

## **LAW ENFORCEMENT LEGAL UPDATE OUTLINE**

### **ARREST, SEARCH & SEIZURE, AND SELECTED OTHER TOPICAL AREAS WITH COMMENTS ON CIVIL LIABILITY RAMIFICATIONS**

#### **I. ARREST, STOP AND FRISK**

##### **A. The Seizure Continuum: "Contact" v. "Terry Seizure" v. "Arrest"**

###### **1. *When does a "contact" become a "seizure"?***

State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992), March '93 LED:09 (Request for ID + q's about drugs + request for consent to search = seizure)

**State v. Harrington, 167 Wn.2d 656 (2009) Feb. '10 LED:17 (Field, or "social," contact held to have developed into a "seizure" without reasonable suspicion at the point during the contact when the officer, with a nearby officer standing by, requested consent to frisk)**

State v. Thorn, 129 Wn.2d 347 (1996) Aug. '96 LED:13 (No seizure for uniformed officer to approach parked car and ask: "where's the pipe?"; State Supreme Court accepts U.S. Supreme Court's alternative tests of "free to decline" or "free to leave" and rejects defendant's exclusive "free to leave" approach)

U.S. v. Drayton, 122 S.Ct. 2105 (2002) Sept. '02 LED:02 (U.S. Supreme Court held under 4<sup>th</sup> Amendment that no seizure occurred in random bus sweep operation in which Florida officers asked Greyhound bus riders: 1) if they were carrying drugs, and 2) if they would consent to search; also, consents were held to be voluntary even though riders were not advised of right to refuse consent. BEWARE: Washington appellate courts are likely to be more restrictive in ruling on "bus sweep" issues of "seizure" and/or "consent" under article 1, section 7 of Washington Constitution)

State v. Elwood, 52 Wn. App. 70 (Div. I, 1988) Nov. '88 LED:05 (Telling FIR contact to "wait right here" – or taking ID and walking away – while checking for warrants is a seizure)

State v. Hansen, 99 Wn. App. 575 (Div. I, 2000) June '00 LED: 17 (Requesting ID, handing it to fellow officer who recorded information

and handed it back to citizen within 30 seconds, radioing information, and then conversing with citizen in non-coercive manner, was not "seizure" under totality of the facts)

State v. Crane, 105 Wn. App. 301 (Div. II, 2001) June '01 LED: 08 (Requesting ID and holding it for several minutes, while standing with subject, and checking by hand-held radio for outstanding warrants was "seizure" under totality of facts, and the seizure was not justified by the mere fact that the person had been observed approaching a residence for which police were in the process of obtaining a search warrant)

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Washington Supreme Court holds that no seizure occurred where officer spotlighted a car parked in a market parking lot, then followed up by asking the person in the driver's seat about his presence there and by asking him for ID)

State v. Stroud, 30 Wn. App. 392 (Div. II, 1981) Feb. '82 LED:05 (Turning on overhead flashers is a seizure)

State v. Young, 135 Wn.2d 498 (1998) Aug. '98 LED:02 (Shining spotlight on person not necessarily a "seizure")

State v. Knox, 86 Wn. App. 831 (Div. II, 1997) Oct. '97 LED:12 (Motioning driver of parked car to roll down window not necessarily a "seizure")

**Greene v. Camreta, 588 F.3d 1011 (9<sup>th</sup> Cir. 2009) (decision filed December 10, 2009) Feb. '10 LED:05 (In Civil Rights Act lawsuit, 3-judge panel holds "seizure" occurred when social services casework and officer interviewed possible child sex abuse victim at elementary school without parental consent or court order or exigent circumstances)**

**2. *May a Terry stop detainee be arrested for violating Washington's "obstructing" statute for merely refusing to identify himself or herself?***

**No.** Compare State v. White, 97 Wn.2d 92 (1982) April '82 LED:02; Carey v. Nevada Gaming Control Board, 279 F.3d 873 (9<sup>th</sup> Cir. 2002) Jan. '03 LED:02 with Hiibel v. Sixth Jud. Dt. Of Nevada, 124 S.Ct. 2451 (2004) Aug. '04 LED:02 (Arrest under a Nevada "stop and identify" statute that is worded differently than Washington's "obstructing" statute)

3. ***Is a show of authority when attempting a stop a "seizure"?***

**Yes, under the Washington constitution.** California v. Hodari D., 499 U.S. 621 (1991) July '91 LED:01 (No seizure under Fourth Amendment if suspect flees from show of authority. BUT SEE State v. Young, 135 Wn.2d 498 (1998) Aug. '98 LED:02 – Washington constitution, article 1, section 7 takes contrary view of what constitutes a "seizure." Under Washington constitution, show of authority itself may be "seizure" even if no compliance by suspect.

4. ***May passengers routinely be asked for ID at MV stops?***

**No, not under the Washington constitution.**

See State v. Larson, 93 Wn.2d 638 (1980) Aug. '80 LED:01 (Directing passenger in illegally parked car to show ID was unlawful seizure). State v. Rankin, 151 Wn.2d 689 (2004) Aug. '04 LED: 07 (Washington Supreme Court majority opinion under article 1, section 7 of Washington constitution interprets State v. Larson broadly, rejecting the argument that it is ok for officers to routinely request, so long as they do not demand, ID from non-violator, non-suspect passengers during traffic stops); In re Brown, 154 Wn.2d 787 (2005) Sept. '05 LED:17 (Washington Supreme Court holds that Rankin rule applies to requests to passengers for identifying information as well as to requests for ID documents); State v. Mote, 129 Wn. App. 276 (Div. I, 2005) Nov. '05 LED:10 (Rankin rule does not extend to non-seizure contacts with occupants in parked vehicles); **State v. Allen, 138 Wn. App. 463 (Div. II, 2007) July '07 LED:21 (Rankin rule does not permit asking driver or passenger for ID where officer knows driver is protected by a no-contact order, but officer has no physical description of prohibited person on the no-contact order and knows only the name of the prohibited person).**

5. ***Is it an impermissible extension of a seizure to delay completion of a traffic ticket while waiting to learn if the driver has any outstanding arrest warrants?***

**No**, holds State v. Rife, 81 Wn. App. 258 (Div. I, 1996) Aug. '96 LED:17, on the *constitutional* question, as this is a minimal additional intrusion. *But see* State v. Rife, 133 Wn.2d 140 (1997) Oct. '97 LED:03 (State Supreme Court rules, solely on *statutory* grounds, that officer lacked authority to hold jaywalker only for warrant check – the legislation at RCW 46.61.021 has since been amended to allow the warrant check – Nov. '97 LED:03)

6. ***Does “community caretaking function” give officers authority to make “stops” for non-investigative purposes in order to help citizens?***

**Yes, but stop must be objectively and subjectively justified and not pretextual (similarly, certain non-investigative actions that might otherwise be deemed unlawful “searches” may be similarly justified).**

State v. Kinzy, 141 Wn.2d 373 (2000) Sept. '00 LED:07 (Washington Supreme Court holds that this function did not justify an officer's seizure of a young-looking teenage girl out late on a school night with older, drug-historied companions, in downtown Seattle)

State v. Acrey, 148 Wn.2d 738 (2003) May '03 LED:04 (In an 8-1 decision, Washington Supreme Court distinguishes Kinzy and holds that it was ok for officers to detain a 12-year-old long enough to call his mother where the officers had responded at 12:40 a.m. to a report that youths were fighting – which, on police contact, they credibly denied – and the youths were located in an “isolated” commercial area with no nearby residences or open businesses)

7. ***May consent to search be sought routinely during or after MV stop for a civil infraction or minor offense or is this additional intrusion an impermissible extension of the seizure?***

**Generally no, though a “clean break” might change things.**

State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct. '93 LED:21 (After speeding ticket signed by violator, it was unlawful seizure for officer to extend the duration and scope of the stop by asking for consent to search MV)

Ohio v. Robinette, 519 U.S. 33 (1996) Feb. '97 LED:02 (U.S. Supreme Court rules that after completion of traffic stop police obtained valid consent to search without first telling detainee that he was free to go; beware, however, of 11/12/97 Ohio Supreme Court decision on remand holding that police unlawfully extended the traffic stop when they pursued consent to search after issuing the ticket)

See two-page article on this issue in the October '96 LED at pages 19-21. The article also discusses the then-recent decision of Division Three in State v. Henry, 80 Wn. App. 544 (Div. III, 1995). The article suggests that, if officers are going to attempt to get consent to search in traffic stop circumstances where they lack “reasonable suspicion”

to justify extending the duration of the stop or expanding the scope of the investigation, they use either a “clear break” or an “in the process” method of requesting consent. **In light of Henry and discussion in State v. Allen, 138 Wn. App. 463 (Div. II, 2007) July '07 LED:21 placing restrictions on what questions may be asked without reasonable suspicion during a routine traffic stop, the “clear break” approach appears to be the more readily defended approach.**

8. ***May officers who do not have reasonable suspicion as to a drug violation bring a drug-sniffing dog to sniff the exterior of a vehicle if the use of the dog does not extend the duration of the traffic stop?***

**“Maybe” is the best answer we have for Washington officers.**

Illinois v. Caballes, 125 S.Ct. 834 (2005) March '05 LED:03, April '05 LED:02 (United States Supreme Court rules that using dog outside stopped car did not violate the Fourth Amendment of the U.S. Constitution, but U.S. Supreme Court was focused on “seizure” issue not on “search/privacy” issue; a different ruling might be made under article 1, section 7 of the Washington constitution, either on seizure or search rationale, but there are as yet no Washington appellate court decisions directly on point)

9. ***Does the Washington constitution permit roadblocks?***

**Generally no.**

City of Seattle v. Mesiani, 110 Wn.2d 454 (1988) July '88 LED:14 (City of Seattle’s DUI roadblock program held to violate article 1, section 7 of the Washington constitution)

State v. Silvernail, 25 Wn. App. 185 (Div. I, 1980) April '80 LED:04 (Stopping and inquiring of the occupants of every car coming off the ferry from Vashon to West Seattle held supported under the special circumstances of that case - - i.e., report from victims of just-committed robbery that gave police reasonable suspicion that robbers had taken that particular ferry to the mainland)

10. ***Does Terry stop-and-frisk authority extend to non-traffic civil infractions?***

**No (but, of course, safety first regarding frisk authority).**

State v. Duncan, 146 Wn.2d 166 (2002) June '02 LED:19 (Washington Supreme Court says "no" as it holds in an "open container" case that officer must have probable cause to believe that the infraction is occurring in his or her presence before making a seizure or frisk). State v. Day, 161 Wn.2d 889 (2007) Dec. '07 LED:18 (Washington Supreme Court also says that there is no Terry authority in a parking infraction case). Regardless of Duncan and Day, however, officers obviously will and must take reasonable safety precautions, including frisking non-traffic civil infraction suspects reasonably believed to be armed and dangerous. Note that the Duncan and Day opinions do state that a stop for a suspected traffic infraction may be based on reasonable suspicion.)

11. *Does Terry authority apply to all previously committed (i.e., not committed "in the presence") misdemeanors and gross misdemeanors?*

No, not generally as to some non-dangerous misdemeanors in circumstances where there is a reasonable alternative for identifying the suspect.

U.S. v. Grigg, 498 F.3d 1076 (9<sup>th</sup> Cir. 2007) April '08 LED:06 (No; for those gross misdemeanors and misdemeanors that do not have potential for ongoing or repeated danger or risk of escalation, a Terry stop is not justified, at least if there is a reasonable alternative for identifying the suspect. Per our LED editorial comments re Grigg, we believe this restriction does not include those misdemeanors that are listed in RCW 10.31.100 as exceptions to the "in the presence" arrest rule.)

12. *May possible witnesses be seized under Terry?*

Generally no, though exigent circumstances might justify.

State v. Carney, 142 Wn. App. 197 (Div. II, 2008) Feb. '08 LED:17 (Not as to witnesses to possible reckless driving, but perhaps under narrow, compelling circumstances rules a 3-judge panel that issues 3 separate opinions). State v. Dorey, 145 Wn. App. 423 (Div. III, 2008) August '08 LED:08 (Officer's seizure of potential witness was not justified where there were no exigent circumstances, not even a report of a recently committed crime.)

