to remain on the neighbor's property. *See, e.g., State v. Littlefair*, 129 Wn. App. 330, 119 P.3d 359 (2005) (an officer's observations collected at night while the officer was on property that he believed belonged to the neighbor were suppressed as the officer had unintentionally, but surreptitiously, strayed onto the defendant's property without a warrant for the sole purpose of looking for marijuana)

3. Plain View.

The historical elements of a plain view search are that the officer has a prior lawful justification for the intrusion into the constitutionally protected area; that the item(s) seized were immediately recognized as contraband or as having some evidentiary value; and that the discovery of the incriminating evidence must be inadvertent. However, neither article I, section 7, nor the Fourth Amendment still require inadvertent discovery to justify a seizure under the plain view exception. *See Horton v. California*, 496 U.S. 128, 130, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *State v. Hudson*, 124 Wn.2d 107, 114 n.1, 874 P.2d 160 (1994) (noting the *Horton* revision to the plain view test). The classic example of a "plain view" occurs where an officer is serving a search warrant for stolen television sets and discovers marijuana plants.

An officer need not have absolute knowledge that the object is related to a crime. It is sufficient that the officer have probable cause to believe that the object is evidence of a crime. *State v. Sistrunk*, 57 Wn. App. 210, 214, 787 P.2d 937 (1990). For example, in *State v. Gonzales*, a clear vial of capsules and pills, "viewed in context" of other items of drug paraphernalia, was properly seized. 46 Wn. App. 388, 400-01, 731 P.2d 1101 (1986). On the other hand, a closed paper bag containing marijuana was improperly seized because the marijuana was clearly not visible. *Id.* at 400, 731 P.2d 1101; *see also Sistrunk*, 57 Wn. App. at 214, 787 P.2d 937 (no probable cause to seize empty beer cans in open view when the condition of cans was consistent with driver's explanation that they had been picked up for recycling).

An officer cannot tamper with the evidence in order to establish probable cause to believe that the object is evidence of the crime under investigation or will lead to an arrest for another crime. If an object is moved or tampered with in any way to determine whether it is evidence of a crime, the "immediately apparent" prong of the plain view test will fail. *State v. King*, 89 Wn. App. 612, 622 n.31, 949 P.3d 856 (1998) (citing *State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974)). Police officers must connect items to a crime based solely on what is exposed to their view; they cannot move the object even a few inches. *Murray*, 84 Wn.2d at 527, 527 P.2d 1303 (holding that the police may not move a TV to view the serial number). *See also State v. Johnson*, 104 Wn. App. 489, 502, 17 P.3d 3 (2001) (plain view will not allow an officer to seize a video tape if the exterior of the tape does not indicate that the tape may be evidence of a crime).

a. Computers

The application of plain view to computer contents is in a state of flux. Two separate rules[16] have been announced by the various Federal Circuit Courts of Appeal. The current positions are summarized here, beginning with the most restrictive:

i. Special Subjective Test. In the Tenth Circuit, the usual objective test for admitting plain view evidence has been replaced by a subjective test

[16]A third more restrictive rule was adopted by the Ninth Circuit in its 2009 opinion in *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009). This "rule" required compliance with a complex set of prophylactic procedures designed to avoid admission of plain view evidence altogether. The Court, however, retreated from this position in its 2010 opinion. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010).

designed to narrow the scope of plain view: Evidence outside the scope of a warrant is permitted in plain view only if the agent was subjectively looking for evidence within the scope of the warrant. *See United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999).

The Seventh Circuit seems to accept the Tenth Circuit's inadvertence standard for plain view (or arguably takes a third approach, that the test is whether the agent knew or should have known that the file opened was outside the scope of the warrant). *See Untied State v. Mann*, 592 F.3d 779 (7th Cir. 2010). The Seventh Circuit, however, reject's the Ninth Circuit's position, stating that:

> Although the Ninth Circuit's rules provide some guidance in a murky area, we are inclined to find more common ground with the dissent's position that jettisoning the plain view doctrine entirely in digital evidence cases is an "efficient but overbroad approach." *Id.* at 1013 (Callahan, J., concurring in part and dissenting in part). As the dissent recognizes, there is nothing in the Supreme Court's case law (or the Ninth Circuit's for that matter) counseling the complete abandonment of the plain view doctrine in digital evidence cases. *Id.* We too believe the more considered approach "would be to allow the contours of the plain view doctrine to develop incrementally through the normal course of fact based case adjudication." *Id.* We are also skeptical of a rule requiring officers to always obtain pre-approval from a magistrate judge to use the electronic tools necessary to conduct searches tailored to uncovering evidence that is responsive to a properly circumscribed warrant. Instead, we simply counsel officers and others involved in searches of digital media to exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described.

United State v. Mann, 592 F.3d 779, 785-86 (7th Cir. 2010).

ii. **Usual Test**. The Fourth Circuit expressly rejects the Tenth Circuit's plain view rule, stating that:

> Williams, relying on the Tenth Circuit's opinion in *United States v. Carey*, advances an argument that the plain-view exception cannot apply to searches of computers and electronic media when the evidence indicates that it is the officer's purpose from the outset to use the authority of the warrant to search for unauthorized evidence because the unauthorized evidence would not then be uncovered "inadvertently."
>
> This argument, however, cannot stand against the principle, well-established in Supreme Court jurisprudence, that the

scope of a search conducted pursuant to a warrant is defined objectively by the terms of the warrant and the evidence sought, not by the subjective motivations of an officer.

While Williams relies accurately on *Carey*, which effectively imposes an "inadvertence" requirement, such a conclusion is inconsistent with *Horton*. Inadvertence focuses incorrectly on the subjective motivations of the officer in conducting the search and not on the objective determination of whether the search is authorized by the warrant or a valid exception to the warrant requirement.

In this case, because the scope of the search authorized by the warrant included the authority to open and cursorily view each file, the observation of child pornography within several of these files did not involve an intrusion on Williams' protected privacy interests beyond that already authorized by the warrant, regardless of the officer's subjective motivations.

At bottom, we conclude that the sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents. As the Supreme Court recognized in *Andresen*, "[T]here are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable." 427 U.S. at 482 n.11. While that danger certainly counsels care and respect for privacy when executing a warrant, it does not prevent officers from lawfully searching the documents, nor should it undermine their authority to search a computer's files. *See United States v. Giberson*, 527 F.3d 882, 888 (9th Cir. 2008) (holding that "neither the quantity of information, nor the form in which it is stored, is legally relevant in the Fourth Amendment context"). We have applied these rules successfully in the context of warrants authorizing the search and seizure of non-electronic files, *see Crouch*, 648 F.2d at 933-34, and we see no reason to depart from them in the context of electronic files.

Thus, the warrant in this case, grounded on probable cause to believe that evidence relating to the Virginia crimes of threatening bodily harm and computer harassment would be found on Williams' computers and digital media, authorized the officers to search these computers and digital media for files satisfying that description, regardless of the officers' motivations in conducting the search. If, in the course of conducting such a search, the officers came upon child pornography, even if finding child pornography was their

> hope from the outset, they were permitted to seize it as direct evidence of criminal conduct and, indeed, bring additional charges based on that evidence. *See Phillips*, 588 F.3d 218, 2009 WL 4061558, at *5.

United States v. Williams, 592 F.3d 511, 522-23 (4th Cir. 2010).

It is anticipated that the United States Supreme Court will ultimately resolve this multi-circuit split. In the meantime, officers should consult their department's legal advisor and the local prosecuting attorney prior to conducting any search of a computer.

4. Search Incident to Arrest.

The law regarding searches incident to arrest underwent a profound upheaval with the issuance of the United State's Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). After a period of uncertainty, the Washington Supreme Court expressly held that Const. art. I, § 7, does not allow an officer to conduct a warrantless search of a vehicle when the officer has reason to believe that evidence related to the crime of arrest is present in the vehicle. *See State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012).

Officers, prosecutors, and the courts will grapple with the implications of *Gant* and *Snapp* for years to come. The information that follows is the author's best guess of what *Gant* and *Snapp* allows in combination with Washington's unique Article I, § 7 jurisprudence. As always, a prudent officer should discuss this information with their department's legal advisor and with their local prosecuting attorney.

a. Actual, Lawful Custodial Arrest Required.

A search incident to arrest is triggered by an actual, lawful custodial arrest. If the arrest is invalid, then the search incident to the arrest is invalid as well. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007); *State v. Hehman*, 90 Wn.2d 45, 50, 578 P.2d 527 (1978); *State v. Terrazas*, 71 Wn. App. 873, 878, 863 P.2d 75 (1993). In Washington, however, even when an arrest is valid, a search is not properly "incident" to the arrest if the arrest is merely a pretext for conducting a search to obtain evidence of a different offense. *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999) (declining to interpret article I, section 7 according to federal law, under which pretextual traffic stops did not violate the Fourth Amendment).

Merely having probable cause to make the arrest is insufficient to justify a "search incident to arrest." *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489, 501 (2003). An actual, lawful custodial arrest requires probable cause, a warrant or compliance with either the common law rules governing warrantless arrests or RCW 10.31.100, and a sufficient show of authority to convince a reasonable person that he or she is not free to leave.

"Arrest" for *Miranda* purposes and "arrest" for search incident to arrest are different and distinct concepts. An individual may be in custody such that their statements will be deemed inadmissible absent a knowing and intelligent waiver of their

Miranda warnings and yet not be sufficiently in custody to allow for a search incident to arrest.

i. **Non-custodial Arrests**. A non-custodial arrest occurs where the defendant is issued a citation for a criminal offense at the scene of a stop. Pursuant to *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489, 501 (2003), no warrantless search may be made in these cases unless the defendant is actually taken into physical custody prior to the search and prior to the officer exercising his or her discretion to book or to issue a citation. *See State v. Pulfrey*, 154 Wn.2d 517, 111 P.3d 1162 (2005).

A. Intent of Officer

The courts will independently determine whether a defendant has been placed into custody. The subjective intent of the officer, as well as the objective facts will both be considered. Telling a defendant that he is under arrest is insufficient where the officer placed the unhandcuffed defendant with his cell phone in the back of the officer's patrol car while the officer conducted a search of the defendant's vehicle, where the officer did not intend to take the defendant to jail unless the officer found evidence of a felony. *State v. Radka*, 120 Wn. App. 43, 83 P.3d 1038 (2004). *But see State v. Gering*, 146 Wn. App. 564, 192 P.3d 935 (2008) (officer's subjective knowledge that the Spokane County Jail was on emergency status on the day of the arrest and that the jail would not accept for booking a DWLS charge was irrelevant as the determination of custody hinges upon the "manifestation" of the arresting officer's intent, and this officer removed the suspect from a store, handcuffed him, and did not tell the defendant prior to searching him that the defendant was free to leave prior to conducting the search.).

ii. **Non-booking Arrests**. A non-booking arrest occurs where a defendant is detained for some period of time, but the officer does not plan on booking the defendant into the jail due to population restrictions at the jail. If the officer's conduct in detaining the defendant would result in a reasonable person feeling that he or she were not free to leave and if the officer has not told the defendant that the defendant is not under arrest prior to conducting a search, then pre-*O'Neill* cases indicate that a warrantless search incident to arrest may be conducted. *See generally State v. Gering*, 146 Wn. App. 564, 192 P.3d 935 (2008) (search incident to arrest conducted after the efendant was seized in a store and handcuffed was lawful even though the arresting officer knew that the jail would not accept the defendant due to population restructions); *State v. Craig*, 115 Wn. App. 191, 61 P.3d 340 (2002) (search incident to arrest lawful where defendant who was arrested for DWLS was transported from the scene of the stop to a police station for "administrative booking"); *State v. Balch*, 114 Wn. App. 55, 55 P.3d 1199 (2002) (search incident to arrest conducted after the defendant was handcuffed and placed in the arresting officer's vehicle was lawful even though the arresting officer's superior officer ordered the defendant released after the search was conducted); *State v. Clausen*, 113 Wn. App. 657, 56 P.3d 587 (2002) (search incident to arrest

was lawful even though the jail would not accept defendant for booking due to population restrictions when the officer arrived with the defendant at the jail). Whether these cases will apply if a defendant was not removed from the scene of the stop to another location is uncertain. Your department's policies should be reviewed with your department's legal advisor and the local prosecuting attorney.

b. **Scope of Search.** The area to be searched pursuant to an actual, lawful custodial arrest must be within the defendant's zone of control.

i. **Persons**. An arrestee has a greatly diminished expectation of privacy due to his or her status as a prisoner. An unwarranted search incident to a custodial arrest may extend to the arrestee's person. *See, e.g., Thornton v. Untied States*, 541 U.S. 615, 626, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring) ("Authority to search the arrestee's own person is beyond question"); *State v. Whitney*, 156 Wn. App. 405, 232 P.3d 582, *review denied*, 170 Wn.2d 1004 (2010) (*Gant* does not apply to a search of a person, upon the person's arrest).

A search incident to the arrest of a person also extends to the area within the immediate control of the arrestee. An area or item is within an arrestee's immediate control if the area is one from which he may gain possession of a weapon or destructible evidence. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009); *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). "Searching any room other than that in which an arrest occurs" or "searching through all the desk drawers or other closed or concealed areas in that room itself" is not justified absent a search warrant. *Chimel*, 395 U.S. at 762-63. The Washington Supreme Court has stated that the search incident to arrest is "restricted in time and place in relation to the arrestee and the arrest," as opposed to being "a wide-ranging exploratory, rummaging, ransacking" search. *State v. Smith*, 88 Wn.2d 127, 135, 559 P.2d 970 (1977).

There is no hard and fast rule for determining whether the area searched or the object seized was within the "immediate control" of the defendant under the Fourth Amendment. The court has considered various factors, including: (1) whether the arrestee was physically restrained; (2) the position of the officer in relation to the defendant and the place searched; (3) the difficulty of gaining access into the container or enclosure searched; and (4) the number of officers present as compared with the number of arrestees or other persons. *See* 3 Wayne R. LaFave, *Search and Seizure* § 6.3(c), at 462-75 (5th ed. 2012); *see also id.* § 7.1(b), at 676–79.

A search incident to the arrest of the person may include those items that are "immediately associated with the person". Such items include wallets, purses, and waist-fanny packs. *See, e.g. State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025 (1992) (search of fanny pack that defendant was wearing when the officer tackled him); *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (defendant's purse) ; *State v. Johnson*, 155 Wn. App. 270, 229 P.2d 824, *review denied*, 170 Wn.2d 1006 (2010) (purse that driver removed from

vehicle and was holding at the time of arrest.). The search can include small containers found on the arrestee. *See, e.g., State v. Gammon*, 61 Wn. App. 858, 864, 812 P.2d 885 (1991) (upholding search of prescription pill bottle found on defendant following lawful arrest); *State v. White*, 44 Wn. App. 276, 278, 722 P.2d 118 (1986) (upholding police examination of cosmetic case found in arrestee's coat pocket). An officer can, however, lose the ability to search such items incident to arrest by placing the item in the arrested person's vehicle while handcuffing the person. *United States v. Maddox*, 614 F.3d 1046 (9th Cir. 2010) (the officer illegally retrieved the defendant's cell phone and key chain, that the officer removed from the defendant and tossed into the defendant's vehicle while handcuffing the defendant; once defendant was handcuffed *Gant* barred a search of the cell phone and key chain because the defendant posed no risk and there were no grounds to believe the vehicle contained evidence of the crime of arrest).

An officer's search incident to arrest is not limited to evidence related to the crime of arrest or to weapons. *See State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025 (1992) (allowing admission of drug paraphernalia found in a fanny pack during a search subsequent to a lawful arrest for consuming liquor in public); *State v. Gammon*, 61 Wn. App. 858, 864, 812 P.2d 885 (1991) (allowing admission of crack cocaine found in a prescription pill vial located in the defendant's clothing during a search subsequent to a lawful arrest for shoplifting); *State v. LaTourette*, 49 Wn. App. 119, 127-28, 741 P.2d 1033 (1987) (allowing admission of baggie of cocaine found in the defendant's pocket during a search subsequent to a lawful arrest for reckless driving).

Courts are currently struggling with whether the controlling principles laid out by the United States in *Arizona v. Gant* apply to the search of a purse or other container incident to the arrest of the container's owner. Some courts hold that *Gant* is limited to vehicle searches. *See, e.g., United States v. Brewer*, 624 F.3d 900, 905-06 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1805 (2011) (declining to apply *Gant* to a search of an arrestee's person); *United States v. Perdoma*, 621 F.3d 745, 751-52 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 2446 (2011) (declining to apply *Gant* to a search of a bag recovered from an area within the arrestee's immediate control); *People v. Diaz*, 51 Cal. 4th 84, 96 n. 9, 244 P.3d 501, 119 Cal. Rptr. 3d 105(2011), *cert. petition filed* (*Gant* not relevant or applicable to the search of an item versus a vehicle); *Smallwood v. State*, 61 So. 3d 448 (Fla. App. 2011) (refusing to extend *Gant* to a cell phone found on the arrestee's person). Other courts disagree. *See, e.g., United States v. Shakir*, 616 F.3d 315, 318 (3d Cir.), *cert. denied*, 131 S. Ct. 841 (2010) ("Because *Gant* involved an automobile search, and because it interpreted *Belton*, another automobile case, the Government contends that the rule of *Gant* applies only to vehicle searches. We do not read *Gant* so narrowly. The *Gant* Court itself expressly stated its desire to keep the rule of *Belton* tethered to the justifications underlying the *Chimel* exception, and *Chimel* did not involve a car search." (internal citation and quotation marks omitted)); *In re Tiffany O.*, 217 Ariz. 370; 174 P.3d 282 (2007) (A finding that the juvenile was delinquent based on her possession of a pipe that she used or intended to use to smoke marijuana was improper

because the juvenile court erred when it admitted the pipe into evidence. There was no objective basis on which to justify the additional search of her purse once the officer had seized it.).

There are numerous reasons to treat vehicles differently from an arrestee's purses and other containers. The automobile can be left at the scene of the arrest and/or towed to a different location. The purse that a defendant is carrying at the time of arrest will have to be transported to the jail if the defendant is booked. At some point, whether the defendant is booked or released at the scene, the purse has to be returned to the suspect. This means the suspect will have access to any weapon in the purse while still in contact with a police officer or jail employee.

These differences led the Washington Supreme Court to hold that a search incident to arrest of a defendant's person does not have to be justified by concerns for evidence preservation or officer safety. *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013). The search properly extends to items the arrestee has actual possession of at the time of a lawful custodial arrest. *Id.*, at 621-22. The Washington Supreme Court "caution[s] that the proper scope of the time of arrest rule is narrow, in keeping with this "jealously guarded" exception to the warrant requirement. It does not extend to all articles in an arrestee's constructive possession, but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest. . . . Searches of the arrestee's person incident to arrest extend only to articles 'in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person.'" *United States v. Rabinowitz*, 339 U.S. 56, 78, 70 S. Ct. 430, 94 L. Ed. 653 (1950) (Frankfurter, J., dissenting) (describing the historical limits of the exception)."

The Washington Supreme Court has determined that the warrantless search of items in an arrestee's actual possession at the time of arrest, is lawful even though not performed until after the arrestee is handcuffed. *See, e.g. State v. MacDicken*, 179 Wn. 2d 936, 319 P.3d 31 (2014) (laptop bag that defendant was carrying and rolling duffel bag that defendant was pushing at time of arrest were subject to search without a warrant incident to the defendant's arrest; defendant was cuffed and a car length away from the bags when they were searched). A warrantless search of items that are within the arrestee's reach, but not within the arrestee's actual possession at the time of arrest, will need to be justified by an individualized showing that concerns of officer safety or the preservation of evidence were such, that the search could not be delayed until a warrant could be obtained. *See MacDicken*, at ¶¶ 6-7.

- **Cell Phones.** The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. *Riley v. California*, No. 13-132, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (Jun. 25, 2014). This limitation should apply equally to tablets, lap top computers, and other data devices. *See Riley*, slip op. at 17 ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also

happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity.”).

- Although the search incident to arrest exception does not apply to cell phones, the continued availability of the exigent circumstances exception may give law enforcement a justification for a warrantless search in particular cases. *See Riley*, slip op. at 15 (“If ‘the police are truly confronted with a “now or never” situation,’—for example, circumstances suggesting that a defendant’s phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately.”), and 26 (exigent circumstances exception to the warrant requirement still applies, “ exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury”).
- While consent may allow an officer to view the contents of a cell phone, the prudent officer will proceed with caution in this area. The Washington Supreme Court recently determined that the sender of text messages has a Const. art. I, § 7, right against a police officer reading the unopened message on the recipient’s phone. *See State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014). Under this ruling, it is questionable whether the recipient’s consent to search the recipient’s phone without a warrant is sufficient to defeat the sender’s interest. In other words, a warrant is the safest course.

The Washington Supreme Court also determined that a police officer reading an unopened text message on the recipient’s devise is an “intercept” under Chapter 9.73 RCW. This privacy act violation requires suppression of the text messages. *See State v. Roden*, 179 Wn.2d 893, 321 P.3d 1183 (2014). While a search warrant should be sufficient to review all files identified in the warrant on a properly seized phone, a prudent officer may also wish to obtain an RCW 9.73.130 intercept order.

Officers must use care to secure the phone while awaiting receipt of the warrant and/or intercept order. The preferred method is to isolate the cell phone in a Faraday bag. Alternatively, an officer may switch the device to “airplane mode,” while awaiting the receipt of the search warrant. Turning the phone off should be avoided, as there can be a loss of data when the phone is turned on again.

A warrantless search of an item that was in the arrestee's actual possession or "immediately associated" with the arrest person must be conducted promptly upon arrest. *Compare United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977) (search of luggage or other personal property could not be justified as a search incident to arrest when the search occurred more than an hour after the arrest), *with New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (a search of the defendant's jacket that "followed immediately upon arrest" was valid as a search incident to a lawful custodial arrest). *See also State v. Smith*, 119 Wn.2d 675, 683, 835 P.2d 1025 (1992) (surveying case law that finds a search conducted within 17 minutes of arrest to be reasonable, but that a delay of 30 to 45 minutes is unreasonable); *State v. Carner*, 28 Wn. App. 439, 445, 624 P.2d 204 (1981) (search made at the station house after officers had determined that the defendant would not be detained, but released to his mother, was unreasonable).

Evidence properly seized at the scene pursuant to the arrest of the defendant may lawfully be photocopied or subjected to forensic testing at a later time. *See, e.g., United States v. Rodriguez,* 995 F.2d 776, 778 (7th Cir. 1993) (where address book had been lawfully seized from defendant during search incident to arrest, "photocopying the contents of the address book was within the permissible scope of the search as an attempt to preserve evidence"); *United States v. Fortna*, 796 F.2d 724, 738 (5th Cir. 1986), *cert. denied*, 479 U.S. 950 (1986) (where initial examination of documents was clearly proper, photocopying of those documents "merely memorialized the agents' observations and provided a means to verify any subsequent recounting of them") *(citing United States v. White,* 401 U.S. 745, 28 L. Ed. 2d 453, 91 S. Ct. 1122 (1971))*; Wright v. State,* 276 Ga. 454, 579 S.E.2d 214, 222 (2003) ("Development of the film was simply an examination of the camera (i.e., container) found incident to the arrest, and is akin to a laboratory test on any lawfully seized object."); *State v. Riedel*, 259 Wis. 2d 921, 656 N.W.2d 789, 794 (2002) (the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant). *Accord State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003) (officers could subject evidence that was placed in jail's property room upon the defendant's arrest to forensic testing without a search warrant).

An arrest will not by itself allow for a strip search. *See State v. Rulan C.*, 97 Wn. App. 884, 970 P.2d 821 (1999); *State v. Audley*, 77 Wn. App. 897, 894 P.2d 1359 (1995). A strip search can occur without the removal of all clothing. *See Edgerly v. City and County of San Francisco*, 495 F.3d 645 (9th Cir. 2007) (the officer's conduct in having the suspect drop his trousers and manipulate his boxer shorts to allow for a visual inspection constituted a strip search).

- Any warrantless strip search must strictly comply with RCW 10.79.130. This statute permits warrantless strip searches of arrestees at local detention facilities in four situations: (1) a person

may be strip searched where there is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other things that constitute a threat to the security of a local detention facility; (2) a person arrested for a violent offense, an offense involving escape, burglary or use of a deadly weapon or a drug related offense may be strip searched solely on the basis of the nature of the crime for which he or she is arrested; (3) a strip search may be conducted where there is probable cause to believe that it is necessary to discover criminal evidence that does not constitute a threat to the security of the facility; and (4) a strip search may be conducted where there is a reasonable suspicion to believe that it is necessary to discover a health condition requiring immediate medical attention.

- An arrestee's nervousness, standing alone, is insufficient to support a warrantless strip search. *See State v. Barron*, 170 Wn. App. 742, 285 P.3d 231 (2012).

A strip search conducted under these circumstances should be reasonable under the Fourth Amendment. *See generally Florence v. Board of Freeholders*, ___ U.S. ___, 132 S. Ct. 1570, 182 L. Ed. 2d 566 (2012) (every person arrested and held temporarily, who will be placed among other prisoners at the facility, can be subjected to a routine strip search, so long as it involves only a visual inspection without touching or abusive gestures).

ii. **Places.** The area of a house or other building that made be searched incident to an individual's arrest is extremely limited. Specifically, anything beyond the defendant's lunge zone is prohibited.

The scope of the search may not be expanded by allowing the defendant to move about. *See, e.g., State v. Kull*, 155 Wn.2d 80, 118 P.3d 307 (2005) (officer who arrested defendant in the laundry room on a misdemeanor warrant violated the defendant's right to privacy when they accompanied her and her friend into her bedroom so the defendant could retrieve her purse which held her bail money; cocaine located on top of the defendant's dresser and in her purse was suppressed); *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (campus police officer who arrested an underage college student for the offense of minor in possession of alcohol violated the student's privacy rights by entering the student's dorm room after the officer who accompanied the student into the dorm room to retrieve his identification noticed what the officer believed to be marijuana).

iii. **Vehicles**. If a person is arrested in a vehicle, the passenger compartment can only be searched"incident to the arrest" of the driver or a passenger if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 496 (2009); *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012).

The "unsecured" exception will rarely apply. *Gant*, 173 L. Ed. 2d at 496 n.

4. This exception requires more arrestees than officers and/or handcuffs and/or patrol cars. *See, e.g., United States v. Davis*, 596 F.3d 813, 817 (8th Cir. 2009) (vehicle lawfully searched following the arrest of the driver, as three passengers, all of whom had been drinking, were not in secure custody and they outnumbered the two officers at the scene). An officer who leaves a suspect unrestrained and nearby just to manufacture authority to search, will see evidence suppressed as a violation of the Fourth Amendment. *See Thornton v. United States*, 541 U.S. 615, 627, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)(Scalia, J., concurring) ("Indeed, if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures." (emphasis in the original)). An officer who leaves a suspect unrestrained just to manufacture authority to search, will see evidence suppressed as a violation of Const. art. I, § 7. *See, e.g., State v. Radka*, 120 Wn. App. 43, 83 P.3d 1038 (2004) (defendant was not "arrested" for purposes of searching a vehicle incident to arrest where the officer placed the unhandcuffed defendant and his cell phone, in the back of the officer's patrol car after telling the defendant he was under arrest).

Some post-*Gant* federal court decisions have indicated that the "unsecured" exception applies when an officer will be releasing an offender at the scene, instead of booking the offender. The rationale utilized by these federal courts is inconsistent with prior article I, § 7 case law. The Washington constitution requires any search incident to arrest to be conducted after the offender is actually arrested and before the officer makes the decision to release the offender at the scene. *See State v. Pulfrey*, 154 Wn.2d 517, 111 P.3d 1162 (2005) (a search incident to arrest must be made prior to the officer exercising his or her discretion to book the suspect or to release the suspect with a citation); *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489, 501 (2003) (no warrantless search may be made in these cases unless the defendant is actually taken into physical custody prior to the search).

In Washington, an officer who will be releasing a defendant at the scene may enter the vehicle to search for weapons under the following circumstances:

- After obtaining a knowing, intelligent, and voluntary consent to search the vehicle.

  Consent searches present some problems. The Fourth Amendment does not require that a lawfully seized driver be advised that he is "free to go" after the traffic citation is issued, before his consent to search will be recognized as voluntary. The Fourth Amendment also does not require an officer, prior to requesting consent to search, to have any articulable facts that the driver is engaged in criminal conduct or that the car contains contraband. *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996). 2d 347 (1996).

  The Washington Constitution, however, prohibits an officer from extending a traffic stop for an infraction in order to request consent

to search the vehicle when the officer does not have a reasonable suspicion that evidence of a crime will be found in the vehicle. *See generally*, *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997); *State v. Veltri*, 136 Wn. App. 818, 150 P.3d 1178 (2007); *State v. Cantrell*, 70 Wn. App. 340, 853 P.2d 479 (1993), *rev'd in part on other grounds*, 124 Wn.2d 183 (1994); *State v. Tijerina*, 61 Wn. App. 626, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991).

- Pursuant to *Michigan v. Long*, 436 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). *Michigan v. Long* "permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'" *See Gant*, 129 S. Ct. at 1721. *Accord State v. Afana*, 169 Wn.2d 169, 184-85, 233 P.3d 879 (2010) (J. Johnson, Justice, concurring) ("officer may search for weapons in passenger compartment of vehicle if he has 'reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle'"); *State v. Larson*, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997) ("Under the Washington Constitution, a valid *Terry* stop may include a search of the interior of the suspect's vehicle when the search is necessary to officer safety. A protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events.") .

In Washington, at least, the unsecured exception is not triggered by the presence of an unsecured and non-arrested vehicle occupant. *See State v. Afana,* 169 Wn.2d 169, 178-79, 233 P.3d 879 (2010). In Washington, an officer who is confronted with additional vehicle occupants may only gain access to the vehicle's interior with proper consent, to conduct a *Michigan v. Long* sweep for weapons, or pursuant to a search warrant.

