CONFESSIONS, SEARCH, SEIZURE, AND ARREST
A GUIDE FOR POLICE OFFICERS
AND PROSECUTORS
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[1]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).

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.").

   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"

   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 (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 (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. 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*, __ U.S. __, 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. 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. 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 (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*, No. 08-99030, ___ F.3d ___ (9th Cir. Apr. 28, 2011).

4. Procedural issues.

a. 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 using an interpreter, every possible effort should be made 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).

b. 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 Doody v. Ryan*, No. 06-17161, ___ F.3d ___ (9th Cir. May 4, 2011) (*Miranda* warnings were "defective" where the officer deviated from the language of the form).

ii. 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).

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

iv. 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. 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*, ___ U.S. ___, 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).

d. 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*, No. 06-17161, ___ F.3d ___ (9th Cir. May 4, 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?"

D. Custodial Interrogation

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

a. 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.

b. 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).

i. 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).

ii. 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. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992).

iii. 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).

2. "Custody" means:

a. 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. *State v. Harris*, 106 Wn.2d 784 (1986).

i. 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).

b. "In custody" and "seizure" or "seized" (not free to leave) are not the same.

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

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

B. 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.

C. *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*, 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).

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.2d

210, 95 P.3d 345 (2004); and *State v. Ustimenko*, 137 Wn. App. 109, 151 P.3d 256 (2007).

ii. "In custody" often means the suspect has been cuffed and is in a secure environment, even if not actually arrested.

iii. "In custody" for purposes of *Miranda* means freedom of action curtailed to a degree associated with formal arrest. *Berkemmer v. McCarty*, 468 U.S. 420 (1984).

iv. 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, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976).

c. 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).

d. 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 Maryland v. Shatzer*, ___ U.S. ___, 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).

e. Factors to be considered in deciding whether someone is "in custody":

i. the place of the interrogation

ii. whether the interrogation is conducted during normal business hours or is conducted at an odd hour of the night

iii. the presence of friends, relatives or neutral persons at the interview

iv. the presence or absence of fingerprinting, photographing, and other booking procedures

v. telling a suspect that s/he is under arrest

vi. the length and mode of the interrogation

vii. the existence or probable cause to make the arrest

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

f. Factors that purportedly play no part in deciding whether an individual is "in custody" for purposes of *Miranda*:

i. the suspect's youth

ii. The suspect's lack of prior exposure to the criminal justice system.

Yarborough v. Alvarado, 541 U.S. 652, 124 S. Ct. 2140, 159 L. Ed. 2d 938 (2004); *but see 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).

Whether a court may consider a juvenile's age in a *Miranda* custody analysis in evaluating the totality of the circumstances and determining whether a reasonable person in the juvenile's position would have felt he was not free to terminate police questioning and leave is the issue presented in a case argued in the United States Supreme Court on March 23, 2011. *See J.D.B. v. North Carolina*, No. 09-11121. A decision should be issued in this case by late June, 2011.

g. 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:

i. 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); *State 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).

ii. 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).

iii. 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).

iv. 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 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).

v. 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).

vi. 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).

vii. 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).

viii. 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).

h. 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:

i. the number of law enforcement personnel

ii. the number of law enforcement agencies represented

iii. whether the law enforcement representatives are armed

iv. whether the suspect was at any point restrained, either by physical force or by threats;

v. whether the suspect was isolated from others

vi. 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).

3. "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, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980); *State v. Johnson*, 48 Wn. App. 681, 739 P.2d 1209 (1987).

a. 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, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980).

i. 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).

ii. 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).

b. 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, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (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).
- 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).

- Routine inquiries by a guard concerning the security status of prisoners are not interrogation. *Kemp v. Ryan*, No. 08-99030, ___ F.3d ___ (9th Cir. Apr. 28, 2011).
- 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. Invocation of Rights

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

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

3. 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, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). This request must, however, be made to an officer. A request for counsel at arraignment or first appearance, however, does not prevent officers from contacting the defendant to request an interview. *See Montejo v. Louisiana*, ___ U.S. ___, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009).

   a. 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. 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*, ___ U.S. ___, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010). A break in custody can include incarceration in the general prison population. *Id.*

      ii. 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).

      ii. *Edwards* and *Roberson* 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*, ___ U.S. ___, 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).

b. 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*, ___ U.S. ___, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010), will also apply in the different investigation context.

c. Suspect's request for counsel must be unequivocal. *Davis v. United States*, 512 U.S. 452, 458-59, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (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).

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).

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).

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).

d. 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. 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. 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*, ___ U.S. ___, 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)

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).

5. 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).
- 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

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

    a. State constitution, Const. art. I, § 22, is co-extensive with the Sixth Amendment. *See generally State v. Medlock*, 86 Wn. App. 89, 97-935 P.2d 693, *review denied*, 133 Wn.2d 1012 (1997).

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

3. 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).

4. 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).

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

b. 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).

5. 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).

6. 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. 2001), *cert. denied*, 534 U.S. 1034, 122 S. Ct. 576, 151 L. Ed. 2d 448 (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

1. 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).

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

   b. "Unrelated crimes" in the context of the Sixth Amendment means those crimes that do not satisfy the *Blockburger* double jeopardy test. *Texas v. Cobb*, 121 S. Ct. at 1343.

      i. 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).

2. 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.

   a. 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

1. 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)).

2. 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, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A.L.R. 357 (1938).

   a. 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.

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

      ii. 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.

      iii. 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).

3. *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.

   a. 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.

4. 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. 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. 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).

ii. 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).

5. 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*, ___ U.S. ___, 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. 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).

   a. Court rule right is not the same as an arrested person's *Miranda* rights.

      i. The *Miranda* warnings contained on some departmental issued cards will not adequately advise a suspect of his or her court rule rights to counsel.

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

2. A person who is unable to pay a lawyer is entitled to have one provided without charge." [CrR 3.1(c)(1)]

B. Practical Aspects of the Court Rule Right to Counsel

1. 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 with an attorney is not required. *Bellevue v. Ohlson*, 60 Wn. App. 485, 803 P.2d 1346 (1991). The rules require more 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 defendants, 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).

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. 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, and 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.[2] 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. 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 DUII context, where an arrested driver has an Article I, section 11, "right to a reasonable opportunity to consult

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[2]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.").

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 FST 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.

IV. Consular Notification

A. Treaty Obligations in Criminal Cases

1. 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. 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." These countries are listed in the table that may be found in the appendix to these materials.

3. 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,[3] requires the United States

[3]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.

to review all violations and to fashion a remedy.

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 (3rd ed. July 2010).

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**.

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 (3rd ed. July 2010).

ii. If an arrested person claims to be a foreign national but has no "proof", the State Depart

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[4]:

> 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

[4]The State Department has translations of the advisements in Arabic, Cambodian, Chinese, Creole, Farsi, French, German, Greek, Hindi, Italian, Japanese, Korean, Polish, Portuguese, Russian, Spanish, Tagalog, Thai, and Vietnamese on the internet at http://travel.state.gov/law/consular/consular_753.html

notifying the consular official of the individual's detention. The language suggested by the State Department for the notice[5] 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.

      iii. Current fax numbers may be obtained on the State Department's web site: http://travel.state.gov/law/consular/consular_745.html

      iv. Suggested fax form available on the State Department's web site http://travel.state.gov/law/consular/consular_753.html

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?

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[5]See fn. 7.

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[6], 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

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[6] *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).

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.

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. 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. 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, 12 L. Ed. 2d 908, 84 S. Ct. 1774, 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).

2. 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).

3. A defendant may waive the voluntariness hearing.

4. 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).

5. 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. If multiple police officers are present when a defendant waives his *Miranda* warnings, the State's failure to call each and every officer at the admissibility hearing, or to explain on the record why an officer is not available to testify, can result in the suppression of statements. *See generally State v. Erho*, 77 Wn.2d 553, 559, 463 P.2d 779 (1970) (*"*Where, as here, there appears to be adequate opportunity to obtain and present the corroborating testimony of other officers present at the scene of apprehension and custody, we are satisfied the state fails to meet the heavy *Miran*da burden of proof when, without explanation, it omits to supply such corroboration.)

      - The continued viability of the "every officer must testify" rule will be decided by the Washington Supreme Court in *State v. Abdulle*, No. 84660-0 (Argued June 28, 2011).

      This does not mean, however, 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).

6. 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).

7. 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.

8. The 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

1. 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 (1984).

2. Any waiver of a suspect's *Miranda* rights must be knowingly, voluntarily, and intelligently made.

   a. 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, 93 L. Ed. 2d 473, 107 S. Ct. 515, 520-21 (1986); *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973).

   b. 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*, COA No. 39215-1-II, ___ Wn. App. ___, ___ P.3d ___ (May 6, 2011).

3. 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).

   a. 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, 36 L. Ed. 2d 854, 93 S. Ct. 2041, 2047 (1973)); *State v. Robtoy*, 98 Wn.2d 30, 36, 652 P.2d 284 (1982).

4. 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.

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

b. 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.

c. 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).

5. 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).

6. 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, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975); *State v. Hubbard*, 103 Wn.2d 570, 575, 693 P.2d 718 (1985).

a. Statements obtained pursuant to a purposeful violation of *Miranda* may not be utilized for any purpose. *See Missouri v. Seibert*, 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. In situations where the “two-step” process was not deliberately employed by police, *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.

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).

iii. 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* (1996) 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, 111 S.Ct. 685, 112 L.Ed.2d 677 (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 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*, 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

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

2. 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. at 133-34; *State v. Riley*, 19 Wn. App. 289, 298, 576 P.2d 1311 (1978); *State v. Ficher*, 13 Wn. App. 665, 667, 537 P.2d 1074 (1975).

D. Specific Issues that May Impact a Finding of Voluntariness

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, 19 L. Ed. 2d 35, 88 S. Ct. 189 (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, 16 L. Ed. 2d 895, 86 S. Ct. 1761 (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, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (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*, No. 06-17161, ___ F.3d ___ (9th Cir. May 4, 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, 20 L. Ed. 2d 77, 88 S. Ct. 1152 (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, 88 L. Ed. 1192, 64 S. Ct. 921 (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, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (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).

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, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970); *Haynes v. Washington,* 373 U.S. 503, 10 L. Ed. 2d 513, 83 S. Ct. 1336 (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 taht 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).

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, (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).

7. Language barriers

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

i. 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).

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

iii. 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).

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).

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 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.

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[7] 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

[7]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).

established against changed expectations. *See, e.g., State v. Sieyes*, 168 Wn.2d 276, 225 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.[8] 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.[9] *See, e.g, State v. Smith*, 88 Wn.2d 127, 133, 559 P.2d 970 (1977) ("It is apparent that

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[8] *See, e.g., ICC v. Brimson*, 154 U.S. 447, 478 (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 (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 (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.").

[9] 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 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.").

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

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.[10]

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.

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).

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

[10]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).

> 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.

2. Person. 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), *review granted*, 166 Wn.2d 1001 (2009); *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, ___ P.3d ___ (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 student who is removed from class to be questioned by a caseworker and a uniformed police officer regarding alleged abuse has been seized for Fourth Amendment purposes. A warrantless seizure of an alleged victim of child sexual abuse will violate the child's Fourth Amendment rights unless the officers have a court order, exigent circumstances, or parental consent. *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009). Children 12-years of age or older can provide their own consent. *See generally* RCW 13.40.140(10).

- 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 not 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*, No. 09-1272, slip op. at 16, ___ U.S. ___, ___ S. Ct. ____, ___ L. Ed. 2d ____ (May 16, 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.*

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).