13. *When does a "seizure" become an "arrest"? (Case law is a bit inconsistent, in part because State and defense*

***sometimes argue opposite sides of the issue, depending on whether “probable cause” is at issue or “search incident” authority is at issue)***

Dunaway v. New York, 442 U.S. 200 (1979) July '79 LED:01 (Involuntary transport to stationhouse for questioning is per se an arrest)

Kaupp v. Texas, 123 S.Ct. 1843 (2003) July '03 LED:19 (Forcible transport of suspect to the police station is per se an arrest requiring probable cause per Fourth Amendment)

State v. Belieu, 112 Wn.2d 587 (1989) Sept. '89 LED:17, and State v. Mitchell, 80 Wn. App. 143 (Div. I, 1995) March '96 LED:09 (Felony stop procedures not necessarily an "arrest" – depends on circumstances; not arrest here where persons in stopped car were reasonably suspected of being home invasion robbers)

State v. Wheeler, 108 Wn.2d 230 (1987) Aug. '87 LED:08 (Two-block transport of burglary suspect to scene of burglary for show-up ID not an arrest under the circumstances; reviewed on totality of circumstances, considering: (1) length of time, (2) place of detention, (3) extent of movement of detainee, (4) need for moving suspect, (5) nature of restraints)

State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March '04 LED:11 (Putting suspended driver in back seat of patrol car and telling him he is under arrest held not a “custodial arrest” for “search incident” purposes where he was not frisked, searched, or handcuffed, and he was allowed to use cell phone while sitting in the patrol car)

## **B. The Information, Or Level-Of-Suspicion, Continuum**

### **1. *What constitutes articulable "reasonable suspicion"?***

Illinois v. Wardlow, 528 U.S. 119 (2000) March '00 LED:02 (U.S. Supreme Court holds that unprovoked, headlong flight at sight of police car by person in area known for heavy drug trafficking is “reasonable suspicion” under the “totality of the circumstances”)

**State v. Doughty, 148 Wn. App. 585 (Div. III, 2009) April '09 LED:14 (Less-than-two-minute visit to known drug house at 3:20 a.m. by suspect unknown to police officer held to provide officer with reasonable suspicion of drug crime and hence stop of suspect’s car) (Status: The Washington Supreme Court is reviewing this Court of Appeals decision)**

Florida v. J.L., 529 U.S. 266 (2000) May '00 LED:07 (U.S. Supreme Court holds that anonymous phone call regarding young man in plaid shirt at bus stop with a gun failed to meet the "reasonable suspicion" test, and therefore seizure and frisk was unlawful)

State v. Hopkins, 128 Wn. App. 855 (Div. II, 2005) Oct. '05 LED:09 (Where officers did not call back to get more details, citizen informant's call on cell phone to report possible juvenile in possession of handgun was not shown, on the totality of the circumstances, to establish reasonable suspicion for Terry seizure of suspect, nor were there sufficient corroborating observations to support the Terry seizure)

State v. Almanza-Guzman, 94 Wn. App. 563 (Div. I, 1999) June '99 LED:13 (Division One holds that officers did not have "reasonable suspicion" to stop a man known to be in possession of a gun and suspected of being in violation of the law requiring that an alien with a gun have an alien firearm license – facts (1) that suspect's primary language appeared to be Spanish and (2) that alien firearm licenses are rarely issued did not justify seizure for investigation.)

Campbell v. DOL, 31 Wn. App. 833 (Div. I, 1982) Aug. '82 LED:04 (Conclusory statement to officer that driver of car going by is "drunk" does not justify stop, nature of crime and alternative investigative options are factors in reasonableness-of-seizure determination)

State v. Anderson, 51 Wn. App. 775 (Div. III, 1988) Oct. '88 LED:10 (Known citizen's action of pointing out car and making weaving gesture justified stop)

**State v. Jones, 85 Wn. App. 797 (Div. III, 1997) Aug. '97 LED:16 (Unknown driver of marked commercial vehicle was not a sufficiently reliable source, even though he had made an in-person report). But see State v. Lee, 147 Wn. App. 912 (Div. I, 2008) Feb. '09 LED:11 (Corroborated citizen's report constituted reasonable suspicion; Court questions part of the analysis in the Jones decision by Division Three)**

State v. Stroud, 30 Wn. App. 392 (Div. II, 1981) Feb. '81 LED:05 (Late hour, high-crime area not enough to justify stop)

State v. Lyons, 85 Wn. App. 268 (Div. II, 1997) Aug. '97 LED:18 (Holding that RCW 46.20.349 constitutionally authorizes stop of vehicle based on reasonable suspicion that registered owner of MV has revoked or suspended driver's license). But see State v.

Penfield, 106 Wn. App. 157 (Div. III, 2001) Aug. '01 LED:12, which holds that, while a MV stop to check for the registered owner was permissible under the Lyons-type facts, the officer was not permitted to extend the stop to ask for ID when the reasonable suspicion evaporated once the officer noticed that the driver could not be the person identified by records as the registered owner. Note also the McKinney decision below Part II.A.9., where the Washington Supreme Court ruled that random license checks for warrants and other information on registered owners of MVs are lawful.

State v. Barber, 118 Wn.2d 335 (1992) April '92 LED:02 (Officers should not make irrelevant statements about the person's racial incongruity with the neighborhood)

State v. Mitchell, 80 Wn. App. 143 (Div. I, 1995) March '96 LED:09 (Holding dangerous suspect at gun point not necessarily an arrest; case also addresses "reasonable suspicion" question regarding a handgun that a citizen was carrying in his hand while walking in a residential area)

State v. Perea, 85 Wn. App. 339 (Div. II, 1997) June '97 LED:02 (Officer's seven-day-old information about license suspension justified MV stop)

U.S. v. Arvizu, 122 S. Ct. 744 (2002) April '02 LED:02 (Totality of circumstances, including officer's experience and training, must be considered by the courts)

State v. Martinez, 135 Wn. App. 174 (Div. III, 2006) Nov. '06 LED:09 (High crime area plus history of vehicle prowls in the area in the past (but no prowling reports that night) plus midnight hour and suspect's nervous manner do not add up to particularized, objective "reasonable suspicion")

**State v. Gatewood, 163 Wn.2d 534 (2008) July '08 LED:04 (Officer's testimony about suspect's 1) eyes getting big at seeing police, 2) suspect's furtive gesture in apparently tossing something, and 3) his walk-away as officers came back toward him did not add up to reasonable suspicion for Terry stop. Supreme Court did not address the fact that suspect's walk-away from the officers constituted jaywalking in their presence.)**

**State v. Prado, 145 Wn. App. 646 (Div. I, 2008) Sept. '08 LED:16 (Traffic stop held not justified where driver crossed 8-inch-wide, exit-lane divider by 2 tire-widths for 1 second)**

## 2. *What constitutes "probable cause"?*

State v. Smith, 102 Wn.2d 449 (1984) Nov. '84 LED:11 (Aguilar-Spinnelli standard controls informant-based arrest per independent grounds reading of state constitution, both for arrest and search)

**State v. Grande, 164 Wn.2d 135 (2008) Sept. '08 LED:07 (Moderate odor of marijuana coming from vehicle during traffic stop did not provide probable cause to arrest passenger under article 1, section 7 of the Washington constitution. The Grande decision essentially overrules State v. Huff, 64 Wn. App. 641 (Div. II, 1992) April '98 LED:09, and it essentially rejects, on independent Washington constitutional grounds, the probable cause reasoning under the Fourth Amendment by the U.S. Supreme Court in Maryland v. Pringle, 124 S.Ct. 795 (2003) Feb. '04 LED:02; but arrest of driver of single-occupant vehicle apparently would still be justified based on marijuana smell and constructive possession theory.)**

## 3. *Is there a "pretext stop" prohibition?*

**Yes, under the Washington constitution.**

Whren v. U.S., 517 U.S. 806 (1996) Aug. '96 LED:09 (U.S. Supreme Court holds under Fourth Amendment that there is no pretext stop rule; probable cause as to violation justifies stop regardless of officer's motive). However, on July 1, 1999, in State v. Ladson, 138 Wn.2d 343 (1999) Sept. '99 LED:05, the Washington State Supreme Court interpreted article 1, section 7 of the Washington constitution as imposing a pretext stop prohibition, the violation of which can be proven through either: (1) subjective evidence (showing the officer had a pretextual motive through his or her own admissions or based on circumstantial evidence) or (2) objective evidence (showing the officer didn't follow normal or standard practices and procedures for that officer)

See also State v. DeSantiago, 97 Wn. App. 446 (Div. III, 1999) Nov. '99 LED:12 (Court applies Ladson pretext rule to suppress evidence seized by patrol officer following a pretext stop)

State v. Meckelson, 133 Wn. App. 431 (Div. III, 2006) Aug. '06 LED:12 ("Pretext stop" issue must be addressed in case where officer testified that, just before he observed driver commit a traffic infraction,

the officer noticed a “deer in the headlights” look on the face of the driver)

**State v. Montes-Malindas, 144 Wn. App. 254 (Div. III, 2008) July '08 LED:21 (Pretext stop ruling is based on officer's mere hunch and his hunch-inspired surveillance, followed by his stop of the suspect van, purportedly for driving a short distance without headlights.)**

But see State v. Hoang, 101 Wn. App. 732 (Div. I, 2000) Nov. '00 LED: 08 (Court upholds trial court finding of “NO pretext” where officer testified believably that, though he had other suspicions as well, he made stop for traffic enforcement reasons; officer's failure to issue citation after finding illegal drugs is not per se evidence of pretext) **See also State v. Nichols, 161 Wn.2d 1 (2007) Sept. '07 LED:10 (Washington Supreme Court upholds trial court finding of “NO pretext” where officer testified believably that, though he had other suspicions as well, he made stop for traffic enforcement reasons)**

Note also State v. Davis, 35 Wn. App. 724 (Div. I, 1983) Jan. '84 LED:06 (Court holds in pre-Ladson decision that arrest on a valid warrant can never be pretextual); State v. Goodin, 67 Wn. App. 623 (Div. II, 1993) March '93 LED:17 (Same rule for entry on search warrant); State v. Busig, 119 Wn. App. 381 (Div. III, 2003) Feb. '04 LED:16 (Search under a search warrant that was issued to allow officers to search a third party's residence to make an arrest on an arrest warrant held not subject to pretext challenge); State v. Lansden, 144 Wn.2d 654 (2001) Nov. '01 LED:03 (Same ruling regarding administrative search warrant). **But see State v. Hatchie, 161 Wn.2d 390 (2007) Oct. '07 LED:06 (Washington Supreme Court rules under the Washington constitution, article 1, section 7, that forcible entry to arrest on a gross misdemeanor warrant will be reviewed for pretext. It is not clear whether the Washington Supreme Court would extend the Hatchie rule for pretext review to forcible entry to arrest on a felony arrest warrant.)**

## C. Frisk Authority And Related Officer-safety Issues

### 1. *What constitutes reasonable belief of danger?*

State v. Collins, 121 Wn.2d 168 (1993) July '93 LED:07 (Court says question is, on totality of circumstances, whether the officer had a founded suspicion such that frisk was "not arbitrary or harassing".)

State v. Horrace, 144 Wn.2d 386 (2001) Oct. '01 LED:05 (Because driver leaned over toward front-seat passenger as officer was conducting a radio check during a 1:15 a.m. traffic stop, the passenger was subject to a lawful frisk once the officer learned of and acted on information that the driver was subject to custodial arrest based on arrest warrants and based on driving while license suspended)

**State v. Setterstrom, 163 Wn.2d 621 (2008) July 08:06 (Officer could not lawfully frisk a lawfully seized man based solely on fact that the man was nervous and fidgeting when confronted by the officer)**

**State v. Adams, 144 Wn. App. 100 (Div. III, 2008) July '08 LED:14 (Frisk of mere passenger in stolen car held not supported by the trial court's findings of fact or the evidence that did not show any danger was presented by the passenger)**

**State v. Xiong, 164 Wn.2d 506 (2008) Nov. '08 LED:02 (Delayed frisk of handcuffed, cooperative brother of warrant subject (in mistaken-identity seizure) held not supported by reasonable belief that detain was presently armed and dangerous)**

**2. *What is the permissible scope of a frisk?***

**State v. Horton, 136 Wn. App. 29 (Div. III, 2006) Jan. '07 LED:02 (Court of Appeals held that a cigarette pack could not have contained a weapon and therefore should not have been searched as part of a frisk) (Prosecutor's petition for Washington Supreme Court review was denied). But see U.S. v. Hartz, 458 F.3d 1011 (9<sup>th</sup> Cir. 2006) Nov. '06 LED:02) (Officer's testimony about potential for small weapons convinces 9<sup>th</sup> Circuit panel that an altoids tin could have contained a weapon and therefore could be searched as part of a frisk)**

**3. *Is the test purely objective?***

**Maybe not in Washington, so officers should be prepared to explain that they were actually concerned for safety.**

State v. Coutier, 78 Wn. App. 239 (Div. III, 1995) Oct. '95 LED:04 (Court asserts that if officer not concerned about safety, then frisk not justified even if reasonable officer would have been; appears to be erroneous subjective standard, but officer might have avoided by testifying as to training and experience)

**4. May frisk be search for evidence?**

**No.**

State v. Alcantara, 79 Wn. App. 362 (Div. I, 1995) Feb. '96 LED:11 (Suspicion, falling short of probable cause, that person may have secreted drugs in pocket doesn't justify frisking or searching pocket)

**5. May driver at stop routinely be directed into or out of MV?**

**Yes.**

State v. Kennedy, 107 Wn.2d 1 (1986) Dec. '86 LED:01 (Apparently adopting U.S. Supreme Court view – Pa. v. Mimms, 434 U.S. 106 (1977) – that driver can be directed out of MV without articulable grounds)

State v. Belieu, 112 Wn.2d 587 (1989) Sept. '89 LED:17 (Citing Mimms for the above principle)

**6. May passengers routinely be directed into or out of MV?**

**No, not under Washington constitution.**

Maryland v. Wilson, 519 U.S. 408 (1997) April '97 LED:02. (The U.S. Supreme Court holds by a 7-2 decision that Pa. v. Mimms applies to give officer automatic authority to order a passenger out of a lawfully stopped MV)

State v. Mendez, 137 Wn.2d 208 (1999) March '99 LED:04 (In an “independent grounds” ruling under Washington constitution, article 1, section 7, Washington Supreme Court holds that, while officers have automatic or “bright line” authority to direct *drivers* out of, or back into, their vehicles during routine traffic stops, under a newly announced “heightened awareness of danger” test, officers must be able to articulate an objective reason for directing *passengers* (*at least where such passengers themselves have committed no violation*) out of, or back into, vehicles in such routine traffic stops)

State v. Reynolds, 144 Wn.2d 282 (2001) Oct. '01 LED:08 (Officer may order those in the vehicle to get out if anyone in the vehicle is subjected to a custodial arrest)

**7. When may MV's be "frisked"?**

Michigan v. Long, 463 U.S. 1032 (1983) Sept. '83 LED:08 (Frisk under same safety standard as governs frisk of person); see also State v. Belieu, cited above at I.C.5.