A. Proximity to Vehicle at Time of Arrest.

The *Gant* or *Snapp* weapons exception does not apply unless the arrestee was in the vehicle at the time of arrest or the arrestee has just recently exited the car at the time of the arrest. *State v. Rathbun*, 124 Wn. App. 372, 101 P.3d 119 (2004); *State v. Turner*, 114 Wn. App. 653, 59 P.3d 711 (2002); *State v. Wheless*, 103 Wn. App. 749, 14 P.3d 184 (2000); *State v. Porter*, 102 Wn. App. 327, 6 P.3d 1245 (2000). Whether a vehicle can be searched when a former occupant is arrested outside the vehicle will be determined under the totality of the circumstances. The question to be answered is whether a vehicle that the arrestee has recently occupied is within the area of the arrestee's immediate control at the time the police initiate the arrest. *Id.* While an arrestee's status as a recent occupant may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him. *See Thornton v. United States*, 541 U.S. 615, 124 S. Ct.

2127, 159 L. Ed. 2d 905 (2004).

- Police may not search a vehicle without a warrant incident to the driver's arrest, when before the officer places the driver under arrest but after the officer contacts the driver, the driver exists the vehicle and locks the door. *State v. Quinlivan*, 142 Wn. App. 960, 176 P.3d 605 (2008).

B. What May Be Searched

When a warrantless passenger search is authorized, prior Washington law limited the search to the vehicle's "passenger compartment." A prudent officer who is conducting a warrantless search pursuant to the *Gant/Snapp* weapons exception should limit the search to the areas authorized by pre-*Gant* case law.

The passenger compartment is construed "as including all space reachable without exiting the vehicle." *State v. Johnson*, 128 Wash.2d 431, 909 P.2d 293 (1996) (sleeping compartment in the cab of a tractor-trailer); *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (20001) (the living quarters of a motor home that is stopped while moving down the road); *State v. Mitzlaff*, 80 Wn. App. 184, 907 P.2d 328 (1995), *review denied*, 129 Wn.2d 1015 (1996) (trunk area of hatch back automobile and rear section of a station wagon). The engine compartment of a vehicle, notwithstanding fact that release latch was located in the passenger compartment, may not be searched. *State v. Mitzlaff*, 80 Wn. App. 184, 907 P.2d 328 (1995), *review denied*, 129 Wn.2d 1015 (1996).

- Many modern vehicles have rear seats the flip down, allowing access to the trunk from inside the car. A recent unpublished opinion from Division III of the Court of Appeals held that officers may not search the trunk area of such a car even where the defendant placed his backpack in the trunk area from inside the car after the officer stopped the defendant's vehicle. *See State v. King*, No. 21925-9-III, 2004 Wash. App. Lexis 400 (March 18, 2004), *petition for review denied*. The Ninth Circuit, on the other hand, compares such a compartment to a glove box and allows the space to be searched to the same extent as a glove box. *See United States v. Mayo*, 394 F.3d 1271 (9th Cir.), *cert. denied*, 125 S. Ct. 1749 (2005). Officers should consult with their department's legal advisor and/or their local prosecutor to determine whether searches may be conducted of these rear glove-box-like areas.

The search of the vehicle presumptively includes all unlocked containers. Locked containers, including a glove box, cannot be legally searched without a search warrant unless exigent circumstances exist. *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), *overruled on other grounds by State v. Valdez*, 167 Wn.2d

761, 224 P.3d 751 (2009). The arrestee must remain at the scene of the arrest, in the patrol car is fine, while the search takes place. No search, however, may occur if the defendant exits his car and locks the vehicle prior to the officer physically seizing him or her. *See State v. Perea*, 85 Wn. App. 339, 932 P.2d 1258 (1997).

This bright line rule was blurred by the Washington Supreme Court in 1999. Please note that reasonable prosecuting attorneys differ on what the rules are following the Supreme Court's November 4, 1999, plurality decision in *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). You should check with your county prosecuting attorney to determine which approach they feel comfortable taking.

In *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999), the Washington State Supreme Court consolidated three cases. In each case, the defendants were passengers in vehicles where the drivers were lawfully arrested. In one case the jacket of the nonarrested passenger was searched. In the other two cases, the purses of the nonarrested passengers were searched. The Court held that,

> …the arrest of one or more vehicle occupants does not, without more, provide the "authority of law" under article I, section 7 of our state constitution to search other, nonarrested vehicle passengers, including personal belongings clearly associated with such nonarrested individuals. In determining whether an item within a vehicle is "clearly and closely" associated with a nonarrested passenger, [the following rule is adopted].
>
> …a straightforward rule allowing police officers to assume all containers within the vehicle may be validly searched, unless officers know or should know the container is a personal effect of a passenger who is not independently suspected of criminal activity and where there is no reason to believe contraband is concealed within the personal effect prior to the search.

Parker, 987 P.2d at 83.

> Pursuant to *Stroud*, officers may lawfully search a vehicle passenger compartment incident to the arrest of the driver. Pursuant to our rationale above, officers may assume all containers in the vehicle are lawfully subject to search. If however, officers know or should know certain containers within the vehicle belong to nonarrested occupants, such containers may not be searched absent an independent, objective basis to believe the containers hold a weapon or evidence.

Parker, 987 P.2d at 84.

> [***Note***: In arriving at their holding in *Parker,* the Court considered officer safety concerns. "It is precisely because the privacy interest of a nonarrested individual remains largely undiminished that full blown evidentiary searches of nonarrested individuals are constitutionally invalid **even where officers may legitimately fear for their safety."** (emphasis added). *Parker*, 987 P.2d at 81.]

Cases decided since *Parker* was issued establish that:

- An officer may frisk a vehicle passenger and the passenger's belongings if the officer is able to point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger could be armed and dangerous. *See State v. Horrace*, 144 Wn.2d 386, 399, 28 P.3d 753 (2001).
- An officer may search items that have been abandoned or disclaimed by the non-arrested passengers. *See State v. Reynolds*, 144 Wn.2d 282, 27 P.3d 200 (2001) (officer properly searched coat placed on the ground under the passenger side of the vehicle which the passenger claimed was not his).
- An officer may investigate items where there is genuine confusion over whether it belongs to a non-arrested passenger. *See State v. Jackson*, 107 Wn. App. 646, 27 P.3d 689 (2001) (officer properly checked pockets of jacket found in car without first showing the jacket to the arrested driver, where the arrested driver indicated that the non-arrested passenger had nothing in the car and that the brown leather jacket was the drivers and the passenger said it was his).

A question left unanswered by the Supreme Court's *Parker* decision is whether a vehicle that is not owned, entirely or in part, by an arrested passenger may be searched incident to the arrest of the passenger or whether a search incident to such a passenger is limited to the items "clearly and closely" associated with the passenger and the "lunge-zone". *Compare State v. Chelly*, 94 Wn. App. 254, 380-81, 970 P.2d 376, *review denied*, 138 Wn.2d 1009 (1999), and *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012 491 (1992), *with State v. Parker*, 987 P.2d at 80-81 (the privacy right of the driver is independent of the right of the passenger). Division One of the Court of Appeals recently held that evidence officers found in that portion of the passenger compartment that the arrested back seat passenger could reach immediately before his arrest was lawfully seized. *State v. Bello*, 142 Wn. App. 930, 176 P.3d 554 (2008).

C. Use of Canines

Once the vehicle has been secured by the arresting officer, it is questionable whether the defendant may be detained at the scene to allow for a K-9 unit to arrive at the scene. What is clear in light of *Snapp* is that the K-9 may not enter the vehicle absent a warrant or consent from the driver and/or vehicle's owner. Whether the K-9 may examine the exterior of the vehicle without a warrant is currently unknown. .

Prior Washington case law is inconsistent regarding whether a K-9's sniff of an exterior constitutes a search that requires a warrant. Compare *State v. Stanphill,* 53 Wn. App. 623, 769 P.2d 861 (1989) (no warrant required for a canine to smell a package at post office); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (no warrant required for a canine to smell a safety deposit box at bank); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980) (no warrant required for a canine to smell a parcel in bus terminal), *with State v. Dearman*, 92 Wn. App. 630, 962 P.2d 850 (1998), *review denied*, 137 Wn.2d 1032 (1999) (Const. art. I, § 7 requires a warrant before a narcotics dog may sniff along the exterior seam of a garage). The issue will ultimately turn upon whether dogs are more similar to flashlights than to thermal imaging detectors.

The olfactory abilities of dogs have been recognized throughout recorded history. Dogs have long been used in law enforcement to track criminals. They have also been used to track fugitives of all kinds, whether soldiers, rebels, or escaped slaves. *See State v. Hall*, 4 Ohio Dec. 147 (Com. Pleas 1896) (discussing history of tracking by bloodhounds). The citizens of Washington Territory and early Washington State were doubtless aware of these facts. They knew that dogs could be used to discover things and people that were hidden. They knew that this ability had historically been used as an instrument of government by beneficent and tyrannical rulers alike. Had the people considered this to be a threat to their privacy or liberty, they would have taken steps to protect themselves against it, whether by statute or case law.

There is, however, no evidence of any such protection for a century after the Washington Constitution was adopted. There are and have been numerous statutes dealing with dogs. Some protect the dogs themselves against cruelty. *See* RCW ch. 16.52. Some protect the right of handicapped individuals to the assistance of service dogs. *See* RCW ch. 70.84. Some protect the public against dangerous dogs or those that carry communicable diseases. *See* RCW ch.16.08, 16.70. Some deal with licensing of dogs and regulation of stray dogs. *See* RCW 25.27.010(7), ch. 16.10, ch. 36.49. Some deal with the protection of wildlife against dogs and the use of dogs in hunting. RCW 77.12.315, 77.15.240. There is, however, not a single statute

that seeks to protect citizens from the use of dogs' olfactory abilities.

Nor is there any early case law recognizing such protection. Until 1979, it does not appear that anyone even suggested that the use of a dog's nose constituted an invasion of privacy. That year, the Court of Appeals held in *Wolohan* that the use of a dog to smell luggage in a public place did not violate any legitimate expectation of privacy. During the next 10 years, the court twice reached similar conclusions, in *Boyce* and *Stamphill*. It was not until 1998 that a court first reached a contrary conclusion in *Dearman* -- almost 20 years after the issue was first raised in Washington, and almost 100 years after the Washington constitution was drafted.

This history demonstrates that protection against a dog's sense of smell is not part of the "privacy interests which citizens of this state have held … safe from governmental trespass absent a warrant." Rather, dogs have long been a routine and legitimate tool of law enforcement. The citizens of Washington have apparently believed that the natural and inherent limitations on a dog's abilities constitute a sufficient protection for their privacy.

Dogs are entirely different from modern surveillance tools, such as thermal imagers. Thermal imagers, GPS, and other such technologies are new, sophisticated, and available to few people. They are also subject to further innovation that could render them even more sophisticated.

The association between people and dogs is older than recorded history. Dogs are widely available to Washington citizens. Although dogs can be trained to respond to different odors, their inherent abilities have not changed and are not likely to. The information that a dog can obtain is extremely limited:

> The use of trained dogs to detect the odor of marijuana poses no threat of harassment, intimidation, or even inconvenience to the innocent citizen. Nothing of an innocent but private nature and nothing of in incriminating nature other than the narcotics being sought can be discovered through the dog's reaction to the odor of the narcotics.

Wolohan, 23 Wn. App. at 820, *quoting People v. Campbell*, 67 Ill. 2d 308, 367 N.E.2d 949, 953-54 (1977), *cert. denied*, 435 U.S. 942 (1978).

In each of these respects, a dog more closely resembles the flashlight that was considered in *State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996):

> A flashlight is an exceedingly common device; few homes or boats are without one. It is not a unique intrusive device used by police officers to invade the

> privacy of citizens, and is far different from the device at issue in [Young]. In Young, we held that the use of an infrared device to detect heat patters in the home, which could not be detected by the naked eye or other senses, and which could in effect enable the officer to "see through the walls" of the home, was a particularly intrusive method of viewing which went well beyond more enhancement of normal senses. A flashlight, in contrast, does not enable an officer to see within the walls or through drawn drapes. Instead, it is a device commonly used by people in this state. . .

Rose, 128 Wn.2d at 399.

Similarly, dogs are commonly used by many Washington citizens, both for their sense of smell and for other purposes. They do not allow anyone to see though walls. They do enhance the senses (as a flashlight does), but only by allowing the dog's natural sense of smell to be substituted for the handler's. Like a flashlight, the common use of a dog's natural senses does not constitute an "intrusive method of viewing" that invokes constitutional protections.

D. What May Be Seized

Once an officer is lawfully in the vehicle, the officer may seize any items that the officer recognizes as contraband or as having evidentiary value. *See* Discussion of Plain View elsewhere in these materials.

E. Suggestions for Processing Vehicles Pursuant to *Snapp*

These suggestions are the personal opinion of the author. They do not represent the official position of the Washington Association of Prosecuting Attorneys, of any prosecutor's office, or of the "State of Washington." These suggestions are not intended to be relied upon to create a right or benefit, enforceable at law by a party in any criminal or civil litigation. Police officers are encouraged to discuss these suggestions with their department's legal advisor and with their local prosecutors.

i. Always Consider the Appropriateness of a *Terry* Sweep of the Vehicle for Weapons.

"Under the Washington Constitution, a valid *Terry* stop may include a search of the interior of the suspect's vehicle when the search is necessary to officer safety. A protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events." *State v. Larson*, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997). This principle survives the recent United States Supreme Court case of *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710,

173 L. Ed. 2d 485 (2009). *See Gant*, 129 S. Ct. at 1721 (listing *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), which permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons, as an established exceptions to the warrant requirement that authorizes an officer to enter a vehicle); *United States v. Goodwin-Bey*, 584 F.3d 1117 (8th Cir. 2009) ("In reexamining the search incident to arrest exception to the warrant requirement, Gant left [the *Michigan v. Long*] exception untouched.").

In a no-arrest situation, where a contact will conclude with the driver and/or the passengers returning to the vehicle, the officer should consider whether sufficient objective facts support a "frisk" for weapons. *See Arizona v. Gant,* 556 U.S. 332, 129 S. Ct. 1710, 1724, 173 L. Ed. 2d 485 (2009) (Scalia, J., concurring) ("In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed.").

Factors that will support a "frisk" of the passenger compartment in the area immediately adjacent to the suspect:

- Driver or passenger's furtive movements as if placing a weapon under the seat (*i.e.* bending down). *See State v. Horrace*, 144 Wn.2d 386, 395-96, 28 P.3d 753 (2001); *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986); *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997).
- Prior contacts with suspect or one of the other vehicle occupants. *See State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (the fact that the officer had two months previously arrested the suspect and at that time discovered the suspect to be in possession of a holster and bullets provides a reasonable basis to believe the suspect is presently armed and dangerous).
- Visible weapon, weapon's case (*i.e.* knife sheath), or ammunition. *See State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (the fact that the officer had two months previously arrested the suspect and at that time discovered the suspect to be in possession of a holster and bullets provides a reasonable basis to believe the suspect is presently armed and dangerous).

- Credible report from citizen that an occupant in the vehicle had pointed a gun at the citizen. *State v. Glenn*, 140 Wn. App. 627, 166 P.3d 1235 (2007).

ii. Conduct Through Searches of the Arrested Person

A search of the person incident to arrest remains unchanged. Such a search should not be limited to an examination for weapons or contraband. The search should include an examination for evidence related to each and every "crime of arrest."

- Example: In DUI cases – look for evidence of receipts from bars, restaurants, and other places that serve alcohol.
- Example: In false name cases – look for any credit cards, ID cards, passports, etc., that have a name on them.

During the search incident to arrest, carefully consider the items that you uncover. Ask yourself if the evidence you uncover supports probable cause to believe that evidence related to another crime may be present in the vehicle.

iii. Carefully Examine the Vehicle's Interior Through the Windows

If an officer can safely walk around the vehicle, the officer should examine the interior of the vehicle through every available window. In making this examination, the officer may use a flashlight. *See State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996) (held illumination through uncurtained window of the interior of a mobile home by a flashlight at night satisfied the open view doctrine); *State v. Manly*, 85 Wn.2d 120, 124, 530 P.2d 306, *cert. denied*, 423 U.S. 855 (1975) (view through open window enhanced by binoculars). An officer, however, should not enter the vehicle through any door or open window during this examination.

The officer should carefully note everything he or she observes. Particular attention should be paid to items that relate to the crime of arrest. Detailed notes should be made regarding such items, their location, and their appearance.

- Example: Six pack of Heineken beer, with one can missing, observed in open paper sack in the rear passenger seat well, immediately behind the driver's seat. Open can of Heineken beer in the dashboard cup holder. Condensation apparent on this beer can.

When feasible, an officer should photograph, from outside the car, the evidence the officer observes through the

vehicle's windows.

While neither the photographs nor an officer's observations of items made through a vehicle's windows while the officer is outside the vehicle are "searches", an officer may not enter the vehicle without a warrant or consent to collect the evidence. *See State v. Jones*, 163 Wn. App. 354, 259 P.3d 351 (2011), *review denied*, 173 Wn.2d 1009 (2012) (an officer's observations of pills in the defendant's vehicle was not a search, but the observations did not provide a basis for the warrantless entry into the vehicle to collect the pills).

iv. Ask the Arrestee About the Contents of His or Her Vehicle and About Any Items of Interest Discovered During the Vehicle Walk-around and the Search of the Arrestee

If the arrested person agrees to answer questions after being fully advised of his or her *Miranda* rights, inquire whether the vehicle contains any items that relate to the crime of arrest or to another crime. Also inquire whether the vehicle contains anything that may harm the person who will ultimately remove the vehicle from the location of the stop.

Carefully consider whether the arrested person's statements arise to probable cause to believe that evidence related to any crime may be present in the vehicle.

v. Do Not Ask the Arrestee if He or She Wishes to Have Something that is Contained in the Vehicle Brought to the Jail with Him or Her

When every vehicle was subject to search incident to arrest, many officers got into the habit of asking the arrested person if there was anything in the vehicle that the arrested person wished to have brought to the jail. This question was frequently answered in the affirmative, accompanied by requests for purses, wallets, cell phones, and keys. A real concern exists that post-*Gant*/post-*Snapp*, such a question will be deemed an improper attempt to expand the area an officer may access incident to arrest. *Cf. State v. Kull*, 155 Wn.2d 80, 118 P.3d 307 (2005) (officer who arrested defendant in the laundry room on a misdemeanor warrant violated the defendant's right to privacy when they accompanied her and her friend into her bedroom so the defendant could retrieve her purse which held her bail money; cocaine located on top of the defendant's dresser and in her purse was suppressed); *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (campus police officer who arrested an underage college student for the offense of minor in possession of alcohol violated the student's privacy rights

by entering the student's dorm room after the officer who accompanied the student into the dorm room to retrieve his identification noticed what the officer believed to be marijuana).

Post-*Gant* and *Snapp*, officers should let the arrested person initiate any discussion regarding the possibility of bringing any of the vehicle's contents with him or her to jail. If the arrestee does request that a purse, wallet, or other item be fetched from the vehicle, the officer will need to obtain the arrestee's informed consent prior to entering the vehicle to obtain the object. See, e.g., *State v. Nelson*, 47 Wn. App. 157, 163-64, 734 P.2d 516 (1987) (the defendant's consent was voluntary and uncoerced, when tendered after the arresting officer gave the defendant, who had been arrested on the porch of his home in midwinter wearing only pants and a t-shirt, the alternative of proceeding to the police station "as is" or allowing the officer to accompany the defendant into his home to obtain other clothing). Information that the officer will want to convey to the arrestee includes: (1) the officer will have to enter the vehicle to obtain the item; (2) that while the officer will limit his entry into the vehicle to the path necessary to fetch the item, the officer will seize any evidence or contraband that the officer observes along that path; (3) that any item the officer retrieves from the vehicle will be subject to a search; and (4) that any evidence discovered by the officer may be used against the arrested person in a court of law. If the arrestee agrees to these terms, the officer should document the consent and what actions the officer took based upon that consent.

- Example – Ms. Naughty asked me if it was possible to have her purse brought with her to the police station. I explained that she would not be allowed to enter her car to fetch the purse, but that she could give me permission to enter the car to retrieve the purse. I explained that, if retrieved, the purse would be subject to a search and that any drugs, weapons, or other evidence I discovered while in the car to retrieve her purse, would be seized and might be used against her at trial. Ms. Naughty stated she understood these conditions, and that she still wanted me to fetch her purse. I asked Ms. Naughty where her purse was located. She indicated that the purse was on the rear passenger seat. I entered Ms. Naughty's vehicle through the driver's door as the rear doors of the vehicle were locked. Immediately upon entering the vehicle, I observed .....

vi. Consider the Appropriateness of a Search Warrant

Search warrants are available for all crimes, felonies and misdemeanors. Obtaining a search warrant, however, can remove an officer from patrol for a significant period of time and can entail the cost of an impound. The time and cost factor must be weighed against the currently available evidence of the crimes of arrest and the likelihood that the vehicle contains evidence of other crimes.

If seizing the evidence observed through the windows of the vehicle walk-around will not increase the strength of the case, an officer should probably forego seeking a search warrant and should simply proceed with determining the final disposition of the vehicle.

- Example– In a DUI arrest, the seizure of beer cans, open liquor bottles, and other similar items that will not be subjected to forensic examination is unnecessary when photographs of the items were taken during the vehicle walkaround or when the officer includes a detailed description of the items in his or her report.

If seizing evidence observed through the windows of the vehicle will increase the strength of the case and/or statements made by the arrested person, items observed from the exterior of the vehicle, odors, and other information provides probable cause to believe that the vehicle contains evidence of any crime, then an officer should obtain a warrant. This probable cause is different from the probable cause to make an arrest. *See generally United States v. O'Connor*, 658 F.2d 688, 693 n.7 (9th Cir. 1981) ("Probable cause to arrest concerns the guilt of the arrestee, whereas probable cause to search an item concerns the connection of the items sought with crime and the present location of the items."; probable cause to search or seize may exist even though probable cause to arrest does not).

- If the anticipated search does not extend beyond the passenger compartment and the trunk, an officer may wish to obtain and execute the warrant at the roadside. If the initial search gives rise to a need to perform forensic tests or to remove door panels, etc., the vehicle can then be transported to a secure police impound yard or forensic facility.

- If the search cannot be conducted at the roadside, the vehicle may be seized and held for the time reasonably required to obtain a warrant. The seizure of the vehicle extends to all items located in the

vehicle. *See, e.g., State v. Campbell*, 166 Wn. App. 464, 272 P.3d 859 (2012) (officers, who had probable cause to search a vehicle and who seized the car while waiting for the warrant's arrival, properly barred the passenger from retrieving her purse, which she had left in the vehicle, until after the warrant was executed).

The seizure of the vehicle for a search warrant does not authorize an officer to seize the occupants. *Cf. State v. Broadnax*, 98 Wn.2d 289, 654 P.2d 96 (1982) (an occupant of a house for which a warrant is being sought may not be detained upon leaving the house unless there is probable cause to arrest them for a crime or there are some independent facts tying the departing occupant to illegal activity). Facts in support of a *Terry* stop must give rise to believe that the individual, as opposed to the place where he was found, is involved in criminal activity

A search warrant may only be obtained for (1) evidence of a crime; (2) contraband, the fruits of crime, or things otherwise criminally possessed; (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; and (4) person for whose arrest there is probable cause, or who is unlawfully restrained. A search warrant may only authorize an officer to seize items related to those offenses for which there is probable cause. In executing a search warrant, however, an officer is not required to ignore evidence of other crimes that the officer encounters. If an officer encounters such evidence, he or she can return to the judge and request an expansion of the search warrant and/or seize the items under the plain view exception to the warrant requirement.

Therefore, in deciding whether to seek a search warrant, an officer should take into account his or her suspicions that a vehicle contains evidence related to crimes, other than the crimes of arrest.

- Example – Possibility that drugs may be in the vehicle of a person who is arrested for DUI and who is exhibiting signs of recent drug use.

An officer's subjective belief that evidence of additional crimes may be in the vehicle, will not invalidate a search conducted pursuant to a warrant that was issued for other offenses for which the officer had probable cause. The Washington Supreme Court has already rejected the applicability of *Ladson* pretext doctrine to search warrants:

> Lansden's primary claim is that the initial warrant issued to search for code violations was a pretext to enable law enforcement personnel to search the defendant's property for evidence of drugs. Lansden analogizes to this Court's line of pretext traffic stop cases, where minor traffic infractions led to searches for drugs or other criminal activity.
>
> Lansden argues that the reasoning of *State v. Ladson*, a pretext case in the context of a traffic stop, applies to the case before us. The *Ladson* court concluded that there is "a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement." *State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). Where a valid warrant is issued, the result reached in *Ladson* is not applicable, as the search in *Ladson* was warrantless.
>
> The defendant also cites to *State v. Bartholomew*, 56 Wn. App. 617, 784 P.2d 1276 (1990), for the proposition that even when the police have a valid warrant, unauthorized law enforcement personnel may not be present to search and arrest for their own purposes. In the case before us, the search warrant was directed "to the Sheriff of Yakima County, State of Washington, his deputies or to any peace officer of the State of Washington duly authorized to enforce or assist in enforcing any law thereof." CP at 51. Even though the police may have suspected drug activity at Pence Road, there is no evidence that the officers who executed the warrant failed to conform with its directive.
>
> We decline to apply a pretext analysis to searches pursuant to a valid warrant.

State v. Lansden, 144 Wn.2d 654, 662, 30 P.3d 483 (2001).

Any officer, who obtains a search warrant for a vehicle for evidence related to a relatively minor offense, must strictly conform his or her behavior to the terms of the search warrant. A cautious police officer may wish to limit an initial search warrant to the passenger compartment of a vehicle,

and seek an expansion of the warrant to include hidden compartments or the trunk if evidence is observed during the execution of the limited search warrant that will support entry into these additional areas of the vehicle.

Any search warrant will involve a commitment of resources, including tow truck fees and the diversion of manpower from other tasks. In some jurisdictions, line officers need to obtain approval for search warrants from supervising officers.

vii. Follow Departmental Policy Regarding the Final Disposition of the Vehicle

Once an officer decides that a search warrant will not be sought, the officer should follow departmental policy regarding the final disposition of the vehicle. Evidence and contraband observed during an impound inventory or while moving the vehicle to a location where it will not impede traffic, may be seized pursuant to the plain view exception to the warrant requirement.

- An officer should not use an impound as a pretext to collect evidence. *See generally State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980) ("we recognize the possibility for abuse and have required that the State show that the [inventory] search was conducted in good faith and not as a pretext for an investigatory search"); *State v. Gluck*, 83 Wn.2d 424, 428-29, 518 P.2d 703 (1974) (inventory searches must be conducted in good faith to be justified). A prudent officer who unexpectedly discovers evidence of a crime during an impound inventory will cease the impound inventory and will obtain a search warrant prior to looking for additional evidence.

When an vehicle is being released to a passenger or to someone else identified by the arrestee, an officer should advise that person that the vehicle has not been searched and that contraband or weapons may be present. The officer should ensure that the person who is collecting the vehicle knows they are taking the vehicle "as is." The officer should document that this exchange occurred.

5. Inventory Searches.

One of the narrow exceptions to the warrant requirement is a valid inventory search. *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013); *State v. White*, 135 Wn.2d 761, 769 n. 8, 958 P.2d 982 (1998). An inventory search may be performed without the consent of the person who owns the property or who is currently in control of the property. *Tyler*, 177 Wn.2d at 706-08.

Inventory searches serve many important non-investigatory purposes. Warrantless inventory

searches are permissible because they (1) protect the vehicle owner's (or occupants') property, (2) protect law enforcement agencies/officers and temporary storage bailees from false claims of theft, and (3) protect police officers and the public from potential danger. *Tyler*, 177 Wn.2d at 701; *White*, 135 Wn.2d at 769-70.

An inventory search must be restricted to the areas necessary to fulfill the purpose of the search. For example, to protect against the risk of loss or damage to property in the vehicle, the search should be limited to protecting against substantial risks to property in the vehicle and not enlarged on the basis of remote risks. *Tyler*, 177 Wn.2d at 701, 707.

A non-investigatory inventory search must be conducted in good faith. *See Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990) ("an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"). Any attempt to use an inventory search as a pretext for an investigatory search will result in the suppression of evidence. *See Tyler*, 302 P.3d at 171; *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968) ("this court" would not "have any hesitancy in suppressing evidence of crime found during the taking of the inventory, if we found that … impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant"). Whether an inventory search was conducted in bad faith or for the purpose of an investigation is determined by looking at the totality of the circumstances. *See generally, State v. Simpson*, 95 Wn.2d 170, 191, 622 P.2d 1199 (1980); *Montague*, 73 Wn.2d at 389-90. An officer's strict adherence to procedure is grounds for a court to reject a defendant's claim of pretext. *See Tyler*, 177 Wn.2d at 702-03 (pretext properly rejected where officer explored alternatives to impound, followed procedure in calling a two truck, and utilized the standardized Washington State Patrol impound form).

a. **Vehicles.** When a vehicle is impounded, an inventory search pursuant to department policy may be conducted. Evidence seized may be used in a criminal prosecution. Probable cause is not needed for this exception. The search must be reasonable and the impound must not be a pretext for an evidentiary search. *See State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). *Accord State v. Green*, 177 Wn. App. 332, 312 P.3d 669 (2013) (an officer exceeds the scope of a vehicle inventory by seizing receipts that were contained in a plain brown paper bag, as the officer did not immediately recognize the receipts as evidence of a crime). If a vehicle is impounded for evidentiary purposes only, a search warrant, based on probable cause, is needed.

An inventory search is permitted only to the extent necessary to achieve its purposes. *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980). Searches of locked trunks and locked containers is prohibited under the vehicle inventory exception because privacy interests exhibited by placement of any property in such containers and in trunks outweigh the need to inventory the contents to protect the property or protect against false claims of theft. *Tyler*, 177 Wn.2d at 708. Currently, under article I, section 7, the officer must obtain permission to search the locked trunk or a locked container. *Id.* The only exception is where manifest necessity exists. *State v. White*, 135 Wn.2d 722, 958 P.2d 982 (1998); *see, e.g., State v. Ferguson*, 131 Wn. App. 694, 703-04, 128 P.3d 1271 (2006) (presence of chemical fumes indicated likelihood that highly combustible materials were being transported in the vehicle's trunk and presented manifest necessity for search).

i. **Modern Vehicle Construction.** The Court has noted that "[g]iven modern vehicle design, there may be a question as to when a trunk is locked if it can be accessed from the interior of the vehicle." *Tyler*, 177 Wn.2d at 708 n. 8. The Court, however, has not answered the question. Officers are encouraged to seek guidance from their department's legal advisors and prosecutors.

ii. **Closed Containers.** In *State v. Tyler*, 177 Wn.2d 690, 302 P.3d 165 (2013), the Court prohibited the opening, as part of an inventory search, of "locked containers." The Court did not similarly restrict the opening of closed containers.

