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Survey of Washington Search and Seizure Law: 1998 Update

Justice Charles W. Johnson

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INTRODUCTION

This is the second revision of the original Search and Seizure Survey by Justice Robert F. Utter, Washington State Supreme Court (retired), published in the *University of Puget Sound Law Review*, volume 9, number 1 (Fall 1985). That work was the culmination of Justice Utter's efforts, as well as the efforts of his successive law clerks, legal externs, and the members of the University of Puget Sound Law Review. The original Survey was intended to serve as a source to which the Washington lawyer, judge, or law enforcement officer could turn to as an authoritative common starting point for researching the

Washington law of search and seizure. Three years after the original publication, this Survey was updated in the *University of Puget Sound Law Review*, volume 11, number 3 (Spring 1988).

Continual revision of the law and new cases interpreting the Washington State Constitution and the United States Constitution have made an update imperative once again. The *Seattle University Law Review* is pleased to have Justice Charles W. Johnson continue these efforts in this 1998 edition. Justice Johnson and the Seattle University Law Review have endeavored to update the case comments and statutory references, which are current through July 1998. In addition, all references to WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987) have been updated to the third edition, published in 1996.

Many of these changes involve the Washington State Supreme Court's interpretation of the Washington Constitution. Also, as the United States Supreme Court has continued to examine Fourth Amendment search and seizure jurisprudence, its decisions and their reflection on Washington law are also discussed.

Article I, section 7 is the state constitutional search and seizure counterpart to the Fourth Amendment. That section provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Washington State Supreme Court has continued to apply the analytical framework adopted in *State v. Gunwall*, 106 Wash. 2d 54, 61-62, 720 P.2d 808, 811 (1986) in its case-by-case determination of the scope of protection afforded under article I, section 7 and in which situations greater protection exists under the state constitution than under the Fourth Amendment.

Gunwall adopted six neutral criteria: (1) the textual language of the state constitution; (2) the significant differences in the texts of parallel provisions of the federal and state constitutions; (3) the state constitutional and common law history; (4) the preexisting state law; (5) the differences in structure between the federal and state constitutions; and (6) the matters of particular state interest or local concern. *Gunwall*, 106 Wash. 2d at 61-62, 720 P.2d at 811. Two years after *Gunwall*, the Washington State Supreme Court made the *Gunwall* analysis mandatory in cases arguing that the state constitution provides greater protection than the federal constitution. *State v. Wethered*, 110 Wash. 2d 466, 472, 755 P.2d 797, 800-01 (1988) (holding that a party's failure to address the *Gunwall* criteria would result in the court's refusal to consider the matter on the ground that it was insufficiently argued).

The analytical framework developed in *Gunwall* provides the structure from which the Washington State Supreme Court will continue to define the scope of article I, section 7. The court has recognized that article I, section 7 can provide greater protection of individual rights than those established under the Fourth Amendment.

This Survey, as did the previous Surveys, summarizes the predominant treatment of search and seizure issues under the Fourth Amendment and under article I, section 7 of the Washington State Constitution to the extent that this state's provision is interpreted differently from the federal provision. The Survey focuses primarily on substantive search and seizure law in the criminal context; it omits discussion of many procedural issues.

CHAPTER 1: TRIGGERING THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7: DEFINING SEARCHES AND SEIZURES

This chapter addresses three questions: (1) "What is a search?"; (2) "What is a seizure of the person?"; and (3) "What is a seizure of property?"

These questions represent the threshold inquiry in any search or seizure problem. Unless a true search or seizure has occurred within the meaning of the federal or state constitution, constitutional protections are not triggered. This chapter will first discuss when a search has occurred, be it in the form of entry into a home or the taking of a blood sample. The chapter will then discuss when a seizure of the person has occurred, be it an arrest or investigatory stop. The chapter will conclude with a discussion of when, for constitutional purposes, personal property has been seized.

*1.0 Defining "Search" pre-*Katz*: "Constitutionally Protected Areas"*

Prior to 1967, the United States Supreme Court defined the applicability of Fourth Amendment protections in terms of "constitutionally protected areas." *Berger v. New York*, 388 U.S. 41, 57-59, 87 S. Ct. 1873, 1882-83, 18 L. Ed. 2d 1040, 1051-52 (1967); *Lopez v. United States*, 373 U.S. 427, 438-39, 83 S. Ct. 1381, 1388, 10 L. Ed. 2d 462, 470 (1963); *Silverman v. United States*, 365 U.S. 505, 510-12, 81 S. Ct. 679, 682-83, 5 L. Ed. 2d 734, 738-39 (1961). The Fourth Amendment guarantees apply only to those searches that intrude into one of the "protected areas" enumerated within the Fourth Amendment: "persons" (including the bodies and clothing of individuals); "houses" (including apartments, hotel rooms, garages, business offices, stores, and warehouses); "papers" (such as letters); and "effects" (such

as automobiles). *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(a), at 375-81 (3d ed. 1996); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

In *Katz*, the United States Supreme Court rejected the rigid "constitutionally protected area" test:

> The correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." . . . [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz, 389 U.S. at 350-52, 88 S. Ct. at 510-11, 19 L. Ed. 2d at 581-82. *Katz* thus defined the scope of search protections as the individual's "reasonable expectation of privacy." The nature of this new test and the degree of continued vitality of the old "constitutionally protected area" test will be examined in the following sections. *See* 1 LAFAVE, SEARCH AND SEIZURE § 2.1, at 375-94.