2. For Arrest

a. Generally. 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*, No. 09-17188, ___ F.3d ___ (9th Cir. May 5, 2011).

b. **Objective.** Probable cause is generally an objective standard. 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. 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. **Pre-Text 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. More suppression motions can be expected as a result of the *Ladson* decision over the next few years. 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)

- 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).

c. **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.

d. **Erroneous Belief**. Because probable cause is generally an objective standard, 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. 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. 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).

ii. If the crime for which probable cause exists is one that must occur in the presence of the officer, the fruits of any search incident to the arrest would be properly suppressed if the crime did not occur in the presence of an officer.

e. **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).

- Laws of 2011, ch. 181, § 401 amends RCW 69.51A.040 to prohibit 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 maynot 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.

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).

f. **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*, No. 09-17188, ___ F.3d ___ (9th Cir. May 5, 2011).

g. **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

a. **Generally**. 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. Johnson, 28 Seattle Univ. L. R. 467, *Survey of Washington Search and Seizure Law: 2005 Update* (2005); Johnson, 22 Seattle Univ. L. Rev 337, *Survey of Washington Search and Seizure Law: 1998 Update* (1998); Utter, 3 University of Puget Sound Law Review 450, *Survey of Washington Search and Seizure Law: 1988 Update* (1988).

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*, No. 09-1272, slip op. 16, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (May 16, 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 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).

- 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. 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).

- 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).

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

- 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).

B. Community Caretaking

1. **Definition**. 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).

2. **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)).

3. **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).

4. **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).

5. **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.

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. Child

a. 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. 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[11] 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;

[11]RCW 10.31.110 was amended by both Laws of 2011, ch. 148 (effective date Apr. 21, 2011), and Laws of 2011, ch. 305 (effective date July 22, 2011). The version in these materials incorporate the changes made by both of these session laws.

(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. Protective custody of 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*, COA No. 38325-0-II, ___ Wn. App. ___, ___ P.3d ___ (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

1. Definition. 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).

a. 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 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."

b. Completed Crimes.

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.

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).

c. 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.

i. **Children.** The removal of a child from a classroom to interview the child about a crime the child witnessed is 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). Children 12-years of age or older can provide their own consent. *See generally* RCW 13.40.140(10).

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).

d. 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. 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.*

With regard to information from an unidentified informant, courts have relied 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).

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).

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:

- **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).

- **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).

- **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).

- **Motorcyclist.** Laws of 2011, ch. 49 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."

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).

The older cases to the contrary that the defense bar generally cites do not survive *Duncan*. *See, e.g.*, *State v. Chelly* 94 Wn. App. 254, 970 P.2d 376, *review denied*, 138 Wn.2d 1009 (1999) (indicating an office must have probable cause to stop a vehicle to investigate a traffic infraction); *State v. Cole*, 73 Wn. App. 844, 871 P.2d 656, *review denied*, 125 Wn.2d 1003 (1994).

The reasonable suspicion standard adopted by the Washington Supreme Court is consistent with the standard utilized by virtually every other circuit court of appeals. *See United States v. Booker*, 496 F.3d 717, 721 (D.C. Cir. 2007) (applying reasonable suspicion standard to stop for improper display of temporary license plate); *United States v. Pierre*, 484 F.3d 75, 84 (1st Cir. 2007) (upholding traffic stop because officer had reasonable suspicion that driver's license was suspended); *United States v. Delfin-Colina*, 464 F.3d 392, 397 (3d Cir. 2006) (joining the other circuits "in holding that the *Terry* reasonable suspicion standard applies to routine traffic stops," in case involving driver's obstructed vision); *United States v. Bueno*, 443 F.3d 1017, 1024-25 (8th Cir. 2006) (upholding stop on reasonable suspicion grounds where officers could not see temporary registration affixed to vehicle's windshield until after the stop); *Holeman v. City of New London*, 425 F.3d 184, 189 (2d Cir. 2005) ("The Fourth Amendment requires that an officer making . . . a stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation . . . ."); *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005) ("For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur . . . ."); *United States v. Chanthasouxat*, 342 F.3d 1271, 1275 (11th Cir. 2003) ("[A] traffic stop is a constitutional detention if it is justified by reasonable suspicion under *Terry* or probable cause to believe a traffic violation has occurred . . . ."); *United States v. Callarman*, 273 F.3d 1284, 1287 (10th Cir. 2001) (holding that cracked windshield gave officer reasonable suspicion to stop vehicle and stating that "[w]hile either probable cause or reasonable suspicion is sufficient to justify a traffic stop, only the lesser requirement of reasonable suspicion is necessary"); *United States v. Lopez-Soto*, 205 F.3d 1101, 1104-05 (9th Cir. 2000) (joining the other circuits and "reaffirm[ing] that the Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops," in case involving display of registration sticker); *United States v. Hassan El*, 5 F.3d 726, 729 (4th Cir. 1993) (holding that "an ordinary traffic stop . . . must be justified by probable cause or reasonable suspicion, based on specific and articulable facts," such as the commission of a traffic offense).

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 *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. 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.

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).

2. 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). 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 and the fellow officer rule 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:

- 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 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 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)

- 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).

- 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).

- 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 suspect from vehicle. *State v. Watkins*, 76 Wn. App. 726, 729, 887 P.2d 492 (1995).

- Performance of field sobriety tests. *See 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).

- 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).

- 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:

- 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).

- 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).

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).

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).

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.

A suspect who refuses to provide his or her name during a *Terry* stop has not committed a crime. *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*, No. 83992-1, ___ Wn.2d ___, ___ P.3d ___ (May 12, 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).

3. 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.

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)).

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).

- 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*, No. 09-30260, ___ F.3d ___ (9th Cir. Jul. 20, 2010).

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).

- **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).

b. **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).

c. **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*, ___ U.S. ___, 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,* ___ U.S. ____, 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. *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).

d. **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.

e. **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. **Custodial 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. An arrest warrant may be issued by any Washington judge. 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).

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.

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.

Arrest warrants may be issued by tribal judges. State officers may not serve tribal court arrest warrants on Indians or non-Indians.[12] 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

[12]A chart at the end of these materials set out the general rules regarding criminal law jurisdiction regarding Indians and Indian Country.

(2002); *Queets Band of Indians v. State*, 102 Wn.2d 1, 4-5, 682 P.2d 909 (1984).

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).

b. **Warrants Check.** A check for any outstanding arrest warrants is a 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?

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. 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).

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.

In Washington, RCW 10.31.100 provides that an officer may make a warrantless arrest when:

i. There exists probable cause to believe a felony has been committed.

ii. There has been a misdemeanor committed in the presence of the officer.

- **Judicially Created Exception.** There is a judicially created exception to this statutory authorization for very 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).

- **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).

- **Municipal Ordinances.** A warrantless arrest may be made for a violation of a municipal criminal ordinance. *See State v. Kirwin*, 137 Wn. App. 387, 153 P.3d 883 (2007) ("'Misdemeanor' includes misdemeanor violations of municipal codes.").

A. Committed in the presence of the officer

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).

The viewing officer does not have to actually make the warrantless arrest for the non-felony offense. The viewing officer must, however, be a participant in the arrest. *See State v. Ortega*, 159 Wn. App. 889, 248 P.3d 1062 (2011) (an arrest is made "in the presence" of an officer where the officer observes the suspect committing the crime, directs fellow officers to make the arrest, keeps the suspect and fellow officers in view, and immediately proceeds to the location of the arrest to confirm that the fellow officers arrested the correct suspect.).

1. 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). Examples of offenses which the courts have held are non-continuing offenses:

- 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).

B. 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).

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.

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:

- There exists probable cause to believe that a misdemeanor has been committed outside of the officer's presence involving (i) harm or threats of harm; (ii) taking of property; (iii) the use or possession of cannabis; (iv) the acquisition, possession, or consumption of alcohol by a person under 21-years; or (v) criminal trespass.

  - Mere possession of drug paraphernalia does not provide probable cause for arrest under state law. *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. 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.

  - Laws of 2011, ch. 181, § 401 amends 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.

- There exists probable cause to believe that a person has committed or is committing any act of indecent exposure.

- There exists probable cause to believe that a person has committed or is committing: (i) hit and run, attended or unattended; (ii) DUI or physical control; (iii) driving while license suspended or revoked; (iv) negligent driving in the 1st degree; or (v) reckless driving.

i. Non-listed traffic offenses. For more minor traffic offenses which do not appear in the preceding paragraph, a custodial arrest may only occur if the officer has reasonable grounds to believe that the driver will not respond to a citation. *See State v. Hehman*, 90 Wn.2d 45, 578 P.2d 527 (1978). The following factors may give rise to such a belief:

- 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).

ii. 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).

iii. 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.

- Arrest is not allowed for civil infractions, and the person must be released upon issuance of the citation.

- 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).

- An officer conducting an investigation at the scene of a motor vehicle accident may arrest the driver of a vehicle involved in the accident if the officer has probable cause to believe that the driver has committed in connection with the accident a violation of any traffic law or regulation. ***(This provision is antiquated and is of no effect now that most traffic laws and regulations have been decriminalized.)***

- 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.

- There is probable cause to believe that a person has operated a vessel in a reckless manner or while under the influence of intoxicants.

- There exists 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.

- There exists probable cause believe that a person, within the last 24 hours, has willfully or recklessly disrupted the normal functioning of a health care facility or willfully or recklessly interfered with access to or from a health care facility. *See* RCW 9A.50.020.

RCW 10.31.100 provides that an officer ***shall*** make a warrantless arrest when:

- 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."

"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).

- 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 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.

- 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.

- The intent of the mandatory arrest provisions is to protect 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).

- 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).

- 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.

- An office could be held liable for not making an arrest as required by the statute.

- The various types of court orders are described in the following chart. Key facts to recall regarding all of the various orders are:

  A. 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*, No. 76224 (July 27, 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*, No. 76224 (July 27, 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."

  B. 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.

  C. 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.

D. 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.

E. 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).

COMPARISON OF COURT ORDERS

FAMILY AND DOMESTIC VIOLENCE ORDERS

KIND OF ORDER	DOMESTIC VIOLENCE NO-CONTACT ORDERS	DOMESTIC VIOLENCE PROTECTION ORDERS	FAMILY LAW RESTRAINING ORDERS	FOREIGN PROTECTION ORDERS
Nature of Proceeding	Criminal in context of pending criminal action. *See* Chapter 10.99 RCW	Civil, under RCW 26.50	Civil, normally in context of pending dissolution or other family law action. *See, e.g.,* 26.09, 26.10, and 26.26	Civil or Criminal, under the law of the state or tribe where the order was issued
Who may Obtain order	The prosecuting attorney, on behalf of victims of domestic violence, when criminal charges are filed. Limited ability for order to be imposed on an individual who is released from jail pending his or her first appearance in court.	Petitioner who has been a victim of domestic violence or who fears abuse from a family or household member.	Petitioner who is either married to respondent or has a child in common with the respondent.	Depends upon the law of the state or tribe where the order was issued.
How is the Order obtained	Prosecution, generally after consultation with the victim, will make a request to the court for issuance of an order. Order may be obtained regardless of the victim's wishes.	Victim files petition. Order may be obtained telephonically in special circumstances. May also be obtained during the course of a family law matter.	Victim files a petition for divorce, legal separation, or child custody, or a paternity action.	Depends upon the law of the state or tribe where the order was issued.
Where is the Order obtained	District, Municipal or Superior Court through the prosecuting authority.	District, Municipal, or Superior Court. Superior Court only if family law action pending or if case involves children or order to vacate home.	Superior Court only.	Depends upon the law of the state or tribe where the order was issued.
What does the Order provide	No contact with petitioner directly or indirectly anywhere by phone, in writing, or in person. Prohibition from knowingly coming within, or knowingly remaining within, a specified distance of a location.	Temporary: Exclusion from a residence, prohibition from knowingly coming within, or knowingly remaining within, a specified distance of a location. no acts of violence, no interference with custody of minor children. Full: All of the above and custody and visitation schedule, treatment or counseling, court costs, specific relief or assistance.	Temporary or Full: Various restraint provisions including exclusion from a residence, prohibition from knowingly coming within, or knowingly remaining within, a specified distance of a location, no acts of violence or harassment, custody and visitation directives. .	Depends upon the law of the state or tribe where the order was issued.
Cost of the Order	None.	No cost to petitioner.	Same as dissolution (divorce) filing fee. The filing fee may be waived if indigent. Petitioner pays related costs and service fees.	Depends upon the law of the state or tribe where the order was issued.