An earlier Washington Supreme Court case appears to ban the opening of closed containers. *See State v. Houser*, 95 Wn.2d 143, 156, 622 P.2d 1218 (1980) ("the legitimate purposes behind an inventory search could have been effectuated by inventorying as a unit the closed toiletry kit in which the drugs were found"). It appears that the rule announced in *Houser* was based upon the Fourth Amendment. This conclusion is based both upon the *Houser* Court's reliance upon federal case law and its statement in footnote 4 that "[f]or the purposes of this Fourth Amendment question, it suffices to say that no such necessity was shown here." *Houser*, 95 Wn.2d at 156 n. 4. Seven years after *Houser* was issued, the United States Supreme Court clarified that the Fourth Amendment is not violated by an inventory of the contents of closed containers found inside an impounded vehicle. *See generally Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

Reasonable Alternative Rule. Washington cases generally limit impounds and impound searches to those occasions when there is no reasonable alternative to an impound. *See State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). The legislature has enacted statutes to dispense with the reasonable alternative rule with respect to certain types of offenses, but whether such statutes are constitutional under Art. 1, § 7, is still an open question. *See In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 60 P.3d 53 (2002) (avoiding the constitutional issue by striking down a mandatory Washington State Patrol regulation on statutory grounds); *State v. Hill*, 68 Wn. App. 300, 305, 306, 842 P.2d 996 (1993) (even when authorized by statute "impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties"; "in Washington, impoundment is inappropriate when reasonable alternatives exist").

Under the reasonable alternative rule, police may not impound a vehicle if:

- The owner is present, the owner does not wish to have the vehicle impounded, the vehicle may be lawfully parked at the scene, and the owner is willing to sign a liability waiver.
- The owner is present, the owner does not wish to have the vehicle impounded, and the owner is willing to let a sober, licensed driver remove the vehicle from the scene. The sober, licensed driver must either be at the scene or able to respond to the scene in a reasonable period of time.

An inventory may be conducted, over the defendant's objections, once alternatives to impound have been explored without success. *See State v. Tyler*, 177 Wn.2d 690,

302 P.3d 165 (2013). A defendant's prior denial of consent to search the vehicle will not preclude an inventory of its contents once impound becomes necessary. *Id.*, at 703.

When a vehicle is not impounded, but is left at the scene, an officer may still enter the vehicle to turn off the engine, roll up the windows, and lock the doors. Evidence that the officer sees in plain view while conducting these chores may be admissible into evidence. *See, e.g., State v. Delao*, 333 Mont. 68, 140 P.3d 1065 (2006) (officer who is not impounding vehicle may take reasonable steps to limit civil liability; entering vehicle to obtain the keys, so officer could start the motor in order to operate the vehicle's power locks and windows, was reasonable; bottle of vodka that was partially covered by armrest was properly seized by officer).

Exceptions to the Reasonable Alternative Rule

i. **Vehicle is evidence of a crime**. As evidence of a crime if there is probable cause to believe it is stolen or has been used in a felony. Also if the officer has probable cause to believe the serial numbers in the vehicle have been altered or destroyed. *See* RCW 46.12.310. (Under these circumstances, a warrant should be obtained prior to searching the contents of the vehicle).

A vehicle may be seized and sealed while a warrant is being obtained if the officer has probable cause to believe the car contains contraband or evidence of a crime. Seizure only authorized for the time reasonably necessary to obtain a search warrant and to conduct the search. *See State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992).

- There are no Washington cases that address how long an officer may hold a vehicle pending issuance of a search warrant. Officers are encouraged to contact a magistrate for issuance of the warrant:
  - the day the vehicle is seized, when the seizure occurs during normal court hours; or
  - by 10:00 a.m. the day following seizure (including weekends and holidays) when seizure occurs outside normal court hours.

Officers must present their probable cause to a magistrate within 48 hours of seizing the vehicle. *Cf.* CrR 3.2.1(a) ("A person who is arrested shall have a judicial determination of probable cause no later than 48 hours following the person's arrest"); CrRLJ 3.2.1(a) (same); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991) (a judicial probable cause determination must occur within 48 hours of a warrantless arrest). The 48 hour period is consistent with decisions from states that follow a rule similar to that announced in *State v. Huff*. *See State v. Guzman*, 965 A.2d 544, 184 Vt. 518 (2008) (a delay from seizure of car on Saturday to the next business day on a Monday was not an unreasonable delay in obtaining the search warrant); *Edlin v. State*, 523 So.2d 42, 48 (Mississippi 1988) (one day delay in obtaining search warrant for seized car not unreasonable).

ii. **Vehicle is subject to forfeiture.** A vehicle may be impounded when it is subject to statutory forfeiture. (Example: RCW 69.50.505). *See generally Frost v. Walla Walla*, 106 Wn.2d 669, 724 P.2d 1017 (1986).

iii. **Community Caretaking.** Vehicle threatened by vandalism or theft of contents. In *State v. Sweet*, 44 Wn. App. 226, 721 P.2d 560 (1986), the court upheld the inventory search of a vehicle where the arrestee was unconscious, items of value were visible in the vehicle, and the vehicle was in an area of high crime.

iv. **Exigent Circumstances.** A vehicle may be impounded to prevent flight by a suspect. *See State v. Burgess*, 43 Wn. App. 253, 716 P.2d 948 (1986) (officer's flattened the tires); *State v. Bresolin*, 13 Wn. App. 386, 534 P.2d 1394 (1975) (court sustained the impoundment of the vehicle because, among other reasons, leaving the vehicle in the street would have left it open to use by a possible third suspect who remained at large). .

v. **Statute Authorizes Impoundment**

As part of the police function of enforcing traffic regulations, if the driver has committed a traffic offense for which the Legislature has authorized impoundment. If the statute is mandatory, then the officer does not have to provide the driver with an opportunity to remove personal property from the vehicle before the inventory is conducted. *See United States v. Penn*, 233 F.3d 1111 (9th Cir. 2000). If, however, the statute merely indicates that an officer "may" impound the vehicle, an officer must exercise discretion when deciding to impound the vehicle. *See, e.g. State v. Coss*, 87 Wn. App. 891, 943 P.2d 1126 (1997), *review denied*, 134 Wn.2d 1028 (1998). This means that if passengers are present, the officer must first inquire whether any of the passengers are willing to move the car and whether the person who steps forward is validly licensed. A police officer may, nonetheless, impound a vehicle if that appears the best method of preventing a reoccurrence of the illegal conduct. *See, e.g.*, *State v. Peterson*, 92 Wn. App. 899, 964 P.2d 1231 (1998).

State statutes authorizing impoundment are either discretionary or mandatory. A local jurisdiction may adopt an ordinance that mandates impoundment when a state statute does not so require. The validity of such an ordinance is uncertain. *Compare City of Kent v. Mann*, 161 Wn. App. 126, 253 P.3d 409 (2011), *with In re 1992 Honda Accord*, 117 Wn. App. 510, 71 P.3d 226 (2003).

When a vehicle is impounded pursuant to a statute, evidence discovered during an inventory search may be inadmissible under the Fourth Amendment. *See United States v. Cervantes*, 703 F.3d 1135, 1140-43 (9th Cir. 2012) (inventory search will violate the Fourth Amendment – even though the driver was driving on a suspended license— if the government presents no evidence that the impoundment served any caretaking function); *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005) ("We begin

with the premise, apparently not recognized by the Defendants, that the decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment. . . .”). A prudent officer should note all valid community caretaking functions that are present at the time of the impound. Valid caretaking functions include ensuring free flow of traffic, removing public safety threats, protecting the owner's property, protecting police from the owner charging them with having stolen, lost, or damaged the owner's property. *Cervantes*, 703 F.3d at 1141. Legislative findings may also be considered in establishing that the statute serves a valid community caretaking function. *See, e.g.,* RCW 46.55.330 (findings in support of the mandatory 12 hour DUI impound).

A. Discretionary Statutes

Currently the legislature has authorized impound in RCW 46.55.113 when:

- the driver of a vehicle is arrested for a violation of RCW 46.20.342 or 46.20.345 (specific restrictions if the vehicle is a commercial vehicle)
- a police officer finds a vehicle standing upon the roadway in violation of any of the provisions of RCW 46.61.560
- a police officer finds a vehicle unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety
- a police officer finds an unattended vehicle at the scene of an accident or when the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property
- whenever the driver of a vehicle is arrested and taken into custody by a police officer
- whenever a police officer discovers a vehicle that the officer determines to be a stolen vehicle
- whenever a vehicle without a special license plate, placard, or decal indicating that the vehicle is being used to transport a person with disabilities under RCW 46.16.381 is parked in a stall or space clearly and conspicuously marked under RCW 46.61.581 which space is provided on private property without charge or on public property
- upon determining that a person is operating a motor vehicle without a valid and, if required, a specially endorsed driver's license or with a license that has been expired for ninety days or more

- when a vehicle is illegally occupying a truck, commercial loading zone, restricted parking zone, bus, loading, hooded-meter, taxi, street construction or maintenance, or other similar zone where, by order of the director of transportation or chiefs of police or fire or their designees, parking is limited to designated classes of vehicles or is prohibited during certain hours, on designated days or at all times, if the zone has been established with signage for at least twenty-four hours and where the vehicle is interfering with the proper and intended use of the zone
- when a vehicle with an expired registration of more than forty-five days is parked on a public street

RCW 46.32.060 allows an officer to impound a vehicle that is found to be so defective that it is considered unsafe to operate until the defective equipment is corrected

RCW 46.55.085 authorizes the impound of an unauthorized vehicle left within a highway right of way. Generally, the officer must first attach a notice and wait 24 hours to see if the vehicle has been removed before the impound is allowed.

B. Mandatory Statutes

Promoting Prostitution. A vehicle must be impounded when used in the commission of commercial sexual abuse of a minor, promoting commercial sexual abuse of a minor, or promoting travel for commercial sexual abuse of a minor, and the owner of the vehicle is arrested . A vehicle may be impounded when used in the commission of patronizing a prostitute, promoting prostitution in the first degree, promoting prostitution in the second degree, and promoting travel for prostitution. *See* RCW 9A.88.140.

DUI and Physical Control. Laws of 2011, ch. 167, "Hailey's Law", codified at RCW 46.55.350-.370, requires an officer to impound a vehicle when a driver is arrested for a violation of RCW 46.61.502 or RCW 46.61.504. This law does not apply to individuals arrested for vehicular assault, vehicular homicide, negligent driving in the first degree, Minor DUI, or CMV .04 arrests.

- If the arrested driver is a registered owner of the vehicle, the vehicle is subject to a twelve-hour hold. The 12 hour period begins when the impounded vehicle arrives at the registered tow truck operator's storage facility.
    - If there is a second registered owner of the vehicle, the non-arrested legal or registered owner may redeem the vehicle as soon as the vehicle arrives at the registered two truck operator's storage facility.
- If the arrested driver is not the registered owner of the

vehicle, the vehicle may be redeemed by the vehicle's registered owner as soon as it arrives at the registered tow truck operator's storage facility. .

- If the arrested driver was operating a commercial vehicle or farm transport vehicle and the arrested driver is not the owner of the vehicle, the police officer must attempt to contact the owner of the vehicle before the vehicle may be impounded. If the owner can arrive at the scene is a reasonable period of time, the officer may release the vehicle to the owner.

  - If the owner was in the vehicle while the driver was operating the vehicle while intoxicated, the officer may not release the commercial vehicle or farm transport vehicle to the owner.

- An officer is not required to wait with the vehicle for the tow truck operator to arrive if: (i) the officer has waited 30 minutes after the police contacted the police dispatcher requesting a registered two truck operator and the responding tow truck has not arrived; or (ii) the police officer is presented with exigent circumstances such as being called to another incident or due to limited available resources being required to return to patrol.

Wrongful Impoundment. Any person who feels that an officer improperly impounded a vehicle is entitled to a hearing in district court to contest the validity of the impound. RCW 46.55.120(2)(b). "... the person or agency who authorized the impoundment shall be liable for any towing, storage, or other impoundment fees..." RCW 46.55.120(3)(c). The process for redeeming an impounded vehicle contained in RCW 46.55.120 is not the exclusive remedy for a person whose vehicle is unlawfully impounded. A person whose vehicle is unlawfully impounded may bring a conversion action against the authority that authorized the impoundment. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008). A person whose vehicle is unlawfully impounded may obtain suppression of any evidence located by the officer during the inventory search. *United States v. Maddox*, 614 F.3d 1046 (9th Cir. 2010).

b. **Persons**. An inventory search may also be made of a person who is booked into jail. *South Dakota v. Opperman*, 428 U.S. 364 (1976). If the suspect is eligible for bail, the suspect must be given an opportunity to post the bail prior to the inventory search or the inventory search will be unlawful. *State v. Smith*, 56 Wn. App. 145 (1989); RCW 10.31.030. This restriction only applies to people who were not immediately searched incident to arrest.

The Court of Appeals held in *State v. Dugas*, 109 Wn. App. 592, 36 P.3d 577 (2001), that absent exigent circumstances (such as an indication of dangerous contents) or

consent, it is unreasonable under the Fourth Amendment for the police to open closed containers discovered inside an article of clothing during an inventory search. The Court of Appeals based its decision on *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). In *Houser*, the Washington Supreme Court held that the Fourth Amendment is violated by opening closed containers found inside an impounded vehicle. Neither *Dugas* nor *Houser* correctly state the Fourth Amendment rule. The United States Supreme Court, which is the final arbiter with respect to the Fourth Amendment, has ruled that the Fourth Amendment is not violated by an inventory of the contents of closed containers found inside an impounded vehicle. *See generally Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

c. **Possessions.** Bags, purses, and other items come into police officer custody when a person is arrested, as lost property, and under other circumstances. Officers may inventory the contents of these possessions. *See State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994). However, an inventory search that is "a ruse for a general rummaging in order to discover incriminating evidence" is unreasonable. *Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990); *State v. Mireles*, 73 Wn. App. 605, 871 P.2d 162 (1994). Inventory searches, moreover, are not unlimited in scope, and "must be restricted to effectuating the purposes that justify their exception to the Fourth Amendment." *State v. Dugas,* 109 Wn. App. 592, 597–98, 36 P.3d 577 (2001) (holding that while police could inventory arrestee's jacket, they could not search the closed container within the jacket when there was no indication of dangerous contents or illegal drugs). *But see Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987) (Fourth Amendment is not violated by an inventory of the contents of closed containers found inside an impounded vehicle).

Washington courts have not indicated whether reasonable alternatives to inventory must be explored. *But see State v. Smith*, 56 Wn. App. 145, 150-52, 783 P.2d 95 (1989) (holding that a booking search of an arrestee's purse was unlawful because she was not given timely opportunity to post bail, and police were not concerned that she was carrying weapons). The Montana Supreme Court, which has adopted a Washington-style reasonable alternatives to vehicle impound rule, has rejected such a rule in the context of items that will be placed in a police department or jail property room:

> [The defendant] also asserts that the "less intrusive means rule," discussed in *State v. Sawyer* (1977), 174 Mont. 512, 571 P.2d 1131, and in *Sierra*, should be applied to the inventory of an arrestee's possessions upon his or her incarceration in jail. [The defendant] contends that, as a less intrusive means of dealing with the sorts of potential problems referred to above, the police could have secured his rucksack for safekeeping, could have inventoried valuable items found in plain view, could have marked the rucksack in a manner from which one could determine whether there had been tampering and then could have placed the rucksack in an appropriate area for

safekeeping during the arrestee's detention.

Keeping in mind that the protection of the arrestee, the police and other persons in and about the station house from the potential harm posed by weapons, dangerous instrumentalities and hazardous substances concealed on or in the arrestee's possessions is the primary justification for administrative inventory searches, as a practical matter, there are several problems inherent in the "less intrusive means" approach.

First, if, as pointed out above, the closed container contains a weapon, it can take but a matter of seconds for the arrestee to retrieve the weapon and use it against an unsuspecting person. This concern alone vitiates [the defendant's] argument that a less intrusive means of conducting an inventory search will accomplish the State's goal of safeguarding persons and property in the station house. A search of a closed container found on or in the possession of the arrestee is the least intrusive method of alleviating any risk from weapons and dangerous instrumentalities that may be used by an arrestee upon his or her release from the jail.

Second, if an arrestee is carrying a concealed bomb, explosive or incendiary device, there is little, short of a physical search of the arrestee's possessions, that the police can do to protect against the potential harm inherent in such a situation. While [the defendant] suggested at oral argument that the police could store prisoners' personal possessions in a bomb-proof room, it is not likely that Montana police stations and sheriff's offices would have access to such a room and even less likely that city councils, county commissioners and taxpayers would be willing to finance the cost to construct that type of facility. Again, a physical inventory search is the most practical and least intrusive method of dealing with the problem.

Third, it is impractical and unreasonable to expect the police to make decisions on a daily basis about which containers to search and what, if any, is the least intrusive means available to inventory an arrestee's personal property on or in his or her possession. *Lafayette,* 462 U.S. at 648. "It would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit." *Lafayette*, 462 U.S. at 648. The potential for danger alone justifies the inventory of items found on or in the possession of a lawfully arrested person at the station house. "[A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Lafayette*, 462 U.S. at 648, citing *New York v. Belton*

> (1981), 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860. To a certain extent, we must defer to police departments in their development of standardized administrative procedures which will best serve to protect the interests of the arrestee, the police, others incarcerated in jail, and society at large. *Lafayette*, 462 U.S. at 648.
>
> While [the defendant] argues, correctly, that the right of privacy can only be infringed by a compelling state interest closely tailored to effectuate that interest, it does not follow that the less intrusive means rule mandates that the police use some method short of physically searching the arrestee's possessions. The routine, administrative inventory search of the personal property on or in the possessions of the arrestee at the police station following arrest is closely tailored to effectuate the compelling interest of safeguarding persons and property in the station house from weapons, dangerous instrumentalities and hazardous substances which might be concealed in the arrestee's possessions.

State v. Pastos, 269 Mont. 43, 887 P.2d 199, 203-04 (1994).

6. Emergency Doctrine.

The need to protect or preserve life, avoid serious injury or protect property in danger of damage justifies an entry that would otherwise be illegal absent an emergency. Police officer owe other duties to the public such as rendering aid to individuals in danger and protecting their property and premises. The officer's motivation for the entry is the linchpin in the assertion of the emergency doctrine. It is important to remember, however, that while an entry may be justified under the emergency doctrine, a warrant will generally need to be obtained prior to further investigation or seizure of evidence.

The emergency doctrine does not require probable cause but must be motivated by the perceived need to render aid or assistance. Police are acting under their general or community caretaking role in emergency action, not in their evidence gathering role. Washington cases have generally held that for a search or entry to come within the emergency exception, the court

> must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search and instead was "actually motivated by a perceived need to render aid or assistance." To that end, the State must show that: (1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed.

State v. Lynd, 54 Wn. App. 18, 21, 771 P.2d 770 (1989) (citation omitted). There must also be a reasonable basis for associating the need for assistance with the place that is entered. *State v. Menz*, 75 Wn. App. 351, 354, 880 P.2d 48 (1994), *review denied*, 125 Wn.2d 1021 (1995); *State v. Gocken*, 71 Wn. App. 267, 277, 857 P.2d 1074 (1993), *review denied*, 123 Wn.2d 1024 (1994). Satisfaction of these three factors will address the concern that the "claimed emergency was not simply a pretext for conducting an evidentiary search and instead was actually motivated by a perceived need to render aid or assistance." *Lynd*, 54

Wn. App. at 21.

The Washington Supreme Court recently distilled the case law into a five-part test, requiring the government to show that:

(1) the officer subjectively believed that someone likely needed assistance for health or safety concerns;

(2) a reasonable person in the same situation would similarly believe that there was need for assistance;

(3) there was a reasonable basis to associate the need for assistance with the place being searched.

(4) there is an imminent threat of substantial injury to persons or property;

(5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and

(6) the claimed emergency is not a mere pretext for an evidentiary search.

State v. Schultz, 170 Wn.2d 746, 754-55, 248 P.3d 484 (2011).

While the United States Supreme Court recently held that for Fourth Amendment purposes, the officer's subjective motivation is irrelevant in determining whether a warrantless entry under the emergency doctrine was reasonable, *Brigham City v. Stuart*, 547 U.S.398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006), an officer's subjective motivation is an issue under Const. art. I, § 7. *See generally State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011). An officer's subjective belief of an emergency and actions taken in good faith based upon that relief will not satisfy Const. art. I, § 7. *Schultz*, 170 Wn.2d at 760-61.

When making an emergency entry, police should announce their identity at the doorway and again upon entering those areas of the building where occupants are present. Officers do not, however, need to wait to see whether the occupants will refuse them entry into the building before entering. *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006).

While many examples of emergency doctrine entries/searches are contained in the community caretaking portion of these materials, certain categories of cases merit additional discussion.

a. Domestic Violence Exigencies. It is essential when responding to a report of domestic violence to establish actual contact with the victim. Contact is necessary to establish that the victim is safe, to discharge the officer's statutory obligations, and to obtain a complete report. *See, e.g., State v. Raines*, 55 Wn. App. 459, 778 P.2d 538 (1989), *review denied*, 113 Wash.2d 1036 ("police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants" of a home). While in most cases the victim will be easily accessible, a suspect will occasionally try to block the officer's access to the victim by claiming that the victim has left or the 911 call was accidently made by a child. In such circumstances, special rules apply to the entry into the house.

In January of 2011, the Washington Supreme Court considered the legality of a warrantless emergency entry in a domestic violence incident in *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011). Although the Court "recognize[d] that domestic violence presents unique challenges to law enforcement and courts," and stated " that the likelihood of domestic violence may be considered by courts when evaluating whether the requirements of the emergency aid exception to the warrant requirement have been satisfied,"*Schultz*, 170 Wn.2d at 750, it held that the officers did not have enough facts to justify an entry based upon the emergency aid exception to the warrant requirement. The facts that were known to the officers at the time of the entry were as follows: Police received a phone call from a resident of an apartment complex about a yelling male and female. Responding officers overheard a man and a woman talking with raised voices. They specifically overheard the man say that he wanted to be left alone and needed his space. When the officers knocked on the apartment door, a female answered. She appeared agitated and flustered. When she was asked where the male occupant of the apartment was, the female denied that anyone else was there. The officer told the female that the officer had heard a male voice in the apartment. The female called for the male, who emerged from a nearby bedroom. The female then stepped back, opened the door wider, and the officer followed the female inside. The officers did not notice that the female's neck was red and blotchy until after they had enter the apartment.

The Court indicated what additional information could have supported a warrantless entry:

> if the officers could not have ascertained the location of the man whose voice they had heard, they would have been entitled to make further inquiries and perhaps enter the home to verify that he was safe. But [the male] appeared before the officers entered. Certainly other facts such as past police responses to the residence, reports of threats, or any other specific information to support a reasonable belief that domestic violence had occurred or was likely to occur, or that the circumstances were volatile and could likely escalate into domestic violence, may have justified entry. But upon the record before us, we conclude that the warrantless entry into [the female's] home and subsequent search violated her constitutionally protected right of privacy within her home.

Schultz, 170 Wn.2d at 761.

The above factors generally appear in the following pre- *State v. Schultz* cases that upheld entry under the emergency doctrine in the domestic violence context:

- In *State v. Jacobs*, 101 Wn. App. 80, 2 P.3d 974 (2000), officers responded to a residence that had been the scene of prior domestic violence incidents involving the individual who made several 911 calls. The individual who made the calls indicated he had been beaten up. This individual displayed suspicious behavior, constantly changing his story regarding who had assaulted him and who was currently in the house. The responding officer had extensive experience dealing with domestic violence situations and knew

that it was not uncommon for domestic violence victims to protect the perpetrator, either out of fear or misguided loyalty. The responding officer could not ensure that the residence did not contain additional victims or a person who might pose a threat to the already contacted victim without conducting a quick sweep.

- In *State v. Lynd*, 54 Wn. App. 18, 771 P.2d 770 (1989), an officer responded to a 911 hand-up call at defendant's residence. The line was busy when the officer returned the call. Upon arriving at the residence, defendant was loading things into a car and the officer noticed a cut on his face. Defendant said he had pushed and slapped his wife who went to her mother's home down the street. The officer requested permission to enter, but the defendant refused. Officer entered without consent and noticed evidence of a struggle. Officer did not locate victim, but noticed marijuana growing. The officer testified that she was concerned about the victim's safety based upon defendant's injuries, statement and his reluctance to allow entry. Held: Entry was permitted under the emergency exception to the warrant requirement. Court rejects the argument that the officer should have pursued other less intrusive means to check on the victim's safety such as calling to her from the door, looking in the windows or checking the victim's mother's residence.

- In *State v. Menz*, 75 Wn. App. 351, 353, 880 P.2d 48 (1994), *review denied*, 125 Wn.2d 1021 (1995, an anonymous caller reported domestic violence at a specific address. The caller said that he thought the participants were Debbie and Dale and that a 10 year old also resided in the house. The caller was unsure about the presence of weapons. Upon arrival at the residence, the officers noticed that the front door was open, the TV and lights were on, however there were no cars in the driveway. There was no response when the officers knocked and announced their presence three times so the officers entered out of concern for the occupants. They discovered marijuana plants and subsequently obtained a search warrant and seized the plants. Held: Entry was permitted under the emergency exception.

- In *State v. Raines*, 55 Wn. App. 459, 778 P.2d 538 (1989), *review denied*, 113 Wash.2d 1036 (1990), a neighbor reported hearing victim tell defendant not to hit 7 year old son. Upon arrival, the police noticed a man peering out the window. The victim answered the door and advised that defendant was not at home and that there was no problem. There were no signs of injury or disturbance, but the police were familiar with defendant and his violent temper, as well as victim's inconsistent stories from past contacts. Victim stepped back to let officers enter, but she shut the bedroom door indicating her desire that the officers not enter that room. The officers entered the bedroom and found contraband. Holding: The emergency exception justified the initial entry, as well as entry into the bedroom where defendant and cocaine were located. The court focused on the following factors to establish the existence of an emergency: 1) defendant's prior history of violence; 2) no obligation to believe the victim when she said there was no problem based

upon her past efforts to protect him; 3) "the fact that the occupants appeared unharmed..did not guarantee that the disturbance had cooled to the point where their continued safety was assured;" 4) consideration of why defendant concealed himself and did not come forward; 5) officers did not know defendant's "condition and state of mind" until they could see and talk to him; 6) the specific threat indicated by the caller; and 7) the possible inability of obtaining a telephonic warrant due to the late hour.

- In *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001), officers responded to a DV call. The call came from a relative outside the house who reported that the victim had locked herself in the bathroom. As the first officer approached the house, a man stepped outside. This man was extremely slow to respond to an inquiry of whether anyone was in the house. Eventually the man, who had a bloody cut on his wrist, smelled of marijuana, and appeared to be under the influence of marijuana indicated that his girlfriend was in the bathroom. In the meantime, another officer's knock on the door was answered by a woman who was shaking and had blood on her lip. The woman started to exit the house, but the officer told her to stay and he walked inside. The officer was found to have entered the house to protect the woman and other potential victims, to keep the man and woman separate for safety, and to ensure an orderly investigation. The Court indicated that an officer does not have to question the one known victim before entering to search for other victims.

- In *United States v. Black,* 482 F.3d 1035 (9th Cir.), *cert. denied*, 128 S. Ct. 612 (2007), the police were dispatched to the defendant's apartment after they received a 911 call from the defendant's girlfriend who reported the defendant had beaten her up that morning in the apartment and had a gun. Toward the end of her 911 call, the defendant's girlfriend told the dispatcher that she intended to return to the apartment with her mother in order to retrieve her clothing and that the two women would wait outside the apartment, in a white Ford pickup truck, for police to arrive. When the first officer arrived at the apartment a few minutes later there were no signs of the defendant's girlfriend, her mother, or the truck. The first officer contacted his backup to request that the backup stop by the grocery store from which the defendant's girlfriend made the 911 call. The backup officer checked the store for signs of the defendant's girlfriend but, finding none, he continued to the apartment. The two officers then knocked on the front door but received no response. They then contacted the apartment manager in an attempt to gain access to the building. In the meantime, one officer circled the building to inspect the backyard area. There, he discovered an individual who matched the defendant's physical description. The individual identified himself and admitted that he knew the police were investigating a domestic violence call. He denied knowing the whereabouts of his girlfriend and also denied that he lived in the apartment. When the defendant became agitated, one of the police officers patted him down for weapons and searched his pockets with the defendant's consent, which yielded the key to the apartment.

Using the key, the officer entered and made a quick sweep of the apartment to see if anyone was there. No one was present, but the officer noticed a gun on the bed. Without touching the gun, he exited, arrested the defendant as a felon in possession of a firearm, and sought a warrant for the gun. The entry into the apartment was justified because the officers feared that the defendant's girlfriend could have been inside the apartment, badly injured and in need of medical attention. This was a lawful "welfare search" where rescue was the objective, rather than a search for a crime.

- In *State v. Williams,* 148 Wn. App. 678, 201 P.3d 371, *review denied*, 166 Wn.2d 1020 (2009), a police officer responded to a 911 call about a disturbance at a local hotel. As he pulled into the parking lot, a man approached the officer and said that his nephew was "being violent" with him and that he wanted his nephew removed from his hotel room. The man added that his nephew was on parole for a crime committed in California. The officer called for back up, and then walked with the man to his hotel room. One of the officers knocked on the door. An individual, later identified as the nephew, Williams, opened the door. Williams's left hand was behind the partially-opened door and not visible to the officers. The officers asked Williams to show his hand. The officers heard the sound of an object dropping behind the door and Williams brought his left hand into view. Williams then backed up, and the officers and Williams' uncle walked into the hotel room. The officers had Williams sit down. They asked Williams his name, and he gave an incorrect one. While the officers were trying to identify Williams, one of the officers observed drug paraphernalia, and what he believed to be rock cocaine in a partially opened dresser drawer. At some point during this process, the first officer at the scene walked outside the hotel room with Williams' uncle. The uncle told the officer that Williams had assaulted him and had broken his jaw. The Court held that the warrantless entry into the hotel room was not justified under these facts because the officers never manifested any concern that somebody inside the hotel room was in immediate danger. The uncle never stated that any person other than Williams was in the hotel room or had traveled with them to the hotel. Moreover, unlike a larger residence in which victims could be located far from the front door, much of the hotel room was visible to the officers when Williams opened the door.

b. On-Going Violence

An officer who observes violence inside a building through a window or open doorway may make a warrantless entry into the building. The officer need not delay entry until she is able to ascertain that one of the occupants needs medical treatment. *See* . *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) ("The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.").

c. Burglary in Progress

A recurring theme in "emergency" cases involves officers responding to a suspected burglary in progress. To sustain an entry under this theory, the officer must possess both a subjective belief that a burglary is being committed and there must be an objective basis for believing that a burglary is in progress.