*1.1 Defining "Search" post-*Katz*: The "Reasonable Expectation of Privacy"*

In a concurring opinion in *Katz*, which has since come to be accepted as the *Katz* test, Justice Harlan explained that the *Katz* holding extends search and seizure protections to all situations in which a defendant has a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 587 (1967) (Harlan, J., concurring); *see* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1 (3d ed. 1996). A reasonable expectation of privacy is measured by a "twofold requirement, first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 588 (Harlan, J., concurring). *See also California v. Greenwood*, 486 U.S. 35, 39, 108 S. Ct. 1625, 1628, 100 L. Ed. 2d 30, 36 (1988); *State v. Young*, 123 Wash. 2d 173, 189, 867 P.2d 593, 601 (1994); *State v. Boot*, 81 Wash. App. 546, 550, 915 P.2d 592, 594 (1996).

Although "a man's home is, for most purposes, a place where he expects privacy, . . . objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *State v. Drumhiller*, 36

Wash. App. 592, 595, 675 P.2d 631, 633 (1984) (legitimate expectation of privacy means more than subjective expectation of not being discovered; defendants' claimed privacy expectation in home was not reasonable when defendants positioned themselves in front of a picture window with the lights on and drapes open). *See also State v. Rose*, 128 Wash. 2d 388, 392, 909 P.2d 280, 283 (1996) (where the "open view" doctrine is satisfied, the object under observation is not subject to any reasonable expectation of privacy; no violation was found where the officer looked through an unobstructed window of the defendant's mobile home with the aid of a flashlight). See *infra* section 5.6 for a discussion of the plain view doctrine.

The expectation of privacy must also be one "which the law recognizes as 'legitimate.'" *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12, 99 S. Ct. 421, 430-31 n.12, 58 L. Ed. 2d 387, 401-02 n.12 (1978).

> A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." . . . Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

Id. *See also State v. Clark*, 129 Wash. 2d 211, 221, 916 P.2d 384, 390 (1996) (no expectation of privacy that a buyer would not record the conversation of drug transaction; "one who unwittingly speaks to an undercover agent necessarily risks the listener's trustworthiness"). *See generally United States v. White*, 401 U.S. 745, 751, 91 S. Ct. 1122, 1126, 28 L. Ed. 2d 453, 458 (1971); *State v. Hastings*, 119 Wash. 2d 229, 232, 830 P.2d 658, 660 (1992) (no expectation of privacy where illegal business is openly conducted).

Consequently, when a police investigative device is capable of detecting only the presence of unlawful articles, the use of the device does not constitute a search. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644-45, 77 L. Ed. 2d 110, 121 (1983) (a canine sniff of luggage is not a search within the meaning of the Fourth Amendment because it reveals only whether or not contraband is present). Washington has not adopted the federal Supreme Court's blanket holding that dog sniffs are not searches; however, Washington law does require an examination of the circumstances of the sniff. *State v. Boyce*, 44 Wash. App. 724, 727, 723 P.2d 28, 30 (1986) (dog sniff of safety deposit box at a bank is not a search); *see also State v. Young*, 123 Wash. 2d 173, 188, 867 P.2d 593, 600 (1994); *State v. Stanphill*,

53 Wash. App. 623, 631, 769 P.2d 861, 865 (1989) (dog sniff of package at post office is not a search); *State v. Wolohan*, 23 Wash. App. 813, 818, 598 P.2d 421, 424 (1979) (dog sniff of parcel in bus terminal is not a search). Nevertheless, the court envisions few situations where a canine sniff of an object would constitute a search. *Boyce*, 44 Wash. App. at 730, 723 P.2d at 31. "As long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred." *Id.*

Similarly, unlawful activity in a public toilet stall carries no legitimate expectation of privacy. *State v. Berber*, 48 Wash. App. 583, 590, 740 P.2d 863, 868 (1987) (a police officer's glance over the defendant's shoulder while standing over an open toilet in a public restroom was not a violation of the defendant's privacy rights).

In addition, there is no right of privacy under the Fourth Amendment or article I, section 7 of the state constitution where one party consents to recording a conversation. *United States v. Caceres*, 440 U.S. 741, 744, 99 S. Ct. 1465, 1467, 59 L. Ed. 2d 733, 738 (1979); *State v. Clark*, 129 Wash. 2d 211, 221, 916 P.2d 384, 390 (1996); *State v. Pulido*, 68 Wash. App. 59, 63, 841 P.2d 1251, 1253 (1992) (quoting *State v. Salinas*, 119 Wash. 2d 192, 199, 829 P.2d 1068 (1992)). A defendant who utilized a telephone answering service whereby both he and the caller were aware that a third party was taking messages had no reasonable expectation of privacy in the message records and, thus, no search occurred when the records were subpoenaed. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220, 226 (1979).

*1.2 Defining "Search" post-*Katz*: Continuing Vitality of "Constitutionally Protected Areas"*

Although the concept of "constitutionally protected areas" does not "serve as a talismanic solution to every Fourth Amendment problem," the concept retains considerable authority. *Katz v. United States*, 389 U.S. 347, 351 n.9, 88 S. Ct. 507, 511 n.9, 19 L. Ed. 2d 576, 582 n.9 (1967). The United States Supreme Court has referred to "constitutionally protected areas" since *Katz* and has given special deference to the areas specifically enumerated within the Fourth Amendment. For example, the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home, absent exigent circumstances, to effect a routine felony arrest. *Payton v. New York*, 445 U.S. 573, 576, 100 S. Ct. 1371, 1375, 63 L. Ed. 2d 639, 644 (1980).