KIND OF ORDER	DOMESTIC VIOLENCE NO-CONTACT ORDERS	DOMESTIC VIOLENCE PROTECTION ORDERS	FAMILY LAW RESTRAINING ORDERS	FOREIGN PROTECTION ORDERS
How does the respondent receive notice of the Order	Verbal and written notice given to the defendant when order is entered. Order may be entered at any stage of the proceeding, including the bail hearing, the arraignment, or the sentencing.	Notice served on respondent by police officer, private party, or process server. Notice by certified mail, or publication authorized in limited circumstances.	Notice served on respondent or respondent's attorney generally by process server, private party, or police server.	Depends upon the law of the state or tribe where the order was issued.
Consequences if Order is knowingly violated	Mandatory arrest. Release pending trial may be revoked. Additional criminal or contempt charges may be filed. Class C felony if assault or reckless conduct accompanies a violation. Class C felony if two or more prior convictions of any similar type of order. Otherwise gross misdemeanor. *See* RCW 26.50.110.	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless conduct accompanies a violation. Class C felony if two or more prior convictions of any similar type of order. Otherwise gross misdemeanor. *See* RCW 26.50.110.	Mandatory arrest if criminal legend appears. Possible criminal charges or contempt. Class C felony if assault or reckless conduct accompanies a violation. Class C felony if two or more prior convictions of any similar type of order. Otherwise gross misdemeanor. *See* RCW 26.50.110.	Mandatory arrest for violating restraint and exclusion provisions or other provision where the foreign order expressly provides for mandatory arrest. Possible criminal charges or contempt. Class C felony if assault or reckless conduct accompanies a violation. Class C felony if two or more prior convictions of any similar type of order. Otherwise gross misdemeanor. *See* RCW 26.50.110.
Duration of Order	Set period of time, usually until trial and/or sentencing are concluded. Post-sentencing provision may last up to the statutory maximum sentence and/or until probation is concluded.	Temporary: 14 days Full: 1 year or more	Temporary: 14 days. Preliminary: Pendency of action. Full: In final decree, permanent until modified.	Depends upon the law of the state or tribe where the order was issued.
How may the Order be modified	Only by the Court.	Only by the Court.	Only by the Court.	Depends upon the law of the state or tribe where the order was issued.
How do the police know the Order exists	Entered into WACIC, except those issued by jail prior to charging.	Entered into Washington State Criminal Information Computer (WACIC).	Entered into WACIC by request only.	Entered into WACIC if registered with a Washington Court. Depending upon the law of the state or tribe where the order was issued, the order may be entered into that jurisdictions' criminal information computer.

OTHER COURT ORDERS

KIND OF ORDER	ANTI-HARASSMENT ORDERS	HARASSMENT NO CONTACT ORDERS	ABUSED CHILD RESTRAINING ORDERS	VULNERABLE ADULT PROTECTION ORDERS	SEXUAL ASSAULT PROTECTION ORDER
Nature of Proceeding	Civil, under RCW 10.14	Criminal, under RCW 9A.46.040	Any judicial proceeding conducted in juvenile court in which it is alleged that a child has been subjected to sexual or physical abuse. *See* RCW 26.44.063.	Civil, under RCW 74.34.110.	Civil, under RCW 7.90.090. Criminal as part of a pending criminal proceeding or as a condition of a sentence, under RCW 7.90.150.
Who may Obtain order	Petitioner who has been seriously alarmed, annoyed, or harassed by conduct which served no legitimate or lawful purpose.	The prosecuting attorney, on behalf of victims of harassment, when charges are filed.	The Court on its own motion, the guardian ad litem, or any party.	A vulnerable adult who has been abandoned, abused, subject to financial exploitation or neglect. The Department of Social and Health Services may also obtain an order on behalf of a vulnerable adult.	Petitioner, or the parent of a petitioner or the guardian of a vulnerable adult, who has been a victim of nonconsensual sexual conduct or sexual penetration and who has a fear of future dangerous acts based upon specific statements or actions made at the time of the sexual assault of subsequently thereafter. The prosecuting attorney, on behalf of victims of sex offenses, when criminal charges are filed. Limited ability for order to be imposed on an individual who is released from jail pending his or her first appearance in court.
How is the Order obtained	Victim files a petition.	Prosecuting attorney, generally after consultation with the victim, will make a request to the court for issuance of an order. Order may be obtained regardless of the victim's wishes.	A party or the guardian ad litem will make a request to the court of issuance of an order or the Court may issue an order on its own. The order may be obtained regardless of the victim's wishes.	Victim or the Department of Social or Health Services will file a petition.	Victim or parent of a victim files a petition for a civil order. Prosecuting attorney, generally after consultation with the victim, will make a request to the court for issuance of an order. Order may be obtained regardless of the victim's wishes.
Where is the Order obtained	District Court, but in Superior Court when respondent is under the age of 18 years or when case is referred to the Superior Court by the District Court.	The criminal order may be obtained by the prosecutor in district, municipal, or superior court.	Superior Court Juvenile Department	Superior court.	The superior court, district court, and municipal court, but if the respondent is less than District Court, but only the superior court can issue a final order if the respondent is under the age of 18 years. The criminal order may be obtained by the prosecutor in district, municipal, or superior court.

KIND OF ORDER	ANTI-HARASSMENT ORDERS	HARASSMENT NO CONTACT ORDERS	ABUSED CHILD RESTRAINING ORDERS	VULNERABLE ADULT PROTECTION ORDERS	SEXUAL ASSAULT PROTECTION ORDER
What does the Order provide	Exclusion from and restrained from a specific distance from residence, work, or school of petitioner, no contact of any kind directly/indirectly by phone, writing, or in person.	Prohibition on contacting the victim, going to the victim's home , school, business or place of employment or other specific locations.	Prohibition on contacting the victim, entering the victim's family home without specific court approval, molesting or disturbing the peace of the victim, and on knowingly coming within, or remaining within, a specified distance of a specified location.	Various restraint provisions including exclusion from victim's residence, prohibition from contacting victim, prohibition upon knowingly coming within, or remaining within, a specified distance of a specified location.	Various restraint provisions including no contact with victim, prohibition upon going to the petitioner's residence, workplace, school or day care, and a prohibition upon knowingly coming within or remaining within, a specified distance of a specified location.
Cost of the Order	Basic district court or superior court filing fee. The filing fee may be waived if the petitioner is indigent. The service fee may be waived if the petitioner is indigent, the victim of stalking or a sex offense, or a family or household member.	No cost.	No cost to victim, since the order is generally obtained in a proceeding initiated by the Department of Social and Health Services.	Basic superior court filing fee. The fee may be waived at the discretion of the court.	No cost to the petitioner.
How does the respondent receive notice of the Order	Notice served on respondent or respondent's attorney by police, private party, or process server.	Verbal and written notice of criminal order given to the defendant when order is entered. Order may be entered whenever the defendant is being released on bail or personal recognizance.	Verbal and written notice generally given to the individual whose conduct will be restrained or to the individual whose conduct will be restrained's attorney. Ex parte orders may be entered only if the court finds evidence that irreparable injury could result if an order is not issued until the time for responding has elapsed.	Notice served on respondent or respondent's attorney by police, private party, or process server.	Notice of civil order served on respondent by police, private party, or process server. Verbal and written notice of criminal order given to the defendant when order is entered. Order may be entered at any stage of the proceeding, including the bail hearing, the arraignment, or the sentencing.

KIND OF ORDER	ANTI-HARASSMENT ORDERS	HARASSMENT NO CONTACT ORDERS	ABUSED CHILD RESTRAINING ORDERS	VULNERABLE ADULT PROTECTION ORDERS	SEXUAL ASSAULT PROTECTION ORDER
Consequences if Order is knowingly violated	May be arrested. Possible criminal charges or contempt if the violator is an adult. Contempt only if the violator is a juvenile. *See* RCW 10.14.120; RCW 10.14.170; RCW 10.31.100(8).	An intentional violation is a misdemeanor. RCW 9A.46.040(2). A warrantless arrest may only be made for violations that occur in the officer's presence, unless the violation also constitutes criminal trespass.	Mandatory arrest if criminal legend appears. *See* RCW 10.31.100(2)(a). Possible criminal charges or contempt. The crime is a misdemeanor. *See* RCW 26.44.067.	Mandatory arrest if criminal legend appears. Possible criminal charges or contempt. Class C felony if assault or reckless conduct accompanies a violation. Class C felony if two or more prior convictions of any similar type of order. Otherwise gross misdemeanor. *See* RCW 26.50.110.	Mandatory arrest if criminal legend appears. Possible criminal charges or contempt. Class C felony if assault or reckless conduct accompanies a violation. Class C felony if two or more prior convictions of any similar type of order. Otherwise gross misdemeanor. *See* RCW 26.50.110.
Duration of Order	Emergency: 14 days Full: 1 year	Until the criminal case is concluded.	Until further order of the Court.	Not to exceed 1 year.	Temporary civil order – 14 days. Full civil order fixed period not to exceed 14 days. Criminal orders – Set period of time, usually until trial and/or sentencing are concluded. Post-sentencing provision may last up to two years following the expiration of any senence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.
How may the Order be modified	Only by the Court.	Only by the Court.	Only by the Court.	Only by Court.	Only by Court.
How do the police know the Order exists	Entered into WACIC.	May be entered into WACIC. Victim is provided with a copy of the order.	Entered into WACIC.	Entered into WACIC.	Entered into WACIC.

b. **Where Allowed.** 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).

i. **Pursuit**

(1) What is the particular officer's scope of authority.

(2) Felony Pursuit <u>Within</u> Washington State

(a) Felony pursuit into a private dwelling

(i) All warrantless entries of a home are presumptively unreasonable.

(ii) 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. *Paxton v. New York*, 445 U.S. 573 (1980)

(iii) The government bears the burden of demonstrating exigent circumstances to overcome this presumption.

(iv) Factors to be considered in determining whether exigent circumstances exist to justify

a warrantless entry into a home:

- 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 of the suspect
- 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 (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.

(b) Felony pursuit into private business.

(i) Safety of officer and customers is of primary concern.

(3) Misdemeanor Pursuits Within Washington State

(a) Forced entry of private dwellings

(i) An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense.

- 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).

- 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).

- 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).

(ii) A "warrantless entry into a home requires 'real immediate, and serious consequences' if action is postponed to get a warrant." *Seattle v. Altschuler*, 53 Wn. App. 317, 321, 766 P.2d 518 (1989).

(iii) Hot pursuit alone is not sufficient exigent circumstances. *State v. Altschuler*, 53 Wn. App. 317, 321, 766 P.2d 518 (1989).

(b) Fresh pursuit onto property of private business.

(i) Parking lot in front of building.

- Try not to block the way to customers.

- Move patrol vehicle as soon as possible.