Factual examples of when the emergency doctrine was found to apply or to not apply in the burglary in progress context include:

- In *State v. Morgavi*, 58 Wn. App. 733, 794 P.2d 1289 (1990), police searched a residence after seeing a broken garage door open back door to house, open side door to garage, and a car in the driveway with its windows rolled down. The court concluded there was insufficient evidence that a burglary had occurred, and thus there were no exigent circumstances warranting a search.

- In *State v. Muir*, 67 Wn. App. 149, 835 P.2d 1049 (1992), officer's responded to a citizen report of individuals entering a residence that the citizen knew to be empty, prowl around, and load things into a car. Officers arrived at the residence in time to contact the burglars in the driveway in possession of bolt cutters, a recently cut padlock, and other items. As one officer *Mirandized* the suspects the other officer went to the residence to see whether there was a forced entry. As this officer walked by the car he noted a strong odor of marijuana. The officers checked the front door to the house, which was locked, and went to the back where there was a garage that was connected to the house. The officer entered this area, noted an odor of marijuana and searched further. As soon as the officer saw the marijuana, he stopped the search, sealed the house, and obtained a search warrant. The court held that the officer's knowledge of recently committed burglary of empty home to which officer had responded did not give rise to "emergency" or "exigent circumstances" justifying warrantless search of home because the officer knew that the resident was at work, there was no reason to believe that anyone was still in the house, and the officer's leaving the house to obtain the warrant indicated that he was not responding to an emergency.

- In *State v. Campbell*, 15 Wn. App. 98, 547 P.2d 295 (1976), the defendant's neighbor summoned the police after observing a burglary in progress and watching a suspect flee the scene. Upon arrival, the police spoke with the neighbor and discovered a broken window and wide-open door at the burglarized apartment. The officer immediately entered the apartment, without benefit of a warrant, "to investigate the recent crime, to look for possible participants in the burglary, to search for evidence of the burglary, and to aid any victims...." During the search, 7 marijuana plants were discovered. Division One of this Court found this search to be valid, concluding that it met the emergency or exigent circumstances exception, indicating that "[i]t is reasonable for officers, responding to a request for police assistance and with probable cause to believe that an open, unsecured dwelling has been recently burglarized, to immediately enter the dwelling

without a warrant for the limited purposes of investigating the crime, rendering aid to any possible victims of the felony, protecting the occupant's property, and searching for remaining suspects."

- In *State v. Bakke*, 44 Wn. App. 830, 723 P.2d 534 (1986), the defendant's neighbor summoned the police to respond to a burglary in progress. The neighbor had seen two juveniles running from the back door of the defendant's home. Upon arrival, the police spoke with neighbors and discovered that the window in the back door to the defendant's house had been broken and that the hole was large enough to accommodate a juvenile's body. The police also noted that fresh muddy footprints extended from the back door, through an enclosed porch to an interior door that had been broken from its jam. Without a warrant, the officers entered the house "to locate any suspects and secure the safety of the house and its contents." They found no suspects but saw two marijuana plants and some growing paraphernalia. Based on those facts, they obtained a warrant to search the house further. During the follow-up search, they found several marijuana plants and a grow light. The appellate court found that the entry was justified by the emergency doctrine.

- In *State v. Swenson*, 59 Wn. App. 586, 799 P.2d 1188 (1990), the police responded to an early morning report from Swenson's neighbor that Swenson's front door was ajar. When the police arrived, they spoke to the neighbor, who indicated that the house appeared to be unoccupied. Approaching the house, the officers heard a dog barking and noticed that there was no vehicle in the driveway. At the front door, the police called into the house, but received no response. They then drew their weapons and conducted a room by room search. During the search, they discovered drugs and drug paraphernalia belonging to Swenson. This search was held to not be justified under the emergency doctrine because the police did not have any cause to believe that the house was occupied, did not receive a call reporting an injured person, did not find signs of forced entry, and did not employ less intrusive investigative measures to determine whether their suspicions were well-founded. Evidence of a "door left open late on a summer night" was not sufficient to justify the entry.

- In *State v. Ibara-Raya*, 145 Wn. App. 516, 187 P.3d 301 (2008), *rev'd on other grounds by*, 172 Wn.2d 880 (2011), an early morning warrantless entry into a house was improper as there was no evidence of immediate risk to health or safety. The officers went to the house in response to a 2:27 a.m. 911 call from a neighbor, who complained of noise coming from a nearby house in Walla Walla that looked vacant during the day. The incident was dispatched as "noise coming from a vacant house." When officers arrived at the house, they saw lights on and heard party noise but reported nothing exceptional. Although a truck in the driveway came back as "stolen out of California", the lights in the house's living room went off when officers knocked on the front door, and two men were seen through a window leaving a room and opening the back door, these facts, taken together, do not support

a protective sweep of the house.

d. **Medical Emergencies**. The medical emergency exception allows a police officer to enter a dwelling without a warrant for purposes of rendering emergency aid and assistance to a person he reasonably believes is in need of such assistance. But the State must prove that (1) "the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched." Further, the officer must " 'be able to point to specific and articulable facts' " and reasonable inferences drawn therefrom, that provide reasonable justification for the warrantless entry.

The medical emergency doctrine will not apply once it becomes obvious that the person is deceased. Accordingly, a warrantless search conducted inside a private residence for the purpose of locating a photo identification for the suicide victim was illegal because the evidence seized was not in plain view, the area searched was beyond the immediate area of the suicide victim's body, and the victim's need for emergency medical assistance had ended prior to the start of the search. *State v. Schroeder*, 109 Wn. App. 30, 32 P.3d 1022 (2001).

Factual examples of when the emergency doctrine was found to apply or to not apply in the medical emergency context include:

- In *State v. Davis*, 86 Wn. App. 414, 937 P.2d 1110, *review denied*, 133 Wn.2d 1028 (1997), officers were summonsed to a motel by the motel manager because (1) the dead bolt to the defendant's standard motel room was activated from the inside; (2) the occupant did not respond to repeated telephone calls and knocks at the door throughout the late morning and early afternoon of October 26; and (3) it was after check-out time. The officer, who on an earlier occasion had entered an unresponsive motel guest's room and found the guest in need of medical attention due to a drug overdose, used the pass key to enter the room in order to determine whether the occupant was in need of immediate medical attention. This entry was found to be proper.

- In *State v. Angelos*, 86 Wn. App. 253, 936 P.2d 52 (1997), *review denied*, 133 Wn.2d 1034 (1998), an officer accompanied emergency medical technicians into the living room of the defendant who called 911 to report that she had overdosed. When the officer learned that there were three children present in the home after the defendant had been transported to the hospital, he asked the 12-year-old daughter to look and see if any drugs had been left around. When the defendant's daughter reported that she found something in thebathroom, the officer went to the bathroom where he found an line of cocaine beside the sink. The court upheld the search under the medical emergency exception.

- In *State v. Gocken*, 71 Wn. App. 267, 857 P.2d 1074 (1993), *review denied*, 123 Wn.2d 1024 (1994), an officer arrived at 72-year-old Ann Compton's

condominium in response to a call from her friend Norma Haskell who had been unable to reach Compton for some time. Officer Brunette was aware that Compton was elderly and had mental health problems because she had a reputation at the police station for making "crazy" calls complaining that people from federal and local agencies were watching her. When no one responded after Officer Brunette knocked on Compton's door and announced that he was from the police, he decided to perform a routine health and safety check to see if Compton might have been injured and in need of assistance. He entered the condominium without a warrant through an unlocked window. He found the home very neat and orderly except for an unkempt bedroom with men's effects. He also saw a large door at the end of the hallway which he assumed was a closet. The door was locked but there was nothing unusual about it. When Officer Brunette initially entered the condominium, he had been aware that he might smell a dead body because Haskell was concerned that Compton had been injured.

Eight days later, on June 24, Officer Brunette responded to a second dispatch to Compton's condominium, assuming it would involve another health and safety check. Haskell was outside waiting with another woman. Because nothing around the condominium appeared unusual, Brunette did not enter it. He did not write a report for either of the two visits because he considered them only routine health and safety checks, not criminal investigations.

At about the same time, Diana Berthon, Compton's niece, also became worried about Compton because she had not seen her for several weeks. On June 21, Berthon went to Compton's home and found a note signed "Ann" indicating she would be back Monday, June 25, but the note was not in Compton's handwriting. Berthon called the police and was advised that she should file a missing person report if Compton had not returned by Monday. Because Berthon could not reach Compton on Monday, she filed the report with the police. Officer Victor Shively, who was not aware of Officer Brunette's previous visits, accompanied Berthon to Compton's condominium at 10 a.m. to do a health and safety check. Shively had met Compton once and remembered making a police call to her condominium about 2 years earlier. At the condominium, Berthon looked through a window and said she thought furniture was missing. She convinced Officer Shively that he should enter the condominium to see if Compton was sick or injured. She also mentioned that Compton had a roommate. Shively knocked and announced who he was and, after receiving no response, entered through the front window. He let Berthon in through a sliding glass door. Berthon confirmed that furniture was missing, but at that point Officer Shively did not consider that fact suspicious. There were also beer cans, food, and garbage strewn around the living room and kitchen. Berthon began noticing a strong odor in the hallway and walked toward the closed door which she identified as her aunt's bedroom. She mentioned that Compton had had a dog that was put to sleep. Compton had been unable to part with it, and

Berthon wondered if the smell might be the dog's body. She tried to open the door, but it was locked. She also noticed that the edges of the door were sealed with masking tape and a towel lay across the base of the doorway. Officer Shively recognized the odor as that ofdecaying flesh and immediately escorted Berthon out of the condominium. The Court held that the entry by Officer Shively was "clearly justified" by the emergency doctine.

- In *State v. Cahoon,* 59 Wn. App. 606, 799 P.2d 1191 (1990), *review denied*, 116 Wn.2d 1014 (1991), two EMT's and one paramedic responded to the defendant's home due to a request for an ambulance. One of the EMT's was also an off-duty police officer. The defendant, who was found lying in the yard, indicated that she had consumed crank. The EMTs had been taught the importance of obtaining the drug ingested and transporting it to the hospital, to aid the physicians in rendering medical care. Consequently, the EMTs asked the defendant where the drug was located and searched several cabinets in the kitchen based upon her information. During the search marijuana and cocaine were found in different cabinets. Upon discovering the drugs, the police officer/EMT called the sheriff's office. A search warrant was ultimately obtained based upon the EMT/police officer's observations.he court upheld the entry into the house, the warrantless search, and the search pursuant to the warrant under the emergency doctrine.
- In *State v. Loewen*, 97 Wn.2d 562, 647 P.2d 489 (1982), an officer, who followed an accident victim who was unable to identify herself due to her injuries to the hospital, searched the victim's tote bag for identification. The court held that this search did not fall within the medical emergency doctrine because the nurse who assisted the officer in the search was equivocal about the need to identify the victim at that time and the officer, not the nurse, initiated the search.
- In *State v. Gibson*, 104 Wn. App. 792, 17 P.3d 635 (2001), the court held that the police, who were responding to a report that a babysitter was smoking marijuana, had grounds to make a warrantless entry into the house when the woman who answered the door appeared to be under the influence of drugs. The entry was permitted to allow police to check on the welfare of the children and to let them to check on the woman's welfare after she had been out of their sight in another room for 3-5 minutes.
- In *State v. Hos*, 154 Wn. App. 238, 225 P.3d 389 (2010), a warrantless entry was upheld under the community caretaking/emergency doctrine. The police officer was at the residence at the request of a CPS worker, who needed to interview the defendant about a CPS referral regarding her daughter. The police officer's loud knocks received no answer. Looking through a window near the front door, the officer observed the defendant sitting on a couch just a few feet from the door with her eyes closed and her head resting on her chest. Neither the officer nor the CPS worker could tell whether the defendant was breathing, and she appeared to be either unconscious or dead. When the defendant did not rouse in response to the officer's pounding on

the window, the officer opened the unlocked front door, and yelled the defendant's name. When he received no response, he entered the house, announcing "Sheriff's Office." As he approached the defendant, she slowly raised her head and looked around bleary eyed. Next to the defendant on the couch, was a butane torch of the type that methamphetamine users commonly use. The officer explained why he was there, and upon noticing that the defendant's pockets were "quite full of items", asked her if there was anything in her pockets that the officer should be concerned about. The defendant responded by emptying her pockets. When she stood to accomplish this, the officer observed a methamphetamine pipe through an opening in her coat pocket. This led to the defendant's arrest for use of drug paraphernalia.

e. Fire/Explosion

i. Meth Lab Odor. The chemicals used to "cook" methamphetamine are extremely volatile and dangerous. *See, e.g. United States v. Bradley*, 321 F.3d 1212 (9th Cir. 2003). Many meth labs are located in residential neighborhoods.

- **Building.** In *State v. Downey*, 53 Wn. App. 543, 768 P.2d 502 (1989), two officers were dispatched to the defendant's home to investigate a report of a strong ether odor. The officers noticed an ether odor 150 to 200 feet from the defendant's residence. This odor increased in intensity as the officers moved closer to the defendant's home. The officers contacted the police narcotics unit for advice on how to proceed. They were cautioned that ether is highly volatile and explosive in concentrated form, and were instructed to leave the residence and contact the fire department's hazardous materials squad if the smell of ether overpowered someone, or if open chemicals were found. The officers entered the residence without a warrant to determine whether and why ether was inside the building and to ensure that no one was inside. One officer was able to enter only a few feet into the residence before the ether odor made him nauseous and interfered with his breathing. This officer then left the building and called the hazardous materials unit. The other officer went further and located a lab. This officer called narcotics detectives who obtained a search warrant. The court held that while the mere odor of ether is insufficient to establish an emergency, the overpowering odor of ether in the present case justified the warrantless entry.

  Courts will carefully scrutinize the officer's behavior in deciding whether the officers were truly responding to a perceived emergency or were merely investigating a methamphetamine laboratory. *Compare State v. Link*, 136 Wn. App. 685, 150 P.3d 610 (2007) (officer who went to apartment to investigate whether a methamphetamine laboratory was being operated inside unlawfully

entered without a warrant where he let the 4-year-old and 7-year-old children enter the apartment from which emanated a strong odor of acetone and the officer testified that he was concerned for the children's safety because acetone is highly flammable, but he that his primary intention when he entered the apartment was to investigate the possible methamphetamine laboratory) *with State v. Smith*, 137 Wn. App. 262, 153 P.3d 199 (2007) (officers responding to a tip that a stolen semi-truck containing two 1,000 gallon tanks filled with anhydrous ammonia could be found at a particular address made a lawful emergency entry into the residence upon noting a partially concealed semi-truck that returned as stolen, although two individuals were observed in an upstairs window and a dog barked no one answered the officer's knocks, and the officer's observed a gun case through the windows. The officers limited their emergency entry to a sweep for people and for any firearm that might be used to puncture the anhydrous ammonia tanks. The officers then secured a warrant before searching for the meth lab.

The emergency exception to the warrant requirement does not apply when an officer, after being notified that muriatic acid and a "gasser" is present in a trailer on the property, called for a Clandestine Lab Team to conduct the search instead of personally and immediately securing the premises. *State v. Leffler*, 142 Wn. App.175, 165 P.3d 386 (2007).

- **Automobiles**. In *State v. Ferguson*, 131 Wn. App. 694, 128 P.3d 1271 (2006), the trooper, in rural Ferry County, discovered the following while conducting an inventory search of a vehicle: (1) a palm scale ; (2) a knife showing a reddish, thick, phosphorous-like residue; (3) a coffee pot with burnt residue on the bottom; (4) an open grocery bag with cartons of about 100 match book covers neatly stacked, with the matches removed and the phosphorous strikers remaining; (5) a bag of rock salt; (6) miscellaneous glassware; (7) a blue plastic tub with the lid ajar on the back seat containing a glass bottle with tubing extending from the top; and (8) a jar containing a substance that later tested as ephedrine. The trooper also detected a chemical odor coming from the car. From his training, the trooper knew these items were components consistent with red phosphorous methamphetamine manufacturing in a rolling meth lab. At that point, the trooper attempted to get a warrant to search the trunk, but due to the large number of pending warrant applications was unable to obtain the warrant at that time. The trooper, aware that flammable gas is used in cooking meth, and wanting to assure that any gas that was present was properly secure and safe to transport, opened the trunk using the inside trunk latch. Upon observing a can of white gas, plastic containers, and a Coleman stove, the trooper immediately shut the trunk and called a local task force for assistance. After the

task force properly secured the flammable items, the car was towed and a search warrant was later obtained. The Court of Appeals held that the State met its burden of demonstrating by a preponderance of the evidence that a valid manifest necessity existed for a warrantless limited search of the car trunk-to remove or insure the safeness of the suspected hazardous materials before towing.

ii. Other Toxic Chemicals.

In *State v Smith*, 165 Wn.2d 511, 199 P.3d 386 (2009), a warrantless entry into a house was held to be justified under the "officer and public safety" prong of the "exigent circumstances" exception to the warrant requirement. The officers who made the warantless entry were on the property seeking a stolen tanker truck that was known to contain 1,000 gallons of anhydrous ammonia. The officers were aware that anhydrous ammonia is extremely toxic, and is one of the most potentially dangerous chemicals used in agriculture. Anhydrous ammonia can cause severe chemical burns in victims exposed to it in small amounts. The tanker truck was located fewer than 75 feet from a house that was purportedly vacant. Two officers approached the truck wearing protective gear. These officers secured the truck and verified that the valves were not leaking.

While the tanker was being secured, 10 other officers surrounded the house, knocked on the door, and announced their presence. While securing the house one officer saw through a window "what appeared to be a rifle … located in the living room area of the first floor next to a mattress." The officers also saw in the yard between the truck and the house "a propane tank with a modified and discolored valve, which Detective Gonzalez [sic] recognized by training and experience to be consistent with the storage of anhydrous ammonia." This weapon vanished from the window after two people who left the house informed the officers that no one else was present.

Aware of the explosion that could be caused by a bullet penetrating the propane tank or the grave risk to health that would be caused by a bullet penetrating the anhydrous ammonia tank, four officers entered the house to perform a "safety sweep." During the sweep, they searched in places where a person could be hiding, but did not look in other spaces, such as drawers. During this search, the officers seized a 16-gauge shotgun from a second floor crawl space. The officers also noticed items consistent with the manufacture of methamphetamine. No one was inside the house. The officers exited the house, sought a search warrant, and then reentered the house to dismantle the methamphetamine laboratory.

The officers' actions at the scene prior to the obtaining of the search warrant were held by the court to be consistent with their stated purpose of preventing the risks to themselves and the public.

iii. Fire Scene.

Fire fighters may enter a building without a warrant in order to extinguish a

fire. This entry may include a search of rooms or locations not immediately located with the blaze to ensure that the fire has not spread there, to ventilate the building, or to search for the cause of the fire. Fire fighters may seize evidence, such as marijuana plants, that are in plain view. *See State v. Bell*, 108 Wn.2d 193, 737 P.2d 254 (1987). Police officers who are informed of the existence of the contraband do not need a warrant to aid the fire fighters in seizing the contraband and in removing the contraband from the house.

The chief of every organized fire department in the state of Washington has the authority to enter upon and examine any building or premises where any fire has occurred in order to determine the source of the fire. RCW 48.48.030; RCW 48.48.060; RCW 52.12.031(7). This authority, however, must be exercised in a timely manner. A warrantless entry to investigate the cause of a fire that results in the total destruction of the dwelling is reasonable if made shortly after the fire is extinguished. Such an investigation must be limited to such facilities as the heating, ventilation, gas and electrical systems, and locations where combustibles have been accumulated; a general rummaging through the surviving personal effects of the householder is prohibited. Evidence regarding the origin of a fire may possibly be seized without a warrant during the investigation that occurs during and immediately after a fire is extinguished. The propriety of a warrantless seizure will depend upon whether the investigation indicates that the fire was an arson. If the evidence indicates that the fire was accidental or an act of nature (*i.e.* lightening), the warrantless, nonconsensual seizure of items, such as space heaters, located where the fire began is improper.

f. Death Scenes

While responding to a homicide or serious assault scene, police may:

- Make warrantless entry where they reasonably believe a dead body or injured person will be found. Since there is always an outside chance that the suspected dead body may still be alive.
- Examine the body itself.
- Search the premises for other victims or the killer.
- Seize any evidence in plain view while inside the residence pursuant to any of the above permissible activities.

Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d (1978).

While responding to a homicide or serious assault scene, a search warrant or consent is generally required once exigent circumstances cease to exist. For this reason, police generally must have a warrant to collect trace evidence, take photographs and measurements, and otherwise process the scene. *Flippo v. West Virginia*, 528 U.S. 11, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999).

g. Juvenile Parties

The combination of underage children and alcohol will generally not provide a

sufficient basis for a warrantless entry into a building. Absent some basis to believe that one or more of the children requires immediate medical treatment, a warrant will be needed. *See, e.g., United States v. Furrow*, 229 F.3d 805 (9th Cir. 2000).

A homeowner may not be arrested for obstructing an officer based upon his refusing a warrantless entry to an officer who was pursuing minor who was observed consuming alcohol because there were no exigent circumstances which justified any exceptions to requirement of search warrant. *State v. Bessette*, 105 Wn. App. 793, 21 P.3d 318 (2001).

h. Burning Marijuana

While the odor of marijuana will provide probable cause for a search, the odor of marijuana does not present exigent circumstances that will permit a warrantless search of a motor vehicle. *State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885 (2010). The same rule should apply to a home.

7. Miscellaneous Exceptions.

a. Hot Pursuit. Fresh or hot pursuit has been defined as "pursuit without unreasonable interruption" or "the immediate pursuit of a person who is endeavoring to avoid arrest." Exigent circumstances or emergent circumstances need be present to justify a search made in hot pursuit. The government must show that a warrant could not be obtained under the circumstances. The amount of time it takes to get a warrant and the ability to get a telephonic warrant are considered. This exception will generally not apply to "minor" crimes, including DUI's and other non-felony traffic offenses. *See, e.g., Altshuler v. Seattle*, 63 Wn. App. 389, 395, 819 P.2d 393 (1991), *review denied*, 118 Wn.2d 1023 (1992) (warrantless entry into motorist's garage while pursuing suspect who drove through red light and failed to stop by driving at a non-reckless 30 mph for 12 blocks to his home's garage was improper).

The State must show that the searching officer subjectively believed an emergency existed and a reasonable person similarly situated would have thought an emergency existed. The officer must also have a reasonable a basis to associate the place searched with the emergency situation. Danger to an officer or other people is a sufficiently exigent circumstance to allow entry without permission. Possible destruction of evidence or the escape of a person being pursued is not in and of itself enough to fall within this exception.

There are 11 factors to consider in determining whether exigent circumstances existed to justify a warrantless police entry into a home: (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; (6) the entry is made peaceably; (7) hot pursuit; (8) fleeing suspect; (9) danger to arresting officer or to the public; (10) mobility of the vehicle; and (11) mobility or destruction of the evidence. *See City of Seattle v. Altschuler*, 53 Wn. App. 317, 320, 766 P.2d 518 (1989).

While hot pursuit will excuse the initial warrantless entry into the building, once the suspect is in custody, a search warrant is needed before any evidence is sought and collected.

b. **Private Individuals.** In *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921), the Court held that the Fourth Amendment of the United States Constitution is a limit on governmental action and not private action. Consequently, evidence seized by a private individual's search should not be excluded in a subsequent criminal action. This rule is equally applicable in Washington where the exclusionary rule is inapplicable to the actions of private persons unless it is shown that the State in some way "instigated, encouraged, counseled, directed, or controlled" the conduct of the private person. *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985).

> No per se rule can be formulated to determine if a private citizen is acting as an agent of governmental authorities. Each case must be determined by its own circumstances. While a close working relationship with the authorities may make a person the agent of police, *State v. Birdwell*, 6 Wn. App. 284, 288, 492 P.2d 249, *review denied*, 80 Wn.2d 1009, *cert. denied*, 409 U.S. 973, 34 L. Ed. 2d 237, 93 S. Ct. 346 (1972), mere evidence that the private person's purpose was to aid the authorities is insufficient to transform a private search into a government search. *State v. Ludvik*, *supra* at 263; *State v. Sweet*, 23 Wn. App. 97, 100, 596 P.2d 1080 (1979).

State v. Dold, 44 Wn. App. 519, 522, 722 P.2d 1353 (1986).

The mere purpose of private individuals to aid the government is insufficient to transform an otherwise private search into a government search. *State v. Sweet*, 23 Wn. App. 97, 100, 596 P.2d 1080 (1979). The critical factors for determining whether a private party is acting as a government instrument or agent are: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends. *Clark*, 48 Wn. App. at 856; *Reed*, 15 F.3d at 931.

A government agent, however, may not conduct a warrantless search of the area searched by the private individual. The privacy interest protected by Const. art. I, § 7 survives the exposure that occurs when it is intruded upon by a private actor; i.e., an individual's privacy interest is not extinguished simply because a private actor has actually intruded upon or is likely to intrude upon the interest. *See State v. Eisfeldt,* 163 Wn.2d 628, 185 P.3d 580 (2008). A government agent may rely upon the private actor's observations to establish probable cause of the issuance of a search warrant. *State v. Krajeski*, 104 Wn. App. 377, 383, 16 P.3d 69 (2001) (entry into apartment by defendant's mother and landlords were private searches as they were for the purposes of securing the defendant's dog and to collect the defendant's belongings while he was in jail).

i. **Private Citizen Involvement in Search at Police Officer's Directive.** Sometimes, a lone police officer may need civilian assistance in conducting a search. The Ninth Circuit in *United States v. Sparks*, 265 F.3d 825 (9th

Cir. 2001), held that civilian assistance is lawful when:

- the civilian's role was to aid the efforts of the police, and not simply to further the civilian's own goals;
- the officer was in need of assistance. Police cannot invite civilians to perform searches on a whim; there must be some reason why a law enforcement officer cannot himself conduct the search and some reason to believe that postponing the search until an officer is available might raise a safety risk; and
- the civilians are limited to doing what the police had authority to do.

c. Silver Platter . The silver platter doctrine holds that, even though it would not be legal for local law enforcement officials to gather evidence in the same manner, evidence gathered by agents of a foreign jurisdiction (tribal, federal, or other state) is admissible in Washington courts if: (1) there was no participation from local officials; (2) the agents of the foreign jurisdiction did not gather the evidence with the intent that it would be offered in state court rather than in their jurisdiction; and (3) the agents of the foreign jurisdiction complied with the laws governing their conduct. *See generally*, *State v. Brown*, 132 Wn.2d 529, 586-87, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

i. The silver platter doctrine allows the state to utilize DNA evidence collected in another state pursuant to their laws. *See State v. Mezquia*, 129 Wn. App. 118, 118 P.3d 378 (2005).

ii. The silver platter doctrine may allow Washington prosecutors and police officers to utilize tape-recorded calls made by a witness in another state pursuant to that state's one-party consent law. *See State v. Fowler*, 157 Wn.2d 387, 139 P.3d 342 (2006) (state allowed to utilize tape-recorded calls made by the defendant's stepdaughter in Oregon under Oregon's one-party consent law to aid in an Oregon investigation related to defendant's alleged Oregon sexual abuse of which Washington officials were unaware).

iii. When federal officers are working with and assisting state officials, the federal officers must comply with the Washington constitution. *State v. Johnson*, 75 Wn. App. 692, 700, 879 P.2d 984 (1994).

d. Special Needs

On March 13, 2008, the Washington Supreme Court issued a plurality opinion in *York v. Wahkiakum*, 163 Wn.2d 297, 178 P.3d 995 (2008), that struck down random and suspicionless drug testing of student athletes as a violation of Const. art. I, § 7. A majority of the justices further held in this opinion that there is no "special needs" exception to the search warrant requirement under Const. art. I, § 7. Although subsequent cases approve of some "special need" searches, police officers should consult with their legal advisors before relying upon the special needs exception to the warrant requirement.

i. **Schools.** School officials and employees have far greater latitude to search a student, his or her belongings or locker, than do police officers in their dealings with citizens. The courts and legislature have recognized the need for school officials to maintain order and discipline in schools and to protect all students from illegal drugs and weapons. "The school search exception to the warrant requirement is well established under both Washington and federal law." *State v. Meneese*, 174 Wn.2d 937, 943, 282 P.3d 83 (2012).

A police officer on assignment as a school resource officer (SRO) is not a "school official" for purposes of the school exception to the warrant requirement. A SRO will need a warrant or consent prior to searching a student's possessions. *State v. Meneese*, 174 Wn.2d 937, 943, 282 P.3d 83 (2012).

The validity of searches of students by school officials is judged by the "reasonable belief" standard. This standard requires that the searching party have a reasonable belief that the student is in possession of a prohibited item. Two criteria must be met: (1) the belief must be supported by articulable and reasonable grounds; and (2) the grounds must be directed at an individual student, not an entire class or group.

Factors considered in the reasonable belief determination include:

- The student's age, disciplinary history and school record.
- The prevalence and seriousness of the problem in the school to which the search was directed.
- The exigency to make the search without delay.
- The probative value and reliability of the information used as a justification for the search.
- Information received from a "reliable source", which may include an unnamed student. *See State v. E.K.P.*, 162 Wn. App. 675, 255 P.3d 870 (2011) (the *Aguilar-Spinelli* test, which requires that an informant (1) be credible and reliable and (2) have a basis for his information does not apply with a school official conducts a search based upon information from an informant; the test does apply if the search is conducted by a police officer).