The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." U.S. CONST. amend. IV. That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable Government intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 683, 5 L. Ed. 2d 734, 739 (1961). In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. *Id.* *See also State v. White*, 129 Wash. 2d 105, 111, 915 P.2d 1099, 1102 (1996) (the sanctity of the home does not extend to a public toilet stall); *State v. Young*, 123 Wash. 2d 173, 184, 867 P.2d 593, 599 (1994) (the use of an infrared thermal detection device to perform warrantless, infrared surveillance violated the state constitution's protection of one's "home"); *State v. Solberg*, 122 Wash. 2d 688, 699, 861 P.2d 460, 466 (1993) (the state constitution prohibits police officers from arresting a suspect without a warrant while the suspect is standing within the doorway of a residence); *State v. Weller*, 76 Wash. App. 165, 167, 884 P.2d 610, 612 (1994) (the defendant's porch was not a constitutionally protected area). Houses, then, are "constitutionally protected areas" because, as under the pre-*Katz* analysis, "houses" are specifically enumerated within the Fourth Amendment. "While the Fourth Amendment generally prohibits the warrantless entry of a person's home," this prohibition does not apply where the police obtain voluntary consent, either from the individual whose property is searched, or from a third person who possesses common authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148, 156 (1990). Under the Fourth Amendment, the police may reasonably rely on the apparent authority of the person consenting to the entry. *Id.* *But see State v. Leach*, 113 Wash. 2d 735, 738, 782 P.2d 1035, 1037 (1989) (establishing that implied consent by a third party is ineffective where a suspect is present and objecting to the search).

*1.3 Specific Applications of post-*Katz *Analysis*

1.3(a) Residential Premises

As described above, an individual has a privacy interest in the interior of his or her home. *See Payton v. New York*, 445 U.S. 573, 589-90, 100 S. Ct. 1371, 1381-82, 63 L. Ed. 2d 639, 652-53 (1980); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(b), at 474 (3d ed. 1996). A search of a home can occur even when government officers do not themselves enter the home. If the officers are able to monitor persons, objects, or activities within the home that would not be observable under ordinary circumstances, a search has occurred. *See United States v. Karo*, 468 U.S. 705, 714-15, 104 S. Ct. 3296, 3302-03, 82 L. Ed. 2d 530, 541 (1984) (a search occurs, triggering the Fourth Amendment, when the government monitors an electronic device to determine whether a particular article or person is in an individual's home at a particular time); *Clinton v. Virginia*, 377 U.S. 158, 158, 84 S. Ct. 1186, 1186, 12 L. Ed. 2d 213, 213 (1964) (Clark, J., concurring) (the Fourth Amendment is implicated when a microphone used by police officers "penetrate[s]" the petitioner's premises in a manner sufficient to constitute trespass); *State v. Young*, 123 Wash. 2d 173, 186, 867 P.2d 593, 599 (1994) (infrared surveillance of home was a search in violation of the Fourth Amendment).

The privacy interest in a home is not confined to houses, but extends to other types of residences. *See Stoner v. California*, 376 U.S. 483, 490, 84 S. Ct. 889, 893, 11 L. Ed. 2d 856, 861 (1964) (hotel rooms); *State v. Murray*, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1308 (1974) (apartments); *State v. Davis*, 86 Wash. App. 414, 937 P.2d 1110 (1997), *review denied*, 133 Wash. 2d 1028 (1997) (motel rooms). There is a reduced expectation of privacy in motor vehicles that are readily mobile but can also be used for sleeping. *California v. Carney*, 471 U.S. 386, 389, 105 S. Ct. 2066, 2068, 85 L. Ed. 2d 406, 412 (1985) (mobile motor home). *See, e.g., State v. Johnson*, 71 Wash. 2d 239, 427 P.2d 705 (1967). In addition, there is a reduced privacy interest when several persons or families occupy premises in common rather than individually, *e.g.*, tenants sharing common living quarters but separate bedrooms. *State v. Alexander*, 41 Wash. App. 152, 155-56, 704 P.2d 618, 620 (1985) (community living rule). Note that the expectation of privacy in residential premises may persist even when a home is fire-damaged and arson is suspected. *Michigan v. Clifford*, 464 U.S. 287, 292, 104 S. Ct. 641, 646, 78 L. Ed. 2d 477, 483 (1984).

A person may relinquish the privacy interest in an activity or object in the home by making the activity or object observable to persons outside. *State v. Drumhiller*, 36 Wash. App. 592, 595, 675 P.2d 631, 632 (1984) (defendants had no reasonable privacy interest in activity in their home when they positioned themselves in front of picture window with lights on and drapes open). However, a person does not relinquish his or her privacy interest in the home by opening the door in response to a police officer's knock. *State v. Holeman*, 103 Wash. 2d 426, 429, 693 P.2d 89, 91 (1985). *See also State v. Ferrier*, 136 Wash. 2d 103, 960 P.2d 927 (1998). Furthermore, persons may waive their right to privacy by willingly admitting a visitor, *e.g.*, an undercover police officer, into the premises to conduct an illegal transaction. *State v. Carter*, 127 Wash. 2d 836, 848, 904 P.2d 290, 296 (1995) (defendant waived any right to privacy by willingly admitting a stranger into motel room to conduct a drug transaction); *State v. Dalton*, 43 Wash. App. 279, 284-85, 716 P.2d 940, 944 (1986) (student invited officer into college dormitory to conduct an illegal drug transaction; warrantless entry upheld as nonintrusive since police were invited in and took nothing except what would have been taken by a willing purchaser).

A person using his home telephone has no Fourth Amendment privacy interest in the phone numbers dialed, *Smith v. Maryland*, 442 U.S. 735, 745-46, 99 S. Ct. 2577, 2582, 61 L. Ed. 2d 220, 230 (1979), nor is there a privacy interest in the contents of a phone call when a recording machine's speaker makes incoming calls audible to anyone present in the room. *United States v. Whitten*, 706 F.2d 1000, 1011 (9th Cir. 1983).