(ii) Inside a business establishment.

- Be reasonable.
- Ask suspect to step outside to conclude contact.
- Try not to confront the suspect with their violation in front of other customers.

(1) Out-of-State Pursuits

(a) Felony

(i) No pursuit into Canada.

(ii) Oregon/Idaho rules under RCW 10.89.

(A) Pursuit can be for any felony including the crime of felony eluding.

- 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.

  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.

- Oregon Uniform Act on Fresh Pursuit, O RS 133.410.
- Idaho Uniform Act on Fresh Pursuit, 19.701

(B) Rules Under RCW 10.89.

- Officer has same authority as officer in other state.
- Suspect must be taken immediately before local magistrate.
- An arrest for negligent homicide at an out-of- state hospital, for the purpose of taking a blood sample under implied consent, is legal because of felony pursuit law. *State v. Steinbrunn*, 54 Wn. App. 506, 774 P.2d 55, *review denied*, 113 Wn.2d 1015 (1989).
- Only Governor can extradite. RCW 10.88.210.

4. Use of force in making an arrest.

a. An officer may use all necessary means to effect an arrest. RCW 10.31.050; *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986).

b. Four reasons for officer to use force (to get the D-O-P-E):

i. Secure and **DETAIN** the offender

ii. **OVERCOME** resistance

iii. **PROTECT** the officer from bodily harm

iv. Prevent **ESCAPE** and to recapture

c. Statutory Use of Force

i. RCW 9A.16.020 -- 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.

ii. RCW 10.31.050 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

d. Use of force continuum

- Escalate force gradually.
- Must justify a jump in force.
- If person is only offering passive resistance – Use only enough force to take subject into custody and get sufficient help from others to to handle the person gently.

e. Citizen's use of force during arrest

- "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).
- 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).

f. Limitations on the Use of Force

i. 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).
- Fleeing felons

  DO NOT SHOOT AT ANY FLEEING FELON WHO IS NOT AN IMMEDIATE DANGER TO THE OFFICER OR TO OTHERS

  Deadly force may not be used against a nonviolent felon. *Phillins v. Ward*, 415 F. Supp. 976 (1975).

ii. Statutory limitations on the use of deadly force – RCW 9A.16.040

Deadly force is justified in the following cases:

- When directed by a court.
- When used to overcome resistance to legal duty.
- When used by officer to:
  - Apprehend a felon.
  - Prevent escape from a prison.
  - Prevent escape of a felon from a county or city jail.
  - To suppress a riot when participant is armed with a deadly weapon.
- Officer must have probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others.

  "Threat of serious physical harm" includes:
  - Suspect threatens officer with weapon.
  - Officer has probable cause to believe suspect has committed a crime involving serious physical harm.

iii. Court 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

a. 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.*

b. 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.

i. 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.

c. 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).

i. Result might be different if the crime for which the defendant was arrested is a felony.

ii. 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.

iii. 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".

6. Arrestees with Special Needs.

Accommodations may have to be made if the person under arrest has a physical challenge. The American With Disabilities Act applies to police officers.

a.. DUI arrests and deaf suspects. An officer need not wait for an oral interpreter before administering field sobriety tests to a profoundly deaf suspect. Nor must an officer refrain from administering field sobriety tests in favor of transporting the suspect to the police station for a breath test. An officer may administer field sobriety tests if the officer can give directions in a manner that the deaf suspect can understand.

Once at the station, an officer must take appropriate steps to ensure the his or her communication with the deaf arrestee is a s 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.

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).

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.
- A person's claim that the property is not theirs is not enough to establish abandonment. *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2006).

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*, COA No. 40181-9-II, ___ Wn. App. ___, ___ P.3d ___ (May 3, 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*, No. 83742-2, ___ Wn.2d. ____, ___ P.3d ___ (Apr. 28, 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 some courts have held that individuals have an expectation of privacy in the data stored on a cellular phone, such that a warrant or consent is always needed to access the archived voice mails, text messages, photographs, and address book. *See, e.g., State v. Smith*, 124 Ohio St. 3d 163, 920 N.E.2d 949 (2009) (the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement does not permit police officers to examine the contents of an arrestee's cell phone); *United States v. Park*, 2007 WL 1521573 (N.D. Cal. 2007) (officers cannot conduct a warrantless examination of the contents of a cellular phone under the booking exception to the warrant requirement); *State v. Isaac*, 209 P.3d 765; 2009 Kan. App. Unpub. LEXIS 492 (2009) (relying upon *State v. Rupnick*, 280 Kan. 720, 125 P.3d 541 (2005), to hold that since modern cell phones contain personal data in the same fashion as a computer, a search warrant is generally necessary to retrieve information stored on a cell phone; warrantless search incident to arrest may be appropriate when conducted immediately at the scene of the arrest, but not later at the station house). Other courts take a different view and allow for warrantless examination under certain exceptions to the warrant requirement. *See, e.g., United States v. Young,* 278 Fed. Appx. 242, 245-46 (4th Cir. May 15, 2008), *cert. denied*, 129 S. Ct. 514 (2008) (per curiam) (holding that officers may retrieve text messages from cell phone during search incident to arrest)*; United States v. Finley*, 477 F.3d 250 (5th Cir.), *cert. denied*, 549 U.S. 1353 (2007) (officer's warrantless search of the cellular phone's call records and text messages upheld as search incident to arrest); *United States v. Ortiz,* 84 F.3d 977 (7th Cir. 1996) (officer did not violate the Fourth Amendment by recovering, without a search warrant, phone numbers from a pager that was seized incident to arrest).

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 Storage Facilities**. 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)..

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).

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).

    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).

    The Florida Supreme Court has determined that a "sniff test" by a drug detection dog conducted at the front door of a private residence is a "search" under the Fourth Amendment that must be supported by probable cause and a search warrant. State v. Jardines, No. SC08-2101, ___ So.3d ____ (Fla. Apr. 14, 2011).

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*, No. 83742-2, ___ Wn.2d. ____, ___ P.3d ___ (Apr. 28, 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. Warrants

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).

Search warrants may be issued for evidence of both misdemeanors and felonies.

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).

- While CrR 4.7(b)(2)(vi) permits "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. 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. A superior court commissioner possesses the same authority. *See State v. Goss*, 78 Wn. App. 58, 895 P.2d 861 (1995). 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 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).

A district court judge may issue a search warrant for virtually any location within the county (some exceptions may apply for property located within an Indian reservation). *See State v. Uhthoff*, 45 Wn. App. 261, 724 P.2d 1103, *review denied*, 107 Wn.2d 1017 (1986). A district court judge may also issue a warrant in connection with an investigation of a charge already filed in superior court. *See State v. Stock*, 44 Wn. App. 467, 474-75, 722 P.2d 1330 (1986). A district court judge may not, however, issue a search warrant for property located outside of the county. *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).

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). 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).

A municipal court judge may issue a search warrant for virtually any location within the city limits (some exceptions may apply for property located within an Indian reservation). RCW 69.50.509 gives a municipal court judge the authority to sign search warrants for controlled substances violations, seemingly with no jurisdictional restraints.

i. Special Restrictions.

- 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).
- 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).

b. Place/Person to be Searched. The warrant must describe the place or person to be searched with specificity. The description of the person or place to be searched properly appears in the caption of the warrant and affidavit in support of search warrant (*i.e. State of Washington v. the two-story white house with green shutters located at the corner of Pike and Pine, Port Orchard, Washington, with a street address of 2265 Pike*).

i. **Buildings/Houses/Apartments**. In addition to the street address or apartment number, a description of the building or the location of the apartment in the building (*i.e.* No. 2D, an apartment located in the NE corner of the 2nd floor of the apartment building with a red door), can save a search warrant that contains a typographical error with respect to the house or apartment number. *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).

A warrant authorizing the search of a residence will not authorize entry into outbuildings or vehicles 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).

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.

- **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).

ii. **Vehicles**. Vehicles must be described with particularity. Color, make, model, license number, etc. should be included to the extent possible. 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).

- **Route of Travel.** The Washington Supreme Court recently held that warrants will be 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.

iii. **Person.** A warrant authorizing the search of an individual must describe the individual with sufficient particularity so that the police can identify him with reasonable certainty. Identifying the person to be searched by name is best. "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 "John Doe" warrant

that includes a physical description of the person to be searched and identifies the unnamed suspect's residence may be adequate. *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).

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.

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).

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. Items that May be Seized. A warrant must be for specifically authorized objects or people, i.e. any property that constitutes evidence of a criminal offense. 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.

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).

The required degree of particularity depends upon the nature of the materials sought and the circumstances of each case. 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 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*.

- 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).

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).

i. 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 personal 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 personal 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).

e. **Oath**. The affidavit, declaration, or testimony in support of the issuance of the warrant must be made under oath or affirmation. 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.

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.

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).

- **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 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.** Laws of 2011, ch. 181, § 901, which was vetoed, created a secure and confidential registry with the Department of Health for medical cannabis patients. Specific portions of the vetoed provision required officers investigating a cannabis-related incident to make reasonable efforts to ascertain whether the location or person under investigation is registered in the registration system, and include the results of this inquiry in the affidavit submitted in support of the application for the warrant. This requirement did not apply to investigations in which:

  (a) The peace officer has observed evidence of an apparent cannabis operation that is not a licensed producer, processor of cannabis products, or dispenser;

  (b) The peace officer has observed evidence of theft of electrical power;

  (c) The peace officer has observed evidence of illegal drugs other than cannabis at the premises;

  (d) The peace officer has observed frequent and numerous short-term visits over an extended period that are consistent with commercial activity, if the subject of the investigation is not a licensed dispenser;

  (e) The peace officer has observed violent crime or other demonstrated dangers to the community;

  (f) The peace officer has probable cause to believe the subject of the investigation has committed a felony, or a misdemeanor in the officer's presence, that does not relate to cannabis; or

  (g) The subject of the investigation has an outstanding arrest warrant.

  An officer seeking a search warrant for cannabis should determine whether any state[13] or local entity maintains a voluntary registry for medical cannabis users. If one is maintained, the officer should disclose the existence of the

[13]At least one bill was introduced during the 2011 Special Session that would create a registry. The Special Session had not concluded at the time this update was prepared.

registry, the efforts the officer made to determine whether the location or person has a current valid registry, or why no efforts were made to check the registry.

g. Probable Cause. The warrant must be issued upon probable cause. Conclusory statements must be avoided in providing probable cause. 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. 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).

iv. **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). Credibility of information is always considered higher when the informant is brought before the magistrate to swear under oath that the informant is telling the truth.

- **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*).

- **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.

  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. 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.*

- **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).

- **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). When such statements are against the informant's penal interest, the probability that the information is accurate is heightened. 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. 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).

vi. **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.

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:

- **Intoxication / Breath or Blood Alcohol Test** – Within 6 hours of the traffic stop. *State v. Dugas*, 296 S.W.3d 112 (Tex. App. 2009).

- **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)

- **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).

- **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).

- **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).

- **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*, ___ Wn.2d ___ (Apr. 27, 2010) (5 months okay, citing cases that upheld time periods as long as 2 years).

- **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).

vii. **Nexus.** 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).

viii. 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).

ix. 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.

x. Other Issues to Consider

- 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).
- 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.)).

- 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.

- 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.

- 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).