A student's violation of a closed campus rule, without more, will not provide reasonable grounds for concluding that a search would reveal evidence of that or additional violations of law or school rules. *See State v. B.A.S.*, 103 Wn. App. 549, 13 P.3d 244 (2000). The observation of a knife in a vehicle parked on school property that held two truants, was sufficient to justify a search of the vehicle for weapons, by school officials. *State v. Brown*, 158 Wn. App. 49, 240 P.3d 1175 (2010), *review denied*, 171 Wn.2d 1006 (2011).

School officials may search school lockers pursuant to RCW 28A.600.210-.240. These sections provide specific authority empowering school officials

to search a student locker's at any time without prior notice or even reasonable suspicion that the search will yield evidence of a violation of the law or school rules. Simply put, the student has no reasonable expectation of privacy in the locker assigned by the school for his use. Locked containers within the locker may be opened by a school official and searched if reasonable suspicion develops that the container holds evidence that the law or school rules have been violated. If a police officer is assisting a school official in conducting the search (*i.e.* by providing a narcotics dog to conduct a "sniff" of the exterior of the lockers), the school official is likely to be considered a state agent and the officer should use the information collected to support a search warrant prior to any entry into the locker.

School officials are authorized by RCW 28A.600.230 to search students and their possessions if the officials have reasonable grounds to suspect that the search will yield evidence of the student's violation of the law or school rules. Limitations on the scope of the search require that the methods be reasonably related to the objectives of the search, and not excessively intrusive. Strip and body cavity searches are generally prohibited. *See Safford United School Dist. #1 v. Redding*, 557 U.S.364, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009) (search of a school child's outer clothing and backpack based upon plausible information that the student was violating the school's drug rules was proper, but the search of the child's underwear violated the Fourth Amendment); *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260 (9th Cir. 1999). The Ninth Circuit, moreover, prohibits canine searches of students. *See B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260 (9th Cir. 1999).

ii. **Courthouses**. Everyone entering a courthouse may be required to pass through a metal detector and may be required to submit their purses and other packages to a visual or x-ray search for weapons. No individualized suspicion is required. Contraband discovered during such a search may be used in a criminal prosecution.

iii. **DNA.** In *United States v. Kincaid*, 379 F.3d 813 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1638 (2005), the court held that the Fourth Amendment permits compulsory DNA profiling of certain conditionally-released federal offenders in the absence of individualized suspicion that they had committed additional crimes. The same result is reached under the Washington State Constitution. *See State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007).

e. Alcohol or Drug Dissipation or Absorption

Washington, like all other states, has an implied consent statute. *See* RCW 46.20.308. The implied consent statute does not create an exception to the warrant requirement. *See, e.g., Cooper v. State*, 587 S.E.2d 605 (Ga. 2003) ("To hold that the legislature could nonetheless pass laws stating that a person 'impliedly' consents to searches under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment."). *Accord Douds v. State*, No. 14-12-00642CR, 2014 Tex. App. LEXIS 6152 at *47-

48, ___ S.W.3d ___ (Tex. App. (June 5, 2014) (the implied consent statute cannot alter the Fourth Amendment warrant requirements or its recognized exceptions); *Weems v. State*, No. 04-13-00366-CR, 2014 Tex. App. LEXIS 5109, ___ S.W. 3d ___ (Tex. App. May 14, 2014) (in the absence of exigent circumstances a blood draw pursuant to an implied consent statute violates the constitution). Implied consent statutes yield admissible alcohol and drug tests solely to the extent that warrantless testing is lawful under the exigent circumstances exception to the warrant requirement.

Blood Tests.

Washington courts have long allowed warrantless blood draws for alcohol testing from persons arrested for driving while under the influence ("DUI") based solely upon dissipation of the alcohol over time. *See generally York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 317-18, 178 P.3d 995(2008) (Madsen, C.J., concurring) ("we have recognized that warrantless searches may be permissible under article I, section 7 when certain exigent circumstances require immediate action to avoid the destruction of evidence or the flight of a suspect. . . . *State v. Baldwin*, 109 Wn. App. 516, 523, 37 P.3d 1220 (2001) (exigent circumstances may justify warrantless blood drug test of DUI (driving under influence) suspect)); *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995) ("Both the United States Supreme Court and this court have held that the State can constitutionally force a defendant to submit to a blood alcohol or breathalyzer test."); *State v. Baldwin*, 109 Wn. App. 516, 523, 525, 37 P.3d 1220 (2001), *review denied*, 147 Wn.2d 1020 (2002) (A blood test can be taken without consent and without a warrant because "[w]ithout knowing what drugs have been ingested or how long a particular drug stays in the system of a particular person, the arresting officer faces an emergency situation when the facts and circumstances indicate that a suspect has been driving under the influence of drugs or drugs and alcohol.").

The Washington decisions, although reaching their conclusion under article I, § 7, often relied upon the United States Supreme Court's decision in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). In *Schmerber*, the Court upheld the warrantless collection of a blood sample from a man, who after being arrested for DUI was taken to a hospital for treatment. The blood was extracted by a doctor approximately two hours after the defendant was taken from the scene. *Schmerber*, 384 U.S. at 769. The Court held that it was reasonable for the officer to proceed without a warrant because:

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence," *Preston v. United States*, 376 U.S. 364, 367. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek

> out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Id. at 770-71.

On April 17, 2013, the Supreme Court issued its opinion in *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). In this case, the defendant was stopped for speeding and crossing the centerline. After declining to take a breath test to measure his blood alcohol concentration (BAC), he was arrested and taken to a nearby hospital for blood testing. The officer never attempted to secure a search warrant and directed a lab technician to draw a sample over the defendant's objections. The defendant, a repeat offender, refused to submit to a test after being read a standard implied consent form that advised the defendant that his refusal could be used against him in a future prosecution and that he would lose his license for one year. The defendant's BAC was well above the legal limit. *McNeely*, 133 S. Ct. at 703.

The question presented in *McNeely* is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. *McNeely*, 33 S. Ct. at 702. A clear majority of the Court concluded that it does not. A plurality of the Court held, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

The Court's rejection of a per se exigency based upon the natural metabolization of alcohol was based upon advances in technology that allow for the more expeditious processing of warrant applications and the ability to streamline the warrant process by using standard-form warrant applications. *McNeely*, 33 S. Ct. at 708-09. The Court also found that the slow rate of loss of BAC evidence and the ability of experts to work backwards from the BAC at the time of the sample to determine the BAC at the time of the alleged offense make a per se rule inappropriate. *Id*., at 709-10. Finally, the Court recognized that there is already a delay in conducting a blood draw because of the need to transport the suspect to a medical facility to obtain the assistance of someone with medical training. "[T]he warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." *Id.*, at 707-08.

Post-*McNeely* a warrantless blood draw for alcohol or drug testing may only occur pursuant to consent or exigent circumstances. A court determines whether an exigent circumstance existed by looking at the totality of the situation in which the circumstance arose. *State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887 (2004). Factors the court takes into account include: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) the quality and quantity of the evidence establishing the suspect's guilt; (3) the mobility or effervescent nature of the evidence; and (4) why it was impractical to take the time to get a warrant. *See generally*. *State v. Smith*, 165 Wn.2d 511, 518, 199 P.3d 386 (2009); *State v.*

Hinshaw, 149 Wn. App. 747, 753-54, 205 P.3d 178 (2009).

Factors Related to Exigent Circumstances. A number of jurisdictions, either by statute or case law, required officers, pre-*McNeely*, to demonstrate exigent circumstances beyond the natural metabolization of alcohol in the bloodstream, in order to justify a nonconsensual warrantless blood test. The factors, both positive and negative, identified in these cases are set out here:

- **Availability of less obtrusive test, such as a breath test.** *See, e.g., Nelson v. City of Irvine*, 143 F.3d 1196, (9th Cir.), *cert. denied*, 525 U.S. 981 (1998) (not reasonable to force an arrestee to undergo a blood test when a breath test is a reasonably effective, alternative test that will collect the same evidence); *State v. Tripp*, 2010 UT 9, 227 P.3d 1251, 1262 n. 2 (2010) ("there can be no exception for exigency where the police themselves cause the exigent circumstance, as they arguably did here, by rebuffing Ms. Tripp's cooperation with a urinalysis in favor of a more accurate, thorough blood test.").

- **A serious injury or death**. *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (warrantless blood draw upheld, both driver and passenger sustained serious injuries); *State v. Flannigan*, 194 Ariz. 150, 978 P.2d 127, 131 (Ariz. App. 1998), *cert. denied*, 528 U.S. 1074 (2000) (warrantless blood test suppressed as insufficient exigent circumstances in a case in which the driver of the other vehicle was killed and her two teenage passengers were injured); *People v. Schall*, 59 P.3d 848 (Colo. 2002), *cert. denied*, 539 U.S. 903 (2003) (death of driver of another vehicle); *State v. Harris*, 763 N.W.2d 269 (Iowa 2009) (single-vehicle collision with elderly pedestrian; pedestrian killed; warrantless blood test suppressed as insufficient exigent circumstances); *Deeds v. Mississippi*, 27 So.3d 1135, 1145 (Miss. 2009), *cert. denied*, 131 S. Ct. 150 (2010) (major vehicle collision involving serious injuries to multiple people requiring their transportation to nearby hospitals); *State v. Rodriguez*, 2007 UT 15, 156 P.3d 771, 781 (2007) (both defendant and passenger critically injured; warrantless blood draw supported by exigent circumstances; "One fact cominates all others with respect to its relevance to whether the warrantless blood draw was reasonable: that [the passenger] was expected to succumb to her injuries. ... The severity of the possible alcohol-related offense bears directly on the presence or absence of an exigency sufficient to justify a blood draw without a warrant.").

- **A suspect's initial flight from the scene of the collision or stop.** *See, e.g., State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008) (suspect left the scene of the collision on foot and was located several blocks away); *State v. Lovig*, 675 N.W.2d 557 (Iowa 2004) (although suspect fled scene and it took officers two hours to secure the suspect, exigent circumstances did not support a warrantless entry into a home in order to obtain a warrantless blood draw).

- **Need for a specially trained officer's presence**. *See, e.g., State v. Johnson*,

744 N.W.2d 340, 344 (Iowa 2008) (called a traffic officer specialized in OWI enforcement).

- **The length of the process for obtaining the warrant.** *See, e.g., State v. Flannigan*, 194 Ariz. 150, 978 P.2d 127, 131 (Ariz. App. 1998)*, cert. denied*, 528 U.S. 1074 (2000) (15 to 45 minute delay while obtaining a warrant insufficient to establish exigent circumstances as evidence of a stimulant in the blood can be detected hours after consumption; exigency can exist if police encounter difficulties in reaching a magistrate when the officer tries to obtain a warrant); *State v. Harris,* 763 N.W.2d 269, 273-274 (Iowa 2009) (exigent circumstances not established where the officer who directed the blood draw did not know how long it took to obtain a warrant; delay in drafting the warrant because the officer was unfamiliar with the process and needed assistance from the assistant county attorney; exigent circumstances not found)); *State v. Johnson*, 744 N.W.2d 340, 345 (Iowa 2008) (length of time needed to obtain a telephonic warrant); *Deeds v. Mississippi*, 27 So.3d 1135, 1145 (Miss. 2009), *cert. denied*, 131 S. Ct. 150 (2010) (exigent circumstances found where officer indicated the process for getting a warrant takes 1 ½ hours to 2 ½ hours and he knew that alcohol would be decreasing in the suspect's body); *State v. Jones*, 111 Nev. 774, 895 P.2d 643, 644 (1995) (a failure to utilize available technology in a jurisdiction, such as phones, to shorten the time for obtaining a warrant may preclude a finding of exigent circumstances – "Although the state asserts that obtaining a search warrant in Clark County requires more than six hours, this alleged delay does not justify the violation of a suspect's Fourth Amendment rights. Under this reasoning, the slower the jurisdiction is to issue search warrants, the more 'exigent' circumstances arise, and the fewer warrants are needed. The Fourth Amendment is simply not susceptible to this type of reasoning."); *State v. Dahlquist*, 750 S.E.2d 580 (N.C. App. 2013) (exigent circumstances supported warrantless blood draw where officer knew any alcohol in the suspect's blood would dissipate and it would take 4 to 5 hours for a blood draw if a warrant were first obtained); *State v. Fletcher*, 202 N.C. App. 107, 688 S.E.2d 94 (2010) (exigent circumstances supported the warrantless blood draw where the suspect could not produce a valid breath sample and the officer was able to testify that the process of driving to the magistrate's office, waiting in line for the warrant, and then returning to the hospital would take from 2 to 3 hours); *State v. Moylett*, 313 Ore. 540, 836 P.2d 1329, 1335 (1992), *overruled by State v. Machuca*, 374 Ore. 644, 277 P.3d 729, 736 (2010), *overruled by Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (no exigent circumstances where the officer's own superiors knew that a search warrant could be quickly obtained within the time period necessary to prevent the loss of evidence).

- **Possibility that the result of a later test can be extrapolated**. *See, e.g., State v. Johnson*, 744 N.W.2d 340,346 (Iowa 2008) (possibility of an extrapolated blood-alcohol percentage insufficient to remove the exigency

caused by other factors).

- **Suspect hospitalized for treatment for injuries.** *See, e.g., Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (suspect being treated in hospital for injuries, warrantless blood draw upheld); *State v. Flannigan*, 194 Ariz. 150, 978 P.2d 127, 128 (Ariz. App. 1998)*, cert. denied*, 528 U.S. 1074 (2000) (warrantless blood test suppressed where suspect was treated by paramedics at the scene for approximately 25 minutes); *People v. Schall*, 59 P.3d 848 (Colo. 2002), *cert. denied*, 539 U.S. 903 (2003) (suspect seriously injured and evacuated to a hospital by helicopter; warrantless blood draw collected while suspect was being treated at the hospital); *Deeds v. Mississippi*, 27 So.3d 1135, 1138 (Miss. 2009), *cert. denied*, 131 S. Ct. 150 (2010) (suspect pinned behind the steering wheel and taken to hospital once removed) *State v. Rodriguez*, 2007 UT 15, 156 P.3d 771 (2007) (officer waited 20 to 25 minutes in CT room; blood collected from an IV line that had been previously inserted for medical purposes; warrantless blood draw supported by exigent circumstances).

- **Officer's knowledge as to how long it takes the substance to metabolize in the body.** *See, e.g., State v. Flannigan*, 194 Ariz. 150, 978 P.2d 127, 129 (Ariz. App. 1998)*, cert. denied*, 528 U.S. 1074 (2000) (no exigent circumstances where the DRE believed the suspect manifested physical symptoms of methamphetamine or cocaine consumption; "Cocaine remains in the blood system for less time than alcohol, while methamphetamine remains in the blood for a longer period than alcohol. Specifically, methamphetamine has a half-life in blood of six to fifteen hours, while cocaine's half-life in blood is one to two hours); *State v. Harris*, 763 N.W.2d 269, 274-75 (Iowa 2009) (no exigent circumstances where the officer had insufficient personal knowledge as to whether a warrant could be obtained fast enough in light of the natural dissipation of blood-alcohol levels; officer's impetus for ordering the warrantless blood draw was his belief that he was acting upon the instructions of the assistant county attorney); *State v. Jones*, 111 Nev. 774, 895 P.2d 643, 643 (1995) ("cocaine may be reduced by half in an individual's blood system within forty-five minutes, and that on the average, cocaine dissipates in the bloodstream within four hours.").

- **Officer tied up clearing collision scene, directing traffic, etc.** *See, e.g., Carrington v. Superior Court*, 31 Cal. App. 3d 635, 107 Cal. Rptr. 546 (1973) (exigent circumstances found where the patrolman and his fellow officers spent the first hour and a half after arriving at the scene caring for the suspect and other seriously injured victims and in other duties at the scene; officer not required to leave the suspect to choke on his own blood as he attempts to rout out a magistrate).

- **Seriousness of the offense**. *See, e.g., Marshall v. Columbia LA Regional Hospital*, 345 F.3d 1157, 1174 (10th Cir. 2003) (warrantless blood draw not justified for a first DUI offense); *State v. Lovig*, 675 N.W.2d 557 (Iowa

2004) (crime of OWI is a comparatively serious offense where is carries a maximum sentence of one year in jail and a minimum sentence of two days in jail, as well as a substantial fine).

- **Probable cause to believe suspect caused collision.** *See, e.g., People v. Schall*, 59 P.3d 848 (Colo. 2002), *cert. denied*, 539 U.S. 903 (2003) (probable cause to believe the suspect was driving under the influence of alcohol and that he caused the collision by driving his car into oncoming traffic; warrantless blood draw collected while suspect was being treated at the hospital).

An officer who is obtaining a non-consensual blood sample pursuant to the exigent circumstance exception should provide the suspect with the following warning:

> A test of your blood will be administered to determine the concentration of alcohol and/or any drug in your blood; due to the circumstances of your arrest, this will be done regardless of your consent; you have the right to additional tests administered by a qualified person of your own choosing. Do you understand?

Breath Tests.

The natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual breath testing in all drunk-driving cases. Breath testing is treated differently than blood testing because breath testing "is a far more gentle process than a venipuncture to draw blood" *Maryland v. King*, 133 S. Ct. 1958, 1969, 186 L. Ed. 2d 1 (2013) ("The fact that an intrusion is negligible is of central relevance to determining reasonableness"). *See generally State v. Won*, No. CAAP-12-000858, ___ P.3d ___ (Hawaii App. Mar. 28, 2014), *cert. granted*, ___ P.3d ___ (Jun. 24, 2014) ("*McNeely* does not address breath tests or the validity of implied consent statutes, and neither *McNeely*'s holding nor its reasoning compels the conclusion that HRS § 291E-68 [the Hawaii implied consent statute] is unconstitutional.").

A warrantless breath test, related to a traffic offense, must be obtained in compliance with the implied consent statute, RCW 46.20.308.

f. **Probation/Parolee Searches.** An individual who is under community supervision, or probation, or on parole has a lesser expectation of privacy then the general public. Such a person may be subjected to warrantless searches by a probation, parole, or community corrections officer upon a well-founded or reasonable suspicion of a probation violation. *See, e.g. State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985); *State v. Lucas*, 56 Wn. App. 236, 783 P.2d 121 (1989), *review denied*, 114 Wn.2d 1009, 790 P.2d 167 (1990); *State v. Patterson*, 51 Wn. App. 202, 752 P.2d 945 *review denied*, 111 Wn.2d 1006 (1988); *State v. Simms*, 10 Wn. App. 75, 516 P.2d 1088 (1973), *review denied*, 83 Wn.2d 1007 (1974). *See also Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).

A probation or parole or community corrections officer may search the probationer's

home without a warrant so long as the officer has, at the time of the search, probable cause that the place to be searched is the probationer's home. *See generally State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). Whether the probation, parole, or community corrections officer must also have probable cause to believe that the probationer is at home is an open question. *Id.* Memory cards and their contents fall within the warrantless search of a probationer's ""person, residence, automobile, or other personal property" that is authorized by RCW 9.94A.631. A non-password protected memory stick is treated the same as a closed shoebox when analyzing the legality of a probation search. *State v. Parris*, 163 Wn. App. 110, 259 P.3d 331 (2011), *review denied*, 173 Wn.2d 1008 (2012).

People who live with probationers are entitled to the full protection of Const. art. I, § 7. Evidence discovered during a warantless search of a non-common area of the home will not be admissible against the non-probationer. *State v. McKague*, 143 Wn. App. 531, 178 P.3d 1035 (2008).

A police officer's authority to detain someone is not increased just because an offender is on active supervision. A police officer may contact or detain a Department of Corrections (DOC) offender the same as the officer would any other person. This includes social contact, *Terry* stop, community caretaking, infraction, or for a new crime.

An officer may not detain a DOC offender just to see if DOC wants to have them arrested. An officer may arrest an offender for DOC violations when a CCO *unequivocally* asks the officer to do so. An officer cannot arrest for DOC violations unless a CCO says so; there are no investigatory stops or arrests for DOC violations. If the DOC officer does not specifically tell the officer you are to arrest the offender for DOC, the officer may not do so unless the officer can make a valid arrest for a new crime on the officer's own.

An offender's supervision status does not increase a police officer's search authority. To search any person a police office will need a warrant or any valid exception to the warrant requirement. For example, if DOC asks the police officer to arrest a person, the police officer can search incident to that arrest just as the officer would for any other crime. An officer can frisk for weapons for the same reasons the officer would frisk any other person.

An officer may not enter a residence without the consent of the offender to serve a DOC detainer. If the offender is present and will not give consent, the police officer will need to obtain a search warrant in order to enter the house to retrieve the parolee or probationer.

A community corrections officer (CCO) may ask a law enforcement officer to accompany him, for his safety, when making a contact with a probationer to investigate a possible violation of probation. A searching CCO officer does not run afoul of the Fourth Amendment merely because they originally receive a tip from police that the probationer may be violating the terms of his probation. Probationers are not entitled to greater protection from warrantless searches under Const. art. I, § 7, then they receive under the Fourth Amendment. *State v. Reichert*, 158 Wn.

App. 374, 242 P.3d 44 (2010), *review denied*, 171 Wn.2d 1006 (2011).

g. Civil Standby

"'[A] civil standby is when an officer is basically called to come out basically to make sure there is no breach of the peace.'" *Osborne v. Seymour*, 164 Wn. App. 820, 828 n.3, 265 P.3d 917 (2011), (quoting *Harris County v. Hinojosa*, 294 S.W.3d 737, 741 (Tex. App. 2009) (internal quotation marks omitted)); *accord Beal v. City of Seattle*, 134 Wn.2d 769, 773-74, 954 P.2d 237 (1998). Most civil standbys occur in relation to a domestic violence protection order.

A police officer must either secure the permission of the protected person or be expressly granted permission to enter the home in the RCW 26.50.080 order. Police officers may not rely upon consent from the restrained and excluded household or family member for entry into the family home. *See generally Osborne v. Seymour*, 164 Wn. App. 820, 828 n.3, 265 P.3d 917 (2011). An officer may be liable to the protected person pursuant to 42 U.S.C. § 1983 if the officer relies solely upon the restrained and excluded household or family member's consent. *Id.*

If the relevant box is not checked by the court, officers should advise the restrained party to ask the court to authorize the civil standby. The relevant portion of the court orders are as follows:

I. Temporary Order for Protection and Notice of Hearing , Page 4 of 4:

Law enforcement shall assist petitioner in obtaining:

☐Possession of petitioner's ☐ residence ☐ personal belongings located at: ☐ the shared residence

☐respondent's residence ☐other:_____

☐ Custody of the above-named minors, including taking physical custody for delivery to petitioner (if applicable).

☐Other: _____ .

II. Order for Protection, Page 5 of 5:

Law enforcement shall assist petitioner in obtaining:

☐Possession of petitioner's ☐ residence ☐ personal belongings located at: ☐ the shared residence

☐respondent's residence ☐other:_____

☐ Custody of the above-named minors, including taking physical custody for delivery to petitioner (if applicable).

☐Other: _____

III. Domestic Violence No-Contact Order, Page 2 of 2:

8. ☐ Civil standby: The appropriate law enforcement agency shall, at a reasonable time and for a reasonable duration, assist the defendant in obtaining personal belongings located at:

_____.

h. Special Inquiry Judge.

A special inquiry judge functions and has some powers similar to a grand jury. A special inquiry judge, however, cannot initiate a special inquiry, actively investigate criminal activity, or make a decision to prosecute. *State v. Neslund*, 103 Wn.2d 79, 87-88, 690 P.2d 1153 (1984); *State v. Manning*, 86 Wn.2d 272, 274, 543 P.2d 632 (1975). Because a special inquiry proceeding is investigatory in nature, once a prosecutor has charged the defendant the special inquiry proceeding may no longer be used to discover or gather evidence. *Manning*, 86 Wn.2d at 175. *Accord State v. Buri*, 87 Wn.2d 175, 550 P.2d 507 (1976) (special inquiry proceeding may not be used to interview defense witnesses after charges have been filed).

"A 'special inquiry judge' is a superior court judge designated by a majority of the superior court judges of a county to hear and receive evidence of crime and corruption." RCW 10.27.020. The process for designating the judge is not clear, with neither state court rule nor statute setting out how the decision is to be formalized or the term of the special inquiry judge. *See generally* RCW 10.27.050 ("In every county a superior court judge as designated by a majority of the judges shall be available to serve as a special inquiry judge to hear evidence concerning criminal activity and corruption."). Some local rules, however, provide more guidance on this point. *See, e.g.,* Grant County Superior Court Local Rule LAR 2(b)(4).[17] Nothing in the statute limits a county to a single special inquiry judge and at least one case found that a county's policy in which each of "the five judges had agreed that each and every one of them could serve as a SIJ" was not improper. *State v. Hilton*, 164 Wn. App. 81, 85, 261 P.3d 683 (2011), *review denied*, 173 Wn.2d 1037, *cert. denied*, 133 S. Ct. 349 (2012).

Although the special inquiry judge is "disqualified from acting as a magistrate or judge in any subsequent court proceeding arising from such inquiry except alleged contempt for neglect or refusal to appear, testify or provide evidence at such inquiry in response to an order, summons or subpoena," RCW 10.27.180, the special inquiry judge may issue search warrants in order to further the investigation. *State v. Neslund*, 103 Wn.2d 79, 88, 690 P.2d 1153 (1984). Search warrants, however, are not the only investigative tool available to a special inquiry judge.

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[17] Grant County Superior Court Local Rule LAR 2 sets the term of the presiding judge as 2 years. This local rule identifies the duties of the presiding judge, which includes the following:

> (4) Special Inquiry Judge. By virtue of office, the Presiding Judge shall be the Special Inquiry Judge designated by the judges of the court as required by the Special Inquiry Judge designated by the judges of the court as required by RCW 10.27.050. In the event the Presiding Judge is disqualified from any special inquiry proceeding, the Acting Presiding Judge will be deemed to be the special inquiry judge so designated.

A special inquiry judge may issue a subpoena under RCW 10.27.170. Such a subpoena satisfies article I, section 7's "authority of law" requirement. RCW 10.27.170 does not require that probable cause support the judge's decision to issue a subpoena. The standard for issuing a subpoena is reasonable suspicion – the same standard as for a grand jury subpoena under the Fourth Amendment. *State v. Reeder*, COA No. 69226-7-I, ___ Wn. App. ___, ___ P.3d ___ (Jun. 23, 2014).

Special inquiry judge proceedings are closed to the public and witnesses and others involved in the proceeding are enjoined to secrecy. RCW 10.27.090. The closed nature of these proceedings does not violate article I, section 10 of the Washington constitution. *State v. Reeder*, COA No. 69226-7-I, ___ Wn. App. ___, ___ P.3d ___ (Jun. 23, 2014).

The Washington Association of Prosecuting Attorneys Model Policy for Using Special Inquiry Judge Proceedings is available on the WAPA website -- www.waprosecutors.org.

i. Administrative and Regulatory Inspections and Seizures

An "administrative inspection" is a search of a work place or the area subject to inspection by a regulatory agency for the purpose of insuring compliance with printed regulations.

Work Site Inspections. Government employees charged with regulating an industry are not as restricted in their actions as are criminal investigators. Warrants are generally required for administrative searches of both private and commercial premises. *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

Warrants not required when searches are made pursuant to legislative authority. Warrantless inspection of commercial premises must meet the following criteria: (i) substantial governmental interest; (ii) inspections must be necessary to fulfill the regulatory scheme; and (iii) the inspections program must be certain and regular. *See generally New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed.2d 601 (1987).

Examples of administrative inspections:

- Vehicle spot checks at weigh stations, trucking companies, etc. *See United States v. Delgado*, 545 F.3d 1195 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1383 (2009) (commercial trucking is subject to warrantless inspections as a pervasively regulated industry under *New York v. Burger*, 482 U.S. 691 (1987)). *But see* Justice Charles W. Johnson and Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law :2013 Update*, 36 Seattle Univ. L. Rev. 1581, 1752 (2013) ("there is no general 'heavily regulated industry' exception in Washington.").
- Wrecker yard, hulk hauler inspections.
- School bus inspections.
- Aircraft inspections (FAA, WSP).

- Health inspections.
- Fire code inspections.
- Building inspections.
- OSHA/WISHA inspections.

Commercial Vehicle Spot Checks. Are valid when conducted near truck weigh-in stations. *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). Issues that courts will consider include:

- Are the spot checks sufficiently productive mechanisms to justify the intrusion?
- The checks must not involve "unconstrained exercise of discretion" by officers conducting the stops. *Delaware v. Prouse*, *supra*.
- Purpose of motor carrier inspections.
  - (a) "Highways may be rendered safer for the use of the general public." RCW 81.80.020
  - (b) Public may be assured adequate, complete, dependable, and stable transportation service in all its phases. RCW 81.80.020.
- Authority
  - (a) The inspection of private, common, and contract carriers with respect to vehicle equipment, drivers' qualifications, and hours of service shall be done in conjunction with weight enforcement. RCW 46.32.010(2)
  - (b) It is a traffic infraction to refuse to have the motor vehicle examined. RCW 46.32.010(6)

Border Inspections

The purpose of a border inspection is to interdict the flow of illegal immigrants and/or illegal goods. The border exception allows ***federal officers*** to briefly detain individuals at border checkpoints for initial questioning, with longer detentions authorized upon articulable facts. *See, e.g., United States v. Martinez- Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976).

State officers have no authority to conduct border inspections or to enforce federal immigration law. *See United States v. State of Arizona*, 641 F.3d 339 (9th Cir.), *cert. granted*, 132 S. Ct. 845 (2011). State officers may, however, make an arrest for a violation of state law based upon evidence that a federal officer discovers during a lawful border inspection.

Airport Inspections. These inspections are conducted to interdict the flow of weapons or explosives. The reasonableness of an airport administrative search does not depend, in whole or in part, upon the consent of the passenger being searched.

See United States v. Aukai, 497 F.3d 955 (9th Cir. 2007).

Road Blocks. The purpose of a road block is to apprehend a fleeing felon. Three requirements must be met before a road block can be erected:

i. Probable cause that a felony has been committed.

ii. Brief stopping of vehicles moving in a particular direction.

iii. Search is for perpetrator. *State v. Silvernail*, 25 Wn. App. 185, 605 P.2d 1279 (1980) (Fourth Amendment analysis).

Informational checkpoint designed to obtain more information about a recent hit and run accident is constitutional under a Fourth Amendment analysis. *See Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004).