The Washington Constitution, however, provides broader protection to a telephone user's privacy interests. *State v. Gunwall*, 106 Wash. 2d 54, 69, 720 P.2d 808, 816 (1986) (specifically overruling *Bixler v. Hille*, 80 Wash. 2d 668, 497 P.2d 594 (1972) and declining to follow *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)). The *Gunwall* court found that a home telephone customer's privacy rights under article I, section 7 were violated when the police, without valid legal process, obtained by means of pen register or other device, a record of the local and long distance telephone numbers dialed on the customer's telephone. *Gunwall*, 106 Wash. 2d at 68-69, 720 P.2d at 816. A pen register is a device that records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached, except for devices used by a provider or customer of a wire or electronic communication service for billing, etc.

See 18 U.S.C. § 3121 (1998). The court also considered whether the police may obtain telephone toll records. The court held that toll records could only be secured under "authority of law," which includes legal process such as a search warrant or subpoena. *Gunwall*, 106 Wash. 2d at 69, 720 P.2d at 816.

Courts in some jurisdictions have held that common hallways of multiple-dwelling buildings that are accessible to the public are not protected areas. *See, e.g., United States v. Acosta*, 965 F.2d 1248 (3d Cir. 1992); 1 LAFAVE, SEARCH AND SEIZURE § 2.3(b), at 488-89. When the building is secure and not accessible to the public, the courts are split. *Compare People v. Beachman*, 296 N.W.2d 305, 308 (Mich. Ct. App. 1980) (Fourth Amendment protections extend to the lobby of a locked residential hotel) *with United States v. Nohara*, 3 F.3d 1239, 1241 (9th Cir. 1993) (apartment dweller of "high security" apartment building has no reasonable expectation of privacy in the common areas of the building; search is valid even though officer trespassed). *See generally* 1 LAFAVE, SEARCH AND SEIZURE § 2.3(b).

Finally, the privacy interest in one's home extends to situations in which the occupant is not a criminal suspect. The Fourth Amendment is triggered when an officer enters a person's home to search for someone who does not live there. *See Steagald v. United States*, 451 U.S. 204, 213-14, 101 S. Ct. 1642, 1648, 68 L. Ed. 2d 38, 46 (1981). Moreover, the Fourth Amendment is triggered when a housing inspector enters to conduct an administrative search. *See Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S. Ct. 1727, 1730-31, 18 L. Ed. 2d 930, 935 (1967); *City of Seattle v. McCready*, 131 Wash. 2d 266, 270, 931 P.2d 156, 158 (1997).

1.3(b) Related Structures: The Curtilage

The "curtilage" of residential premises consists of "all buildings in close proximity to a dwelling which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling, and is habitually used for family purposes." *United States v. Potts*, 297 F.2d 68, 69 (6th Cir. 1961). Prior to *Katz*, the curtilage served as the controlling standard of an individual's privacy interest: structures within the curtilage were protected and structures outside the curtilage were not. *See* 1 LAFAVE, SEARCH AND SEIZURE § 2.3(d), at 493-94. In the aftermath of *Katz*, the curtilage has been considered "part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225 (1984).

The Supreme Court has identified four factors that should be reviewed in determining the extent of a residence's curtilage:

> [T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326, 334-35 (1987). The *Dunn* Court expressly declined to adopt a "bright-line" rule that the curtilage extend no further than the nearest fence surrounding a fenced house. Rather, a court is to use the factors identified above as a tool in determining whether the area in question is so intimately tied to the home as to fall within "the home's 'umbrella' of Fourth Amendment protection." *Id.* at 301, 107 S. Ct. at 1140, 94 L. Ed. 2d at 335.

There is no greater expectation of privacy in structures located and viewed from outside the curtilage, however, than those viewed from a public place. *Dunn*, 480 U.S. at 304, 107 S. Ct. at 1141, 94 L. Ed. 2d at 337. In *Dunn*, the Court held that police officers standing in an open field could look into the defendant's barn, even if the defendant had a reasonable expectation of privacy in the barn. *See also* 1 LAFAVE, SEARCH AND SEIZURE § 2.3(d), at 496.

Washington courts have not recognized a privacy interest in those areas of the curtilage that are impliedly open to the public. *See State v. Rose*, 128 Wash. 2d 388, 392, 909 P.2d 280, 283 (1996) (officer entitled to walk up a porch which was the usual access route to the house); *see also State v. Chaussee*, 72 Wash. App. 704, 709-10, 866 P.2d 643, 647 (1994) (no expectation of privacy in common access road leading to defendant's residence). The court will, however, consider a combination of factors when analyzing the admissibility of evidence, including whether police officers have done the following: (1) spied into the residence; (2) acted secretly; (3) acted after dark; (4) used the most direct access route; (5) tried to contact the resident; (6) created an artificial vantage point; or (7) made the discovery accidentally. *State v. Rose*, 128 Wash. 2d 388, 403, 909 P.2d 280, 288 (1996); *State v. Seagull*, 95 Wash. 2d 898, 905, 632 P.2d 44, 50 (1981). *See also State v. Niedergang*, 43 Wash. App. 656, 719 P.2d 576 (1986) (car parked in cul-de-sac not within curtilage).

1.3(c) Adjoining Lands and "Open Fields"

Certain lands adjacent to a dwelling fall within the privacy protection surrounding the residence. "The protection afforded by the

Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has been extended to open areas immediately adjacent thereto." *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968) (reasonable expectation of privacy extends to backyard of lodge). *See also Oliver v. United States*, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214, 224 (1984) (individual may have legitimate expectation of privacy in "area immediately surrounding the home"). The applicability of federal search and seizure protections to areas immediately surrounding the home is determined by the *Katz* test of reasonable expectation of privacy. 1 LAFAVE, SEARCH AND SEIZURE § 2.3(f), at 504-05.