  - Laws of 2011, ch. 181, § 901, which was vetoed, created a secure and confidential registry with the Department of Health for medical cannabis patients. Specific portions of the vetoed provision required officers investigating a cannabis-related incident to make reasonable efforts to ascertain whether the

location or person under investigation is registered in the registration system, and include the results of this inquiry in the affidavit submitted in support of the application for the warrant. This requirement did not apply to investigations in which:

(a) The peace officer has observed evidence of an apparent cannabis operation that is not a licensed producer, processor of cannabis products, or dispenser;

(b) The peace officer has observed evidence of theft of electrical power;

(c) The peace officer has observed evidence of illegal drugs other than cannabis at the premises;

(d) The peace officer has observed frequent and numerous short-term visits over an extended period that are consistent with commercial activity, if the subject of the investigation is not a licensed dispenser;

(e) The peace officer has observed violent crime or other demonstrated dangers to the community;

(f) The peace officer has probable cause to believe the subject of the investigation has committed a felony, or a misdemeanor in the officer's presence, that does not relate to cannabis; or

(g) The subject of the investigation has an outstanding arrest warrant.

An officer seeking a search warrant for cannabis should determine whether any state[14] or local entity maintains a voluntary registry for medical cannabis users. If one is maintained, the officer should disclose the existence of the registry, the efforts the officer made to determine whether the location or person has a current valid registry, or why no efforts were made to check the registry.

xi. Computers

A number of cases dealing with search warrants for computers have been issued by courts. These cases 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

[14]At least one bill was introduced during the 2011 Special Session that would create a registry. The Special Session had not concluded at the time this update was prepared.

legal advisor and the local prosecutor.

A. **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).

B. **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).

C. **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.

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.

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 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 affidavit should be typed or printed legibly.

ii. The officer who signs the affidavit must fill out the affidavit in its entirety.

iii. Layout of affidavit:

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.

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, the warrant should include that limitation.

6. If the affidavit 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.

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 and warrant is written out by the officer. The written affidavit should contain the same information discussed in the previous 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.

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).

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.*

- **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.

- **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).

- **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).

- **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 arespecific 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).

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.

A. The rule exists to:

- Reduce the potential for violence to all parties from unannounced entry
- Prevent unnecessary property damage
- Protect the privacy rights of occupants.

B. 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:

(a) Have a warrant.

(b) Announce their identity. This is especially critical when officers are in plain clothes.

(c) Demand Admittance.

(d) State the purpose of their demand.

(e) Be explicitly or implicitly denied admittance.

C. 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.

D. Exemptions from the rule.

1. 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).

While the federal courts are happy with evidence that the suspect "may" have weapons, Washington courts indicate that a "no knock" entry requires the prosecutor to have ***probable cause*** to believe the suspect is armed or violent. *See State v. Markham*, 40 Wn. App. 75, 697 P.2d 263, *review denied*, 104 Wn.2d 1003 (1985).

“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 circumstances that were actually encountered during the service of the warrant. *See 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).

2. **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.

3. **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).

ii. **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).

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 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.

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.

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 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).

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

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. Ollivier*, COA No. 63559-0-I, ___ Wn. App. ___, ___ P.3d ___ (Apr. 18, 2011).

- 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.

If no one is present when the search warrant is executed, a copy of the warrant must be posted in a conspicuous place.

If no one is home when the warrant is executed, a copy of the warrant must be 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. 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.

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. 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).

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).

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 curtilege 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

General Rule. 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. There are some well delineated exceptions to the warrant requirement. 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. oluntariness 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.

Consent will virtually never be found to be voluntary where it is obtained only after an officer has indicated that if consent is not given a warrant will be obtained or that a refusal to consent will result in a search incident to arrest. *See State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489, 503-04 (2003).

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:

> 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.

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. 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. 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 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).

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. *State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989). 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).

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:

- 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).
- A spouse has joint control and equal right to occupancy of the premises, subject of course to a DV order or other court order restricting access. A spouse may consent to a search of the house and generally any evidence located may be used against either spouse.
- 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.
- 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) .
- 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.")

- 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. 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.

- 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).

- A landlord has no authority to consent to a search while the tenancy is still valid. A general authority to enter an apartment to inspect or repair does not give the landlord authority to consent to a search by police. 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.

- 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).

- 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).

- 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).

  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).

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).

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

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).

2. Plain View.

The 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. In a recent United States Supreme Court case, however, the Court held that inadvertence is no longer a requirement for the plain view exception. *Horton v. California*, 496 U.S. 128, 110 L. Ed.2d 112, 110 S. Ct. 2301 (1990). Washington courts seem to be following the federal law. *State v. Goodin*, 67 Wn. App. 623, 627-28, 838 P.2d 135 (1992), *review denied* 121 Wn.2d 1019 (1993); *State v. Hudson*, 124 Wn.2d 107, n.1, 874 P.2d 160 (1994); *State v. Fowler*, 76 Wn. App. 168, 883 P.2d 338 (1994), *review denied* 126 Wn.2d 1009 (1995). The classic example of a "plain view" occurs where an officer is serving a search warrant for stolen television sets and discovers marijuana plants.

The Washington Court of Appeals indicates that plain view involves three stages: viewing, reaching and seizing: (1) The officer must view the item to be seized without intruding unlawfully on the defendant's privacy; (2) the officer must reach the item without intruding unlawfully on the defendant's privacy; and (3) the officer must seize the item (a) without intruding unlawfully on the defendant's privacy (as opposed to the defendant's possession), and (b) with probable cause to believe the item is contraband or evidence of a crime. *See State v. Hoggatt*, 108 Wn. App. 257, 270, 30 P.3d 488 (2001).

- Plain view will not allow an officer to move an item such as a TV set to observe the serial number. *See Arizona v. Hicks*, 480 U.S. 321, 325, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); *State v. Murray*, 84 Wn.2d 527, 534, 527 P.2d 1303 (1974), *cert. denied*, 421 U.S. 1004 (1975).
- 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. *See State v. Johnson*, 104 Wn. App. 489, 502, 17 P.3d 3 (2001).

a. Computers

The application of plain view to computer contents is in a state of flux. Two separate rules[15] 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 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.

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[15]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).

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.

3. 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. 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**. Is the area of a property to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver v. United States,* 466 U.S. 170, 180, 80 L. Ed. 2d 214, 104 S. Ct. 1735 (1984) (*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).

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. *State v. Jesson*, 142 Wn. App. 852, 177 P.3d 139, *review denied*, 164 Wn.2d 1016 (2008).

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)

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*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). To further complicate matters, it is unclear whether the Washington Supreme Court's recent Const. art. I, § 7 opinion in *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), adopted the same rule as that announced in *Gant*, or a more stringent rule. Language in *Patton* can support both interpretations. *Compare* 167

Wn.2d at 384, n. 1 (indicating that *Gant* "articulat[ed] a similar rule" to that announced in *Patton*), and 167 Wn.2d at 396, n. 9 (" our decision is consistent with the United States Supreme Court's recent holding in Gant"), *with* 167 Wn.2d at 390 ¶ 16 (quoting the following passage from *State v. Ringer*, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983): "[a] warrantless search [incident to arrest] is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested"), and 167 Wn.2d at 384 ("We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.").

Subsequent to the issuance of the Washington Supreme Court's opinion in *Patton*, the Court issued *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009). The *Valdez* opinion does not reference the Court's *Patton* decision. Language in *Valdez* returns Washington to the rule announced in *State v. Ringer*, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983). *See Valdez*, 167 Wn.2d at 774 and 777. The *Ringer* rule provides that

> [a] warrantless search … is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.

Ringer, 100 Wn.2d at 699.

It must be noted, however, that neither *Ringer*, *Patton,* nor *Valdez* dealt with a search for evidence related to the "crime of arrest". All three cases involved defendants who were arrested on outstanding warrants. Whether Const. art. I, § 7 precludes a warrantless search for evidence of the crime of arrest once a defendant is secured in the police car may still be open to debate, when other individuals, who may destroy evidence, are present. *See generally Valdez*, 167 Wn.2d at 773 (citing *Ringer*, 100 Wn.2d at 691-93) (a search was permitted incident to arrest under common law to secure evidence of the crime of arrest so as to preserve it for trial. . . It is necessary to permit a search for weapons or destroyable evidence where a risk is posed because, should a weapon be secured or evidence of the crime destroyed, the arrest itself may likely be rendered meaningless—either because the arrestee will escape physical custody or because the evidence implicating the arrestee will be destroyed."). *But see State v. Wright*, 155 Wn. App. 537, 230 P.3d 1063, *review granted*, 169 Wn.2d 1026 (2010) (officer's warrantless search of the defendant's vehicle was lawful under both the Fourth Amendment and Const. art. I, § 7, where the officers had probable cause to arrest the defendant for possession of marijuana and a nexus existed between the defendant, the crime of arrest, and the search of the vehicle).

Whether Ringer, Patton, *Valdez* or some other rule will apply in Washington should be decided by the Washington Supreme Court in *State v. Snapp*, No. 84223-0. Oral argument was held in *Snapp* on May 19, 2011.

Officers, prosecutors, and the courts will grapple with the implications of *Gant*, *Patton,* and *Valdez* for years to come. The information that follows is the author's best guess of what *Gant* 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. Merely having probable cause to make the arrest is insufficient. *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*, 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).

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.). 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).

- Whether an arrest will authorize a warrantless search of a cell phone or computer is undecided at this time. Some courts hold that cell phones and computers may be treated the same as any other personal article. *See, e.g., United States v. Curtis*, 635 F.3d 704, 712-13 (5th Cir. 2011) (a police officer is authorized to search the electronic contents of a cell phone recovered from the area within an arrestee's immediate control); *United States v. Murphy,* 552 F.3d 405, 411 (4th Cir. 2009) (upholding warrantless search incident to arrest, refusing to distinguish cell phones based on their "large" storage capacity because of difficulty quantifying that term "in any meaningful way"); *People v. Diaz*, 51 Cal. 4th 84, 244 P.3d 501, 508 (Cal. 2011) (warrantless search, incident to a lawful arrest, of a cell phone with limited storage capacity does not become constitutionally unreasonable simply because other cell phones may have a significantly greater storage capacity); *Fawdry v. State*, No. 1D10-0896, ___ So.3d ___ (Fla. App. May 13, 2011) (search of a cell phone found in defendant's possession after an arrest pursuant to an unrelated warrant was valid under the Fourth Amendment because it was a search incident to arrest and a cell phone merely acts as a case (i.e. closed container) containing personal effects);

  While other courts have indicated that because cell phones can contain large amount of information and search of contents is not necessary to preserve safety of police or to prevent destruction of evidence, cell phones are not analogous to physical containers or items such as wallets and diaries for purposes of search incident to arrest exception. *See, e.g,, State v. Smith*, 124 Ohio St. 3d 163, 2009 Ohio 6426, 920 N.E.2d 949, 954 (Ohio 2009), *cert. denied*, 131 S. Ct. 102 (2010) (a cell phone is not a closed container for purposes of a Fourth Amendment analysis; a cell phone may not be searched under the incident-to-arrest exception to the warrant requirement; the fact that a cell phone may automatically delete data like call logs does not provide exigent circumstances for a warrantless search)

  Some courts have sought a middle ground allowing some warrantless searches of phones incident to the arrest of a person. In *Hawkins v. State*, 307 Ga. App. 253, 704 S.E. 2d 886, 891-92 (Ga. Ct. App. 2010), the Georgia Court of Appeals indicated that

  > Electronic "containers," on the other hand — including small electronic "containers," such as cell phones, that frequently are transported in vehicles — often will contain the most sensitive kinds of personal information, in which individuals may reasonably have a substantial expectation of privacy and for which the law offers heightened protection. Indeed, it is easy to imagine that cell phones with text messaging or e-mail

> functionality — including the cell phone in this case — may contain a significant number of the electronic equivalent of private papers . . . Moreover, such cell phones may very well contain privileged electronic communications, including communications between lawyers and clients, doctors and patients, and spouses.
>
> Given the volume and diverse nature of data that may be contained in a cell phone or other mobile electronic data storage device, we think courts generally should, as one prominent commentator has put it, treat such a device "like a container that stores thousands of individual containers in the form of discrete files." Kerr, "*Searches and Seizures in a Digital World*," 119 HARV. L. REV. 531, 555 (2005). Just because an officer has the authority to make a search of the data stored on a cell phone (that is, just because he has reason to "open" the "container") does not mean that he has the authority to sift through all of the data stored on the phone (that is, to open and view all of the sub-containers of data stored therein). Instead, his search must be limited as much as is reasonably practicable by the object of the search. *See Ross*, 456 U. S. at 824 (IV). Although it may not always be possible at the outset of a search to immediately identify the specific data that is the object of the search without examining something more, it more often than not will be possible to narrow in some meaningful way the sub-containers that might reasonably contain the object of the search. Where the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored on the phone.