State v. Glossbrener, 146 Wn.2d 670 (2002) Sept. '02 LED:07 (Frisk of car held not justified under objective standard where, after observing driver lean over front-passenger seat while pulling over at outset of traffic stop, officer did not frisk car immediately, but instead: (1) left suspect in suspect's car and returned to patrol car to run radio check for warrants, and then (2) did FST's – which suspect successfully performed – before calling for back-up and doing a car frisk)

**8. *When is a residence or a business premises subject to "protective sweep"?***

Maryland v. Buie, 494 U.S. 325 (1990) May '90 LED:02 (Officer safety is the justification – there must be individualized reasonable suspicion that others may be in residence and may pose danger to officers)

State v. Boyer, 124 Wn. App. 593 (Div. III, 2004) Feb. '05 LED:10 (Court of Appeals holds that there was not individualized reasonable suspicion that others were in residence and could pose danger to officers)

**U.S. v. Paopao, 469 F.3d 760 (9<sup>th</sup> Cir. 2006) Feb. '07 LED:02 (Protective sweep of private area of business premises was ok even though seizure of one suspect was made outside; officers reasonably believed that a second armed robbery suspect could be inside)**

**9. *Cross-gender pat-down considerations?***

**No, not on the street, but be reasonable, and try generally to use same gender officer when same gender officer is present.**

In Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) July '93 LED:09, the Federal Court barred routine cross-gender pat-downs in prison setting. The majority holding was narrowly limited to the special facts of the case. Wasberg view is that this case has no impact on street frisk setting. Officers must act reasonably and professionally, of course.

**10. *When does "plain feel" justify seizure of evidence?***

Minnesota v. Dickerson, 508 U.S. 366 (1993), Sept. '93 LED:15; State v. Hudson, 124 Wn.2d 107 (1994), Oct. '94 LED:06 (U.S. Supreme Court and Washington Supreme Court state restrictive standard for "plain feel" seizure; officer must recognize nature of contraband with tactile sense at or before completion of frisk and without turning the probe into a search for anything but weapons). **But see State v. Garvin, 166 Wn.2d 242 (2009) July '09 LED:18 (Seizure of drugs based on "plain feel" through pants coin pocket held unlawful because officer manipulated baggie after eliminating the baggie as a possible weapon)**

**11. *Can frisk be conducted by emptying suspects' pockets, rather than patting them down?***

State v. Fowler, 76 Wn. App. 168 (Div. III, 1994) May '95 LED:14 (No "single scoop" authority)

**12. *Are there limits on when officer can accompany an arrestee into private premises following arrest?***

State v. Chrisman, 100 Wn.2d 814 (1984) April '84 LED:01 (Under article 1, section 7 of the Washington constitution, the mere fact of an MIP arrest doesn't justify entry into 11<sup>th</sup> floor WSU dorm room in the absence of other articulable suspicions; the Chrisman decision is limited somewhat by its factual context, but officers should at least warn a person who wants to re-enter his or her private residence following arrest – for example, to put on pants, to let the cat out, or put out the fire in the fireplace – that the officer will retain control of the arrestee upon re-entry of the residence)

**13. *Frisking during warrant execution – see II.B.5 below.***

**14. *Securing weapons***

State v. Cotten, 75 Wn. App. 669 (Div. II, 1994) May '95 LED:15 (Weapons may always be secured while officers conduct lawful search)

**D. *Arrest Authority (See also Parts II.D. and II.E below re: "search incident to arrest")***

**1. *Misdemeanor presence rule (limits on arresting or citing persons under RCW 10.31.100 and CrR 2.11 and RCW 46.63.030)***

**State v. Green, 150 Wn.2d 740 (2004) March '04 LED:08; May '04 LED:02 (Washington Supreme Court held as a matter of statutory**

interpretation that failure to transfer title is not a “continuing offense,” and therefore arrest and “search incident” were unlawful); State v. Walker, 129 Wn. App. 572 (Div. III, 2005) Nov. '05 LED:22 (Court of Appeals extended Green's arrest restriction to Terry stops). But the 2008 Washington Legislature nullified the appellate court rulings in Green and Walker by expressly providing that failure to transfer title is a continuing offense.

State v. Holmes, 135 Wn. App. 588 (Div. II, 2006) Dec. '06 LED:19 (Custodial arrest upheld for driving with expired trip permit because this is an offense with driving as an element and that was being committed in the officer's presence)

Staats v. Brown, 139 Wn.2d 757 (2000) Dec. '00 LED:21 (Under CrRLJ 2.1(b), criminal citation may not be issued at the scene by an officer unless the officer would be justified in making a custodial arrest)

State v. Magee, 167 Wn.2d 639 (2009) Feb. '10 LED:23 (Where the infraction of second degree negligent driving did not occur in the law enforcement officer's presence, the officer could not lawfully issue a citation for that infraction - - concurring opinion from Supreme Court notes that prosecutor could have cited/charged the violator)

## 2. Extraterritorial arrest authority

### a. RCW 10.93.070 provides:

In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:(1) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs; (2) In response to an emergency involving an immediate threat to human life or property; (3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority; (4) When the officer is transporting a prisoner; (5) When the officer is executing an arrest warrant or search warrant; or (6) When the officer is in fresh pursuit, as defined in RCW 10.93.120.

[NOTE: fresh pursuit is authorized both as to criminal offenses and as to traffic infractions]

**State v. King, 167 Wn.2d 324 (2009) Dec. '09 LED:21 (Reckless driving does not qualify per se as “an emergency involving an immediate threat to human life or property” under RCW 10.93.070(2))**

NOTE: If an officer makes an arrest outside the officer's territory, then the officer is limited in authority to that of a citizen making an arrest. See State v. Harp, 13 Wn. App. 239 (Div. I, 1975).

**b. Beware of tagging along on other-jurisdiction warrant without consent letter**

In State v. Bartholomew, 56 Wn. App. 617 (Div. I, 1990) April '90 LED:03, the Court of Appeals held that RCW 10.93.070(5) did not authorize Seattle P.D. officers – who were not part of a task force with Tacoma and were not acting under a consent letter from the Tacoma chief or Pierce County Sheriff – to tag along on a Pierce County warrant being executed in Tacoma by Tacoma P.D. officers. In State v. Rasmussen, 70 Wn. App. 853 (Div. I, 1993) April '94 LED:12, however, the Court held that officers with a consent letter from the chief of police or sheriff of another jurisdiction are not restricted by the rationale of Bartholomew from taking action in that other jurisdiction.

**3. Arrest in Washington for felonies committed in other states.**

**RCW 10.88.330** – Arrest of person charged with felony in the courts of another state is expressly authorized by this statute.

**Common law** – There is no Washington case directly deciding the issue but there is case law elsewhere that an arrest can be made based solely on probable cause as to felony committed in other state (State v. Klein, 130 N.W.2d 816 (Wis. 1964)), but there is some suggestion in cases from other jurisdictions that express statutory authority is required (note that RCW 10.31.100 may or may not qualify as such statutory authority) – if at all possible, get legal advice in the case at hand before arresting without a warrant in this circumstance.

**II. SEARCH WITH, WITHOUT A WARRANT**

**A. Defining "Search" – Reasonable Privacy Expectations**

**1. "Open view" and "plain view" concepts**

Many Washington appellate court cases refer to "open view" as the test of whether a "search" has occurred for constitutional purposes. No "search" occurs if the officer is lawfully in a position outside of a protected private area and is able to make observations into the protected area using only his or her own senses or using only permissible sense enhancements. Such observations do not justify immediate entry into the protected area unless one of the exceptions to the constitutional search warrant requirement (e.g. exigency) apply.

State v. Wilson, 97 Wn. App. 578 (Div. III, 1999) Jan. '00 LED:07 (Naked-eye observation from airplane at 500 feet of marijuana grow in roofless shed did not violate state constitutional privacy rights of property owner; officers' observations gave them probable cause that supported issuance of a search warrant)

State v. Bobic, 140 Wn.2d 250 (2000) June '00 LED:14 (Naked-eye observation, without flashlight, through pre-existing hole in storage unit wall into neighboring storage unit was not search )

U.S. v. Sandoval, 200 F.3d 659 (9<sup>th</sup> Cir. 2000) Aug. '00 LED:03 (9<sup>th</sup> Circuit holds that camper trespassing on federal BLM land had a privacy interest in his makeshift abode in cave; case law in Washington and elsewhere is mixed on the question of the arguable privacy interest of a trespasser in his or her tent, "Hovertown" shack, cave, cardboard abode, or other makeshift home)

"Plain view" justifies immediate seizure of evidence. Plain view was formerly said to have three elements: (1) lawful presence of an officer inside an otherwise protected private area; (2) immediate recognition (under a PC standard) of an item as evidence or contraband; and (3) *inadvertence in coming across the item*. In Horton v. Calif., 496 U.S. 128 (1990) Aug. '90 LED:02, the U.S. Supreme Court held that there is no third element of "inadvertence." In State v. Goodin, 67 Wn. App. 623 (Div. II, 1992) March '93 LED:17, and in State v. Hoggatt, 108 Wn. App. 257, 270 (Div. II, 2001), Division Two of our Court of Appeals agreed. See also the State Supreme Court decision in State v. Hudson, 124 Wn.2d 107 (1994) Oct. '94 LED:06 (State Supreme Court recognizes Horton test in "plain view" case. (NOTE: "Plain view" discussed above at I.C.10.) But beware: Washington appellate decisions continue, from time to time, in contexts where it does not matter, to erroneously recite the "inadvertence" element of the "plain view" test.

See also State v. Cheatam, 150 Wn.2d 626 (2003) Feb. '04 LED:05 (No search warrant was needed for police to take a "second look" in

the jail property room at the soles of shoes that had been taken from an arrestee at the time of booking)

**2. *Entry of curtilage of residence not apparently open to the public is a “search”; and there is no “open fields” exception to the search warrant requirement under the Washington constitution***

State v. Johnson, 75 Wn. App. 692 (Div. II, 1994) Jan. '95 LED:19 (Rural farm owner with fenced and gated property, posted with "No Trespassing" signs, had state constitutional privacy protection)

State v. Thorson, 98 Wn. App. 528 (Div. I, 1999) Feb. '00 LED:02 (Unfenced, un-posted, heavily-wooded property with orchard on remote rural island was protected from warrantless search under article 1, section 7 of the Washington constitution)

State v. Hoke, 72 Wn. App. 869 (Div. I, 1994) Jan. '95 LED:06 (Entry of brush-and-junk-shielded yard of home unlawfully invaded "curtilage" because officer went farther than a reasonably respectful citizen would go). COMPARE State v. Gave, 77 Wn. App. 333 (Div. II, 1995) Aug.'95 LED:14 ("No trespassing" signs alone generally don't establish constitutional privacy protection that would prohibit officers from knocking on the front door during the daytime) with State v. Boethin, 126 Wn. App. 695 (Div. II, 2005) June '05 LED:05 (Officer's leaving of the porch area to sniff at the closed doors of an adjoining garage invaded the privacy rights of the resident under article 1, section 7 of the Washington constitution).