Adjoining lands that are used as normal access routes by the general public are only "semi-private" and therefore do not always enjoy Fourth Amendment protections. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 865, 94 S. Ct. 2114, 2115-16, 40 L. Ed. 2d 607, 611 (1974); *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975). Thus, Fourth Amendment protections will not apply to a police investigation that is restricted to places where visitors could be expected to go. *State v. Gave*, 77 Wash. App. 333, 337, 890 P.2d 1088, 1090 (1995) (driveway, walkway, or access routes leading to residence or to porch of residence are all areas of "curtilage" impliedly open to the public). *See also State v. Solberg*, 122 Wash. 2d 688, 698-99, 861 P.2d 460, 465 (1993) (unenclosed front porch held to be a public place, not a constitutionally protected area); *State v. Graffius*, 74 Wash. App. 23, 24, 871 P.2d 1115, 1118 (1994) (driveway commonly used for guests and members of the public); *State v. Coburne*, 10 Wash. App. 298, 314, 518 P.2d 747, 757 (1973) (apartment building common parking lot).

On the other hand, when the police enter onto adjoining lands that are not used as an access area by the general public, the Fourth Amendment guarantees do apply. *See, e.g., State v. Mierz*, 72 Wash. App. 783, 791, 866 P.2d 65, 70-71 (1994), *aff'd*, 127 Wash. 2d 460, 901 P.2d 286 (1995) (warrantless intrusion into a backyard which was enclosed by a six-foot fence and gate secured by padlock violated Fourth Amendment); *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (backyard behind a four-unit apartment building, which is not used as a common passageway by tenants, is protected); *Norman v. State*, 216 S.E.2d 644, 645 (Ga. App. 1975) (truck located under trees in a small meadow behind a house that was not on a farm access route was considered within curtilage). *But see State v. Niedergang*, 43 Wash. App. 656, 662, 719 P.2d 576, 579 (1986) (car parked in

common area near suspect's dwelling was not considered within curtilage).

Under the old "constitutionally protected areas" analysis, the privacy protections did not apply to "open fields." *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 446, 68 L. Ed. 898, 900 (1924). Consequently, a defendant could not invoke constitutional privacy protections with respect to police intrusions onto open fields, wooded areas, vacant lots in urban areas, open beaches, reservoirs, or open waters. *See* 1 LAFAVE, SEARCH AND SEIZURE § 2.4(a), at 522-23.

The "open fields" doctrine has been reaffirmed under the *Katz* analysis on the grounds that an expectation of privacy in open fields is unreasonable. *Oliver*, 466 U.S. at 179, 104 S. Ct. at 1741, 80 L. Ed. 2d at 224 ("[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."). Moreover, a person in possession of land falling within the purview of the open fields doctrine cannot create a legitimate expectation of privacy in the area by taking steps to conceal activities such as posting "no trespassing" signs or erecting fences around the secluded areas. *Id.* at 182, 104 S. Ct. at 1743, 80 L. Ed. 2d at 227 (issue is whether "government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment"); *State v. Hornback*, 73 Wash. App. 738, 744, 871 P.2d 1075, 1078 (1994) ("no trespassing" sign is not dispositive of homeowner's reasonable expectation of privacy for purposes of Fourth Amendment).

Even land within the curtilage may only be protected from certain types of surveillance. Thus, aerial surveillance is not precluded merely because precautions have been taken against ground surveillance. *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 1812, 90 L. Ed. 2d 210, 217 (1986) (aerial surveillance of marijuana growing in a fenced backyard does not implicate Fourth Amendment; officer's observations were merely from a public vantage point). *See also Florida v. Riley*, 488 U.S. 445, 450, 109 S. Ct. 693, 696-97, 102 L. Ed. 2d 835, 842 (1989) (surveillance of a residential backyard by a helicopter is not a "search" requiring warrant under Fourth Amendment). If highly sophisticated equipment is used in conducting the aerial surveillance, however, the Fourth Amendment may be implicated. *Dow Chemical Co. v. United States*, 476 U.S. 227, 238, 106 S. Ct. 1819, 1826, 90 L. Ed. 2d 226, 238 (1986).

In addition, the fact that police commit a common law trespass while observing an object or activity in open fields does not render the intrusion a search under the federal Constitution. *Oliver*, 466 U.S. at 183, 104 S. Ct. at 1741, 80 L. Ed. 2d at 224-25. Thus, an intrusion

may be onto the land itself as well as by aerial surveillance and still not be considered a search. *Id.* at 177, 104 S. Ct. at 1741, 80 L. Ed. 2d at 224-25.

Under the Washington Constitution, aerial surveillance at certain altitudes without the aid of enhancement devices does not constitute a search. *State v. Cord*, 103 Wash. 2d 361, 365, 693 P.2d 81, 87 (1985) (aerial surveillance of defendant's property at an altitude of 3400 feet without the aid of visual enhancement devices does not constitute a search, even though surveillance was conducted with the aim of discovering marijuana plants); *State v. Myrick*, 102 Wash. 2d 506, 514, 688 P.2d 151, 155 (1984) (observation of defendant's marijuana plants at an altitude of 1500 feet with the unaided eye was not a search).

The relevant inquiry under article I, section 7, however, is not whether the observed object was in a "protected place" or whether the defendant had a legitimate and subjective expectation of privacy in the observed location; rather, the appropriate inquiry is whether "the State unreasonably intruded into the defendant's 'private affairs.'" *Myrick*, 102 Wash. 2d at 510, 688 P.2d at 1205. *See also State v. Cockerell*, 102 Wash. 2d 561, 566, 689 P.2d 32, 36-37 (1984) (holding that while an aerial surveillance at the altitude of 800 feet was acceptable, a second plane which flew within 200 feet altitude was an "unreasonable intrusive overflight"). The nature of the property may also be a factor in determining what constitutes "private affairs," but the fact that the location of the search is an open field is not conclusive. *Myrick*, 102 Wash. 2d at 513, 688 P.2d at 155.