Driver's License, Vehicle Registration, and DUI Checkpoints. The purpose of these checkpoints is to identify unlicensed drivers, and to interdict alcohol-affected drivers. Washington law does not permit these checkpoints. *See State v. Meisani*, 110 Wn.2d 454, 755 P.2d 775 (1988). *Accord York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (Const. art. I, §7 does not allow for suspicion-less searches).

Game Checks. RCW 77.15.094 authorizes wildlife agents to make a reasonable search, without a warrant, of vehicles, tents, etc., or other places they have reason to believe contain evidence of game violations.

V. Exclusionary Rule

A. Purpose

Illegal searches and seizures may result in civil liability for the officer or individual who engages in the illegal conduct. The more common remedy for an illegal search or seizure is the exclusion of the illegally obtained evidence and all evidence discovered as a result of the illegality. This latter type of evidence is generally called the "fruits of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The federal exclusionary rule was made applicable to the states in 1961. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

B. The Evolution of Washington's Exclusionary Rule

The earliest Washington case that discusses the exclusionary rule is *State v. Royce*, 38 Wash. 111, 80 P. 268 (1905). *Royce* involved the admissibility of a pawn ticket that was seized from the defendant following an allegedly illegal arrest. The court, without considering the legality of the arrest, held the pawn ticket admissible:

> Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, ... this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully....

Id. at 117. Justice Dunbar, who had been a delegate at the Constitutional Convention,

concurred in this opinion. *See* C. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991*, at 134-37 (1992).

Seventeen years later the court announced the existence of an exclusionary rule, in *State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922). The court relied on then-recent ***federal*** authority requiring suppression of illegally seized evidence. *Amos v. United States*, 255 U.S. 313, 65 L. Ed. 654, 41 S. Ct. 266 (1921). No reference was made to the contrary decision in *Royce*. Following *Gibbons*, the Washington Supreme Court has repeatedly said that "it is beneath the dignity of the state, and contrary to public policy, for the state to use for its own profit evidence that has been obtained in violation of law." *State v. Buckley*, 145 Wash. 87, 89, 258 P. 1030 (1927); *see, e.g., State v. Miles*, 29 Wn.2d 921, 927, 190 P.2d 640 (1948).

The court recognized that the "exclusion of improperly obtained evidence is a privilege." *State v. Smith*, 50 Wn.2d 408, 411, 314 P.2d 1024 (1957). This privilege was lost if the defendant did not seek suppression of evidence in a timely fashion:

> Questions of this character generally arise under one of the three following circumstances:
>
> (1) Where, by the direct or proper cross-examination of the state's witnesses, it is made to appear, or it is otherwise admitted, that the articles which are offered in evidence were unlawfully seized. Under those circumstances, it is the duty of the trial court, upon objection, to refuse to receive them in evidence. No question of fact exists under these circumstances. The court is only called upon to rule on the admissibility of evidence upon admitted or conceded facts. It is not required to stop in the midst of the trial and try a collateral fact.
>
> (2) Where, during the trial, the seized articles are offered in evidence, and it does not appear from the state's testimony, or otherwise, that such articles were unlawfully seized, and objection is made to the introduction of such evidence, on the ground that it was unlawfully seized, and the defendant offers by affidavit, or otherwise, to prove such unlawful seizure, the court should receive the articles in evidence, because it will not, at that stage of the proceedings, stop to investigate the disputed circumstances under which the articles were seized. If, under these circumstances, the defendant desires to suppress, as evidence, the articles taken, he must, within a reasonable time before the case is called for trial, move for such suppression, and thus give the court an opportunity to separately try out this disputed question of fact. One exception to this rule would be:
>
> (3) Where, during the trial of the case, the defendant objects to the receiving of the articles in evidence, on the ground that they had been unlawfully seized, and offers to prove such unlawful seizure, and to further prove that, by the exercise of reasonable diligence, he could not before have learned that the articles had been unlawfully seized, the court should stop in the trial of the case and determine the collateral issue concerning the legality of the seizure. This for the reason that the defendant has not previously had an

> opportunity to raise the question. Where the defendant has had previous knowledge that the articles were taken, it is not unfair to him that he should be required to move, prior to the time of the trial, to suppress the articles as evidence. But where he has not had the opportunity of obtaining the knowledge of the taking until the articles are offered in evidence, it would be a harsh and unfair rule to deprive him of the right, during the trial, to object to the introduction of the articles in evidence and to prove, if he can, the ground of his objection. *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647.

State v. Dersiy, 121 Wash. 455, 462-63, 209 P. 837 (1922). The rules announced in *Dersiy* were followed by Washington courts throughout the 1990's. *See, e.g., State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968); *State v. Blake*, 71 Wn.2d 356, 359-360, 428 P.2d 555 (1967); *State v. Baxter*, 68 Wn.2d 416, 422-24, 413 P.2d 638 (1966); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539, *cert. denied*, 389 U.S. 871 (1967) ("Error predicated upon evidence allegedly obtained by illegal search and seizure cannot be raised for the first time on appeal."); *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995) (same); *In re Rountree*, 35 Wn. App. 557, 668 P.2d 1292 (1983) (a collateral attack cannot be predicated upon a claim that evidence was unlawfully seized)[18].

The court's understanding of the purpose for the exclusionary rule began to transform. In 1983, the court indicated that the exclusionary rule should be applied to achieve three objectives:

> first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.

State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983).

By 2007, the court's understanding of the Washington exclusionary rule evolved further:

> The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.

State v. Chenoweth, 160 Wn.2d 454, 472 n.14, 158 P.3d 595 (2007).

Consistent with its latest understanding of the exclusionary rule's origin and purpose, the

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[18]Prior to 1947, no challenge could be made to a facially valid conviction. *See generally In re Runyan*, 121 Wn.2d 432, 441-43, 853 P.2d 424 (1993).

Washington Supreme Court has indicated a reluctance to impose and/or enforce any procedural restrictions upon a defendant's ability to obtain the suppression of unlawfully seized evidence. *See, e.g., In re Pers. Restraint of Nichols*, 171 Wn.2d 370, 256 P.3d 1131 (2011) (a petitioner can raise a Wash. Const. art. I, § 7, claim for the first time in a personal restraint petition (PRP)); *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011) (a criminal defendant may raise a constitutional challenge to the collection of evidence for the first time on appeal under certain circumstances).

C. Procedures for Challenging Search

1. Trial Court

a. Prior to the Filing of Charges

Any person who is aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. CrR 2.3(e); CrRLJ 2.3(e). The motion is filed in the court which issued the warrant, with a copy served upon the chief executive of the law enforcement agency that obtained the warrant. CrRLJ 2.3(e). The court that issued the search warrant shall transfer the motion to any court in which charges arising from the search are pending for the motion to be heard in the ordinary manner. CrRLJ 2.3(e)(1); CrR 2.3(e). If no charges are pending, a hearing on the motion shall be set not less than 30 days from the date of the filing or service of the motion. CrRLJ 2.3(e)(2). If the motion for return of property is granted, the property shall be returned unless the prosecuting authority seeks review within 14 days. CrRLJ 2.3(e)(3).

At the hearing, the State bears the initial burden of proof to show its right of possession; if the State meets its initial burden, the person has the burden of coming forward with sufficient facts to convince the court of the person's right of possession. *See State v. Marks*, 114 Wn.2d 724, 790 P.2d 138 (1990). A court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute. *See generally State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591, *review denied*, 119 Wn.2d 1016 (1992).

b. After Charges are Filed

The proper procedure for seeking suppression is set out in CrR 3.6 and CrRLJ 3.6. These rules provide that:

> (a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to

the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

CrR 3.6.

(a) Pleadings; Determination Regarding Hearing. Motions to suppress physical, oral or identification evidence other than motions pursuant to rule 3.5 shall be in writing supported by an affidavit or document as provided in RCW 9A.72.085 or any law amendatory thereto, setting forth the facts the moving party anticipates will be elicited at a hearing. If there are no disputed facts, the court shall determine whether an evidentiary hearing is required. If the court determines that no evidentiary hearing is required, the court shall set forth its reasons for not conducting an evidentiary hearing.

(b) Decision. The court shall state findings of fact and conclusions of law.

CrRLJ 3.6.

i. Waiver of Issue

"[E]xclusion of improperly obtained evidence is a privilege." *State v. Smith*, 50 Wn.2d 408, 411, 314 P.2d 1024 (1957), and it must be asserted in a timely fashion. If the defendant fails to seek suppression of evidence until trial, he can obtain suppression only if (1) the relevant facts are undisputed or (2) he could not, by reasonable diligence, have learned of the illegal seizure prior to trial. If the issue could have been raised before trial, the court is not required to interrupt the trial to resolve disputed facts relating to the search. *State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968); *State v. Blake*, 71 Wn.2d 356, 359-360, 428 P.2d 555 (1967); *State v. Dersiy*, 121 Wash. 455, 462-63, 209 P. 837 (1922); *State v. Baxter*, 68 Wn.2d 416, 422-24, 413 P.2d 638 (1966). Admission of illegally obtained evidence does not require a new trial if the defendant makes no timely objection. *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994), *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995).

If a defendant brings a suppression motion, but affirmatively withdraws the motion prior to trial**,** s/he will waive the chance to challenge the illegality of the search or seizure. *See State v. Valladares*, 99 Wn.2d 663, 672, 664 P.2d 508 (1983).

ii. Evidence Rules Applicable to Hearing

As a general principle, a court may consider hearsay testimony at a suppression hearing. *United States v. Raddatz*, 447 U.S. 667, 679, 65 L. Ed. 2d 424, 100 S. Ct. 2406 (1980); *State v. O'Cain*, 108 Wn. App. 542, 556, 31 P.3d 733 (2001). This rule seems to still apply in the post-*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), era. *See State v. Massie*, 2005 Ohio 1678, 2005 Ohio App. Lexis 1613 (Apr. 8, 2005) (*Raddatz* was not overruled by *Crawford*).

iii. Possible Disqualification of Judge

The judge who issued the search warrant that is being challenged in the suppression hearing is not disqualified from presiding over the hearing. *State v. Chamberlin*, 161 Wn.2d 30, 162 P.3d 389 (2007).

2. Appeal

a. Presenting Claim for First Time

The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a "'manifest error affecting a constitutional right.'" *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (internal quotation marks omitted) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). This standard comes from RAP 2.5(a), which permits a court to refuse to consider claimed errors not raised in the trial court, subject to certain exceptions. *McFarland*, 127 Wn.2d at 332-33. [A]lthough RAP 2.5(a) permits a party to raise for the first time on appeal a 'manifest error affecting a constitutional right', RAP 2.5(a) does not mandate appellate review of a newly raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not 'manifest'." *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

In *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011), the Washington Supreme Court held that a suppression issue may be raised for the first time on appeal, even when the facts necessary to adjudicate the claim are not in the record, when the following four conditions are met:

> (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

When a challenge is raised for the first time under this exception, the correct remedy is to remand each case to the trial court for a suppression hearing.

Robinson is the exception to the general rule. *Robinson* dealt with *Gant* claims that were raised for the first time on appeal in cases tried before *Gant* was decided. *Robinson* does not allow every defendant to assert a search incident to arrest claim for the first time on appeal. *See State v. Fenwick*, 164 Wn. App. 392, 264 P.3d 284 (2011), *review denied*, 173 Wn.2d 1021 (2012) (a defendant cannot challenge the search of a vehicle incident to arrest based upon *Gant* for the first time on appeal, when the defendant's trial occurred after *Gant* was decided); *State v. Lee*, 162 Wn. App. 852, 259 P.3d 294 (2011), *review denied*, 173 Wn.2d 1017 (2012) (same).

i. Ineffective Assistance of Counsel

Prior to *Robinson*, some defendants attempted to raise a suppression motion that was not considered by the trial court in the direct appeal under the heading of ineffective assistance of counsel. This tactic is disfavored by our courts, which require the defendant to establish from the trial court record: (1) the facts necessary to adjudicate the claimed error; (2) the trial court would likely have granted the motion if it had been made; and (3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn. 2d 22, 31, 846 P.2d 1365 (1993).

Counsel is not ineffective for failing to forecast changes or advances in the law. *See, e.g., In re the Personal Restraint Petition of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (counsel could not be faulted for failing to anticipate a change in the law); *Sherrill v. Hargett*, 184 F.3d 1172, 1176 (10th Cir.), *cert. denied*, 528 U.S. 1009 (1999); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir.), *cert. denied*, 519 U.S. 1119 (1993) ("The Sixth Amendment does not require counsel to forecast changes or advances in the law, or to press meritless arguments before a court."); *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.), *cert. denied*, 502 U.S. 831 (1991) (same); *Elledge v. Dugger*, 823 F.2d 1439, 1443 (11th Cir. 1987) ("Reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop."); *Bullock v. Carver*, 297 F.3d 1036, 1051 (10th Cir.), *cert. denied*, 537 U.S. 1093 (2002) ("we have rejected ineffective assistance claims where a defendant 'faults his former counsel not for failing to find existing law, but for failing to predict future law' and have warned 'that clairvoyance is not a required attribute of effective representation.'") (quoting *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995)); *United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990) (counsel's conduct was not deficient when, at the time of trial, the instruction given to the jury was the standard instruction that had been approved by the appellate court).

Counsel is not required to preserve an issue after a higher court has granted review of an intermediary appellate court's decision but not yet passed upon the propriety of the lower court's reasoning. *See United States v. McNamara*, 74 F.3d 514, 516-17 (4th Cir. 1996) (counsel was not constitutionally deficient for following controlling law of circuit that willfulness was not an element of structuring financial transactions to avoid currency reporting requirements even though Supreme Court had granted certiorari on that issue at time legal advice was given; "an attorney's failure to anticipate a new rule of law was not constitutionally deficient"); *Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995), *cert. denied*, 517 U.S. 1171 (1996) (trial counsel in capital case was not constitutionally ineffective for failing to preserve an issue at trial based merely on the Supreme Court's grant of certiorari in a case which raised the issue); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991), *cert. denied*, 504 U.S. 920 (1992). (ruling that trial counsel was not ineffective by failing to raise *Batson* challenge two days before *Batson* was decided)

b. Findings of Fact

Written findings of fact and conclusions of law are mandatory for suppression motions heard by the superior court if the motion includes an evidentiary hearing. CrR 3.6; State v. Powell, COA No. 43585-3-II, ___ Wn. App. ___, ___ P.3d ___ (Jun. 10, 2014).

District court judges may enter written findings or merely state oral findings on the record. CrRLJ 3.6. If an appeal is a possibility, the prosecutor should always opt for written findings.

The trial court's failure to enter written findings after a suppression motion will not result in the dismissal of charges. If a trial court's oral decision sufficiently sets forth its reasons for denying a motion to suppress, the appellate court may simply resolve the issue on the record before it. *See, e.g., State v. Riley*, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993); *State v. Smith*, 67 Wn. App. 81, 86-87, 834 P.2d 26 (1992), *aff'd*, 123 Wn.2d 51 (1993). If the trial court's oral decision is insufficient, the appellate court may either examine the record and make its own determination or the appellate court may remand the issue to the trial court for the purpose of entering appropriate findings and conclusions. *See, e.g., State v. Chakos*, 74 Wn.2d 154, 160, 442 P.2d 815 (1968), *cert. denied*, 393 U.S. 1090 (1969) (remand for entry of findings); *State v. Massey*, 60 Wn. App. 131, 141-42, 803 P.2d 340, *review denied*, 115 Wn.2d 1021 (1990), *cert. denied*, 499 U.S. 960 (1991) (appellate court made own determination of voluntariness); *State v. Davis*, 34 Wn. App. 546, 550, 662 P.2d 78, *review denied*, 100 Wn.2d 1005 (1983) (same). Since findings may be entered even after the brief of appellant is filed, counsel for appellant should bring the absence of findings to the trial court's attention as soon as discovered so that the appeal need not be delayed. *State v. Vickers*, 107 Wn. App. 960, 29 P.3d 752 (2001); *State v. Nelson*, 74 Wn. App. 380,

393, 874 P.2d 170, *review denied*, 125 Wn.2d 1002 (1994); *State v. Moore*, 70 Wn. App. 667, 671-72, 855 P.2d 306 (1993). If findings are entered after the brief of appellant has been filed, care must be taken to prevent the findings from being "tailored" to respond to the issues that have been raised. Engaging in such conduct will not be sanctioned by the appellate courts. *See State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998).

The problem of late findings or no findings can be eliminated by following a few simple rules. Regardless of who prevails, prosecutors should consider drafting their own proposed findings. (If the State lost, the prosecutor preparing the findings should use the heading "prepared in conformity with the court's ruling, objections not waived" above his or her signature line.). These findings should be promptly sent to the defense counsel along with a note for motion docket. The note for motion docket will ensure that the entry of findings of fact do not fall between the cracks and that the findings are entered when the hearing judge, defense attorney, and prosecutor will all still be available and will all have a clear recollection of the facts. Prosecutor prepared findings help to ensure that every necessary issue is covered. This is particularly important because an appellate court will interpret the absence of a finding as though a finding of fact against the party with the burden of proof was made. *See State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012 (1992). All findings of fact should be short, specific and limited to discrete ideas. Lengthy paragraphs covering multiple issues should be avoided.

In reviewing the findings of fact entered following a motion to suppress, an appellate court will review only those facts to which error has been assigned. Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994); *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972 (1969).

To challenge a trial court's findings of fact, the defendant must cite to the specific record and assign error to the challenged finding. *State v. Slanaker*, 58 Wn. App. 161, 791 P.2d 575, *review denied*, 115 Wn.2d 1031 (1990); *State v. McGhee*, 57 Wn. App. 457, 788 P.2d 603, *review denied*, 115 Wn.2d 1013 (1990).

Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994); *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). Moreover, a challenge to the sufficiency of the evidence to prove a particular matter in a criminal case requires that the appellate court view the evidence "in the light most favorable to the State." *State v. Bodey*, 44 Wn. App. 698, 723 P.2d 1148 (1986); *State v. Frederiksen*, 40 Wn. App. 749, 700 P.2d 369, *review denied*, 104 Wn.2d 1013 (1985). The court assumes the truth of the supporting evidence and draws all reasonable inferences from that evidence in favor of the State. *State v. Summers*, 45 Wn. App. 761, 728 P.2d 613

(1986). Any inference drawn by the trial court will be upheld on review if the supporting evidence interpreted most favorably to the State is substantial. *State v. LaLonde*, 35 Wn. App. 54, 665 P.2d 421, *review denied*, 100 Wn.2d 1014 (1983).

c. *Gunwall*

The general rule is that an appellate court will not consider whether the Washington Constitution provides greater protection from search or seizure in a particular area absent a timely and adequate *Gunwall* analysis. *See State v. Mierz*, 127 Wn.2d 460, 473 n.10, 901 P.2d 286 (1995) ("The failure to engage in a *Gunwall* analysis in timely fashion precludes us from entertaining a state constitutional claim."); *State v. Thomas*, 128 Wn.2d 553, 562, 910 P.2d 475 (1996)(refusing to consider independent constitutional claim on the grounds that the briefing was inadequate). This analysis with respect to Const. art. I, § 7, is not too onerous as the proponent of the independent state constitutional rule need only address two of the non-exclusive factors: preexisting state law, and matters of particular state interest or local concern. *See generally State v. Bustamante-Davila*, 138 Wn.2d 964, 979, 983 P.2d 590 (1999).

What constitutes a timely presentation of a *Gunwall* analysis is less than clear. Some cases indicate that a failure to present the *Gunwall* analysis in the trial court constitutes a waiver. *See State v. Reding*, 119 Wn.2d 685, 696, 835 P.2d 1019 (1992) ("This court has previously declined to consider state constitutional arguments not raised at the trial or appellate court levels."); *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 570-71, 800 P.2d 367 (1990) (Utter, J., concurring) (failure to perform an adequate *Gunwall* analysis in the trial court will preclude a party from raising a state constitutional issue on appeal); *State v. Wethered*, 110 Wn.2d 466, 755 P.2d 797 (1988) (a state constitutional claim is waived if not properly raised in a timely manner).

Some cases indicate that the analysis may not be raised for the first time in a reply brief. *See State v. Clark*, 124 Wn.2d 90, 95 n. 2, 875 P.2d 613 (1994) (court will not consider a *Gunwall* analysis performed in a reply brief).Courts will grant a motion to strike a *Gunwall* analysis contained in a reply brief. *See State v. Lively*, 130 Wn.2d 1, 18 n. 4, 921 P.2d 1035 (1996) (State's motion to strike portions of the defendant's reply brief that added a *Gunwall* analysis to appellant's Constitutional claim granted by the supreme court); *see also* RAP 10.3(c) ("A reply brief should be limited to a response to the issues in the brief to which the reply brief is directed.).

Other cases would appear to bar first raising an independent state constitutional claim in a motion for reconsideration, in a petition for review, or in a supplemental brief. *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994) (to allow an appellant to engage in a full *Gunwall* analysis in his supplemental brief would encourage parties to save their state constitutional claims for the reply brief and would lead to unbalanced and incomplete development of the issues for review); *State v. Halstien*, 122 Wn.2d 109, 130,

857 P.2d 270 (1993) ("An issue not raised or briefed in the Court of Appeals will not be considered by this court."); *Nostrand v. Little*, 58 Wn.2d 111, 120, 361 P.2d 551 (1961) ("This court has for many years adhered to its rule that it will not consider questions presented to it for the first time in a petition for rehearing.")

Examples of cases where the courts have ignored these rules abound. Nonetheless, prosecutors should be aggressive about restating the rules and seeking to strike arguments made in violation of the above rules.

3. Collateral Attacks

a. Procedural Issues

The United States Supreme Court held in *Stone v. Powell*, 428 U.S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976), that federal courts would not consider a state prisoner's claim that evidence obtained by an unconstitutional search or seizure was introduced at his trial, if the state provides a mechanism wherein the prisoner could have obtained full and fair litigation of his claim in the state courts. The Court reached this conclusion after a thorough discussion of the purposes and costs of the exclusionary rule. The relevant court rules, CrR 3.6 and CrRLJ 3.6, for challenging the legality of a search or seizure provide a mechanism by which a defendant may obtain a full and fair litigation of a claim in state court. *See*, *e.g.*, *Terrovona v. Kincheloe*, 852 F.2d 424, 428 (9th Cir. 1988).

Washington courts will consider a petitioner's claim that evidence obtained by an unconstitutional search or seizure was introduced at his or her trial. *In re Personal Restraint of Nichols*, 171 Wn.2d 370, 256 P.3d 1131 (2011). The claim must meet the requirements for a timely personal restraint (PRP), and the retroactivity rules of *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). *See In re Personal Restraint of Nichols*, 171 Wn.2d 370, 375, 256 P.3d 1131 (2011); *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005).

The State will need to submit affidavits or declarations with relevant evidence from outside the record when responding to a suppression motion made for the first time in a PRP. *See In re Personal Restraint of Nichols*, 171 Wn.2d 370, 375, 256 P.3d 1131 (2011); RAP 16.7(a)(2) If the affidavits received from both the petitioner and the State are insufficient to resolve the matter, the court may order additionally, that a search and seizure issue may order a a reference hearing. *Nichols*; RAP 16.11-.13.

b. Ineffective Assistance of Counsel

Where a defendant pled guilty, a suppression claim will have to be raised under the rubric of ineffective assistance of counsel. Courts consider such claims under the ineffective assistance of counsel framework set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) . Under *Strickland*, the defendant must prove both that the attorney's

performance "fell below the objective standard of reasonableness" and that he was prejudiced by the attorney's deficient performance. *Id*. at 694. The second prong of this test is met by showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

i. Failure to Anticipate Change in Law

Frequently, the ineffective assistance of counsel claim is predicated upon the trial attorney's recommendation to plead guilty despite what subsequently is demonstrated to be a meritorious claim or the trial attorney's failure to seek suppression under a theory that was contrary to established precedent or not yet accepted by the appellate courts when the CrR 3.6 hearing was held.

It is a long-established principle of Washington law that pleading guilty waives the right to challenge any errors committed before arraignment. "A voluntary plea of guilty waives all defenses other than that the complaint, information, or indictment charges no offense." *State v. Bailey*, 53 Wn. App. 905, 907, 771 P.2d 766 (1989); *State v. Olson*, 73 Wn. App. 348, 353, 869 P.2d 110, *review denied*, 124 Wn.2d 1029, 883 P.2d 327 (1994) (guilty plea waives right to appeal the denial of any pretrial motions); *Garrison v. Rhay*, 75 Wn.2d 98, 101, 449 P.2d 92 (1968); *see also*, 13 R. Ferguson, Wash. Practice, *Criminal Practice and Procedure*, at §3618 (1997) ("A valid guilty plea . . . waives all objections the defendant might otherwise make to errors committed prior to arraignment, including an illegal search and seizure[.]").

Similarly, it is well-settled that one of the risks inherent in a guilty plea is that the law may change at some point in the future. A defendant may not accept the benefits of a plea bargain and then seek to improve his situation when the legal landscape changes. According to the U.S. Supreme Court:

> It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, *he does so under the law then existing;* further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. *Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and conviction,* unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.

McMann v. Richardson, 397 U.S. 776, 25 L. Ed. 2d 763, 90 S. Ct. 1441, 1450 (1970)(emphasis added).

Counsel, whether in recommending that his or her client enter a plea or that a suppression issue not be pursued, is not ineffective for failing to forecast changes or advances in the law. *See, e.g., In re the Personal Restraint Petition of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (counsel could not be faulted for failing to anticipate a change in the law); *Sherrill v. Hargett*, 184 F.3d 1172, 1176 (10th Cir.), *cert. denied*, 120 S. Ct. 507 (1999); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir.), *cert. denied*, 114 S. Ct. 154, 126 (1993) ("The Sixth Amendment does not require counsel to forecast changes or advances in the law, or to press meritless arguments before a court."); *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.), *cert. denied*, 502 U.S. 831 (1991) (same);*Commonwealth v. Speight*, 677 A.2d 317, 326 (Pa. 1996), *cert. denied*, 117 S. Ct. 967 (1997) (same); *State v. Brennan*, 627 A.2d 842, 846 (R.I. 1993) (same). Thus, if a case that was decided after the defendant's conviction was obtained provides the basis for the suppression motion, the defendant will not be able to satisfy the deficient performance prong of the *Strickland* test. This is because the propriety of counsel's conduct must be viewed at the time counsel is required to act. *See United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990).

Counsel is also not required to preserve an issue after a higher court has granted review of an intermediary appellate court's decision but not yet passed upon the propriety of the lower court's reasoning. *See United States v. McNamara*, 74 F.3d 514, 516-17 (4th Cir. 1996); *Jameson v. Coughlin*, 22 F.3d 427, 429 (2d Cir. 1994) ("Nor can counsel be deemed incompetent for failing to predict that the New York Court of Appeals would later overrule the Second Department's reasonable interpretation of New York law."); *United States v. Smith*, 915 F. Supp. 1378 (W.D. Pa. 1995). An attorney's failure to seek a continuance in anticipation of a possible change in the law is also not deficient performance. *See United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1541-42 (10th Cir. 1995).

This rule has been applied to claims based upon *Gant*. *See, e.g., State v. Cardwell*, 155 Wn. App. 41, 46, 226 P.3d 243 (2010) (" because *Gant* represents a radical unanticipated change in the law, Cardwell's counsel was not ineffective for failing to anticipate it and move to suppress evidence seized during a search incident to arrest that was entirely lawful at the time Officer Pearce conducted it.").

ii. Failure to Brief *Gunwall*

An attorney's failure to adequately brief the six non-exclusive *Gunwall* factors may result in an appellate court's refusal to consider whether the Washington Constitution provides greater protection than the federal constitution. Inclusion of a *Gunwall* analysis in every brief, however, does not appear to be the "standard of practice" for

Washington appellate counsel. To the contrary, a legion of cases exist where defense counsel did not argue that the court should adopt an independent state constitutional interpretation. *See, e.g, State v. Mierz*, 127 Wn.2d 460, 473 n. 10, 901 P.2d 286 (1995); *State v. Olivas*, 122 Wn.2d 73, 81-82, 856 P.2d 1076 (1993); *State v. Greenwood*, 120 Wn.2d 585, 614, 845 P.2d 971 (1993); *State v. Hollis*, 93 Wn. App. 804, 810 n. 3, 970 P.2d 813, *review denied*, 137 Wn.2d 1038 (1999); *State v. Bryant*, 78 Wn. App. 805, 809 n. 4, 901 P.2d 1046 (1995); *State v. Jones*, 71 Wn. App. 798, 810 n. 3, 863 P.2d 85 (1993), *review denied*, 129 Wn.2d 1016 (1996). The prevalence of this practice precludes a defendant from satisfying the "deficient performance" *Strickland* prong.

c. Retroactivity of New Rules

Individuals who seek to apply judicial opinions decided after their conviction became final to their case or who seek to have a prior rule expanded to their case or who simply seek to have a new rule announced have significant roadblocks to overcome. Under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), a new rule of criminal procedure may not be applied or announced in a habeas corpus case unless the rule falls within one of two narrow exceptions. *Penry v. Lynaugh*, 492 U.S. 302, 313, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). A "new rule" for purposes of the *Teague* analysis is one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or "was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original); *see also Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 953, 127 L. Ed. 2d 236 (1994); *Gilmore v. Taylor*, 508 U.S. 333, 340, 113 S. Ct. 2112, 2116, 124 L. Ed. 2d 306 (1993). The *Teague* doctrine serves to validate "reasonable, good-faith interpretations of existing precedents made by state courts." *Butler v. McKellar*, 494 U.S. 407, 414, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990).

The *Teague* doctrine was adopted in Washington by the State Supreme Court. *See, e.g., State v. Summers*, 120 Wn.2d 801, 815-16, 846 P.2d 490 (1993); *In re the Personal Restraint Petition of St. Pierre*, 118 Wn.2d 321, 326-28, 823 P.2d 492 (1992). *Teague* has been applied by the Washington Supreme Court to a capital case. *See In re the Personal Restraint Petition of Benn*, 134 Wn.2d 868, 939-940, 952 P.2d 116 (1998) ("new rules should not be applied retroactively on collateral review unless they place certain kinds of conduct beyond the power of the State to proscribe or punish, or establish procedures inherent in the concept of ordered liberty.").