In *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2009), the federal district court found a cell phone may not be searched incident to arrest unless officers have reason to believe it contains evidence related to the crime.

The United States Supreme Court has not specifically addressed this issue yet. The Supreme Court, however, has noted in the employee search context that special rules may need to be adopted for dealing with modern communication devices:

> The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment

implications of emerging technology before its role in society has become clear. *See, e.g., Olmstead v. United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), *overruled by Katz v. United States*, 389 U.S. 347, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In Katz, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. *See id.*, at 360-361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (Harlan, J., concurring). It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one amici brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. *See* Brief for Electronic Frontier Foundation et al. 16-20. Another amicus points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. *See* Brief for New York Intellectual Property Law Association 22 (*citing* Del. Code Ann., Tit. 19, § 705 (2005); Conn. Gen. Stat. Ann. § 31-48d (West 2003)). At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

Even if the Court were certain that the *O'Connor* plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. *See* 480 U.S., at 715, 107 S. Ct. 1492, 94 L. Ed. 2d 714. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that

> employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.
>
> A broad holding concerning employees' privacy expectations vis-a-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds.

City of Ontario v. Quon, ___ U.S. ___, 130 S. Ct. 2619, 2629-30, 177 L. Ed. 2d 216 (2010).

A prudent officer will proceed with caution in this area. S/he will treat a password protected phone or computer as a "locked container" that may not be searched absent a warrant or valid consent. *See State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), *overruled on other grounds by State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). An officer who views relevant evidence on a visible screen or monitor may use those observations to obtain a search warrant.

The search of an item that was "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).

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.

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 under two circumstances:

- If the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or
- If it is reasonable to believe the vehicle contains evidence of the offense of arrest.

Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 496 (2009).

A. The First *Gant* Exception.

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 also 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.

B. The Second *Gant* Exception (a/k/a "The Scalia Exception").

The recent Washington Supreme Court case of *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), announced a Const. art. I, § 7, rule governing searches incident to arrest that the Court characterized as "consistent with" or "similar" to the rule in *Gant*. *Patton*, 167 Wn.2d at 384, n. 1 and 396, n. 9. Nonetheless, there is some language in the *Patton* decision that could lead a reasonable person to believe that the Court's formulation of the second *Gant* exception is narrower than that adopted by the United States Supreme Court. *See Patton,* 167 Wn.2d at 390 ¶ 16 (quoting the following passage from *State v. Ringer*, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983): "[a] warrantless search [incident to arrest] is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested"), and 167 Wn.2d at 384 ("We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.").

On December 24, 2009, the Washington Supreme Court issued its opinion in *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009). *Valdez* returns Washington to the rule announced in *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983). Language in both *Valdez* and *Ringer* would appear to limit the second *Gant* exception to those occasions when the arrestee can access the vehicle to destroy evidence of the crime of arrest. If this language is strictly followed, warrantless searches will seldom be allowed for the reasons stated in the prior discussion of the first *Gant* exception. *See Valdez*, 167 Wn.2d at slip op. at 778 ("Under article I, section 7 the search was not necessary to remove any weapons the arrestee could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest that could be concealed or destroyed. The arrestee had no access to his vehicle at the time of the search.").

The Washington Supreme Court will consider the viability of a "relevant evidence" exception under Const. art. I, § 7 in *State v. Snapp*, No. 84223-0. *Snapp* was argued on May 19, 2011.

Early Washington case law supports adoption of a rule that is quite close to that announced by Justice Scalia. The Washington Supreme Court's early case law recognized a search incident to arrest exception to the warrant requirement. *See Olympia v. Culp*, 136 Wash. 374, 377-78, 240 P. 360 (1925). When the use of automobiles became

widespread, the court included them within the scope of searches incident to arrest:

> It has always been held that a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from him any evidence tending to prove the crime with which he is charged. If a search may be made of the person or clothing of the person lawfully arrested, then it would follow that a search may also be properly made of his grip or suit case, which he may be carrying. From this it seems to use to follow logically that a similar search, under the same circumstances, may be made of the automobile of which he has possession and control at the time of his arrest. This is true because the person arrested has the immediate physical possession, not only of the grips or suit cases which he is carrying, but also of the automobile which he is driving and of which he has control.

State v. Hughlett, 124 Wash. 366, 370, 214 P. 841 (1923).

The court fleshed out the parameters of the automobile search in subsequent cases. The rules required a case-by-case analysis, rather than the bright-line rule later adopted in *Stroud*. The validity of any automobile search eventually depended upon the officer having probable cause to believe the suspect was currently or recently engaged in criminal conduct, the officer reasonably believing that the automobile contained evidence related to that criminal conduct, and the automobile being reasonably close to the place of arrest. *See, e.g., State v. Jackovick*, 56 Wn.2d 915, 916-17, 355 P.2d 976 (1960) ("the officers who made the arrest believed, and had every reason to believe, that the appellant had committed a felony and that he had fled the scene in the car found parked back of his shop"); *State v. Cyr*, 40 Wn.2d 840, 844-45, 246 P.2d 480 (1952) ("the automobile in question was in such reasonably close proximity to the place of arrest, and there existed such probable cause to believe that a search of the vehicle would reveal evidence pertinent to the charge, that such search and seizure was incident to the arrest and therefore authorized by law."). If an officer could satisfy these three conditions, the search could proceed even after the arrestee was secured and unable to gain access to the vehicle in order to destroy evidence. *See, e.g.*, *Jackovick*, 56 Wn.2d at 916 (vehicle parked behind the offender's shop was searched after the offender was arrested in his shop); *Cyr*, 40 Wn.2d at 841 (vehicle parked on street searched after defendant was arrested inside an adjacent restaurant).

Evidence related to other crimes was admissible, but only when discovered during an authorized search for evidence related to the

crime of arrest or when securing the arrestee's possessions from loss. *Compare State v. Michaels*, 60 Wn.2d 638, 642-43, 374 P.2d 989 (1962) (evidence of gambling seized from the defendant's car when he was arrested for failing to signal a left turn was inadmissible as the officers did not "reasonably believe" that the automobile contained evidence of the crime of failing to signal a left turn), *with State v. Olsen*, 43 Wn.2d 726, 728, 263 P.2d 824 (1953) ("police officers were performing a routine duty in checking the articles [piled on the backseat] for safekeeping when the items were found which implicated the appellant" in a crime unrelated to the traffic offense for which he was arrested). If, however, evidence suggested that the arresting officer was exploiting either doctrine so as to conduct a general search of the vehicle, evidence found during the search was subject to suppression. *See, e.g., Michaels*, 60 Wn.2d 643-645 (an arrest cannot be used as a pretext for searching an automobile); *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 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).

The relevant evidence exception from these early cases was slightly more restrictive than the rule announced in *Gant*. While *Gant* authorizes a search "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle,'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring)), the early Washington cases imposed a probable cause standard on the relevant evidence exception. *See, e.g., State v. Knudsen*, 154 Wash. 87, 99, 280 P. 922 (1929) ("After careful consideration, we are of the opinion that what the officers saw on the evening of appellant's arrest supported a reasonable belief on the part of the officers that appellant was, in their presence, violating the law, and constituted probable cause for the search which was made of appellant's automobile."). It is unlikely that the Washington Supreme Court will retreat from this higher burden.

The discussion that follows is the author's best guess of what *Gant* exception two means. As always, a prudent officer should discuss this information with their department's legal advisor and with their local prosecuting attorney.

I. "Reasonable to Believe."

The *Gant* opinion does not explain what quantum of evidence will render it "reasonable to believe" evidence relevant to the crime of arrest might be found in the vehicle. Guidance must, therefore, be sought from the use of this phrase in other contexts and from the entire *Gant* opinion.

The phrase "reasonable to believe" is the equivalent of "reason to believe." *See United States v. Gorman*, 314 F.3d 1105, 1111 n.4 (9th Cir. 2002) (listing examples of the use of the phrases"reason to believe", "reasonable belief" and "reasonable grounds for believing" and noting their identical meaning). The "reason to believe" standard first appeared in the United States Supreme Court's opinion of *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). That case held that an arrest warrant gives government agents limited authority to enter a suspect's home to arrest him if they have "reason to believe" he is inside. *Id.*, 445 U.S. at 603. The Supreme Court did not elaborate on the meaning of "reason to believe" in *Payton* and has not done so since then. See *United States v. Magluta*, 44 F.3d 1530, 1534 (11th Cir. 1995) ("The 'reason to believe' standard was not defined in *Payton,* and since *Payton*, neither the Supreme Court, nor the courts of appeals have provided much illumination.").

Every Federal circuit court of the United States Court of Appeals that has addressed the issue, except the Ninth Circuit,[16] has held that the "reason to believe" language was meant to employ a standard less exacting than probable cause.[17] The vast majority of State courts have also held that the "reason to believe" language was meant to employ a standard less exacting than probable cause.[18] The standard

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[16]The Ninth Circuit held that "reasonable belief" in *Payton* is the same as probable cause. *See United States v. Diaz*, 491 F.3d 1074, 1077 (9th Cir. 2007).

[17]*See, e.g., Valdez v. McPheters*, 172 F.3d 1220, 1224-1225 (10th Cir. 1999) (adopting "reasonable belief" standard); *United States v. Route*, 104 F.3d 59, 62 (5th Cir.), *cert. denied*, 521 U.S. 1109 (1997) ("reason to believe" standard is distinct from "probable cause" and allows "the officer who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances"); *United States v. Risse*, 83 F.3d 212, 216 (8th Cir. 1996) ("the officers' assessment need not in fact be correct; rather, they need only 'reasonably believe' that the suspect resides at the dwelling to be searched and is currently present at the dwelling"); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995) (probable cause is "too stringent a test"; proper inquiry is "whether there is a reasonable belief that the suspect resides at the place to be entered to execute an arrest warrant, and whether the officers have reason to believe that the suspect is present"); *United States v. Edmonds*, 52 F.3d 1236, 1247-1248 (3d Cir.), *vacated in part on other grounds*, 1995 U.S. App. LEXIS 16108 (3d Cir. June 29, 1995), *cert. denied*, 519 U.S. 927 (1996) (although "the information available to the [police] clearly did not exclude the possibility that [the suspect] was not in the apartment, [they] had reasonable grounds for concluding that he was there"); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir.), *cert. denied*, 516 U.S. 869 (1995) (for police "to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry").