Moreover, the Washington Supreme Court has suggested that even when an individual has no subjective expectation of privacy, an intrusion may nevertheless constitute a search. "[M]erely because it is generally known that the technology exists to enable police to view private activities from an otherwise nonintrusive vantage point, it does not follow that these activities are without protection." *Id.* The focus is on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id.* at 511, 688 P.2d at 154. *See State v. Cord*, 103 Wash. 2d 361, 365, 693 P.2d 81, 84 (1985); *State v. Seagull*, 95 Wash. 2d 898, 903, 632 P.2d 44, 47 (1981). Note that in both *Cord* and *Myrick* the police used no visual enhancement devices; in addition, their vantage points for observing the contraband were lawful. *Cord*, 103 Wash. 2d at 365, 693 P.2d at 84; *Myrick*, 102 Wash. 2d at 514, 688 P.2d at 155. *Cf. Oliver*, 466 U.S. at 183, 104 S. Ct. at 1743-44, 80 L. Ed. 2d at 227 (police committed common law trespass to view defendant's property). For a general discussion of aerial surveillance,

see Bradley W. Foster, *Warrantless Aerial Surveillance and the Right to Privacy: The Flight of the Fourth Amendment*, 56 J. AIR LAW & COM. 719 (1991); 1 LAFAVE, SEARCH AND SEIZURE § 2.7 at 617.

Although article I, section 7 of the Washington State Constitution generally provides greater protection against governmental intrusion than the Fourth Amendment, it will not protect against a lawful intrusion into an open field that was not posted by the owners. *State v. Hanson*, 42 Wash. App. 755, 762, 714 P.2d 309, 314, *aff'd*, 107 Wash. 2d 331, 728 P.2d 593 (1986) (search warrant for marijuana fields obtained by use of photos and testimony of officer taken from a "plain view" vantage point was sufficient). Similarly, "storage areas" that are visible to the naked eye will not be protected by either state or federal provisions against search and seizure. *State v. Jeffries*, 105 Wash. 2d 398, 413-14, 717 P.2d 722, 731 (1986); *United States v. Pruitt*, 464 F.2d 494, 496 (9th Cir. 1972) (police search of boxes hidden in trees covered with underbrush; defendant could not reasonably expect to keep anybody who discovered boxes from looking in them).

1.3(d) Business and Commercial Premises

The Fourth Amendment privacy protections extend to most business and commercial premises. *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 106 S. Ct. 1819, 1825, 90 L. Ed. 2d 226, 235 (1986); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S. Ct. 1816, 1819, 56 L. Ed. 2d 305, 310 (1978) (OSHA inspector's entry into the nonpublic working areas of electrical and plumbing business constituted a search); *Mancusi v. DeForte*, 392 U.S. 364, 368, 88 S. Ct. 2120, 2124, 20 L. Ed. 2d 1154, 1159 (1968) (union official has reasonable expectation of privacy in his or her office, even when it is shared with other union officials). *See also See v. Seattle*, 387 U.S. 541, 545-46, 87 S. Ct. 1737, 1740-41, 18 L. Ed. 2d 943, 947-48 (1967) (absent consent or emergency, administrative inspectors ordinarily must obtain special administrative warrants in order to conduct routine inspections of commercial buildings for possible health and safety violations). Unlike private homes, however, the legislature may authorize warrantless administrative searches of commercial property without violating the Fourth Amendment. *New York v. Burger*, 482 U.S. 691, 702, 107 S. Ct. 2636, 2644, 96 L. Ed. 2d 601, 614 (1987). If the legislative authorization does not contain rules governing the procedure the inspectors must follow, however, then general Fourth Amendment restrictions will apply. *Donovan v. Dewey*, 452 U.S. 594, 599, 101 S. Ct. 2534, 2538, 69 L. Ed. 2d 262, 269 (1981). One of the factors

considered in determining whether warrantless administrative inspections are allowed is whether a business has been historically extensively regulated (such as businesses dealing with liquor and firearms). *Burger*, 482 U.S. at 707, 107 S. Ct. at 2646, 96 L. Ed. 2d at 617 (automobile junkyards have historically been regulated); *Barlow's*, 436 U.S. at 313, 98 S. Ct. at 1821, 56 L. Ed. 2d at 312.

The nature of the place as either a personal residence or business may also affect the determination of whether an area is curtilage or an open field. *Dow Chemical Co.*, 476 U.S. at 229, 106 S. Ct. at 1827, 90 L. Ed. 2d at 238. If portions of business and commercial premises are open to the public for inspection of wares, they are not considered private. "[A]s an ordinary matter law enforcement officials may accept a general public invitation to enter commercial premises for purposes not related to the trade conducted thereupon . . . ." *United States v. Berrett*, 513 F.2d 154, 156 (1st Cir. 1975). Thus, the warrantless entry into the public lobby of a motel or restaurant for the purpose of serving an administrative subpoena is permitted although the "administrative subpoena itself [does] not authorize either entry or inspection of [the] premises . . . ." *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 413, 104 S. Ct. 769, 772-73, 78 L. Ed. 2d 567, 572 (1984) (an employer may not insist on a judicial warrant as a condition precedent to a valid administrative subpoena unless government inspectors seek nonconsensual entry into an "area not open to the public").