State v. Ross, 141 Wn.2d 304 (2000) Sept. '00 LED:02 (Late-night hour, lack of intent to contact resident, and lack of "legitimate police business" added up to a violation of Fourth Amendment and state constitutional privacy rights where undercover officers went into the impliedly open rear driveway of a residence at midnight to sniff at the garage for a suspected "marijuana grow")

State v. Littlefair, 129 Wn. App. 330 (Div. II, 2005) Nov. '05 LED:13 (Privacy protection extended to back yard area of two-acre parcel, where homeowner had posted "private property" and "no trespassing" signs alongside the roadway approaching his home, and the officer entered the backyard area around midnight dressed in camouflage)

**State v. Jessen, 142 Wn. App. 852 (Div. III, 2008) March '08 LED:12** (Where 1) the entrance to Jessen's driveway was posted with "no trespassing" and "keep out" signs, 2) the entrance had a closed (though unlocked) gate, 3) the property

was in a remote area, and 4) Jessen's secluded home could not be seen from the driveway entrance or from any neighboring properties, the home was not "impliedly open to the public" for purposes of article I, section 7 of the Washington constitution, and hence an officer could not lawfully approach the home in the middle of the day to talk to the resident, who was a possible witness to a theft.)

State v. Dyreson, 104 Wn. App. 703 (Div. III, 2001) May '01 LED:15 (Enclosed garage gets protection against warrantless police entry even though: (1) door open, (2) loud music inside, and (3) renter directed officer to look for owner-resident inside garage)

### **3. Toilet stall privacy**

Tukwila v. Nalder, 53 Wn. App. 746 (Div. I, 1989) Sept. '89 LED:17 (Holds it a privacy invasion for officer to peer over toilet stall door on a hunch that its single occupant was engaged in masturbation)

Compare State v. White, 129 Wn.2d 105 (1996) July '96 LED:15 (Holding that toilet stall is not a protected private area for purposes of Payton v. New York rule restricting entry to make warrantless arrest)

### **4. Using a flashlight or binoculars is not a "search" under ordinary circumstances, but there are limits**

State v. Rose, 128 Wn.2d 388 (1996) March '96 LED:02 (Taking flashlight onto front porch and shining it into uncurtained window accessible from porch not a search)

State v. Jones, 33 Wn. App. 275 (Div. I, 1982) Feb. '83 LED:13 (Officers OK in watching parking lot cocaine use activity through binoculars – it is OK to use binoculars to observe activity that could be lawfully observed with the naked eye but for the need to maintain cover)

### **5. Manipulating soft luggage may be a "search"**

Bond v. U.S., 529 U.S. 334 (2000) June '00 LED:12 (Manipulating soft luggage taken from overhead rack during bus sweep held to be "search")

### **6. Warrant needed to get telephone long distance records and unlisted phone subscriber information under Washington constitution (presumably, similar privacy protection is extended to records of bank customers)**

***where the bank is not a victim of the customer, though there is no Washington case on point, and federal cases do not extend privacy protection to bank records)***

State v. Gunwall, 106 Wn.2d 54 (1986) Aug. '86 LED:04 (Long distance toll call records); State v. Butterworth, 48 Wn. App. 152 (Div. I, 1987) Aug. '87 LED:19 (unlisted subscriber information)

**7. *Warrant needed to search garbage cans and to use thermal detection devices under Washington constitution***

State v. Boland, 115 Wn.2d 571 (1990) Jan. '91 LED:02; State v. Sweeney, 107 P.3d 110 (Div. III, 2005) April '05 LED:15 (Boland and Sweeney involved garbage can searches at single-family residences) [NOTE: communal dumpsters, however, do not generally get same privacy protection – see State v. Rodriguez, 65 Wn. App. 409 (Div. III, 1992) Oct. '92 LED:06]

State v. Young, 123 Wn.2d 173 (1994) April '94 LED:02 (Warrant required for use of thermal detection device on residence); See also Kyllo v. U.S., 533 U.S. 27 (2001) Aug. '01 LED:07 (Fourth Amendment also bars warrantless use of thermal detection device on residence)

**8. *Using a drug-sniffing dog to check a package in transit is not deemed a search of the package, but using a drug sniffing dog at a residence or to sniff people apparently requires a search warrant***

State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov. '98 LED:06 (Holding that use of drug-sniffing dog at residence required search warrant; distinguishing prior packages-in-transit cases) .

B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9<sup>th</sup> Cir. 1999) Dec. '99 LED:12. (Using drug-dog to randomly sniff students at high school violates Fourth Amendment)

Illinois v. Caballes, 125 S.Ct. 834 (2005) March '05 LED:03, April '05 LED:02 (United States Supreme Court rules that using dog outside stopped car did not violate the Fourth Amendment of the U.S. Constitution, but U.S. Supreme Court was focused on “seizure” issue not on “search/privacy” issue; a different ruling might be made under article 1, section 7 of the Washington constitution, either on seizure or search rationale, but there are as yet no Washington appellate court decisions directly on point)

**9. *Checking DOL records is not a "search"***

State v. McKinney, 148 Wn.2d 20 (2002) Jan. '03 LED:05 (Random checking of license plates against DOL database and then checking that information against WACIC database does not violate privacy rights of citizens under article 1, section 7 of WA constitution)

**10. *Abandoned property is not protected***

State v. Whitaker, 58 Wn. App. 851 (Div. I, 1990) Nov. '90 LED:07 (Suspect's tossing of illegal drugs as officers approached held to be abandonment of the drugs); State v. Kealey, 80 Wn. App. 162 (Div. II, 1995) May '96 LED:05 (Purse left in store not "abandoned" because owner did not discard it, but OK under "community caretaking function" for police to look for ID to help find owner); **State v. Evans, 159 Wn.2d 402 (2007) March '07 LED:15 (Locked briefcase that was in the suspect's pickup truck cab was not "abandoned" where the truck was parked in the suspect's driveway, police lacked independent authority to search the truck or briefcase, the suspect denied ownership of the briefcase, and he said that he could not consent to a seizure or search of the briefcase).**

**11. "Day visitor" to home is not protected by Fourth Amendment, but Washington officers beware**

Minnesota v. Carter, 525 U.S. 83 (1998) Feb. '99 LED:04 (Coke dealers making consenting two-hour use of home to process product were not entitled to Fourth Amendment protection – NOTE: Washington appellate courts would probably find privacy protection under article 1, section 7 of the Washington constitution for such consensual visitors); **State v. Link, 136 Wn. App. 685 (Div. II, 2007) March '07 LED:18 (Man who occasionally slept over at woman's house, had a key, and kept some personal effects there, had right of privacy under Fourth Amendment)**

**12. *Installing and tracking GPS system in suspect's car requires search warrant***

State v. Jackson, 150 Wn.2d 521 (2003) Nov. '03 LED:02 (In case in which officers *did* obtain a search warrant to install and track a global position system (GPS) tracking device, the Washington Supreme Court holds in an "independent grounds" interpretation of article 1, section 7 of the Washington constitution that a search warrant is required for such law enforcement intrusion; the Court upholds the warrant in this case, ruling that probable cause supported the search warrant.)

**13. Checking motel guest register, even with consent of motel operator requires search warrant**

**State v. Jordan, 160 Wn.2d 121 (2007) July '07 LED:21 (Random check prohibited under article 1, section 7 of Washington constitution; apparently, the Washington Supreme Court requires a search warrant unless there exists exigent circumstances or consent by the guest, perhaps given at the time of check-in)**

**14. Employee's employer-provided work computer at office**

**U.S. v. Ziegler, 474 F.3d 1184 (9<sup>th</sup> Cir. 2007) March '07 LED:13 (Because this child porn defendant had a lock and key for his office, and he had a personal password for his workplace computer, this worker for a private employer had a privacy right in his workplace computer against warrantless governmental search. However, his employer could and did lawfully consent to a government search where the employer: 1) owned the computer, 2) had a prohibition against certain kinds of usage, and 3) communicated to employees and carried out a policy and practice of routinely monitoring computer use and internet use, and made this clear in training.)**

**15. Administrative subpoenas**

**State v. Miles, 160 Wn.2d 236 (2007) Nov. '07 LED:07 (Use by State Department of Financial Institutions of statutorily authorized administrative subpoena to obtain subject's bank records violates article 1, section 7 of Washington constitution; Washington Legislature lacks the constitutional authority to grant subpoena power to executive branch agencies)**

**B. Search With A Warrant – Writing and Executing**

**1. *Officer misstatements in the affidavit (reckless or worse)***

**Turngren v. King County, 104 Wn.2d 293 (1985) Nov. '85:03 (Plaintiffs in civil suit alleged that affiant officer misstated the informant's story and failed to include important negative information)**

**State v. Jones, 55 Wn. App. 343 (Div. II, 1989) Jan. '90 LED:07 (Informant had recanted information in previous investigation -- affiant officer should have said so)**

State v. Stephens, 37 Wn. App. 76 (Div. III, 1984) July '84 LED:13 (Officer's statement in affidavit that he "observed" person watering marijuana grow, when he in fact only deduced that fact, held in criminal case to be intentionally deceptive or, alternatively, too conclusory).

## **2. "Rubber stamp" judge could lead to liability**

Malley v. Briggs, 475 U.S. 335 (1986) June '86 LED:17 (Officer must have reasonable belief that affidavit establishes PC, or § 1983 federal liability possible)

## **3. CI's: possibility of disclosure**

State v. Thetford, 109 Wn.2d 392 (1987) Jan. '88 LED:05 (Informant so entangled with police in terms of financing and direction that confidentiality lost); State v. Selander, 65 Wn. App. 134 (Div. II, 1992) Nov. '92 LED:17 (Allegations that affiant-officer knew – in light of having previously observed sealed-up windows of garage – that CI must have trespassed into garage were sufficient to trigger an in camera hearing for judge to ask some questions of the CI and officer-affiant)

## **4. Knock and announce (wait time; exceptions)**

Wilson v. Arkansas, 514 U.S. 927 (1995) Sept. '95 LED:03 (Case does not provide any black letter law guidance, but it makes the knock-and-announce requirement a part of the Fourth Amendment – this has significant civil liability implications)

There are numerous Washington cases addressing the knock and announce rule. Unlike some states, Washington does not have a blanket exception to knocking and announcing for drug warrant executions. Case-specific reasons for not knocking and announcing must be given.

Issuing judges cannot give "no-knock" authorization. State v. Spargo, 30 Wn. App. 949 (Div. II, 1982) May '82 LED:02.

There is no blanket authorization for "no knock" entries in narcotics warrant cases; review is under totality of circumstances. Richards v. Wisconsin, 520 U.S. 385 (1997) Aug. '97 LED:07.

## **5. Frisking during warrant execution**

Ybarra v. Illinois, 444 U.S. 85 (1979) Feb. '80 LED:01 (Search warrant for narcotics at tavern did not justify frisking patron at tavern)

State v. Broadnax, 98 Wn.2d 289 (1982) Feb. '83 LED:02 ("Presence plus" rule: individualized articulable reason for frisking those present needed even in narcotics warrant execution)

State v. Lennon, 94 Wn. App. 573 (Div. III, 1999) May '99 LED:04 (No justification to frisk non-occupant visitor who came to the front door as the warrant was being executed)

#### **6. Boilerplate problems ("*all vehicles*"; "*all persons*")**

State v. Rivera, 76 Wn. App. 519 (Div. II, 1995) April '95 LED:05 (Boilerplate in warrant to search "all vehicles present" was not justified with particularity by affidavit)

State v. Carter, 79 Wn. App. 154 (Div. II, 1995) Nov. '95 LED:10 (Boilerplate in warrant to search "all persons present" was not justified with particularity by affidavit)

Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1996) April '97 LED:08 (Spokane police subject to civil suit for searching "all persons on the premises" under a warrant to search a not-quite-den-of-thieves where affidavit didn't support the "all persons" clause)

#### **7. Particularity concerns – *persons, places, things, etc.***

State v. Kelley, 52 Wn. App. 581 (Div. II, 1988) Jan. '89 LED:12 (Warrant failed to mention outbuildings so search of outbuildings held unlawful)

State v. Perrone, 119 Wn.2d 538 (1992) Nov. '92 LED:04 (Child porn warrant too broadly stated)

State v. Higgins, 136 Wn. App. 87 (Div. II, 2006) Feb '07 LED:16 (Stating in warrant that search is for "evidence of assault 2<sup>nd</sup>, DV" is not particular enough)

State v. Riley, 121 Wn.2d 22 (1993) July '93 LED:10 (Inadvertent failure to state any crime being investigated made search warrant invalid)

Groh v. Ramirez, 124 S.Ct. 1284 (2004) April '04 LED:02 (Inadvertent failure by affiant-officer (an ATF agent) to identify in the warrant any

items to be seized made the officer-affiant who prepared the search warrant subject to a federal civil rights lawsuit)

## **8. Probable cause problems; Plus staleness concerns**

State v. Thein, 138 Wn.2d 133 (1999) Aug. '99 LED:15 (Officer-affiant's statement about experience and training re drug dealers' habits alone won't establish link of drug-dealing to a suspect's home)