[18]*V.P.S. v. State*, 816 So. 2d 801, 802-803 (Fla. Dist. Ct. App. 2002); *State v. Northover*, 133 Idaho 655, 659, 991 P.2d 380 (Ct. App. 1999); *State v. Beal*, 26 Kan. App. 2d 837, 840-841, 994 P.2d 669 (2000); *Commonwealth v. Silva*, 440 Mass. 772, 802 N.E.2d 535, 541-42 (2004); *State v. Asbury*, 328 S.C. 187, 191-192, 493 S.E.2d 349 (1997); *Morgan v. State*, 963 S.W.2d 201, 204 (Tex. Ct. App. 1998); *State v. Blanco*, 2000 WI App 119, 237 Wis. 2d 395,

adopted by these courts essentially equate "reasonable belief" with the *Terry* reasonable suspicion standard. *See, e.g. Silva*, 802 N.E.2d at 541 n.8 ("We reject the defendant's argument that adopting a 'reasonable belief' standard would be too confusing for the police to apply. The police are already familiar with a similar standard of 'reasonable suspicion' based on 'specific and articulable facts' used in *Terry*-type investigatory stops. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).")

One can presume that the United States Supreme Court was aware that the phrase "reasonable to believe" is generally treated as comparable to *Terry* when the Court used the term in *Gant*. That the *Gant* Court intended that this meaning be applied to the phrase in the search incident to arrest context is supported by the Court's discussion of other established exceptions to the warrant requirement that are available post-*Gant*. One exception specifically identified is that contained in *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed.2d 572 (1982)[19]:

> If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross, 456 U.S. 798, 820-821, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)*, authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by Justice Scalia's opinion concurring in the judgment in *Thornton*, which we conclude today are reasonable for purposes of the *Fourth Amendment*, *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader.

Gant, 173 L. Ed. 2d at 498. Equating *Gant's* "reasonable to believe" with "probable cause" would render the *Gant* exception meaningless or superfluous.

The Washington Supreme Court did not participate in the *Payton* debate, holding instead that Const. art. I, § 7 requires probable cause before officers enter a suspect's home without a search warrant to serve an arrest warrant on the suspect. *See State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007). Since modern Const. art. I, § 7 allowed an officer to enter a vehicle

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404-406, 614 N.W.2d 512 (Ct. App. 2000)).

[19]*Ross* does not apply in Washington because of Const. art. I, § 7. *See State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983).

without a search warrant merely upon the arrest of an occupant, there is a rational basis for adopting *Gant's* reasonable belief standard. *See generally State v. Johnson*, 128 Wash.2d 431, 909 P.2d 293 (1996); *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (20001); *State v. Stroud*, 106 Wn.2d 144, 151, 720 P.2d 436 (1986). But, older Washington cases required an officer to have probable cause to believe evidence of the crime of arrest would be found in the vehicle. *See, e.g., State v. Knudsen*, 154 Wash. 87, 99, 280 P. 922 (1929) ("After careful consideration, we are of the opinion that what the officers saw on the evening of appellant's arrest supported a reasonable belief on the part of the officers that appellant was, in their presence, violating the law, and constituted probable cause for the search which was made of appellant's automobile."). The Washington Supreme Court will resolve this issue in *State v. Snapp*, No. 84223-0 (argued May 19, 2011).

An officer must consider the "totality of the circumstances" in determining whether it is reasonable to believe the vehicle contains evidence of the offense of arrest. Factors an officer should consider include:

- Any admissions or statements by the arrestee. *State v. Wright*, 155 Wn. App. 537, 230 P.3d 1063, *review granted*, 169 Wn.2d 1026 (2010) (defendant's post-*Miranda* admission that he smoked marijuana earlier helped to establish a nexus between the vehicle and the crime of arrest to support a search of the vehicle)
- Any evidence discovered during a search of the arrestee and/or the items the arrestee removed from the vehicle. *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. Johnson*, 155 Wn. App. 270, 229 P.3d 824, *review denied*, 170 Wn.2d 1006 (2010) (*Gant* does not prohibit an officer from searching a purse that a driver removes from the vehicle and is holding at the time the driver is placed under arrest).
- Any admissions or statements made by other occupants of the vehicle
- Observations reported by witnesses or victims of the crime
- Any items observed by the police officer when the officer looks through the windows of the vehicle. *See, e.g., United States v. Grote*, 629 F. Supp. 2d 1201

(E.D. Wash. 2009), *reconsideration denied* 2009 U.S. Dist. LEXIS 60893 (July 15, 2009) (search of vehicle proper where driver was arrested for DUI and the officer observed a brown paper bag wrapped around a bottle lying in the passenger seat); *United States v. Bullock*, 2009 U.S. Dist. LEXIS 58080 (E. D. Wis. 2009) (search of vehicle proper where driver was arrested for possessing an open intoxicant in car and officer, looking in the front passenger window, observed a red T-shirt partially covering a bottle of gin or vodka in the car); *State v. Wright*, 155 Wn. App. 537, 549, 230 P.3d 1063, *review granted*, 169 Wn.2d 1026 (2010) (wad of money observed in glove box helped to establish a nexus between the vehicle and the crime of arrest to support a search of the vehicle); *State v. Gibson*, 152 Wn. App. 945, 219 P.3d 964 (2009) (items observed through the windows of a vehicle following the arrest of the driver are in "open view" and may be considered by a magistrate in issuing a search warrant and by an officer in determining the existence of exigent circumstances).

- Any odors detected by the officer. *See, e.g., State v. Preston*, 207 P.3d 1081, 1088 (Kan. App. 2009) (officer properly conducted a second search for contraband upon smelling marijuana during a proper protective search for weapons); *State v. Wright*, 155 Wn. App. 537, 549, 230 P.3d 1063, *review granted*, 169 Wn.2d 1026 (2010) (odor of marijuana helped to establish a nexus between the vehicle and the crime of arrest to support a search of the vehicle)

- Evidence observed during a *Michigan v. Long* sweep for weapons. *See, e.g., State v. Preston*, 207 P.3d 1081, 1088 (Kan. App. 2009) (officer properly conducted a second search for contraband upon smelling marijuana during a proper protective search for weapons)

- Evidence observed when retrieving an item, such as the arrestee's purse or cell phone, from the vehicle at the request of the arrestee and with the knowing, intelligent, and voluntary consent of the arrestee.

II. Crime of Arrest

The *Gant* opinion does not define the term "crime of arrest." There are two possible ways of interpreting this phrase. First, the phrase can mean only the offense that the officer identified when he first removed the driver from the vehicle. Second, the

phrase can include every offense that the officer has probable cause to believe the defendant has committed, provided that the probable cause is established before the officer enters the vehicle to conduct a warrantless search.

The second interpretation is consistent with case law that indicates probable cause is an objective standard and an arrest is lawful provided evidence known to the officer prior to the arrest establishes a violation of any offense, not just the one the officer told the defendant he was arresting the defendant for. *See, e.g., Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004) (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); *Fondren v. Klickitat County*, 79 Wn. App. 850, 862, 905 P.2d 928 (1995) (same); *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698, *review denied*, 119 Wn.2d 1007 (1992) (same); *Seattle v. Cadigan*, 55 Wn. App. 30, 36, 776 P.2d 727, *review denied*, 113 Wn.2d 1025 (1989) (same).

In Washington, no statute or case requires an officer to tell a suspect exactly what offense the suspect is being arrested for violating. Most officers, however, do inform a suspect of the reason for an arrest. Post *Gant*, officers should be more expansive with respect to identifying the crime(s) of arrest. For instance, when arresting an individual for DWLS 1, the officer should also identify as a crime of arrest a violation of RCW 46.61.010, if the suspect gave a false name during the encounter. If drugs or other illegal materials are found during the search of the suspect incident to the suspects arrest, the officer should note the time of discovery and let the suspect know that the "crime of arrest" has expanded again. Finally, a suspect's statements and evidence the officer can observe through the vehicle's windows can give rise to an additional "crime of arrest." Once the officer has identified in his own mind and/or informed the defendant of the entire list of crimes, then the officer is in a position to articulate whether there it is reasonable to believe that evidence of any one of the crimes will be found in the vehicle.

A. Are Traffic Offenses Different?

Many persons are arrested for traffic offenses. Evidence supporting the crime of DUI, such as open containers of alcohol, may reasonably found in a vehicle. Evidence to support a defendant's admission of driving in both DUI and DWLS cases will often be found in a vehicle. Evidence establishing the identity of the driver will often be found in a vehicle.

The *Gant* opinion, however, contains the following statement:

> In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. *See, e.g., Atwater v. Lago Vista*, 532 U.S. 318, 324, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001)*; Knowles v. Iowa*, 525 U.S. 113, 118, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998).

Gant, 173 L. Ed. 2d at 496.

> Gant was arrested for driving with a suspended license -- an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. *Cf. Knowles*, 525 U.S., at 118, 119 S. Ct. 484, 142 L. Ed. 2d 492. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Id. at 497.

The first quote must be read in context. The *Atwater* case that the Court cites to dealt with an arrest for offenses that are treated as civil infractions in Washington and most other states. *See Atwater*, 532 U.S. at 324 ("Atwater was charged with driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance."); *Knowles*, 525 U.S. at 118 ("Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained.").

The second quote may have been an accurate assessment of the record that was before the Court. The lawfulness of an officer's entry into the vehicle to obtain evidence related to DWLS will depend upon the officer's ability to articulate the facts that gave rise to a reason to believe such evidence would be in the vehicle. Issues to be considered include:

- Whether the officer personally observed the defendant's driving so that it is unnecessary to determine whether the seat is far enough back to accommodate the driver's height, whether the key in the ignition has a charm or other item attached to it that would establish its owner, etc.

- Whether the defendant provided more than one name to the officer and the officer can see documents or other paperwork in the car that may assist in establishing the defendant's true name. (This actually is not a search in support of the DWLS arrest but is instead a search in support of the often accompanying offense of giving a false name in violation of RCW 46.61.010.)

To date, the post-*Gant* opinions have rejected a per se rule that a vehicle may never be searched when an occupant is arrested for a traffic offense. *See, e.g., United States v. Grote*, 629 F. Supp. 2d 1201 (E.D. Wash. 2009), *reconsideration denied* 2009 U.S. Dist. LEXIS 60893 (July 15, 2009) (search of vehicle proper where driver was arrested for DUI and the officer observed a brown paper bag wrapped around a bottle lying in the passenger seat); *United States v. Bullock*, 2009 U.S. Dist. LEXIS 58080 (E. D. Wis. 2009) (search of vehicle proper where driver was arrested for possessing an open intoxicant in car and officer, looking in the front passenger window, observed a red T;shirt partially covering a bottle of gin or vodka in the car).

B. Arrest on a Warrant

When an individual is arrested on a warrant the "crime of arrest" is the crime that gave rise to the warrant or the facts that gave rise to a warrant.

If the warrant was issued for a defendant in response to the defendant's failure to appear for a court hearing or sentencing, then the "crime of arrest" can often include the, as yet, uncharged offense of bail jumping. This crime is committed when a person fails to appear or fails to surrender as required after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court or to report to a correctional facility for service of sentence. RCW 9A.76.170. Bail jumping can be a felony or a gross misdemeanor, depending upon whether the person was charged with a felony or gross misdemeanor in the underlying case. When bail jumping is a felony, an officer may make a warrantless arrest for the offense upon probable cause. Evidence related to the offense of bail jumping that could reasonably be found inside a motor vehicle includes the defendant's copy of the court order that directed the defendant to appear in court. Every officer should familiarize himself or herself with the documents that courts utilize to provide the defendant with notice of future court dates. (Some forms are printed on goldenrod or other distinctively colored paper.) When a person is arrested on a failure to appear warrant, an

officer should look through the windows of the vehicle to see whether any document similar to that utilized by the courts upon a defendant's release is present. If the officer observes such documents, a search of the vehicle may be proper pursuant to the second *Gant* exception.