Courts have generally upheld police investigative entries into bus terminals, pool halls, bars, restaurants, and general stores such as furniture stores and variety stores. 1 LAFAVE, SEARCH AND SEIZURE § 2.4(b), at 531-32. But "[t]he 'implied invitation for customers to come in' . . . extends only to those times when the premises are in fact 'open to the public'; the mere fact that certain premises are open to the public at certain times does not justify entry by the police on other occasions." *Id.*

Although a reasonable expectation of privacy exists in commercial premises, the warrant requirements for administrative searches of commercial premises may differ from those for searches in general. *See infra* § 6.4(b); *see also* 1 LAFAVE, SEARCH AND SEIZURE § 2.4(b), at 531.

1.3(e) Automobiles and Other Motor Vehicles

Constitutional protections against unreasonable searches apply to automobiles and other motor vehicles. *California v. Carney*, 471 U.S. 386, 390, 105 S. Ct. 2066, 2068, 85 L. Ed. 2d 406, 412 (1985). "[A]utombiles are 'effects' under the Fourth Amendment, and searches

and seizures of automobiles are therefore subject to the constitutional standard of reasonableness." *United States v. Chadwick*, 433 U.S. 1, 12, 97 S. Ct. 2476, 2484, 53 L. Ed. 2d 538, 548 (1977).

At the same time, the pervasive regulation of automobiles may dilute the reasonable expectation of privacy that exists with respect to other property. *See Carney*, 471 U.S. at 386, 105 S. Ct. at 2069, 85 L. Ed. 2d at 414. Thus, a person does not have as great an expectation of privacy in a vehicle as in a home. *Id.* Even so, "[a] citizen does not surrender all of the protections of the Fourth Amendment by entering an automobile." *New York v. Class*, 475 U.S. 106, 112, 106 S. Ct. 960, 965, 89 L. Ed. 2d 81, 89 (1986). Note, however, that when a vehicle is used as a home, its owner has a lesser expectation of privacy if the vehicle is readily mobile and licensed to operate on public streets. *Carney*, 471 U.S. at 393, 105 S. Ct. at 2070, 85 L. Ed. 2d at 414 (mobile home in public lot was treated as a vehicle). *Cf. State v. Johnson*, 128 Wash. 2d 431, 449, 909 P.2d 293, 303 (1996) (lessened privacy interest for sleeper compartment of a tractor-trailer rig).

The lesser expectation of privacy in a vehicle does not automatically extend to closed containers within the vehicle. *Chadwick*, 433 U.S. at 13, 97 S. Ct. at 2484, 53 L. Ed. 2d at 549. On the other hand, when an electronic beeper is placed within a container and officers use a radio transmitter to monitor the container's movement, no reasonable expectation of privacy is invaded to the extent that the container is transported in a vehicle on public roads. *United States v. Knotts*, 460 U.S. 276, 281, 103 S. Ct. 1081, 1085, 75 L. Ed. 2d 55, 62 (1983). *Cf. United States v. Karo*, 468 U.S. 705, 718, 104 S. Ct. 3296, 3305, 82 L. Ed. 2d. 530, 543 (1984) (monitoring electronic beeper while object containing beeper is inside a home violates privacy interest in the home). *See generally* 1 LAFAVE, SEARCH AND SEIZURE § 2.5(a)-(d), at 549-67. For a detailed discussion of the search of closed containers found in automobiles, see *infra* § 5.22.

1.3(f) Personal Characteristics

The Fourth Amendment protects the right of the people to be secure in their persons against unreasonable searches and seizures. This section examines the question of how that right protects the search or seizure of personal characteristics, such as fingerprints and blood samples.

Personal characteristics such as facial features and voice tone, which are continually exposed to the public, generally are not protected by the Fourth Amendment because an individual has no reasonable expectation that these characteristics will remain private.

> In *Katz v. United States*, ". . . [the court] said that the Fourth Amendment provides no protection for what 'a person knowingly exposes to the public, even in his own home or office. . . .' The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice any more than he can reasonably expect that his face will be a mystery to the world."

United States v. Dionisio, 410 U.S. 1, 14, 93 S. Ct. 764, 771, 35 L. Ed. 2d 67, 79 (1973) (subpoena of voice exemplars does not infringe on protected Fourth Amendment interests). The Court reached the same result in *United States v. Mara*, 410 U.S. 19, 21, 93 S. Ct. 774, 776, 35 L. Ed. 2d 99, 103 (1973), where the witness was required to furnish handwriting exemplars. Likening a person's voice to a person's facial characteristics, the Court held "[h]andwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." *Id.* *See also Bedford v. Sugarman*, 112 Wash. 2d 500, 512, 772 P.2d 486, 492 (1989) (shelter program which required indigent alcoholics and drug addicts to move into designated shelters in order to receive benefits did not violate the right to privacy); *State v. Selvidge*, 30 Wash. App. 406, 411, 635 P.2d 736, 740 (1981) (defendants have no reasonable expectation of privacy in the soles of their shoes, thus police officer's observation of the soles of the defendant's shoes was not a search under the Fourth Amendment).

In contrast to the seizure of voice exemplars and facial characteristics, the taking of a blood sample is considered a search within the meaning of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 918 (1966). The police have probable cause to believe that a person's blood sample will provide evidence of criminal activity justifying the seizure if the facts and circumstances known to the officers justify their belief that the person is intoxicated and has committed a crime of which intoxication is an element. *State v. Curran*, 116 Wash. 2d 174, 184, 804 P.2d 558, 564 (1991), *abrogated by State v. Berlin*, 133 Wash. 2d 541, 947 P.2d 700 (1997); *State v. Schulze*, 116 Wash. 2d 154, 161, 804 P.2d 566, 570 (1991) (no right to counsel prior to undergoing a mandatory blood draw); *State v. Komoto*, 40 Wash. App. 200, 208, 697 P.2d 1025, 1031 (1985).