State v. Johnson (Larry Edward), 104 Wn. App. 489 (Div. II, 2001) May '01 LED:05 (Court in molestation case rules search warrant partially unsupported under Thein analysis; also rules that viewing videotapes does not come within "plain view" exception)

State v. McReynolds, 104 Wn. App. 560 (Div. III, 2001) May '01 LED:11 (Court declares search warrant for burglar's residence unsupported under Thein analysis)

State v. Higby, 26 Wn. App. 457 (Div. II, 1980) Sept. '80 LED:05 (Two-week lapse between drug sale and search made information stale)

State v. Petty, 48 Wn. App. 615 (Div. I, 1987) Nov. '87 LED:04 (Similar time lapse of 2 weeks did not make information stale under common sense rule where probable cause information in the affidavit was related to a marijuana grow)

State v. Maddox, 152 Wn.2d 499 (2004) Dec. '04 LED:18 (If officers learn new information bearing on probable cause between the time of issuance of the search warrant and the time of execution of the search warrant, the warrant is valid without further pre-execution review or authorization from the issuing court so long as the new information does not completely negate the existence of probable cause to search)

## **9. Telephonic warrants**

State v. Smith, 87 Wn. App. 254 (Div. I, 1997) Nov. '97 LED:14 (If tape recording fails, reconstruction of affidavit must be based on judge's memory)

State v. Ettenhofer, 119 Wn. App. 300 (Div. II, 2003) Jan. '04 LED:12 (Where judge gave telephonic authorization to search but officers did not bring a paper search warrant to the scene of the search, the

search was warrantless and unconstitutional under the Washington constitution)

## **10. Anticipatory search warrants**

State v. Goble, 88 Wn. App. 503 (Div. II, 1997) Jan. '98 LED:15 (Affidavit must establish a "sure course" of evidence to place of search); State v. Nusbaum, 126 Wn. App. 160 (Div. II, 2005) April '05 LED:20 (Officers must wait for triggering event – here, signal-containing-package going inside the premises and being opened – before executing search); U.S. v. Grubbs, 126 S.Ct. 1494 (2006) May '06 LED:04 (Under Fourth Amendment, an anticipatory search warrant itself need not describe the triggering condition so long as the affidavit describes that condition and otherwise establishes PC).

## **C. Warrantless Entry Of Private Premises To Arrest**

### **1. Arrestee's own residence (Payton v. New York rule)**

Payton v. N.Y., 445 U.S. 573 (1980) June '80 LED:01 (In the absence of exigent circumstances, fresh pursuit, or a search warrant, officers seeking to make a forcible (nonconsenting) entry to arrest a person from his or her residence must have: (1) an arrest warrant + (2) reason to believe the prospective arrestee is at home)

U.S. v. Gorman, 314 F.3d 1105 (9<sup>th</sup> Cir. 2002) March '03 LED:10 (The Ninth Circuit of the U.S. Court of Appeals held that the "reason to believe" test of Payton is a "probable cause" standard)

State v. Holeman, 103 Wn.2d 426 (1985) April '85 LED:11. (Ordering the person to come out of the house or reaching through the threshold to grab the prospective arrestee is the equivalent of a forced entry of the residence. Knocking at the door and requesting either voluntary consent to entry or voluntary exit by resident is permitted, but it is a legally risky tactic, because the person at the door can simply refuse consent.

**Fisher v. City of San Jose, 558 F.2d 1069 (9<sup>th</sup> Cir. 2009) April '09 LED:04 (In March of 2009, a 6-5 majority of an 11-judge panel reversed an earlier 3-judge ruling and held that no arrest warrant or search warrant is required in a barricaded-person situation during the time that officers are attempting to deal with the situation; exigency is deemed to exist throughout the process, and therefore ordering the person out or going in and getting the barricaded person is not subject to the Payton rule.)**

**State v. Hatchie, 161 Wn.2d 390 (2007) Oct. '07 LED:06 (Payton rule applies under Washington constitution for entry to arrest the subjects of misdemeanor and gross misdemeanor warrants, but the Washington rule is not entirely consistent with the federal constitution's Fourth Amendment Payton rule in this context. The Hatchie Court makes two significant rulings: 1) a misdemeanor arrest warrant justifies forcible entry of a person's own premises to arrest if officers have PC to believe the arrestee is present at the time of entry, but the Washington courts: a) will require that the subject of the warrant was actually home at the time of the entry; b) will review to see if the entry to arrest was pretextual; and c) will review the time and manner of the entry to determine reasonableness. Also, the Hatchie Court concludes that the address listed on the arrest warrant does not control in determining what residence constitutes the arrestee's present residence – what controls is the information, i.e., probable cause, that officers have at the time of entry concerning the arrestee's current place of residence)**

**U.S. v. Mayer, 530 F.3d 1099 (9<sup>th</sup> Cir. 2008) Oct. '08 LED:15; Cuevas v. De Roco, 531 F.3d 726 (9<sup>th</sup> Cir. 2008) Oct. '08 LED:15 (Entry of a residence to seize a probationer or parolee for a suspected violation requires probable cause to believe that the probationer or parolee resides at the residence)**

**2. *Third party's residence (Steagald v. U.S. rule)***

Steagald v. U.S., 451 U.S. 204 (1981) May-Aug. '81 LED:01 (In the absence of exigent circumstances or fresh pursuit, officers seeking to make a forcible (nonconsenting) entry to arrest a person from a third party's residence (not also his or her own residence) must have a search warrant)

**3. *Undercover entries as consenting entries***

State v. Nedergard, 51 Wn. App. 304 (Div. I, 1988) Aug. '88 LED:07 (Holds consent valid but scope of search limited by undercover role)

**4. *Hot pursuit of misdemeanor offender into residence***

If officer has probable cause to believe that a person has committed DUI, or another serious crime with alcohol influence as element of crime, and the person tries to flee into a home, the officer apparently has the authority to forcibly enter the home and make an arrest. State v. Griffith, 61 Wn. App. 35 (Div. III, 1991) Sept. '91 LED:18 (Noting the special exigency of likely lost evidence – i.e., dissipation)

of alcohol – if officer has probable cause to arrest for DUI, not some more minor offense, before suspect flees into residence).

See also State v. Wolters, 133 Wn. App. 297 (Div. II, 2006) July '06 LED:17 (Holding that where officer had PC to arrest a DUI suspect who would not take his hands out of his pockets, and who then fled into his home, under all of the circumstances the officer was justified in making forcible warrantless residential entry to arrest the DUI suspect).

**But see State v. Hinshaw, 149 Wn. App. 747 (Div. III, 2009) July '09 LED:21 (Holding that PC as to a DUI committed within the past hour, plus the fact that alcohol dissipates in the body, did not add up to exigent circumstances such as to justify officer's reaching through open doorway to arrest man).**

When there is no articulable exigency, it is much more difficult to argue that forcible, warrantless entry is permitted to carry out the probable cause arrest of one who is suspected of committing some other misdemeanor. Compare Seattle v. Altshuler, 53 Wn. App. 317 (Div. I, 1989) April '89 LED:17 (criminal case) with Altshuler v. Seattle, 63 Wn. App. 389 (Div. I, 1991) (Altshuler II is a civil case not reported in LED. Altshuler II suggests that Altshuler I's criminal case opinion may have been too restrictive regarding hot pursuit issue, but leaves the issue in doubt).

See also State v. Bessette, 105 Wn. App. 793 (Div. III, 2001) Aug. '01 LED:14 (Holds that officer in hot pursuit of MIP suspect did not have exigent circumstances justifying non-consenting, warrantless entry of third party's residence to arrest suspect).

#### **D. Warrantless Search Of M. Vehicle Incident To Arrest**

**ALERT!** In Arizona v. Gant, 129 S.Ct. 1710 (2009) June '09 LED:13, the U.S. Supreme Court significantly restricted the authority of officers to conduct warrantless searches of motor vehicles incident to arrests of occupants. In the June LED, we reported that there will be uncertainty for the foreseeable future regarding some aspects of the new Fourth Amendment rule, and then we gave our best guess regarding the new basic Fourth Amendment rule for a warrantless motor vehicle search incident to arrest in light of Gant and in light of prior Washington appellate court decisions interpreting article 1, section 7 of the Washington constitution. A little over six months later, the Washington Supreme Court issued its decision in State v. Valdez, 167 Wn.2d 761 (2009) Feb. '10 LED:11, interpreting article 1, section 7 of the Washington constitution as even further constricting authority of Washington officers to conduct searches incident to arrest.

Using “strikeout” for deletions of language and underlining for new language of the rule to show how the Valdez decision appears to have shrunk Washington officers’ authority, we now give our best guess as to the Washington rule:

**After officers have made a custodial arrest of a motor vehicle occupant – including searching the arrestee’s person – and have secured the arrestee in handcuffs in a patrol car, and while the vehicle is still at the scene of the arrest, they may automatically search the vehicle – without a search warrant and without need for justification under any other exception to the search warrant requirement – NEVER.**

~~the passenger compartment of the vehicle and any unlocked containers in that compartment if and only if A) they proceed without unreasonable delay; and B) they have a reasonable belief that the passenger compartment contains evidence of: 1) the crime(s) for which the officers originally decided to make an arrest, or (2) any other crime(s) for which the officers have developed probable cause to arrest before beginning the search of the passenger compartment.~~

It is probably no consolation to any current Washington law enforcement officers, but the Valdez Court’s “independent grounds” ruling regarding MV search incident under article I, section 7 in Valdez is not new. Essentially the same “independent grounds” rule was created by the Washington Supreme Court in State v. Ringer, 100 Wn.2d 686 (1983). That search incident ruling in Ringer (along with the Court’s “independent grounds” elimination of the PC-car-search rule of the “Carroll Doctrine”) brought an immediate hue and cry from many Washingtonians who saw Ringer as undermining law and order. Included in the response was an unsuccessful initiative campaign involving the combined efforts of the AGO, prosecutors and law enforcement interests seeking an amendment to the Washington constitution to prevent any further personal-values-driven “independent grounds” rulings (the campaign was inspired by similar constitutional amendment campaigns that had succeeded in limiting “independent grounds” rulings in California and Florida).

While the initiative campaign that was sparked by Ringer did not, unfortunately, succeed, the campaign may have gained the attention of the Washington Supreme Court. Less than three years after deciding Ringer, the Washington Supreme Court reverted back to essentially its pre-Ringer MV search incident rule in State v. Stroud, 106 Wn.2d 144 (1986) (though not then or thereafter restoring the PC-car-search rule of the “Carroll Doctrine”). Whether there will again be a hue and cry by Washingtonians –

and whether the Washington Supreme Court will re-re-revise its interpretation of article I, section 7 – remains to be seen.

We have made our best effort to revise this section II.D. of the outline to delete or revise material that was inconsistent with Valdez/Gant, but that is a judgment call on our part. The appellate court decisions that we cite and describe must be read with Gant in mind.

1. *There must first be an “arrest”*

State v. O’Neill, 148 Wn.2d 564 (2003) April ’03 LED:03 (Under article 1, section 7 of Washington constitution, the search may not precede the arrest – Officers must do the arrest formally “by the numbers” before they search the vehicle)

State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March ’04 LED:11 (Putting suspended driver in back seat of patrol car and telling him he is under arrest held not a “custodial arrest” for “search incident” purposes where he was not frisked, searched, or handcuffed, and he was allowed to use cell phone while sitting in the patrol car)

2. *Crimes for which search incident permitted*

State v. Pulfrey, 154 Wn.2d 517 (2005) Aug ’05 LED:09 (Washington Supreme Court holds that in those circumstances where an officer has discretion whether to make a custodial arrest – or instead to cite and release – as a standard practice, the officer may make the custodial arrest, conduct a search incident to that arrest, and, after completing the search, exercise discretion whether to cite and release the detainee or instead to take the detainee in for booking. Note, however, that the Washington Supreme Court did not address whether a more restrictive rule is required under article 1, section 7 of the Washington constitution, nor was there a constitutional pretext issue presented in the Pulfrey case.)