If the arrest warrant was issued in response to the defendant's involvement in a new crime, for which the defendant has not yet been to court, then the "crime of arrest" is the crime listed in the arrest warrant. Factors to be considered in determining whether it is reasonable to believe that the vehicle contains evidence of this past crime include many of the same factors that must be considered in obtaining a search warrant:

- length of time that has elapsed between the crime and the arrest
- whether it is likely that evidence used in the crime would be stored in a vehicle as opposed to somewhere else (nexus)
- whether the vehicle was used in the commission of the crime

In most cases involving an arrest on a warrant for a new crime, the prudent officer should obtain a search warrant rather than relying upon the search incident to arrest exception. Remember that the car can be impounded and towed to a secure location to await the issuance of a promptly sought warrant. *See State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992).

C. Proximity to Vehicle at Time of Arrest.

Neither *Gant* exception applies unless the arrestee was in the vehicle at the time of arrest or the arrestee had 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).

D. What May Be Searched

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).

E. Use of Canines

Once the vehicle has been searched 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. In *State v. Valdez*, 137 Wn. App. 280, 152 P.3d 1048 (2007), *aff'd on other grounds,* 167 Wn.2d 761, 224 P.3d 751 (2009), the court held that Const. art. I, § 7, was violated by holding the defendant at the scene of arrest for 27 minutes to allow a K-9 unit to conduct a second search of the vehicle incident

to the defendant's arrest on a felony warrant, based only upon the discovery during the first search of a few missing screws and loose paneling in the car.

The Court of Appeal's *Valdez* decision is contrary to prior Washington case law. *See State v. Stamphill*, 53 Wn. App. 623, 769 P.2d 861 (1989); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980). It is also unlikely that citizens in territorial days expected to be free from canine searches.

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.

F. 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. In making this determination, the officer is not limited by the "crime of arrest." *See, e.g., State v. Snapp*, 153 Wn. App. 485, 219 P.3d 971 (2009), *review granted*, 169 Wn.2d 1026 (2010) (evidence of identity theft that was found during a search of the car after the driver, who was arrested for use of drug paraphernalia and was secured in the back of the patrol car, was lawfully seized as the arresting officer testified that he searched the vehicle for drugs– which is evidence related to the crime of arrest).

G. Suggestions for Processing Vehicles in the Post-*Gant*, Post-*Valdez* World

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*, ___ U.S. ___, 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,* ___ U.S. ____, 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 an expansion of the crime of arrest, or if it provides a basis to believe evidence related to some other crime may be present in the vehicle. If the evidence is sufficient to support an arrest on another offense, expand the list of "crimes of arrest" to include the new offenses. Be sure to advise the arrested individual of the expanded list.

- Example: Credit cards in more than one name may be evidence of identity theft, possession of stolen property, etc.

iii. Carefully Examine the Vehicle's Interior Through the Windows Before Entering the Vehicle

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.

Carefully consider whether the items observed during the "vehicle walkaround" give rise to probable cause to believe another offense has been committed. If so, expand the list of "crimes of arrest" to include the new offenses. Be sure to advise the arrested individual of the expanded list.

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." 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 another offense has been committed. If so, expand the list of "crimes of arrest" to include the new offenses. Be sure to advise the arrested individual of the expanded list.

v. Carefully Consider the Crimes of Arrest

The "crimes of arrest" provide a framework for determining whether an officer has a reasonable suspicion or probable cause to believe evidence of a crime, fruits of a crime, contraband, or instrumentalities of a crime may be present in the vehicle.

While an officer should seek to identify every possible crime, an officer need not cite an arrested person for every crime for which the officer has probable cause to arrest. An officer, who is concerned about "piling on charges", should refer the entire case to the prosecuting attorney for charging.

Caution: ***Do not issue a citation for only one of many crimes. This action can prevent prosecution***

for any of the other offenses that the officer identified at the time of arrest.

vi. 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-*Valdez*, 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 *Valdez*, 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. 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 .....

vii. Consider Requesting Consent to Search the Vehicle

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). Document the facts you knew prior to requesting consent, so that you can demonstrate that you had a reasonable suspicion prior to asking for consent to search.

If an arrestee gives an officer permission to conduct a warrantless search of a vehicle, such search should be conducted while the arrestee is still at the scene, so the arrestee can revoke his or her consent and/or limit the scope of the

search.

Remember that the arrestee's consent will only extend to the arrestee's own possessions and those items that the arrestee has joint control over.

viii. 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.

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.

ix. 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.

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.

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). If a vehicle is impounded for evidentiary purposes

only, a search warrant, based on probable cause, is needed.

A locked automobile trunk may not be opened even if it may be opened without a key from an accessible area of the passenger compartment. *See State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998). Locked ***or*** closed containers should be inventoried as a sealed unit absent exigent circumstances. *See generally State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). These same restrictions apply to inventory searches of items other than vehicles. *See generally*, *State v. Dugas*, 109 Wn. App. 592, 36 P.3d 577 (2001).

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).

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.

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).

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).

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*, No. 64672-9-I, ___ Wn. App. ___, ___ P.3d ___ (Apr. 11, 2011), *with In re 1992 Honda Accord*, 117 Wn. App. 510, 71 P.3d 226 (2003).

A. **Discretionary Statutes**

Currently the legislature has authorized impound in RCW 46.55.113[20] 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

[20]RCW 46.55.113 was amended by the Legislature in Laws of 2011, ch. 167. These materials are based upon Laws of 2011, ch. 167, which will become fully effective on July 22, 2011.

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", 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.

- 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.

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 Cases

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), *review granted*, 165 Wn.2d 1036 (2009), 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).

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. Officers must check with their local prosecutors to ascertain the impact of *York* in the following settings:

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 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.

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*, ___ U.S. ___, 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. Implied Consent

In *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966), United States Supreme Court considered the constitutionality of the withdrawal of a blood sample from an objecting patient in a hospital who had previously been placed under arrest. Rejecting claims that this practice violated the petitioner's right of due process, his privilege against self-incrimination, and his right to counsel, that Court additionally held that the taking of this blood sample was not the product of an illegal search and seizure under the Fourth and Fourteenth Amendments.

In the wake of *Schmerber*, most states enacted "implied consent laws." These laws recognized that search warrants are not required to extract blood, but they provided citizens with the right to refuse a warrantless seizure of their blood. Most of these statutes also stated a preference for less invasive alcohol tests, such as breath or urine

tests. Where such procedural statutes exist, warrantless collection of breath or blood for alcohol or drug testing must comply fully with the statutes.

Although some jurisdictions have held that their implied consent statutes preclude alcohol or drug tests performed pursuant to search warrants, Washington courts have not yet decided this issue. The Legislature, however, has clearly stated that search warrants for a blood sample are available regardless of whether a driver consents to a breath or blood test or declines a breath or blood test under the implied consent statute. *See City of Seattle v. St. John*, 166 Wn.2d 941, 215 P.3d 194 (2009); RCW 46.20.308(1) ("Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.").

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.*

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 <u>*unequivocally*</u> 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. 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). *See* Please see discussion elsewhere in these materials.

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)).

- 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. laws *See United States v. State of Arizona*, No. 10-16645, ___ F.3d ___ (9th Cir. Apr. 11, 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 suspicionless 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)[21].

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).

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[21]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).

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 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*, No. 83742-2, ___Wn.2d ___, ___P.3d ___(Apr. 28, 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*, No. 83525-0, ___ Wn.2d ___, ___ P.3d ___ (Apr. 14, 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*, No. 83525-0, ___ Wn.2d ___, ___ P.3d ___ (Apr. 14, 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.

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. CrR 3.6. 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*, No. 83742-2, ___ Wn.2d ___, ___ P.3d ___ (Apr. 28, 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*, No. 83742-2, ___ Wn.2d ___, ___ P.3d ___ (Apr. 28, 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*, No. 83742-2, ___ Wn.2d ___, ___ P.3d ___ (Apr. 28, 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*).

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.)

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).

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, ___ P.3d ___ (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).

The refined "automatic standing" rule

> is proper where (1) "[the defendant] is legitimately on the premises where a search occurred" and (2) "the fruits of the search are proposed to be used against him." *Michaels*, 60 Wn.2d at 646-47; *see Jones*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725. Based on that language, the trial court here concluded that automatic standing exists whenever there is a search and a subsequent seizure of contraband. We believe, however, that this is an overly broad interpretation of the conditions for automatic standing outlined in Jones. Inherent in the conditions for automatic standing is the principle that the "fruits of the search" bear a direct relationship to the search the defendant seeks to contest.
>
> Here, the defendant fails to meet the criteria for application of the automatic standing doctrine. The defendant stipulated that the police officers found the heroin on his person. The defendant has standing to object to an illegal search of his person. But, the defendant does not challenge the search of his person, which was a valid search incident to his arrest under a valid arrest warrant. He is challenging only the officer's entry into a third party's residence to serve the arrest warrant. The defendant's ability to challenge that entry does not depend upon his admission to possession of contraband or to any other illegal activity. We cannot agree that the automatic standing rule as originally conceived by the Supreme Court would have any application where there is no conflict in the exercise of his Fourth and Fifth Amendment rights. Moreover, as expressed by the plurality opinion in Simpson, the automatic standing rule may not be used where the defendant is not faced with "the risk that statements made at the suppression hearing

> will later be used to incriminate him albeit under the guise of impeachment." *Simpson*, 95 Wn.2d at 180, 622 P.2d 1199. Automatic standing is not a vehicle to collaterally attack every police search that results in a seizure of contraband or evidence of a crime.

State v. Williams, 142 Wn.2d at 22-23.

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).

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).

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. Miles*, 159 Wn. App. 282, 244 P.3d 1030 (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).

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**
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.
COMMITTED THE OFFENSE			
WHO	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.
Non-Indian Defendant			

*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).	**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. 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).	**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).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
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*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 496 (2009).	"A warrantless search … is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested." *State v. Ringer*, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983). *Accord State v. Valdez*, 167 Wn.2d 761; 224 P.3d 751 (2009), *but see State v. Wright*, 155 Wn. App. 537, 230 P.3d 1063, *review granted*, 169 Wn.2d 1026 (2010) (warrantless searches under the second *Gant* exception are permissible under Const. art. I, § 7)

	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*, No. 80308-1, ___ Wn.2d ___, ___ P.3d ___ (Aug. 5, 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).	**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. 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).	**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).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
	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).	**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. 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 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).	**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 183 (1994); *State v. Tijerina*, 61 Wn. App. 626, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
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).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
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).
GPS Devices	Officers do not need a search warrant or judicial approval before attaching a mobile tracking device to a suspect's vehicle while the vehicle was parked in the suspect's driveway. *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).	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).
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).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
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).	Need judicial permission to get phone records or install pen register. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)

	Fourth Amendment Rule	Const. art. I, § 7 Rule
	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 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).	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 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).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
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)

	Fourth Amendment Rule	Const. art. I, § 7 Rule
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).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
Special Needs Doctrine	In the context of safety and administrative regulations, a search unsupported by probable cause may acceptable under the Fourth Amendment when "special needs," beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987) (searches of probationer's homes); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) (collection of blood and urine samples from railroad workers who are involved in train collisions); *New York v. Burger*, 482 U.S. 691, 699-703 (1987) (search of premises of certain highly regulated businesses); *New Jersey v. T. L. O.*, 469 U.S. 325, 334, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985) (school searches).	There is no "special needs" exception to the search warrant requirement under Const. art. I, § 7. *York v. Wahkiakum*, 163 Wn.2d 297, 178 P.3d 995 (2008)
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).

	Fourth Amendment Rule	Const. art. I, § 7 Rule
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)