Washington is not alone in adopting the *Teague* doctrine as a matter of state law. *See State v. Slemmer*, 170 Ariz. 174, 823 P.2d 41, 49 (1991); *People v. Flowers*, 138 Ill.2d 218, 149 Ill. Dec. 304, 561 N.E.2d 674, 682 (1990); *Daniels v. State*, 561 N.E.2d 487, 489-90 (Ind. 1990); *Morgan v. State*, 469 N.W.2d 419, 422 (Iowa), *cert. denied*, 502 U.S. 913 (1991); *Taylor v. Whitley*,

606 So.2d 1292, 1297 (La. 1992), *cert. denied*, 113 S. Ct. 2935 (1993); *Commonwealth v. Bray*, 407 Mass. 296, 553 N.E.2d 538, 541 (1990); *Nixon v. State*, 641 So.2d 751, 753 (Miss. 1994), *cert. denied*, 513 U.S. 1120 (1995); *State v. Nichols*, 986 P.2d 1093, 1096-97 (Mont. 1999) (applying *Teague* to new state constitutional rule); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359, 382-83 (Neb.), *vacated on other grounds*, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990); *People v. Eastman*, 85 N.Y.2d 265, 648 N.E.2d 459, 465 (1995); *State v Zuniga*, 336 N.C. 508, 444 S.E.2d 443, 446 (1994); *Ferrell v. State*, 902 P.2d 1113, 1114-15 (Okl. Cr. 1995); *Commonwealth v. Blystone*, 725 A.2d 1197, 1202-03 (Pa. 1999); *Pailin v. Vose*, 603 A.2d 738, 742 (R.I. 1992); *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163, 183 (1995); *State v. Horton*, 195 Wis. 2d 280, 536 N.W.2d 155 (Wis. App. 1995).

In cases where the State claims that collateral relief is barred by the principles of *Teague*, a court should proceed in three steps. *Caspari*, 510 U.S. at 390. "First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes." *Caspari*, 510 U.S. at 390. A state court judgment becomes final for retroactivity analysis for a federal constitutional claim when the time for filing a petition for writ of certiorari has elapsed or a timely-filed petition has been finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). A Washington court judgment becomes final for purposes of a Washington Constitutional claim when the judgment is filed with the court, when the mandate from the direct appeal issues, or when a timely-filed petition for certiorari has been finally denied. *See* RCW 10.73.090(3)(b).

"Second, the court must '[s]urve[y] the legal landscape as it then existed,'" and "'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Caspari*, 510 U.S. at 390 (quoting *Graham v. Collins*, 506 U.S. 461, 468, 113 S. Ct. 892, 898, 122 L. Ed. 2d 260 (1993) and *Saffle v. Parks*, 494 U.S. 484, 488, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990)). Unless reasonable jurists would have felt compelled by existing precedent to grant relief, the court is precluded from granting relief. *Goeke v. Branch*, 514 U.S. 115, 115 S. Ct. 1275, 1277, 131 L. Ed. 2d 152 (1995); *Saffle*, 494 U.S. at 488. The application of an old rule in a new setting or in a manner not dictated by precedent constitutes a new rule barred by *Teague*. *Stringer v. Black*, 503 U.S. 222, 228, 112 S. Ct. 1130, 1135, 117 L. Ed. 2d 367 (1992). A rule may be a new rule even if the court's decision is within the "logical compass" or is "controlled" by a prior decision. *Caspari*, 510 U.S. at 395; *Butler*, 494 U.S. at 415; *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S. Ct. 2822, 2827, 111 L. Ed. 2d 193 (1990).

Third, if the relief petitioner seeks would require the application or announcement of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions recognized in *Teague*. *Caspari*, 510 U.S. at 390; *Graham*, 506 U.S. at 477. The first exception is for new rules

that either decriminalize a class of conduct or that prohibit capital punishment for a particular class of defendants. *Saffle*, 494 U.S. at 495. The second exception allows for the announcement and retroactive application of a new rule if the new rule is a watershed rule of criminal procedure that "requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 307 (citations omitted). This second narrow exception is reserved for new rules that critically enhance the accuracy of the fact-finding process. *Graham*, 506 U.S. at 478; *Teague*, 489 U.S. at 313. The paradigmatic example of a "watershed rule of criminal procedure" falling within *Teague*'s second exception is the requirement that counsel be provided in criminal trials for serious offenses. *Gray v. Netherland*, 518 U.S. 152, 116 S. Ct. 2074, 2085, 135 L. Ed. 2d 457 (1996); *Saffle v. Parks*, 494 U.S. at 495 (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963))"Whatever the precise scope of this [second] exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478 (internal quotation marks omitted). To date, no new Fourth Amendment rule has been found to satisfy this exception to *Teague*. *See, e.g., In re Personal Restraint Petition of Markel*, 154 Wn.2d 262, 269, 111 P.3d 249 (2005) (noting that no new rule has yet been found to satisfy the "watershed exception" to *Teague*).

i. The Pre-*Teague* Rule

Defendants in Washington regularly urge the Washington Supreme Court to abandon the *Teague* test. A majority of the Court recently refused the request to abandon *Teague* in *In re Personal Restraint of Haghighi*, 178 Wn.2d 435, 441, 309 P.3d 459 (2013), but the three concurring/dissenting justices claims that *Teague's* applicability is an "open question." 178 Wn.2d at 461.

Prior to the Washington Supreme Court's adoption of the *Teague* test, the Court considered whether to give retroactive effect to new search laws. As a general rule, the Court determined that "those decisions limiting the government's ability to obtain and use otherwise probative evidence against the defendant" will only apply prospectively. *In re Haverty*, 94 Wn.2d 621, 625, 618 P.2d 1011 (1980). The Court adhered to this principle in *In re Sauve*, 103 Wn.2d 322, 692 P.2d 818 (1985), finding that retroactive application of a new Fourth Amendment rule would have a negative effect on the administration of justice by undermining the finality of litigation and resulting in a large number of collateral attacks. *Sauve*, 103 Wn.2d at 328-29. The Court also determined that it was unreasonable to expect police to foresee the new rule and the suppression of evidence has little to do with the truth-finding function of a criminal trial. *Id.*

The Court reached the same conclusion in *In re Taylor*, 105 Wn.2d 683, 717 P.2d 755 (1986), *overruled by In re Personal Restraint of*

Nichols, 171 Wn.2d 370, 375-76, 256 P.3d 1131 (2011).[19] *Taylor* presented the question of whether the article I, § 7 automobile search rules announced in *State v. Ringer*[20] should apply retroactively to a case that was final when *Ringer* was announced. The *Taylor* court applied three criteria for determining whether a new rule should apply retroactively on collateral review:

> (a) whether the purpose of the new rule would be served by retroactive application, (b) what was the extent of reliance by law enforcement authorities on the old standards, and (c) what effect would retroactive application of the new standards have on the administration of justice.

Taylor, 105 Wn.2d at 691, citing *Stovall v. Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). The Court found that the new *Ringer* rule, like other rules designed to prevent the unreasonable search and seizure of evidence, should only apply prospectively. *Taylor*, 105 Wn.2d at 691-92.

C. Who May Raise Claim

1. General Rule

A person may challenge a search of seizure only if he or she has a personal Fourth Amendment or Art. I, § 7, interest in the area searched or the property seized. The defendant must personally claim a "justifiable", "reasonable," or "legitimate expectation of privacy" that has been invaded by governmental action.

In determining whether a defendant has a personal privacy interest, the court in *Rakas v. Illinois*, 439 U.S. 128, 133, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978), focused on whether the defendant possessed a legitimate expectation of privacy as to the item or area searched.

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others. . . . Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in property, or on an invasion in such an interest . . . [but] even a property interest in the premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon. (Citations omitted.)

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[19] *Nichols* recognized that the retroactivity balancing test utilized in *Taylor* was superseded by the *Teague* test.

[20] *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983).

Rakas, 99 S. Ct. at 430-31 n.12.

a. Burden of Proof

The defendant seeking suppression of seized evidence has the burden of establishing the requisite privacy interest. *See, e.g., Alderman v. United States*, 394 U.S. 165, 173, 89 S. Ct. 961, 22 L. Ed 2d 176 (1969) (quoting *Jones v. United States*, 362 U.S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) (one who brings a motion to suppress must allege and establish "that he himself was the victim of an invasion of privacy"); *United States v. Lyons*, 992 F.2d 1029, 1031, *reh'g denied*, 997 F.2d 826 (10th Cir. 1993) (defendant must prove his standing to challenge a search); *State v. Picard*, 90 Wn. App. 890, 896, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998); *State v. Jackson*, 82 Wn. App. 594, 602, 918 P.2d 945 (1996), *review denied*, 131 Wn.2d 1006 (1997). This burden of proof regarding whether a defendant has standing never shifts to the government. *United States v. Singleton*, 987 F.2d 1444 (9th Cir. 1993). If the defendant's evidence and the State's evidence leaves the court in a "virtual equipoise" as to whether the defendant has a valid privacy interest in the place searched or in the item seized, the Fourth Amendment analysis cannot proceed further. *See State v. Picard*, 90 Wn. App. 890, 896-97, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998).

b. When Raised

Although the State may not raise the issue of a defendant's standing for the first time on appeal when it is an appellant, it may raise the issue of standing for the first time on appeal as a respondent because the appellate court has a duty to affirm on any ground supported by the record, even if it is not the ground relied on by the trial court. *State v. Carter*, 127 Wn.2d 836, 841-42, 904 P.2d 290 (1995); *State v. Grundy*, 25 Wn. App. 411, 415-16, 607 P.2d 1235 (1980), *review denied*, 95 Wn.2d 1008 (1981). If the issue is first raised by the State in the appellate court, the court may order a remand to the trial court for an additional evidentiary hearing. *See, e.g., State v. Picard*, 90 Wn. App. 890, 896, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998).

c. Special Circumstances

i. Court Orders. Certain individuals will always lack standing to challenge an entry into a building. An individual who has been excluded from a particular building by a judicial domestic violence order will lack a reasonable expectation of privacy in the building. *See State v. Jacobs*, 101 Wn. App. 80, 2 P.3d 974 (2000).

ii. Abandoned Property. A defendant who disavows ownership of an item in response to police questioning will still have standing to challenge the warrantless seizure of the item if the item is seized from an area in which the defendant has an expectation of privacy. *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007).

iii. **Social Guest.** A social guest has standing to challenge the warrantless search of his or her host's home. *State v. Link*, 136 Wn. App. 685, 150 P.3d 610 (2007). A social or casual guest, however, does not enjoy the same rights and authority as his host. *See generally State v. Libero*, 168 Wn. App. 612, 277 P.3d 708 (2012).

Four relevant but non-exhaustive factors for analyzing whether a social guest has standing are (1) the defendant's relationship with the homeowner or tenant; (2) the context and duration of the visit during which the search took place; (3) the frequency and duration of the defendant's previous visits to the home; and (4) whether the defendant kept personal effects in the home. *State v. Link*, 136 Wn. App. 685, 693, 150 P.3d 610 (2007).

iv. **Passengers.** The driver of a vehicle does not have standing to challenge an officer's questioning of a passenger. *State v. Pettit*, 160 Wn. App. 716, 721, 251 P.3d 896 (2011).

2. "Automatic Standing"

In *Jones v. United States*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960), *overruled by United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980), the United States Supreme Court recognized a limited exception to the general rule for cases in which a defendant is charged with a possessory offense. In such cases, a defendant legitimately on the premises may challenge the search or seizure even though the defendant did not have a privacy interest in the premises searched. *Jones*, 362 U.S. at 263-65.

The "automatic standing" rule was intended to prevent the government from arguing at a suppression hearing that a defendant did not possess the substance and thus had no Fourth Amendment protected interests, and then contrarily asserting at trial that the defendant was guilty of possessing the substance. *Jones*, 362 U.S. at 263-64. The court in *Jones* was also concerned about the possibility of self-incrimination, where requiring a defendant at a suppression hearing to establish standing by admitting possession of the items seized would provide evidence for the prosecution to use at trial. *Jones*, 362 U.S. at 261-64.

Following *Jones*, the Washington Supreme Court stated in *State v. Michaels*, 60 Wn.2d 638, 646, 374 P.2d 989 (1962), that "the reasoning of [the *Jones*] opinion commends itself to this court." It recognized that requiring a defendant in a suppression hearing to admit possession of items seized would result in confession by the defendant of an element of the possessory offense. The court in *Michaels* did not analyze the state constitution separately from the federal constitution, but treated the two provisions as coextensive, holding that the defendant had standing under both the state and federal constitutions. *State v. Michaels*, 60 Wn. 2d 638, 646-47, 374 P.2d 989 (1962)

When the United States Supreme Court ruled in *Simmons v. United States*, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968), that a claim by a defendant in a pretrial hearing of a privacy interest in the place of seizure cannot be admitted at trial to

establish guilt, it changed the federal rule. The Court stated that, as a matter of public policy, defendants should not be deterred from challenging a search and seizure for fear that their suppression hearing testimony would be used to link them to the contraband. 390 U.S. at 389-94. Thus, after *Simmons*, the reasons which led to the rule of automatic standing seemed no longer to be of consequence.

Recognizing that *Simmons* effectively eliminated the problem of self-incrimination by defendants, the Supreme Court in *United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980), overruled *Jones* and abandoned the automatic standing rule. It held that defendants charged with possessory offenses must establish an "expectation of privacy in the area searched." 448 U.S. at 92-93.

After *Salvucci*, the Washington Supreme Court issued one plurality opinion in 1980 wherein the Court declared adherence to the automatic standing rule as a matter of state constitutional law. *See State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). No *Gunwall* analysis was performed in S*impson*.

The Washington Supreme Court expressed some willingness to consider whether state constitutional law requires continued adherence to the automatic standing rule in early 2000. *See State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000) ("The State did not file a cross-petition for review on the issue of automatic standing; thus, the only issue before us is whether the evidence was in open view. RAP 13.4(d); 13.7(b)."). In October of 2000, the Court refused to announce the demise of the "automatic standing" rule, but did place additional restrictions upon its application. *See generally State v. Williams*, 142 Wn.2d 17, 11 P.3d 714 (2000). Most recently, in May of 2002, the Court indicated once again that automatic standing continues to have a presence in Washington and that the rule will apply whenever the defendant's testimony at a suppression hearing would create a realistic possibility of self-incrimination. *See State v. Jones*, 146 Wn.2d 328, 334, 45 P.3d 328 (2002).

In order to claim automatic standing, the defendant must show that (1) possession is an "essential" element of the offense for which the defendant is charged, and (2) the defendant was in possession of the seized property at the time of the contested search. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The "fruits of the search" must directly relate to the search the defendant is challenging. *State v. Williams*, 142 Wn.2d 17, 24, 11 P.3d 714 (2000).

a. "Essential" Element

Automatic standing, does not apply if the crime charged does not involve possession as an "essential" element of the offense. *State v. Carter*, 127 Wn.2d 836, 842-43, 904 P.2d 290 (1995). If a defendant is charged with multiple crimes, some of which do not involve possession, standing for each offense must be determined separately.

Currently, Washington law recognizes that the following crimes do not involve possession as an "essential" element:

- Arson— *State v. Picard*, 90 Wn. App. 890, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998)

- Larceny— *State v. Mustain*, 21 Wn. App. 39, 42, 584 P.2d 405 (1978)
- Burglary — *State v. Foulkes*, 63 Wn. App. 643, 647, 821 P.2d 77 (1991); *State v. Stone*, 56 Wn. App. 153, 157, 782 P.2d 1093 (1989), *review denied*, 114 Wn.2d 1013 (1990); *State v. Johnston*, 38 Wn. App. 793, 801, 690 P.2d 591 (1984); *State v. Mustain*, 21 Wn. App. 39, 42, 584 P.2d 405 (1978)
- Robbery— *State v. Hayden*, 28 Wn. App. 935, 939, 627 P.2d 973 (1981); *but see State v. White*, 40 Wn. App. 490, 699 P.2d 239, *review denied*, 104 Wn.2d 1004 (1985) (it may be arguable under *Simpson* that first degree robbery includes "possession" of the weapon as an essential element).

b. Nature of Interest

Automatic standing allows a defendant to challenge the search. Automatic standing, however, does not place the defendant in the same shoes as the property owner. Thus, a casual visitor who is charged with a possessory offense has automatic standing to challenge a search, the visitor does not enjoy the same rights and authority as a tenant of the apartment. While the tenant may successfully challenge the search on the grounds that police only obtained consent from a co-tenant to conduct the search, the casual visitor cannot. *See generally State v. Libero*, 168 Wn. App. 612, 277 P.3d 708 (2012).

D. Who Has the Burden of Proof

1. Warrantless Searches

Warrantless searches are presumed to be improper and the burden is upon the prosecution to prove the existence of an exception to the warrant requirement. *See generally State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

2. Warrants

Basic to the review of the complaint for search warrant is the principle that search warrants are a favored means of police investigation, and supporting affidavits or testimony must be viewed in a manner which will encourage their continued use. *United State v. Harris*, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971); *United States v. Ventresca*, 380 U.S. 102, 108-09, 13 L. Ed. 2d 284, 85 S. Ct. 741 (1965). When a search warrant is properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982); *State v. Smith*, 50 Wn.2d 408, 314 P.2d 1024 (1957); *State v. Trasvina*, 16 Wn. App. 519, 557 P.2d 368 (1976).

A "magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. This determination generally

should be given great deference by a reviewing court." *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) ("Generally, the probable cause determination of the issuing judge is given great deference."). "[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant." *State v. J- R Distribs., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988); *see also Cole*, 128 Wn.2d at 286; *Young*, 123 Wn.2d at 195; *State v. Fisher*, 96 Wn.2d 962, 967, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982).

In performing his independent, detached function, the magistrate is to operate in a commonsense and realistic fashion. The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Hypertechnical interpretations are to be avoided when reviewing search warrant affidavits. *State v. Freeman*, 47 Wn. App. 870, 737 P.2d 704, *review denied*, 108 Wn.2d 1032 (1987); *State v. Harris*, 44 Wn. App. 401, 722 P.2d 867 (1986); *State v. Anderson*, 37 Wn. App. 157, 678 P.2d 1310 (1984).

a. Inclusion of Illegally Obtained Evidence

If an affidavit in support of a search warrant contains illegally obtained statements or information obtained pursuant to an illegal entry onto property, the search warrant may still be upheld if the remaining information in the warrant affidavit independently establishes probable cause. *See State v. Gaines*, 154 Wn.2d 711, 719-20, 116 P.3d 993 (2005); *State v. Coates*, 107 Wn.2d 882, 888, 735 P.2d 64 (1987); *State v. Spring*, 128 Wn. App. 398, 403, 115 P.3d 1052 (2005), *review denied*, 156 Wn.2d 1032 (2006).

b. *Franks v. Delaware*

The United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978) provides for a specific procedure to challenge parts of a search warrant predicated on deliberate falsehoods or statements made with reckless disregard for the truth. Under those circumstances, a defendant may challenge those portions of the search warrant which are intentionally false or made with reckless disregard for the truth, excise those parts, and test the sufficiency of the remaining information to establish probable cause. This same procedure has also been extended to material omissions of fact. *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980).

The test and procedure adopted by the United States Supreme Court is applicable in Washington with respect to both material falsehoods and material omissions of fact. *See, e.g., State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Const. art. I, § 7 does not require suppression upon proof of a negligent omission or error. *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007).

An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation, and the mere fact that an affiant did not include every conceivable conclusion in the warrant does

not taint the validity of the affidavit. *United States v. Colkley*, 899 F.2d 297, 300-01 (4th Cir. 1990), quoting *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987); *State v. Bockman*, 37 Wn. App. 474, 486, 682 P.2d 925 (1984), *review denied*, 102 Wn.2d 1002 (1985). *Franks* only protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate. *Colkley*, 899 F.2d at 301. A defendant is only entitled to an evidentiary hearing if s/he makes an initial showing that the alleged misstatement or omission was intentional or culpable rather than reasonable or negligent.

Intentional omissions or misstatements occur when the affiant shows "reckless" disregard for the truth. Recklessness is shown where the affiant "in fact entertained serious doubts as to the truth of the facts or statements in the affidavit." *See State v. O'Connor*, 39 Wn. App. 113, 117, 692 P.2d 208 (1984), *review denied*, 103 Wn.2d 1022 (1985), quoting *United States v. Davis*, 617 F.2d 677, 694 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980).

> [S]uch serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

O'Connor, 39 Wn. App. at 117.

A negligent omission occurs when the affiant genuinely believes that the omitted statement was irrelevant, and this belief was reasonable, even if it was incorrect. *O'Connor*, 39 Wn. App. at 118, citing *United States v. Melvin*, 596 F.2d 492, 499-500 (1st Cir. 1979); *People v. Stewart*, 473 N.E.2d 840 (Ill. 1984); *People v. Kurland*, 28 Cal.3d 376, 618 P.2d 213, 220, 168 Cal. Rptr. 667 (1980).

The defendant has the burden of proving by a preponderance of the evidence that there was an intentional misrepresentation or a reckless disregard for the truth by the affiant. *State v. Hashman*, 46 Wn. App. 211, 729 P.2d 651 (1986), *review denied*, 108 Wn.2d 1021 (1987); *State v. Stephens*, 37 Wn. App. 76, 678 P.2d 832, *review denied*, 101 Wn.2d 1025 (1984). Any fair doubt as to whether allegations of the affidavit on which a search warrant issued were perjurious is to be resolved in favor of the warrant. *People v. Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644 (1965). This heavy burden is imposed upon the defendant because the allegations of the affidavit have already been subjected to examination by a judicial officer in issuing the warrant. *Id.* Reckless disregard will not be established solely from the omission of a material fact. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992); *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990).

Even if a defendant were able to prove an intentional or reckless misstatement or omission, he still would be required to show that probable cause to issue the warrant would not have been found had those false statements been deleted and the omissions included. *State v. Gentry*, 125 Wn.2d 570, 607, 888

P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. However, if the altered content is insufficient, defendant is entitled to an evidentiary hearing. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992); *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684-85; *State v. Larson*, 26 Wn. App. 564, 568-69, 613 P.2d 542 (1980). Omitted information that is potentially relevant but not dispositive is not enough to warrant a *Franks* hearing. *State v. Garrison*, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992); *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990).

In the evidentiary hearing the defendant has the burden of proving by a preponderance of the evidence that there was an intentional misrepresentation or a reckless disregard for the truth by the affiant. *Cord*, 103 Wn.2d at 367; *State v. Hashman*, 46 Wn. App. 211, 217, 729 P.2d 651 (1986), *review denied*, 108 Wn.2d 1021 (1987); *State v. Stephens*, 37 Wn. App. 76, 678 P.2d 832, *review denied*, 101 Wn.2d 1025 (1984).

The State is entitled to introduce evidence at the *Franks* hearing. *State v. Post*, 286 N.W.2d 195, 201-02 (Iowa 1979); *People v. Reid*, 362 N.W.2d 655, 660 (Mich. 1984). While Washington appellate courts have not explicitly held that the State may present evidence at the *Franks* hearing, there are numerous cases that establish this rule by implication. *See e.g., State v. Cord, supra* (affiant testified at suppression hearing); *O'Connor*, 39 Wn. App. at 119 (sworn testimony of affiant considered at suppression hearing to determine whether affiant had acted with good faith). The State's presentation may include facts not included in the affidavit which support the conclusion that the affiant's omission of a particular fact was reasonable due to his or her belief that the omitted fact was irrelevant or untrue. *Post*, 286 N.W.2d at 201-02. The State's presentation may also include those facts known to the affiant that directly related to the allegedly improperly omitted fact, so the court can determine whether the totality of new information would defeat the original probable cause finding. This supplemental evidence may not, however, be considered in determining whether there was sufficient probable cause for the issuance of the warrant. *O'Connor*, 39 Wn. App. at 119.

c. Overbroad Warrants and the Severability Doctrine. A warrant can be "overbroad" either because it fails to describe with particularity items for which probable cause exists or because it describes, particularly or otherwise, items for which probable cause does not exist. If a warrant is overbroad, "the severability doctrine" operates to save its valid parts

Under the severability doctrine, "'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant.'" *State v. Perrone,* 119 Wn.2d 538, 556, 834 P.2d 611 (1992). Thus, the doctrine applies when a warrant includes not only items that are supported by probable cause and described with particularity, but also items that are not

supported by probable cause or not described with particularity, so long as a "meaningful separation" can be made on "some logical and reasonable basis[.]" *Perrone,* 119 Wn.2d at 560.

The severability doctrine applies only when at least five requirements are met:

i. The warrant must lawfully have authorized entry into the premises. The problem must lie in the permissible intensity and duration of the search, and not in the intrusion per se.

ii. The warrant must include one or more particularly described items for which there is probable cause. Otherwise, there is nothing for the severability doctrine to save.

iii. The part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole. If most of the warrant purports to authorize a search for items not supported by probable cause or not described with particularity, the warrant is likely to be "general" in the sense of authorizing a general, exploratory rummaging in a person's belongings, and no part of it will be saved by severance or redaction.

iv. The searching officers must have found and seized the disputed items while executing the valid part of the warrant (i.e., while searching for items supported by probable cause and described with particularity). Just as evidence found while executing a wholly invalid warrant would not be saved, and just as evidence found while exceeding the scope of a wholly valid warrant would not be saved, evidence found while executing the unlawful part of a partially valid warrant should not be saved either.

v. The officers must not have conducted a general search, i.e., a search in which they "flagrantly disregarded" the warrant's scope.

State v. Maddox, 116 Wn. App. 796, 67 P.3d 1135 (2003), *aff'd,* 152 Wn.2d 499, 98 P.3d 1199 (2004).

d. Lost Tape Recording

Ideally, a recording of a telephonic affidavit will be made at the time the sworn statements are offered. If the recording is lost prior to transcription or if the recording device malfunctions, evidence will be suppressed unless the parties can reconstruct the recording. The reconstruction must come from a disinterested person – namely the magistrate. The magistrate must, from his or her memory, establish what information was relied upon in making the probable cause determination. *See generally*, *State v. Myers*, 117 Wn.2d 332, 815 P.2d 761 (1991). It is, therefore, imperative that the magistrate that issued the search warrant is contacted as soon as it is determined that there is a problem with the tape so that the magistrate can record what she recalls while her memory is still fresh.

E. Exceptions to Exclusionary Rule

1. Good Faith

The good faith exception to the exclusionary rule was developed as a means of balancing the costs and benefits of the judicially created exclusionary rule. The good faith exception was first announced by the United States Supreme Court in the case of *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405, 3424 (1984). In that case, the Court determined that rigid application of the exclusionary rule to cases in which law enforcement went through the steps necessary to obtain a search warrant would do little to deter police misconduct but would severely impact the truth-finding function of the criminal justice system leading to a general disrespect for the law and administration of justice.

The good faith exception to the exclusionary rule has been rejected in Washington:

> Unlike its federal counterpart, Washington's exclusionary rule is "nearly categorical." *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). This is due to the fact that article I, section 7 of our state constitution "clearly recognizes an individual's right to privacy with no express limitations." *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). In contrast to the Fourth Amendment, article I, section 7 emphasizes "protecting personal rights rather than … curbing governmental actions." *Id.* This understanding of that provision of our state constitution has led us to conclude that the "right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." *Id*. Thus, while our state's exclusionary rule also aims to deter unlawful police action, its paramount concern is protecting an individual's right of privacy. Therefore, if a police officer has disturbed a person's "private affairs," we do not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite "authority of law." If not, any evidence seized unlawfully will be suppressed. With very few exceptions, whenever the right of privacy is violated, the remedy follows automatically. *See id.*

State v. Afana, 169 Wn.2d 169, 181, 233 P.3d 879 (2010). *Accord State v. Adams*, 169 Wn.2d 487, 238 P.3d 459 (2010).

The New Jersey Appellate Courts, which rejected the good faith exception to the exclusionary rule under the New Jersey Constitution, recently held that the good faith exception would apply when the United States Supreme Court construes the Fourth Amendment to provide greater protection than the New Jersey Supreme Court. *See State v. Adkins*, 433 N.J. Super 479, 81 A.3d 680 (2013) (good faith exception would be applied to admit warrantless blood draws collected prior to the issuance of the United States Supreme Court's decision in *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013)). The facts that led the New Jersey courts to adopt a limited good faith exception for pre-*McNeely* warrantless blood draws are

also present in Washington.

a. *McNeely* Exception?

Pre-*McNeely* article I, section 7 case law treated the natural dissipation of alcohol as sufficient exigent circumstances for a warrantless blood draw. *See generally York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 317-18, 178 P.3d 995 (2008) (Madsen, C.J., concurring) ("we have recognized that warrantless searches may be permissible under article I, section 7 when certain exigent circumstances require immediate action to avoid the destruction of evidence or the flight of a suspect. . . . *State v. Baldwin*, 109 Wn. App. 516, 523, 37 P.3d 1220 (2001) (exigent circumstances may justify warrantless blood drug test of DUI (driving under influence) suspect)"); *State v. Bostrom*, 127 Wn.2d 580, 590, 903 P.2d 157 (1995) ("Both the United States Supreme Court and this court have held that the State can constitutionally force a defendant to submit to a blood alcohol or breathalyzer test."); *Baldwin*, 109 Wn. App. at 523 and 525 (A blood test can be taken without consent and without a warrant because "[w]ithout knowing what drugs have been ingested or how long a particular drug stays in the system of a particular person, the arresting officer faces an emergency situation when the facts and circumstances indicate that a suspect has been driving under the influence of drugs or drugs and alcohol."). Thus, an officer's pre-*McNeely* warrantless collection of a blood sample only violated the Fourth Amendment.

While the more refined Fourth Amendment rule contained in *McNeely* applies to officers in Washington pursuant to both Wash. Const. art, I, § 2, and *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), *McNeely* does not alter the interpretation of article I, section 7. The Washington Supreme Court is the final arbiter of the Washington constitution. *See, e.g. Florida v. Powell*, 559 U.S. 50, 130 S. Ct. 1195, 1201-02, 175 L. Ed. 2d 1009 (2010) (the United States Supreme Court will not interfere with state court interpretations of state constitutions). The fact that an officer's pre-*McNeely* warrantless collection of a blood sample only violated a suspect's Fourth Amendment rights argues for application of the Fourth Amendment good faith exception to the exclusionary rule.