State v. Reding, 119 Wn.2d 685 (1992) Dec. ’92 LED:17 (Declares that custodial arrest OK for all of the traffic crimes which are listed in RCW 10.31.100(3) -- *but* beware of State v. Nelson, 81 Wn. App. 249 (Div. II, 1996) Sept. ’96 LED:06 (indicating limits to Reding rule though upholding negligent driving arrest under former (criminal) negligent driving RCW) **But see Gant-Valdez limits on the threshold question of authority to do MV search-incident in the first place.**

State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) Oct. '98 LED:05 (If officer clearly manifests at the time intent not to make a custodial arrest, then no authority to "search incident")

Knowles v. Iowa, 525 U.S. 113 (1998) Feb. '99 LED:02 (Search held invalid by U.S. Supreme Court where Iowa statute permitted "search incident to traffic citation") **But see Gant-Valdez limits on the threshold question of authority to do MV search-incident in the first place.**

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) July '01 LED:18 (U.S. Supreme Court rules that the Fourth Amendment allows custodial arrest for all misdemeanors, even those punishable only by a fine; Washington constitution probably does not authorize arrest for fine-only misdemeanors, to the extent there may be such statutes or ordinances in Washington) **But see Gant-Valdez limits on the threshold question of authority to do MV search-incident in the first place.**

State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) June '02 LED:21 (Court upholds custodial arrest and "search incident" even though officer did not comply with local policy that required checking with jail before arresting on the particular type of offense)

**State v. Gering, 146 Wn. App. 935 (Div. III, 2008) Jan. '10 LED:09 (Court upholds custodial arrest and "search incident," rejecting defendant's argument that custodial arrest should not be permitted on arrest for offense for which jail would not have taken him)**

### **3. *Search following arrest of passenger, not driver***

State v. Cass, 62 Wn. App. 793 (Div. II, 1991) Jan. '92 LED:06 (Arrest of passenger on warrant justified search of passenger area of vehicle incident to that arrest); State v. Bello, 142 Wn. App. 930 (Div. I, 2008) March '08 LED:07 (same as Cass)

### **4. *Timing of search***

State v. Boyce, 52 Wn. App. 274 (Div. I, 1988) Nov. '88 LED:02 (Vehicle search not incident to arrest if made after the arrestee has been taken away from the scene)

U.S. v. Vasey, 834 F.2d 782 (9th Cir. 1987) (30- to 45-minute delay before searching arrestee's vehicle was too long; search was no longer "incident to" the arrest)

State v. Weaver, 433 F.3d 1104 (9<sup>th</sup> Cir. 2006) March '06 LED:02 (Search ruled to have occurred close enough in time to the time of arrest to be deemed “incident to arrest” even though, for safety reasons, the officers waited 10 to 15 minutes for a third officer to arrive before conducting the car search)

**State v. Boursaw, 94 Wn. App. 627 (Div.I, 1999) May '99 LED:07 (After officer found likely drug paraphernalia in initial check of passenger area, delay of completion of search for 10 minutes waiting for drug-sniffing K-9 to arrive was OK). But see State v. Valdez, 137 Wn. App. 280 (Div. II, 2007) April '07 LED:08 (K-9 search of passenger area of vehicle held to be an impermissible second “search incident” of the vehicle following the arrest of occupants. Officers first secured the arrestee in patrol car, then did a quick search of the arrestee’s car. After seeing a few missing screws and some loose paneling, officer called for a drug-sniffing k-9, which was brought to the scene fairly quickly. The dog sniffed out drugs that were behind the loose paneling. It is difficult to logically distinguish this decision from Division One’s decision in Boursaw). We think that Boursaw was the correctly decided case on this delayed-search issue.**

As noted at the outset of this section of the outline, the Washington Supreme Court granted review in Valdez, but then decided the case on different grounds (i.e., determining that there was no threshold authority to search the vehicle incident to arrest after the arrestee had been secured in a patrol car).

**5. *Required link between arrestee and MV (see comment regarding Gant decision above at the beginning of this section II.D.***

State v. Fore, 56 Wn. App. 339 (Div. I, 1989) March '90 LED:05 (MV was subject to Stroud search where arrestee used car to commit crime moments earlier, and he was near the unlocked vehicle when the arrest for selling marijuana from car was made)

State v. O’Neill, 110 Wn. App. 604 (Div. III, 2002) June '02 LED:21 (Where officer announced that driver was under arrest before the driver got out of the truck, the driver’s act of locking the truck as he got out did not make the truck’s passenger area off-limits to a warrantless “search incident”)

**State v. Adams, 146 Wn. App. 595 (Div. I, 2008) Nov. '08 LED:11 (After officer pulled in behind suspect's parked car and turned on her emergency lights, the suspect could not thwart a search incident to arrest by getting out of the car, and, after the officer ordered him to get back in the car, locking the doors from the outside)**

State v. Perea, 85 Wn. App. 339 (Div. II, 1997) June '97 LED:02 (Where the suspect parked, got out of the vehicle and locked it before a seizure was made, the vehicle was not subject to a "search incident" under the Stroud rule)

**State v. Quinlivan, 142 Wn. App. 960 (Div. III, 2008) March '08 LED:02 (Where, after being seized but before being told he was under arrest, driver got out of his vehicle and locked it, the vehicle was not subject to search incident to his arrest)**

State v. Porter, 102 Wn. App. 327 (Div. I, 2000) Nov. '00 LED:05 (MV not subject to Stroud search where arrest on warrant was made 300 feet from the vehicle, and the vehicle was not linked to the basis for the arrest)

State v. Wheless, 103 Wn. App. 749 (Div. I, 2000) March '01 LED:04 (Holding MV "search incident" not permitted where arrest made in tavern bathroom, even though, during "buy-bust" operation being conducted by police, suspect had only moments earlier gone into his vehicle in the tavern parking lot 50-75 away)

State v. Johnston, 107 Wn. App. 280 (Div. II, 2001) Oct. '01 LED:19 (Vehicle search was not "incident to arrest" even though the arrest took place in the vicinity of the vehicle, because the arrestee had no ready access to the vehicle or immediate control of the vehicle at the time of the arrest)

State v. Turner, 114 Wn. App. 653 (Div. II, 2003) March '03 LED:15 (Vehicle search could not be upheld under "incident to arrest" rationale, as testimony and findings established that arrestee was "near" the open driver's side door, but did not establish how near the door he was when the arrest was made)

State v. Rathbun, 124 Wn. App. 372 (Div. II, 2004) Jan. '05 LED:08 (Vehicle search could not be upheld under "incident to arrest" rationale because arrest process began over 40 feet from the vehicle, even though suspect had been standing near his vehicle when officers began to drive up his driveway to make contact with him)

Thornton v. U.S., 124 S. Ct. 2127 (2004) July '04 LED:02 (Under the Fourth Amendment, the arrestee's prior suspicious activity after he had spotted the officer while driving, and his physical location relatively near his car at the time of his later arrest were sufficient linkage in terms of time, space and behavioral link to his car to justify a warrantless searching of his car incident to his arrest for possession of illegal drugs, despite the fact that the officer's first contact with the suspect occurred after the suspect had gotten out of his car and had shut, but not locked, the door)

#### **6. Scope of the search – "bright line" rule**

State v. Stroud, 106 Wn.2d 144 (1986) Aug. '86 LED:01 (MV search incident extends to passenger area and unlocked containers in that area)

State v. Mitzlaff, 80 Wn. App. 184 (Div. II, 1995) March '96 LED:11 (Engine compartment is not within scope of Stroud)

State v. Johnson, 128 Wn.2d 431 (1996) March '96 LED:06 (MV search of long-haul trucker's cab sleeping area is within scope of Stroud rule)

U.S. v. Mayo, 394 F.3d 1271 (9<sup>th</sup> Cir. 2005) March '05 LED:07 (Hatchback area of vehicle is within scope of the Fourth Amendment MV search incident rule)

State v. Parker, State v. Jines, State v. Hunnel, 139 Wn.2d 486 (1999) Dec. '99 LED:13 (Where arrest is made of less than all of the occupants of the vehicle, then the officer may not automatically search those personal effects that are left behind in the passenger area and which are known to belong to non-arrested person(s). Some question remains as to whether the standard limiting the search is "effects known to belong" or "effects reasonably believed to belong" to non-arrestees. Note, however, that in State v. Reynolds, 144 Wn.2d 282 (2001) Oct. '01 LED:09, the Washington Supreme Court stated in dicta (language not necessary to support the decision) that "known to belong" is the standard under Parker.)

State v. Jackson, 107 Wn. App. 646 (Div. I, 2001) Oct. '01 LED:16 (Under Parker rule, officers may search personal effects for ID where the occupants give confusing information about the ownership of those personal effects)

State v. Jones, 146 Wn.2d 328 (2002) July '02 LED:11 (Washington Supreme Court reverses the Court of Appeals and rules that driver

who kept his gun in his girl-friend's purse had "automatic standing" to raise a Parker objection to a police search of the purse following his arrest, and that the search was unlawful under Parker because the arresting officer knew that the purse belonged to the passenger and was not in control of the arrestee-driver)

State v. Boursaw, 94 Wn. App. 629 (Div. I, 1999) May '99 LED:07 (Removal of ashtray OK—this is not an impermissible dismantling of the vehicle)

State v. Vrieling, 144 Wn.2d 489 (2001) Oct. '01 LED: 02 (Entire readily-accessible passenger area of a Winnebago was subject to Stroud "search incident" where an occupant was custodially arrested in the Winnebago following a traffic stop. Also, the Court of Appeals had earlier held in Vrieling, 97 Wn. App. 152 (Div. I, 1999) Nov. '99 LED:07, that a zipped seat cushion was not a "locked" container under Stroud, and therefore officers could lawfully unzip the cushion and search its contents as part of a motor vehicle search incident to arrest.)

#### **E. Warrantless Search Of Person Incident To Arrest**

**ALERT! Beware of Arizona v. Gant, 129 S.Ct. 1710 (2009) June '09 LED:13 and State v. Valdez, 167 Wn.2d 761 (2009) Feb. '10 LED:11, discussed above at the beginning of section II.D. Gant and Valdez addressed motor vehicle searches incident to arrest, but it is possible that one or both of those decisions may be interpreted at some point to also limit the authority to search a person incident to arrest. For now, however, there is no controlling precedent in this jurisdiction to support such an extension of Gant and/or Valdez.**

##### **1. *There must first be an "arrest"***

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Under article 1, section 7 of Washington constitution, the search may not precede the arrest – do the arrest "by the numbers")

##### **2. *Crimes for which custodial arrest and hence search incident permitted***

Case law allows a custodial arrest for any crime except for certain traffic crimes. See discussion in Part II.D.1 above.

##### **3. *Timing of the search***

State v. Clayton Donald Smith, 119 Wn.2d 675 (1992) Dec. '92 LED:04 (A delay of 10 to 15 minutes before the officer looked inside a fanny pack taken from arrestee did not invalidate the search where the delay was due to other activity of the officer relating to the arrest and investigation)

#### **4. Scope of the search**

The U.S. Supreme Court held in its 1969 Chimel decision that the scope of the search extends to all items on the person of the arrestee and all areas into which the arrestee might lunge to get a weapon or to destroy evidence. State v. Clayton Donald Smith (cited above) holds that a fanny pack being carried by the arrestee when the arrest process begins can be searched following handcuffing of the arrestee, even though at that point the fanny pack is lying on the ground outside the "lunge area". The location of items when the arrest process begins will justify a search of such items. Note that, while the case law here and elsewhere allows for a thorough search of the person, as well his or her outer clothing, packages, and containers based on the mere fact of the arrest, the Court of Appeals has held in State v. Rulan C., 97 Wn. App. 884 (Div. I, 1999) May '99 LED:15 that a complete, cheek-spreading "strip search" at the scene of an arrest in a residence went beyond the permissible scope of a warrantless search incident to arrest.

#### **5. "Bright line" nature of authority**

State v. LaTourette, 49 Wn. App. 119 (Div. I, 1987) Dec. '87 LED:18 (Recognizes that the authority to search incident to arrest does not depend on fact-based probabilities that evidence or weapons will be found. The fact of the lawful arrest establishes the authority to search)

State v. Lowrimore, 67 Wn. App. 949 (Div. I, 1992) March '93 LED:15 (All containers are equally subject to "search incident")

#### **6. "Booking search" limits if arrest made on bail warrant**

State v. Gloria Smith, 56 Wn. App. 145 (Div. III, 1989) March '90 LED:12 & Feb. '91 LED:18 (Must allow person arrested on bail warrant to post bail to avoid "booking" search of personal effects; *suggestion*: be sure to search the personal effects in the field in the "search incident to arrest")

State v. Ross, 106 Wn. App. 876 (Div. I, 2001) Sept. '01 LED:15 (The Gloria Smith bail-warrant-arrest rule does not limit searches in the

field that are “incident to arrest”; therefore, where an officer from one jurisdiction handed over a bail-warrant-arrestee to an officer from another jurisdiction, the second officer could lawfully conduct a second “search incident” prior to continuing the transport of that prisoner to jail).

## **F. Warrantless Search By Consent**

### **1. *First party consent***

#### **a. Voluntariness considerations, including consent request forms, threats to get a warrant, warnings re rights, and deception**

State v. Apodaca, 67 Wn. App. 736 (Div. III, 1992) March '93 LED:13 (Threat to "get warrant" may make consent involuntary)

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Consent not “voluntary” if given after officer asserts that “search incident” standard would justify a warrantless search anyway)

State v. Ferrier, 136 Wn.2d 103 (1998) Oct. '98 LED:02 (Officers seeking consent in a knock-and-talk situation must give warnings advising occupant of the 3 R's of consent – right to refuse, right to restrict scope, and right to revoke – in order to obtain valid consent to search residence)

State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) Nov. '99 LED: 02 (Ferrier rule does not apply to request for residential entry where officer's intent is to make arrest on INS order, not to search)

State v. Leupp, 96 Wn. App. 324 (Div. II, 1999) Oct. '99 LED:05 (Ferrier rule does not apply to request for residential entry to search for a possible DV victim)

State v. Williams (Harlan M.), 141 Wn.2d 17 (2000) Dec. '00 LED:14 (Request to homeowner to search residence for a felon-guest wanted on an arrest warrant is not subject to the Ferrier rule)

State v. Kennedy, 107 Wn. App. 972 (Div. II, 2001) Nov. '01 LED:06 (Full Ferrier warnings were required for officers to obtain valid consent to enter a motel room where the officers had gone to investigate after receiving a report of illegal drug-dealing by persons in the motel room)

State v. Khounvichai, 149 Wn.2d 557 (2003) Aug. '03 LED:06 (Ferrier warnings were not required for officers to obtain valid consent from a suspect's grandmother for purposes of entry of the grandmother's home just to "talk to" her grandson who lived there and who was a suspect in a malicious mischief case; the majority opinion suggests, however, that if probable cause for a search had developed in this situation, the officers would have been required to obtain a search warrant rather than then obtaining consent to search)

State v. Tagas, 121 Wn. App. 872 (Div. I, 2004) July '04 LED:13 (Ferrier warnings were not required to obtain consent to search purse of person to whom officer had offered a ride from the freeway to a nearby restaurant)

**State v. Freepons, 147 Wn. App. 649 (Div. II, 2008) Feb. '09 LED:14 (Ferrier warnings required to seek consent to search house for person believed to have left scene of rollover MV accident)**

State v. Cole, 122 Wn. App. 319 (Div. II, 2004) Sept. '04 LED:23 (Advance written consent-to-search from a person who was a housemate of a person sentenced to home detention was valid for duration of EHD agreement)

**State v. Garcia, 140 Wn. App. 609 (Div. III, 2007) Nov. '07 LED:17 (Court of Appeals invalidates written consent given at the jail by a sleep-deprived defendant who was not given Miranda warnings and whose alleged lack of intelligence and education was not rebutted at suppression hearing)**

**b. Implied consent is possible, but beware**

U.S. v. Shaibu, 920 F.2d 1423 (9th Cir. 1989) May '90 LED:09 (Silently turning and walking back into apartment following officer's request to enter is not implied consent for officers to follow)

**2. *Third party consent – Independent dominion & control + Assumed risk***

**a. Mutual consent requirement of State v. Leach**

State v. Leach, 113 Wn.2d 735 (1989) Feb. '90 LED:03 (Holds that where two business "partners" both were present and had dominion and control over business premises, officers were required to ask both for consent to search)

State v. Walker, 136 Wn.2d 767 (1998) Jan.'99 LED:03 (Exclusionary rule does not apply to consenting cohabitant where Leach rule violated as to cohabitant not asked for consent)

State v. Hoggatt, 108 Wn. App. 257 (Div. II, 2001) Nov. '01 LED:08 (Leach rule does not apply where officers merely request consent to enter living room, as opposed to requesting consent to search)

State v. Morse, 156 Wn.2d 1 (2005) Feb. '06 LED:02 (Leach rule is under article 1, section 7 of Washington constitution; the rule was violated where leaseholder of apartment was in a bedroom because officers obtained consent to search the apartment only from a houseguest who answered their knock on the apartment entry door)

**State v. Williams, 148 Wn. App. 585 (Div. II, 2009) April '09 LED:05 (Where uncle was located outside motel room that he was sharing with his adult nephew, the uncle's consent to police to enter room did not support entry to contact the nephew inside without getting nephew's consent too)**

See also Georgia v. Randolph, 126 S.Ct. 1515 (2006) May '06 LED:05 (Under the Fourth Amendment, which imposes a less restrictive mutual consent rule than does the Washington constitution, if two persons with authority to consent to a search of an area are both present and one consents and the other objects, officers do not have a valid consent to search the area)

**And see U.S. v. Brown, 563 F.3d 410 (9<sup>th</sup> Cir. 2009) (decision filed April 17, 2009) Aug. '09 LED:06 (Consent by residential co-occupant #1 supported search of residence where (A) co-occupant # 2 had been arrested and taken away from the scene, and (B) such arrest and transport was not a pretext to prevent him from objecting to the search)**

**b. Exception to *Leach* rule for MV's (*Cantrell*)**

State v. Cantrell, 124 Wn.2d 183 (1994) Sept. '94 LED:05 (Leach mutual consent rule applies only to fixed premises and does not apply to motor vehicle searches; *warning*: if one co-occupant with right to dominion and control of MV objects to search, don't rely on consent of other co-occupant, whether the search is of a MV or of another type of protected area or premises)

**c. Family relationships (parent-child)**

State v. Summers, 52 Wn. App. 767 (Div. I, 1988) Feb. '89 LED:07 (Parent or guardian generally can consent to search of juvenile's room; but beware of the child who pays rent or is no longer dependent)

**d. Real property relationships (landlord-tenant, host-guest, co-tenant)**

State v. Birdsong, 66 Wn. App. 534 (Div. I, 1992) Jan. '93 LED:01 (Holds that landlord could not lawfully consent to search of premises not yet abandoned by tenant)

State v. Koepke, 47 Wn. App. 897 (Div. III, 1987) Oct. '87 LED:03 (Host who used guest's room to store items and accessed the room on occasion had authority to consent to search of the guest room)

**e. Other relationships (bailor-bailee, employer-employee, school administration)**

Generally, a person (bailor) who loans a car to another (bailee) assumes the risk that the borrower will consent to a search of the car. LaFave, Search & Seizure, § 8.6(a).

Employer authority to consent to search of employee desks, file cabinets, and lockers depends on regulations, policies and practices of employer in relation to those areas. LaFave, Search & Seizure, § 8.6(d).

K-12 school authorities may consent to search of a student's locker. LaFave, Search & Seizure, § 8.6(e).

**3. *"Apparent authority" of 3rd party not enough under the Washington constitution***

Illinois v. Rodriguez, 497 U.S. 177 (1990) Aug. '90 LED:08 (U.S. Supreme Court holds under Fourth Amendment that "apparent authority" of 3rd party allows police to act on that person's consent to search - - But see next entry re the Washington Supreme Court's Morse decision, rejecting this Fourth Amendment "apparent authority" doctrine on independent state constitutional grounds)

State v. Morse, 156 Wn.2d 1 (2005) Feb. '06 LED:02 (In case where leaseholder of apartment was in a bedroom and officers obtained consent to search the apartment only from a houseguest who answered their knock on the apartment entry door, the Washington Supreme Court holds that the Washington constitution, article 1,

section 7, does not recognize the “apparent authority” doctrine followed under the federal constitution’s Fourth Amendment).

**G. Warrantless Search Based On Exigent Circumstances or Under Non-investigative Rationale of “Community Caretaking Function” (NOTE: Washington appellate courts often fail to distinguish the investigative rationale of “exigent circumstances” and the non-investigative rationales of “community caretaking” or “emergency,” and we have not tried to sort the differing rationales in this outline).**

**1. *There must be an articulable basis – for example, the need to protect property or persons under “community caretaking function” and objective and subjective justification must exist.***

Domestic violence calls often present emergency or exigent circumstances.

State v. Lynd, 54 Wn. App. 18 (Div. I, 1989) Nov. '89 LED:07 (Looking for DV victim following hang-up call – man with cut on face admits to hitting spouse, but says that she is no longer home – officers may go in to look for her)

State v. Raines, 55 Wn. App. 459 (Div. I, 1989) Jan. '90 LED:10 (Looking for DV suspect – officer responding to DV report from neighbor, know of history of DV, officer’s see man looking out window as they arrive, woman answers door and says “no problem” and no one there but her and son – officers may go in to look for suspect)

State v. Menz, 75 Wn. App. 351 (Div. II, 1994) Feb. '95 LED:17 (Anonymous caller reports sounds of DV; when police arrive, door open on a cold winter night, TV on, and no response to knock and announce – officers may go in to check on status of occupants)

U.S. v. Black, 466 F.3d 1143 (9<sup>th</sup> Cir. 2006) Dec. '06 LED:13 (For officers responding to a DV 911 call from a victim, exigent circumstances and community caretaking function justified entry of residence to look for the victim, whose present whereabouts were unknown, even though there was some reason to believe that the victim was no longer present in the premises)

However, DV law's 4-hour arrest mandate is not by itself an exigent circumstance; there must be some other reason for forced entry.

**State v. Williams, 148 Wn. App. 585 (Div. II, 2009) April '09 LED:05 (Where uncle was located outside motel room he was sharing with his adult nephew, and uncle alleged the nephew inside had previously assaulted him, there was no justification for police entry under the community caretaking or emergency aid rationales when the nephew himself was not in any distress)**

**2. *Other arguable exigencies reviewed on totality of circumstances***

State v. Swenson, 59 Wn. App. 586 (Div. I, 1990) Feb. '91 LED:16 (Mere fact entry door was open on a warm summer night plus lack of response to police doesn't justify entry of home)

State v. Downey, 53 Wn. App. 543 (Div. I, 1989) June '89 LED:12 (Strong ether smell justified entry of apparently unoccupied house) **But see State v. Lawson, 135 Wn. App. 430 (Div. II, 2006) Dec. '06 LED:15 (In light of officers' actions at the scene, an anonymous 911 call and the officers' detection of strong chemical odor coming from a shed did not justify entry of the shed under community caretaking or emergency exceptions to search warrant requirement); see also State v. Leffler, 140 Wn. App. 223 (Div. II, 2007) Oct. '07 LED:16; State v. Leffler, 142 Wn. App. 175 (Div. II, 2007) Apr. '08 LED:25 (Similar ruling holding that entry of a fifth wheel trailer was unjustified)**

Mincey v. Arizona, 437 U.S. 385 (1978) [NO LED] (No "death scene" search exception; get a warrant once exigencies cease to exist)

State v. Angelos, 86 Wn. App. 253 (Div. I, 1997) Sept. '97 LED:12 (Mom OD'd on drugs; police search home for drugs to protect children living in the house)

**State v. Hos, \_\_\_ Wn. App. \_\_\_, 2010 WL 282371 (Div. II, 2010) March '10 LED:16 (Community caretaking function justified officer's warrantless entry of residence to see if the non-responsive, apparently unconscious person observed in open view on a couch was in need of medical help)**

**State v. Gibson, 152 Wn. App. 945 (Div. II, 2009) Jan. '10 LED:11 (Open view of methamphetamine manufacturing materials in car during traffic stop provided exigent or emergency circumstances supporting entry of the car to make sure the materials were secure before the car was transported to an impound lot while a search warrant was sought)**

## H. Searches By Private Citizens, School Authorities

Private citizens are not subject to restriction unless an officer does something to make the citizen an “agent” of the officer.

There is a special rule for searches by school authorities not acting as agents of police: individualized reasonable belief standard – see RCW 28A.600.210-240. See, for example, State v. Brooks, 43 Wn. App. 560 (Div. I, 1986) Aug. '86 LED:11 (Search of student's locker by school administrator lawful based on reasonable suspicion that the locker contained illegal drugs)

## I. Impound - Inventory of Motor Vehicles

***Washington constitution more restrictive than federal constitution***

State v. White, 135 Wn.2d 761 (1998) Sept. '98 LED:08 (Inventory scope cannot extend to locked trunk absent a "manifest necessity" even if there is a trunk release button in passenger area of vehicle)

State v. Dugas, 109 Wn. App. 592 (Div. I, 2001) March '02 LED:02 (Inventory search authority does not permit inspection of contents of closed containers absent “manifest necessity” to do so)

All Around Underground, Inc. v. WSP, 148 Wn.2d 145 (2002) Feb. '03 LED:02 (Impound ordinances or WAC rules adopted under authority of RCW 46.55.113 provisions relating to vehicles that are driven by suspended or revoked drivers must allow officers to consider reasonable alternatives to impoundment). **See also Potter v. WSP, 161 Wn.2d 335 (2007) Feb. '08 LED:09; Potter v. WSP, 165 Wn.2d 67 (2008) Jan. '09 LED:03 (WSP may be sued civilly on theory of “conversion” for applying its mandatory impound policy)**

## J. Securing Room Or House On PC While Search Warrant Is Sought

Illinois v. McArthur, 531 U.S. 326 (2001) April '01 LED:02 (Officers who develop probable cause to search residence while there for an unrelated purpose may secure the premises from the outside and expeditiously seek a search warrant) (U.S. Supreme Court)

State v. Solberg, 66 Wn. App. 66 (1992) Nov. '92 LED:10 (House may be secured from the outside on probable cause while warrant is sought, but search must await warrant)

**K. Securing Personal Property on Reasonable Suspicion or PC**

Officers with reasonable suspicion to search vehicles or other personal property may take such items from persons in possession and secure such items briefly (under time limits similar to those under Terry v. Ohio) to diligently investigate. Officers with probable cause to search such items may take such items from persons in possession and secure the items for a longer period, but still only for a period that is objectively reasonable in duration, while the officers expeditiously seek a search warrant. See LaFave, Search and Seizure, 3<sup>rd</sup> Ed., Sec. 9.8(e); see also State v. Huff, 64 Wn. App. 641 (Div. II, 1992) Apr. '98 LED:09 (Vehicle may be seized based on probable cause to search and towed to a secure location while officers are expeditiously seeking a search warrant).