2. Inevitable Discovery

A warrantless search is presumed impermissible, and unless the State establishes the existence of one of the recognized exceptions to this presumption applies, evidence discovered during the warrantless search is not admissible during trial. *See, e.g., State v. Richman*, 85 Wn. App. 568, 573, 933 P.2d 1088, *review denied*, 133 Wn.2d 1028 (1997). The United States Supreme Court, however, adopted an "inevitable discovery" exception to suppression. This exception applies when the State can prove that the illegally discovered evidence would have been inevitably discovered. *See, e.g.*, *Nix v. Williams*, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984).

The Washington Supreme Court, however, has determined that the "inevitable discovery" doctrine is incompatible with Wash. Const. art. I, § 7. *State v. Winterstein*,

167 Wn.2d 620, 220 P.3d 1226 (2009).

3. Independent Source Doctrine

The independent source doctrine is similar to the inevitable discovery doctrine. The constitutional restraints (both U. S. Const. amend. 4, and Const. art. 1, § 7) against unreasonable searches and seizures extend not only to evidence directly obtained, but also to derivative evidence. *Silverthorne Lumber. Co. v. United States*, 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182, 24 A.L.R. 1426 (1920). Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. *Id.*, 251 U.S. at 392. This doctrine is consistent with the requirements of article 1, section 7, of the Washington State Constitution. *State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005); *State v. Ludvik*, 40 Wn. App. 257, 263, 698 P.2d 1064 (1985).

Whether or not specific evidence is the unusable yield of an unlawful search or is admissible because knowledge of its availability was obtained from an independent source is a question of fact which must be peculiar to each case. *State v. O'Bremski*, 70 Wn.2d 425, 429, 423 P.2d 530 (1967).

a. Specific Examples

- In *State v. Hilton*, 164 Wn. App. 81, 261 P.3d 683 (2011), *review denied*, 173 Wn.2d 1037 (2012), the court determined that the search warrant for the defendant's duplex, which had uncovered the matching A-Merc shells, was invalid due to lack of specificity to guide officers in their search. The State, however, was still allowed to admit evidence that the defendant had purchased A-Merc .45 caliber bullets, because well prior to the search warrant for the defendant's apartment, the police had recognized the unusual ammunition and decided to trace it. One detective had already contacted the manufacturer, although he had not begun contacting local suppliers, before the search warrant issued. Even after contacting the store at which the defendant purchased the ammunition, the detective continued to contact all of the other local ammunition sellers. While at the store where the defendant purchased the ammunition, the detective did not limit himself to the defendant's A-Merc records, but obtained the records for all purchasers of that ammunition. In short, the record reflected that the detective was not focused solely on the defendant, but was identifying other local A-Merc customers as well. Far from simply exploiting information obtained at the defendant's apartment, the detective was thoroughly pursuing a lead first developed at the murder scene. This is sufficient to establish that the purchase records was independent of the evidence unlawfully seized from the defendant's apartment.

- In *State v. Smith,* 165 Wn. App. 296, 266 P.3d 250, *review granted,* 173 Wn.2d 1034 (2012), officers knocked on the defendant's motel room after discovering his presence, through a suspicionless,

warrantless search of the motel registry. After the defendant was led away in handcuffs pursuant to an outstanding warrant, officers noted a woman holding a bloodied towel to her head. Further investigation revealed that the defendant had assaulted the woman and sexually assaulted the woman's 12-year-old daughter. The testimony of the two victims were independently traced to the officer's community caretaking responsibilities, rather than to the illegal discovery of the defendant's presence at the motel. The testimony of the two victims were also admissible because the adult victim stated that she would have called the police at her earliest opportunity had the police not shown up, suggesting that she wanted police help and would have cooperated with the criminal investigation regardless of any police misconduct.

- In *State v. Miles*, 159 Wn. App. 282, 244 P.3d 1030, *review denied*, 171 Wn.2d 1022 (2011), the State obtained a search warrant for bank records after evidence obtained through the issuance of an administrative subpoena was suppressed. In support of the search warrant, the State submitted the affidavit of a detective in the e Seattle Police Department Fraud, Forgery, and Financial Exploitation Unit, and the affidavit of a senior King County prosecuting attorney from the Fraud Division. The detective's affidavit includes a copy of the victim's complaint, her sworn statement, and the three checks that she wrote to the suspect in October to December 1999. The prosecutor's affidavit sets forth the history of the case, including the prior seizure of the bank records based on the administrative subpoena issued by the Securities Division and the supreme court's decision. The prosecutor's affidavit also addresses the question of whether the State would have applied for a search warrant to obtain the bank records if the Securities Division did not have the authority to issue an administrative subpoena. While the supreme court's decision invalidating the administrative subpoena prompted the request for a warrant, the application of the independent source doctrine will turn on whether the evidence seen in the review of the documents from the administrative subpoena prompted the request for the search warrant and/or whether the officers would have sought a warrant if they had not seen the documents initially obtained by the administrative subpoena.

- In *State v. O'Bremski*, 70 Wn.2d 425, 429, 423 P.2d 530 (1967), the Court held that the testimony of a rape victim who had been discovered in the defendant's apartment following an unlawful entry into the apartment did not have to be suppressed as the rape victim's parents had reported the victim as a run away and the police were actively searching for her and a citizen had already reported the victim's presence in the defendant's apartment.

- In *State v. Hall*, 53 Wn. App. 296, 766 P.2d 512, review denied, 110

Wn.2d 1016 (1989), the court held that evidence collected pursuant to a search warrant that was obtained after the police unlawfully entered and secured the defendant's residence was admissible where the information contained in the affidavit in support of the search warrant was all obtained prior to the illegal entry, the decision to obtain the search warrant was made prior to the illegal entry, and no search was conducted until after the search warrant was obtained.

- In *State v. Early*, 36 Wn. App. 215, 674 P.2d 179 (1983), charge card slips that established the defendant's presence in Spokane at the time of the robbery was not rendered inadmissible by the illegal seizure of an atlas with Spokane circled, since the credit card slips were obtained from the credit card company's records which revealed the businesses and cities in which the defendant used her card. The credit card company accessed the records by using the defendant's name, which had not been illegally seized.
- In *State v. Perez*, 147 Wn. App. 141, 193 P.3d 1131 (2008), the officers who sought a search warrant for the trunk of the defendant's car, indicated that they had no intent to seek a search warrant before they conducted the illegal "inventory search" of the trunk. Because such an intent is foundational to the State's reliance on the independent source rule, the appellate court concluded that the trial court erred in denying the defendant's motion to suppress.

4. Attenuation

Under the derivative evidence doctrine, secondary evidence discovered by exploitation of the initial illegality will be suppressed unless it is sufficiently attenuated from the initial illegality to be purged of the original taint. *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); *State v. Stortroen*, 53 Wn. App. 654, 660-61, 769 P.2d 321 (1989). Under the derivative evidence doctrine courts apply a but-for analysis. *State v. Aranguren*, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985). In determining whether there is a nexus between the evidence in question and the police conduct, the court essentially makes a commonsense evaluation of the facts and circumstances of the particular case. *United States v. Kapperman*, 764 F.2d 786 (11th Cir. 1985).

Whether a confession, or a consent to search, is tainted by a prior illegal arrest: (1) temporal proximity of the arrest and the subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of *Miranda* or *Ferrier* warnings. *See, e.g.*, *State v. Gonzales*, 46 Wash. App. 388, 398, 731 P.2d 1101 (1986). The burden is on the State to prove sufficient attenuation from the illegal search to dissipate its taint. *State v. Childress*, 35 Wash. App. 314, 316, 666 P.2d 941 (1983). The single most "significant" intervening circumstance is actual consultation between the suspect and an attorney prior to obtaining the confession or a consent to search. *See, e.g.*, *Pennsylvania ex rel. Craig v. Maroney*, 348 F.2d 22 (3d Cir. 1965) (opportunity to meet with attorney prior to questioning constitutes sufficient attenuation).

A clear majority of the Washington Supreme Court has yet to hold that attenuation doctrine is consistent with Const. article I, section 7. *See generally State v. Eserjose*, 171 Wn.2d 907, 919-920, 930, 259 P.3d 172 (2011) (plurality opinion in which four justices stating that the Court has "at least, implicitly adopted the attenuation doctrine"; the fifth vote to affirm the conviction, however, held that the author believes "the lead opinion applies an attenuation analysis where none is required"); *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885 n.2, 263 P.3d 591 (2011) ("The parties have not addressed whether the attenuation doctrine is a recognized exception to the exclusionary rule under article I, section 7 of the Washington State Constitution, and we do not reach that issue.").

A plurality of the Washington Supreme Court has stated that:

> When a court determines that evidence is not the "fruit of the poisonous tree," a defendant's privacy rights are respected, the deterrent value of suppressing the evidence is minimal, and the dignity of the judiciary is not offended by its admission. An alternative "but for" principle would make it virtually impossible to rehabilitate an investigation once misconduct has occurred, granting suspected criminals a permanent immunity unless, by chance, other law enforcement officers initiate an independent investigation. The factors the United States Supreme Court identified in *Brown* [*v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975),] are designed to aid courts in determining whether an illegal arrest was, as was said in Vangen, the "operative factor in causing or bringing the confession about." *Id*. at 556. For that reason, we again embrace the *Brown* factors as the proper analytical framework for determining whether a confession is sufficiently an act of free will to purge the taint of an illegal arrest.

State v. Esojerose, 171 Wn.2d 907, 922-23, 259 P.3d 172 (2011). The *Brown* factors are that courts should consider in determining if a confession was sufficiently attenuated from an illegal arrest include: "'[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.," *Id*. at 919 (quoting *Brown*, 422 U.S. at 603-04 (footnote and citation omitted)).

The Washington Supreme Court will be considering, once again, whether the attenuation doctrine violates article I, section 7 of the Washington Constitution in *State v. Smith*, No. 86951-1. Oral argument is expected in the fall of 2012.

5. Silver Platter

The silver platter doctrine holds that, even though it would not be legal for local law enforcement officials to gather evidence in the same manner, evidence gathered by agents of a foreign jurisdiction (tribal, federal, or other state) is admissible in Washington courts if: (1) there was no participation from local officials; (2) the agents of the foreign jurisdiction did not gather the evidence with the intent that it

would be offered in state court rather than in their jurisdiction; and (3) the agents of the foreign jurisdiction complied with the laws governing their conduct. *See generally*, *State v. Brown*, 132 Wn.2d 529, 586-87, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

a. Choice of Law

Whenever a suspect has fled to another jurisdiction and the arrest or search is conducted by agents of that jurisdiction, the State should argue that the law of the situs controls the admissibility of evidence obtained outside the forum state. *See*, Morrison, *Choice of Law for Unlawful Searches*, 41 Okla. L. Rev. 579 (1988); 22A C.J.S. Criminal Law § 771, at 431 ("Evidence validly procured under the laws of the sister state is admissible even if procured in violation of the law of the state in whose court the evidence is offered."); *Pooley v. State*, 705 P.2d 1293 (Alaska Ct. App. 1985); *People v. Blair*, 25 Cal.3d 640, 159 Cal. Rptr 818, 602 P.2d 738 (1979); *McClellan v. State*, 359 So.2d 869 (Fla. App. 1978), *cert. denied*, 364 So.2d 892 (Fla. 1978). *Accord State v. Koopman*, 68 Wn. App. 514, 844 P.2d 1024, *review denied,* 121 Wn.2d 1012, 852 P.2d 1091 (1993).

6. Impeachment

The impeachment exception to the exclusionary rule permits the prosecution in a criminal proceeding to introduce illegally obtained evidence to impeach the defendant's own testimony. The United States Supreme Court first recognized this exception in *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954), permitting the prosecutor to introduce into evidence heroin obtained through an illegal search to undermine the credibility of the defendant's claim that he had never possessed narcotics. The Court explained that a defendant

> "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort toperjurious testimony in reliance on the Government's disability to challenge his credibility."

Walder, 347 U.S. at 65. *Walder* has been approved of by the Washington Supreme Court. *See, e.g., Riddell v. Rhay*, 79 Wn.2d 248, 484 P.2d 907 (1971) (defendant's statements); *State v. Hayes*, 73 Wn.2d 568, 571, 439 P.2d 978 (1968) (admission of suppressed breath alcohol test). *See also State v. Greve*, 67 Wn. App. 166, 834 P.2d 656 (1992), *review denied*, 121 Wn.2d 1005 (1993) (state constitution does not prohibit the use of suppressed evidence for impeachment; its introduction discourages a defendant from perjuring himself directly, thus furthering the goal of preserving the dignity of the judicial process).

Evidence suppressed as the fruit of an unlawful search and seizure may also be used to impeach a defendant's false trial testimony, given in response to proper cross-examination. *United States v. Havens*, 446 U.S. 620, 627-628, 64 L. Ed. 2d 559, 100 S. Ct. 1912 (1980).

The prosecution may not, however, introduce illegally obtained evidence to impeach the testimony of another defense witness. *See James v. Illinois*, 493 U.S. 307, 110 S. Ct. 648, 107 L. Ed. 2d 676 (1990).

When evidence is admitted under this exception to the exclusionary rule, the defendant is entitled, upon request, to a limiting instruction that directs the jury to consider the evidence only in relation to the defendant's credibility. *See State v. Neslund*, 50 Wn. App. 531, 540, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988).

BASIC RULES OF JURISDICTION IN INDIAN COUNTRY*

		CHARACTER OF LAND ON WHICH OFFENSE WAS COMMITTED		
		Trust Property**	**Fee Simple Property****	**Public Road**
WHO COMMITTED THE OFFENSE	**Indian Defendant**	State jurisdiction exits for all crimes committed by an Indian juvenile. State jurisdiction exists for all crimes committed by an Indian adult on trust land located outside the geographic boundaries of the reservation. Federal jurisdiction exists for all crimes committed by an Indian adult. Federal jurisdiction also exists for all crimes committed by an Indian juvenile in the Jamestown-Klallam Reservation, the Nooksack Reservation, the Sauk Suiattle Reservation, and the Upper Skagit Reservation. Tribal court jurisdiction exists for all offenses committed by an Indian adult or Indian juvenile on trust land.	State jurisdiction exists for all offenses committed by an Indian adult or Indian juvenile. Tribal court jurisdiction exists for all offenses committed by an Indian adult or Indian juvenile on fee simple property located within the exterior boundary of the reservation.	State jurisdiction exists for all crimes committed on a state, city, or county road by an Indian adult or Indian juvenile. A civil traffic infraction may only be issued if the Tribe does not have a comprehensive traffic code. If the Tribe has a comprehensive traffic code, then a report should be forwarded to the tribal prosecutor for any action the Tribe should wish to take. Tribal court jurisdiction exists for all offenses committed by an Indian adult or Indian juvenile on public roads located within the exterior boundary of the reservation.
	Non-Indian Defendant	State court jurisdiction exists for all crimes committed by non-Indian adults and non-Indian juveniles. No tribal court jurisdiction over a non-Indian. Tribal officers may detain non-Indian law breakers until a state officer can report to the scene.	State court jurisdiction exists for all crimes committed by non-Indian adults and non-Indian juveniles. No tribal court jurisdiction over a non-Indian. Tribal officers may detain non-Indian law breakers until a state officer can report to the scene.	State court jurisdiction exists for all crimes and civil infractions committed by non-Indian adults and non-Indian juveniles. No tribal court jurisdiction over a non-Indian. Tribal officers may detain non-Indians who have committed a crime until a State commissioned officer can report to the scene.

*Under these rules, more than one entity (*i.e.* Tribal and State) may have jurisdiction over a particular individual and crime at the same time. Also, these rules do not apply to some reservations.

No State jurisdiction exists over Indian adults or Indian juveniles anywhere in the Jamestown-Klallam Reservation, the Nooksack Reservation, the Sauk Suiattle Reservation, the Snoqualmie Reservation, and the Upper Skagit Reservation.

State jurisdiction over Indian adults or Indian juveniles exists anywhere in the Muckleshoot Reservation, the Nisqually Reservation, the Skokomish Reservation, the Stillaguamish Reservation, and the Squaxin Island Reservation.

** The easiest way to determine whether a piece of property is fee or trust is to contact the county auditor. Trust property is exempt from taxes and the records will reflect that. Tulalip Reservation has a special class of fee property that is subject to the same rules as trust property.

Prepared by the Washington Association of Prosecuting Attorneys

ARREST WARRANTS

	TRUST PROPERTY WITHIN RESERVATION	FEE SIMPLE PROPERTY WITHIN RESERVATION	PROPERTY OUTSIDE RESERVATION
TRIBAL COURT	State officers may not serve tribal court arrest warrants on Indians or non-Indians.	State officers may not serve tribal court arrest warrants on Indians or non-Indians.	State officers may not serve tribal court arrest warrants on Indians or non-Indians.
STATE COURT	State officers may serve arrest warrants upon non-Indians or Indians in accordance with normal procedures if the warrant is related to an off-reservation violation of state laws or to a crime committed within the reservation at a location where the state exercises criminal jurisdiction. If the subject of the warrant is an Indian who is currently in tribal custody, the State may have to follow the extradition procedure established by the Tribe to obtain custody of the individual.	State officers may serve arrest warrants upon non-Indians or Indians in accordance with normal procedures.	State officers may serve arrest warrants upon non-Indians or Indians in accordance with normal procedures regardless of whether the property is owned in fee or trust.

SEARCH WARRANTS

	TRUST PROPERTY WITHIN RESERVATION	FEE SIMPLE PROPERTY WITHIN RESERVATION	PROPERTY OUTSIDE RESERVATION
TRIBAL COURT	State officers may not assist in the service of a tribal search warrant. State officers may respond to the scene to take into custody any non-Indians who are found on site and who were found to be engaged in a violation of state law.	State officers may not assist in the service of a tribal search warrant. State officers may assist tribal officers in obtaining a parallel state court search warrant and state officers may serve such a warrant. State officers may respond to the scene to take into custody any non-Indians who are found on site and who were found to be engaged in a violation of state law.	State officers may not assist in the service of a tribal search warrant. State officers may assist tribal officers in obtaining a parallel state court search warrant and state officers may serve the parallel state court warrant.
STATE COURT	State officers may serve state search warrants without obtaining a parallel tribal search warrant or a federal search warrant if the warrant is related to an off-reservation violation of state laws or to a crime committed within the reservation at a location where the state exercises criminal jurisdiction.	State officers may serve state search warrants without obtaining a parallel tribal search warrant or a federal search warrant.	State officers may serve state search warrants on all property located outside the exterior boundary of a reservation regardless of whether the property is owned in fee or trust, by an Indian or a non-Indian.

The Differences Between the Fourth Amendment and Const. Art. I, § 7

	Fourth Amendment Rule	Const. art. I, § 7 Rule
Passengers	**Control of Passengers**. In order to preserve officer safety, an officer may place reasonable restrictions upon a passenger's freedom without identifying any specific factors that give rise to a safety concern. *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). **Identification of Passengers.** No seizure under the Fourth Amendment when an officer requests identification from an automobile passenger. *See People v. Paynter*, 955 P.2d 68, 75 (Colo. 1998).	**Control of Passengers**. Need specific objective safety concerns before restrictions can be placed upon the movements of passengers located in a lawfully stopped vehicle. *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007), **Identification of Passengers** May not ask a passenger, in a vehicle that was stopped for a traffic infraction, his name or whether he is willing to show the officer his identification absent an independent reason justifying the request. *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004); *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005).
Search of Vehicles Incident to Arrest – What	**Locked Containers and Trunks.** When a vehicle may be searched incident to arrest, an officer may open locked containers and may examine items in a trunk. *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed.2d 768 (1981); *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed.2d 572 (1982) **Items that May Belong to Another.** Officer may search passenger's belongings that are found in the car. *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).	**Locked Containers and Trunks.** Need warrant to enter locked containers contained in a car or to enter the trunk when the vehicle is searched incident to the arrest of the driver or owner. *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), **Items that May Belong to Another** Need warrant to search unlocked containers contained in a vehicle that the officer "knows or should knows" belong to a person other than the arrestee. *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999)
Search of Vehicles Incident to Arrest – When	If a person is arrested in a vehicle, the vehicle c an be searched "incident to arrest" without a warrant when: (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 496 (2009).	Warrantless searches under *Gant's* relevant evidence test are not permissible under Const. art. I, § 7. *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
Automobile Exception to the Warrant Requirement	The inherent mobility of automobiles allows officers to conduct a warrantless search when there is probable cause to believe that the automobile contains contraband. *United States v. Ross*, 456 U.S. 798, 823, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982); *Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 A.L.R. 790 (1925).	Const. art. I, § 7 bars warrantless searches of automobiles solely based upon probable cause to believe that the automobile contains contraband. *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983). *Accord State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885 (2010) (exigent circumstances exception based upon destructibility of evidence and mobility of vehicle not permitted by Const. art. I, § 7)
Consent Searches	**Right to Refuse Warning.** Specific notice of right to refuse consent to search not required. *United States v. Watson*, 423 U.S. 411, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976). *See also United States v. Cormier*, 220 F.3d 1103, 1111 (9th Cir. 2000), *cert. denied*, 531 U.S. 1174 (2001) (denying a motion to suppress evidence collected by state officers in violation of *State v. Ferrier* because such warnings are not required by federal law). **Co-Habitant Consent.** While an express denial of access from one co-habitant will invalidate another co-habitant's consent to search, officers do not have to affirmatively obtain consent from everyone who is present prior to conducting a warrantless search. *Georgia v. Randolph*, 547 U.S. 103, 164 L. Ed.2d 208, 126 S. Ct. 1515 (2006). **Authority to Consent.** Evidence obtained pursuant to a consent search will only be admissible if the police officer had a reasonable good faith belief that the person authorizing the search has the authority to do so. *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). **Traffic Stops.** The Fourth Amendment does not require that a lawfully seized driver be advised that he is "free to go" after the traffic citation is issued, before his consent to search will be recognized as voluntary. The request for consent did not have to be based upon any	**Right to Refuse Warnings.** Need to advise an individual of his or her right to refuse to consent to a search and to limit the scope of search or consent is invalid. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). (invalidating "knock and talks") **Co-Habitant Consent** A consent search is invalid unless officers obtain express consent from each person who shares equal control over the property and who is present when consent is requested. *State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989); *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005) (someone can be "present" even if asleep in another room). **Authority to Consent**. Evidence obtained pursuant to a consent search will only be admissible if the person tendering consent had the actual authority to do so. *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005) **Traffic Stops**. An officer may not extend a traffic stop for an infraction in order to request consent to search the vehicle unless the officer has a reasonable suspicion that evidence of a crime will be found in the vehicle. *See generally*, *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997); *State v. Veltri*, 136 Wn. App. 818, 150 P.3d 1178 (2007); *State v. Cantrell*, 70 Wn. App. 340, 853 P.2d 479 (1993), *rev'd in part on other grounds*, 124 Wn.2d

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	articulable facts that the driver is engaged in criminal conduct or that the car contains contraband. *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996).	183 (1994); *State v. Tijerina*, 61 Wn. App. 626, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991).
Control of Arrested Individuals	An arrest allows an officer to monitor the movements of the arrestee, even to the extent of following the arrestee into another room. *Washington v. Chrisman*, 455 U.S. 1, 7, 70 L. Ed. 2d 778, 102 S. Ct. 812 (1982).	An arrest does not allow the officer to accompany the detainee into another room. An arrest does not allow the officer to accompany a friend or relative of the detainee when that person leaves the officer's sight to retrieve property belonging to the detainee. *State v. Kull*, 155 Wn.2d 80, 118 P.3d 307 (2005) (officer who arrested defendant in the laundry room on a misdemeanor warrant violated the defendant's right to privacy when they accompanied her and her friend into her bedroom so the defendant could retrieve her purse which held her bail money; cocaine located on top of the defendant's dresser and in her purse was suppressed); *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (campus police officer who arrested an underage college student for the offense of minor in possession of alcohol violated the student's privacy rights by entering the student's dorm room after the officer who accompanied the student into the dorm room to retrieve his identification noticed what the officer believed to be marijuana).
Emergency Entries	The officer's subjective motivation is irrelevant in determining whether a warrantless entry under the emergency doctrine was reasonable. *Brigham City v. Stuart*, 547 U.S.398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006).	The officer's subjective motivation is relevant in determining whether a warrantless entry under the emergency doctrine was lawful. *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011).
Good Faith Exception to the Exclusionary Rule	Evidence discovered in a search incident to an arrest under a statute that is later declared to be unconstitutional is not subject to exclusion. *Michigan v. DeFillippo*, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).	The "good faith" exception to the exclusionary rule, that allows the use of evidence collected in cases that involve police acting under a mistaken but good faith belief that their actions were constitutional, is inconsistent with article I, section 7 of the Washington State Constitution. *State v. Adams*, 169 Wn.2d 487, 238 P.3d 459 (2010).

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Inevitable Discovery	The federal doctrine allows admission of illegally obtained evidence if the State can "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).	The inevitable discovery doctrine is inconsistent with Const. art. I, § 7. *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009).
Inventory Searches	Police may inventory the contents of closed containers and car trunks when impounding a vehicle pursuant to a standardized procedure. *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). A driver need not be offered an opportunity to make other arrangements for the safekeeping of his property before a vehicle may be impounded. *See Colorado v. Bertine*, 479 U.S. 367, 371-73, 93 L. Ed. 2d 739, 107 S. Ct. 738 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 368-69, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 (1976); *United States v. Penn*, 233 F.3d 1111, 1117 (9th Cir. 2000).	Police may not enter a trunk of an impounded vehicle to inventory the contents. Nor may police open an unlocked, but closed container to inventory the contents. *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998); *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). A vehicle may not be impounded until an officer exhausts reasonable alternatives. *See State v. Williams,* 102 Wn.2d 733, 689 P.2d 1065 (1984).
Open Fields	The Fourth Amendment authorizes the warrantless entry into open fields. *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) (forested area and field located one mile from farmhouse); *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924).	Const. art. I, § 7 protects fields as well as curtilege from warrantless entry. *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984); *State v. Thorson*, 98 Wn. App. 528, 990 P.2d 446 (1990).
Phone Records, Electric Records, Motel Records, Bank Records, Etc.	Telephone user has no legitimate expectation of privacy in telephone pen register showing the numbers dialed. *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed.2d 220 (1979). A motel guest has no reasonable expectation or privacy in motel registration records, so police do not require a warrant in order to view such records. *States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000), *cert. denied*, 531 U.S. 1174 (2001). There is no legitimate expectation of privacy in a power company's records of electrical consumption at a person's	Need judicial permission to get phone records or install pen register. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) Practice of randomly checking the names of guests in motel registry for outstanding warrants without individualized or particularized suspicion violated defendant's rights under Wash. Const. art. I, § 7. *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007). There is a privacy interest in electric consumption records preventing their disclosure by a public utility district

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	residence. *See, e.g.*, *United States v. Porco*, 842 F. Supp. 1393, 1398 (D. Wyo. 1994); *State v. Kluss*, 125 Idaho 14, 867 P.2d 247 (Ct. App. 1993); *People v. Dunkin*, 888 P.2d 305 (Colo. Ct. App. 1994). Bank customer has no legitimate expectation of privacy in bank records. *United States v. Payner*, 447 U.S. 727, 732, 65 L. Ed. 2d 468, 100 S. Ct. 2439 (1980).	employee without authority of law. *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997).
Pretext Stops	Stop is valid under the Fourth Amendment regardless of the officer's true reasons if the facts establish a violation of law). *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 1774-76, 135 L. Ed. 2d 89 (1996).	Need "clean thoughts" when making an objectively reasonable stop. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).
Private Search Doctrine	A warrantless search by a state actor does not offend the Fourth Amendment if the search does not expand the scope of the private search. *United States v. Jacobsen,* 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984); *Walter v. United States*, 447 U.S. 649, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980).	"[T]he private search doctrine is inapplicable under the Washington Constitution", because "[t]he individual's privacy interest protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor." *State v. Eisfeldt*, 163 Wn.2d 628, 636, 638, 185 P.3d 580 (2008).
Probable Cause	The moderate smell of marijuana emanating from a vehicle, without more, establishes probable cause to arrest all occupants of the vehicle. The Fourth Amendment does not require individualized probable cause for each occupant of the vehicle. *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003).	The moderate smell of marijuana emanating from a vehicle, without more, will not provide probable cause to arrest any of the occupants of the vehicle. Const. art. I, § 7 requires individualized probable cause for each occupant of the vehicle, *State v. Grande*, 164 Wn.2d 135, 187 P.3d 248 (2008).
Random School Drug Testing	Random drug testing of public school athletes and of students involved in extracurricular activity is permissible under the Fourth Amendment. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995); *Bd. of Educ. v. Earls, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735* (2002).	Random and suspicionless drug testing of student athletes violates Const. art. I, § 7. *York v. Wahkiakum*, 163 Wn.2d 297, 178 P.3d 995 (2008)

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Search Warrants	Information from an informant that is offered in support of a search warrant need not pass muster under both prongs of the *Aguilar-Spinelli* test. *See Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (abandoning the "two prong test" announced in *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 and *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 and instead applying the totality of the circumstances analysis in which deficiency in one of the two factors considered in *the Aguilar-Spinelli* test, veracity and basis of knowledge, may be mitigated in proving probable cause by a strong showing of the other).	Information from an informant that is offered in support of a search warrant must satisfy both the "basis of knowledge" and "veracity" prongs of the *Aguilar-Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 440, 688 P.2d 136 (1984).
Sobriety Checkpoints	Stationary roadblocks for checking driver's licenses and registration, and for the interdiction of alcohol-affected drivers are permissible under the Fourth Amendment. *Mich. Dep't of State Police v. Sitz,* 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990); *Delaware v. Prouse*, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979).	Sobriety checkpoints violate the right to not be disturbed in one's private affairs guaranteed by article 1, section 7. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988).
Standing	A defendant who is charged with a possessory offense must establish an "expectation of privacy in the area searched" before the defendant can prosecute a motion to suppress any seized evidence. *United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980).	A defendant who is charged with a possessory offense may rely on the automatic standing doctrine, and need not establish ownership of the seized item or an expectation of privacy in the area searched. *State v. Jones*, 146 Wn.2d 328, 332-33, 45 P.3d 1062 (2002); *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980).
Trash cans	Because there is no reasonable expectation of privacy in garbage once it is placed at the can, officers do not need a warrant to examine the contents of a trash bag or trash can. *California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed.2d 30 (1988)	Officers need a warrant in order to examine the contents of a trash can or garbage bag either at the curb or once in a garbage truck. *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990)