**L. No "Carroll Doctrine" In Washington**

State v. Ringer, 100 Wn.2d 686 (1983) Feb. '84 LED:01 (Mobility of MV alone is not "exigent circumstance" justifying a warrantless search.)

**M. No "Forfeitable Property" Exception to Search Warrant Requirement**

State v. Hendrickson, 129 Wn.2d 61 (1996) July '96 LED:11 (Mere fact that MV lawfully seized for forfeiture under drug laws does not authorize full search without a warrant)

**III. INTERROGATIONS LAW**

**A. Exposure To Civil Liability Under Fifth Amendment?**

**1. *General Rule Is That Mere Miranda Violation Alone Does Not Provide Basis For Civil Rights Suit***

The Ninth Circuit of the U.S. Court of Appeals had held that there is an exception to the rule against Fifth Amendment Civil Rights Act liability for Miranda violations where police engage in premeditated extended Miranda-violative interrogation or ignore repeated requests for counsel, even if the statement is not later used in a criminal case and even if the statement is not involuntary in the ordinary sense of that word: see Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) Nov. '92 LED:02; Calif. Attys v. Butts, 195 F.3d 1039 (9<sup>th</sup> Cir. 1999) Jan. '00 LED:03. However, the U.S. Supreme Court rejected the rationales of those Ninth Circuit decisions in Chavez v. Martinez, 123

S.Ct. 1994 (2003) Sept. '03 LED:02. But Chavez left open the possibility of civil rights liability where (1) there was a Miranda violation; (2) the suspect's statement is also shown, based on additional facts unrelated to the Miranda violation, to have been truly involuntary; and (3) the statement was later used against the suspect in a criminal case. In Chavez, the statement was never used in a criminal case against the defendant, so no civil rights liability could be imposed, the Supreme Court held.

The Chavez Court remanded the case for a determination of whether the officer's interrogation conduct was so "shocking to the conscience" as to constitute a Fourteenth Amendment substantive due process violation. The Ninth Circuit remanded the case for trial on that issue. 354 F.3d 1168. The U.S. Supreme Court denied further review. 124 S.Ct. 2932 (Jan. 20, 2004).

**In Stoot v. City of Everett, 582 F.3d 910 (9<sup>th</sup> Cir. 2009) (amended decision filed September 18, 2009) Oct. '09 LED:08, a 3-judge panel of the Ninth Circuit held that a detective's alleged promises of leniency during interrogation of an allegedly mentally and emotionally challenged suspect could be the basis of Civil Rights Act liability for a Fifth Amendment violation because statements obtained in the interrogation were used in preliminary hearings in the criminal case; the City of Everett is seeking U.S. Supreme Court review in Stoot)**

**2. *Interrogation Technique That Does Not Shock The Conscience Generally Won't Support Civil Action***

Keates v. Vancouver, 73 Wn. App. 257 (Div. II, 1995) Nov. '95 LED:18 ("Good guy-bad guy" effort not basis for suit in "outrage," "negligent infliction of emotional distress")

**B. Miranda warnings requirement triggered by (1) custody which is the functional equivalent of arrest plus (2) interrogation.**

Stansbury v. Calif., 511 U.S. 318 (1994) July '94 LED:02; *but see* State v. D.R., 84 Wn. App. 832 (Div. I, 1997) May '97 LED:10 (Warnings were required prior to officer's questioning of 14-year-old who had been called to the principal's office at school); see also State v. Heritage, 152 Wn.2d 210 (2004) Sept. '04 LED:12 (questioning by Spokane City Parks security guards was not "custodial"); State v. Lorenz, 152 Wn.2d 22 (2004) Sept. '04 LED:10 (questioning of suspect on her porch after she was told she did not have to answer questions and was free to leave was not "custodial" and the fact that the officers had PC to arrest her and had focused on her as a suspect was irrelevant); Beware of State v. France, 129 Wn. App. 907 (Div.

II, 2005) Dec. '05 LED:17 (Where officer told Terry DV detainee that the officer would let him go once matters were "cleared up," the suspect was in the functional equivalent of custodial arrest).

**C. "Initiation of contact" rule of Fifth Amendment bars police initiation of contact with subject of custodial interrogation request who asserts right to silence or requests counsel and then remains in continuous custody.**

Fifth Amendment "Initiation of contact" article is available on CJTC LED WEBPAGE.

**D. CrR 3.1 and CrRLJ 3.1 require that police advise an arrestee of the right to counsel after making an arrest.**

State v. Trevino, 127 Wn.2d 735 (1995) Jan. '96 LED:03 (Officer should have advised DUI arrestee of CrR 3.1 right to counsel at time of arrest, but there was no prejudice in the violation, so BAC test not suppressed)

State v. Templeton, 148 Wn.2d 193 (2002) Feb. '03 LED:03 (Because BAC testing is not "questioning," wording of warnings prior to BAC testing must advise of right "at this time," not merely that right exists "before or during questioning," so that DUI arrestee is informed of right to consult an attorney before arrestee decides whether to take BAC test – however, the erroneous warnings did not create prejudice in the consolidated cases on appeal, so suppression is not required)

State v. Copeland, 130 Wn.2d 244 (1996) Jan. '97 LED:03 (Officer should have advised murder suspect of CrR 3.1 counsel right before forcibly transporting him to jail facility, but there was no prejudice in the violation, because only physical evidence was taken and that evidence was seized under a search warrant previously obtained)

State v. Greer, 62 Wn. App. 779 (Div. I, 1991) Feb. '92 LED:05 (Request for attorney during post-arrest, pre-appearance screening at jail by public defender's office may trigger right to counsel under Washington Court Rules)

**E. CrR 3.1 requires that reasonable effort be made to promptly attempt to accommodate request for consult with counsel.**

State v. Kirkpatrick, 89 Wn. App. 407 (Div. II, 1997) March '98 LED:12 (Where arrestee terminated interrogation with request for an attorney during custodial interrogation, out-of-town detective should have attempted to place defendant in telephonic contact with counsel)

at stationhouse in Clallam County, rather than simply terminating questioning and making the transport back to Lewis County)

State v. Whitaker, 135 Wn. App. 923 (Div. I, 2006) Aug. '06 LED:18 (Partially handcuffed murder suspect's waiver of Fifth and Sixth Amendment rights prior to custodial questioning by FBI agents valid – and Criminal Rule 3.1 not violated – because, although suspect asked agents about the process for appointing counsel, he made clear that he was willing to be questioned without a lawyer; also, jailhouse informant could testify because police did not make him their “agent” for Sixth Amendment purposes)

State v. Kronich, 131 Wn. App. 537 (Div. III, 2006) April '06 LED:03 (DUI arrestee changed his mind about contacting counsel, and therefore CrRLJ 3.1 was not violated by law enforcement officer in continuing the interrogation)

#### **IV. CONSULAR CONTACT WARNINGS TO FOREIGN NATIONALS**

See May '99 LED article at 18-21 discussing rights of foreign nationals under Vienna Convention on Consular Relations. Special warnings should be given following “arrest” (but not where there is only a Terry seizure or traffic stop) of foreign national. Federal Department of State WEBPAGE link can be found on CJTC LED WEBPAGE. In Sanchez-Llamas v. Oregon, Bustillo v. Johnson, 126 S.Ct. 2669 (2006) Sept. '06 LED:02, the U.S. Supreme Court held in a criminal case that the Vienna Convention does not itself require suppression of statements taken by officers under circumstances where the treaty has been violated, but that a violation might be taken into account in determining whether a Miranda waiver was voluntary.

In Medellín v. Texas, 128 S.Ct. 1346 (2008) June '08 LED:18, the U.S. Supreme Court ruled that Texas courts are not required to comply with President Bush's memorandum directing the states to give effect to international court's ruling under the Vienna Convention on Consular Relations.

A 3-judge panel of the Ninth Circuit of the U.S. Court of Appeals ruled that civil liability under the federal Civil Rights Act cannot result from a violation of the Vienna Convention. Cornejo v. County of San Diego, 504 F.3d 853 (9<sup>th</sup> Cir. 2007) Nov. '07 LED:02. A 3-judge panel of the Federal Seventh Circuit Court of Appeals, and a U.S. district court judge in another case have held otherwise. See Jogi v. Voges, 480 F.3d 822 (7<sup>th</sup> Cir. 2007) May '07 LED:02; Standt v. City of New York, 153 F.Supp.2d 417 (S.D.N.Y. 2001) Dec. '01 LED:20. Only time will tell which way the U.S. Supreme Court will rule on the civil liability issue.

## V. INTERCEPTING AND RECORDING PRIVATE COMMUNICATIONS

### A. *Unlawful arrest of citizen who tape records officer on street*

RCW 9.73, the “Privacy Act” governing the interception and recording of private conversations and communications, does not define “privacy” for purposes of the Act’s general prohibition on single-party-consent taping of conversations. However, several decisions have held that that a citizen does not violate the statute if the citizen tapes the officer’s spoken words or radio communications where the contact occurs in a public place. State v. Flora, 68 Wn. App. 802 (Div. I, 1992) July ‘93 LED:17; Alford v. Haner, 333 F.3d 972 (9<sup>th</sup> Cir. 2003) Sept. ‘03 LED:06 (Civil rights lawsuit for unlawful arrest); Johnson v. City of Sequim, 382 F.3d 944 (9<sup>th</sup> Cir. 2004) Oct. ‘04 LED:22; Dec. ‘04 LED:14 (Civil rights lawsuit for unlawful arrest).

### B. *Officer tape-recording street contact*

Lewis v. DOL, 157 Wn.2d 446 (2006) Sept. ‘06 LED:09 (Patrol car audio and video recording of traffic stops must comply with oral warning requirement of RCW 9.73.090(1)(c) even though the street conversations are not “private;” but only the recordings, not the officers’ recollections of the events, are to be excluded from evidence for the chapter 9.73 violation)

### C. *Using speakerphone function or extension phone to eavesdrop*

State v. Christensen, 153 Wn.2d 186 (2004) Feb. ‘05 LED:09 (The Washington Supreme Court holds that it violates RCW 9.73 to secretly use a speakerphone function, without court authorization, to eavesdrop on a private phone conversation; the Court distinguishes the “tipped phone” case of State v. Corliss, 123 Wn.2d 656 (1994) June ‘94 LED:02, where the Court found no violation of chapter 9.73 RCW when an officer, without court authorization, listened in on a phone conversation by having a consenting participant tip the phone receiver so that the officer could hear the conversation too.)

### D. *Taping outgoing call from county jail*

State v. Modica, 164 Wn.2d 83 (2008) Sept. ‘08 LED:13 (Where King County Jail phones for outgoing inmate calls provided clear notice that all such calls are recorded, the Jail’s recording of inmate calls was held to be both “not private” and “consenting” under chapter 9.73 RCW)

### E. *Miscellaneous other rulings re chapter 9.73 RCW*

Washington case law supports answering phone calls that come in during execution of a search warrant at a drug dealer's residence. State v. Goucher, 124 Wn.2d 778 (1994) Dec. '94 LED:14 (HELD: no constitutional violation of caller's rights occurred where detective answered phone during search warrant execution); State v. Gonzales, 78 Wn. App. 976 (Div. I, 1995) Jan. '96 LED:22 (HELD: answering phone during search warrant execution did not violate chapter 9.73 RCW because use of the phone was not use of a "device" nor was it an "interception" within the meaning of the statute; and such answering of phone call did not violate the constitution either case involved using the phone call information against the resident whose phone was answered). See also State v. Wojtyna, 70 Wn. App. 689 (Div. I, 1993) Dec. '93 LED:20 (HELD: monitoring numbers coming to lawfully seized pager taken from a drug dealer incident to arrest ok under statute and constitution – the page at issue in Wojtyna came in on the sixth day after the pager was seized, so there does not appear to be any narrow time limitation on the practice – the case involved use of information against the caller).

**Note also that in a tape-recorded interrogation of an arrestee, Miranda warnings must be on the tape even if the officer Mirandized the arrestee off the tape shortly before turning on the recorder. State v. Mazzante, 86 Wn. App. 425 (Div. II, 1997) Aug. '97 LED:20; State v. Courtney, 137 Wn. App. 376 (Div. III, 2007) May '07 LED:08**