Washington has also upheld mandatory blood tests of putative fathers, *see State v. Meacham*, 93 Wash. 2d 735, 739, 612 P.2d 795, 798 (1980), and mandatory HIV and DNA tests of convicted sexual offenders, *see State v. Kalakosky*, 121 Wash. 2d 525, 548, 852 P.2d 1064, 1076 (1993) (mandatory HIV testing of sexual offenders presents minimal Fourth Amendment intrusion for which the State's reasons are compelling); *State v. Olivas*, 122 Wash. 2d 73, 92, 856 P.2d 1076, 1086 (1993) (statute requiring mandatory DNA tests of convicted sexual offenders in order to establish a DNA databank is constitutionally permissible). The constitutional right to privacy does not apply to a private employer that terminates an at-will employee for refusing to take a drug test. *Roe v. Quality Transportation*, 67 Wash. App. 604, 608, 838 P.2d 128, 131 (1992).

Constitutional protections have also been applied when officers take scrapings from an individual's fingernails, *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S. Ct. 2000, 2003, 36 L. Ed. 2d 900, 905 (1973), or take an individual's fingerprints, *Hayes v. Florida*, 470 U.S. 811, 814, 105 S. Ct. 1643, 1648, 84 L. Ed. 2d 705, 709 (1985). The line drawn between facial characteristics and voice exemplars, on the one hand, and blood samples or fingernail scrapings, on the other, may be explained by the fact that the evidentiary value of the former is immediately perceivable. 1 LAFAVE, SEARCH AND SEIZURE § 2.6(a), at 571-73.

Although drawing blood constitutes a seizure, the defendant may unknowingly consent. For example, a person who drives an automobile may give implied consent to the administration of blood tests in certain circumstances. WASH. REV. CODE § 46.20.308 (1987). *See State v. Judge*, 100 Wash. 2d 706, 712, 675 P.2d 219, 223 (1984) (driver gives implied consent to blood testing when arrested for negligent homicide or when unconscious while being arrested for driving while intoxicated).

1.3(g) Personal Effects and Papers

The Fourth Amendment expressly protects the right of privacy in "papers . . . and effects . . . ." U.S. CONST. amend. IV. Although litigation concerning the search, seizure, and use of the content of private papers frequently centers on the Fifth Amendment bar against self-incrimination, *see, e.g., Andresen v. Maryland*, 427 U.S. 463, 473, 96 S. Ct. 2737, 2745, 49 L. Ed. 2d 627, 638 (1976); *United States v. Howell*, 466 F. Supp. 835, 838 (D. Or. 1979), the Fourth Amendment can act as an additional bar because of the protection accorded "papers" and "effects." LaFave and other commentators have argued

that even when the seizure and use of private papers is consistent with the Fifth Amendment, the Fourth Amendment poses an absolute bar against the use of the highly private content of such papers. 1 LAFAVE, SEARCH AND SEIZURE § 2.6(e), at 608-17. *But see State v. Farmer*, 80 Wash. App. 795, 801, 911 P.2d 1030, 1033 (1996) (no right of privacy in bank account for a person who writes or passes bad checks); *Peters v. Sjoholm*, 95 Wash. 2d 871, 876, 631 P.2d 937, 940 (1982) (no need for search and seizure warrant where the seizing agency has probable cause to believe bank fund belongs to the relevant taxpayer); *United States v. Miller*, 425 U.S. 435, 440, 96 S. Ct. 1619, 1623, 48 L. Ed. 2d 71, 77 (1976) (no reasonable expectation of privacy in bank records, checks, deposit slips, and other records relating to bank accounts); *Dep't of Revenue v. March*, 25 Wash. App. 314, 320, 610 P.2d 916, 920 (1979) (no expectation of privacy in tax records from legitimate inquiry by tax authorities).

A reasonable expectation of privacy does not continue in personal effects if the individual's relinquishment of the effects occurred under circumstances indicating that the individual retained no reasonable expectation of privacy in the invaded place. *State v. Nettles*, 70 Wash. App. 706, 708, 855 P.2d 699, 700 (1993) (police may properly seize property discarded by suspects prior to police seizure); *State v. Putnam*, 61 Wash. App. 450, 456, 810 P.2d 977, 980 (1991), *modified and superseded on reconsideration*, 65 Wash. App. 606, 829 P.2d 787 (1992) (no legitimate expectation of privacy where property was owned by third party and the item had been abandoned); *State v. Toney*, 60 Wash. App. 804, 808, 810 P.2d 929, 930 (1991) (object discarded by suspect who is not in police custody is considered abandoned property and may be seized by police); *State v. Whitaker*, 58 Wash. App. 851, 853, 795 P.2d 182, 183 (1990) (police may retrieve voluntarily abandoned property unless abandonment was result of unlawful police conduct). While an individual has an expectation of privacy in the contents of a zipped purse inadvertently left in a store, a police search for identification was justified after learning that the purse contained drugs. *State v. Kealey*, 80 Wash. App. 162, 173, 907 P.2d 319, 323 (1995).

The Washington Supreme Court rejected the holding in *California v. Greenwood*, 486 U.S. 35, 43, 108 S. Ct. 1625, 1630, 100 L. Ed. 2d 30, 38 (1988), finding a reasonable expectation of privacy in garbage left at curb for collection. *State v. Boland*, 115 Wash. 2d 571, 578, 800 P.2d 1112, 1116 (1990). *But see State v. Rodriguez*, 65 Wash. App. 409, 418, 828 P.2d 636, 642 (1992) (no reasonable expectation of privacy in stolen goods hidden in a community garbage receptacle);

State v. Graffius, 74 Wash. App. 23, 31, 871 P.2d 1115, 1120 (1994) (no privacy right in garbage can left partially open and exposing contraband to view).

A reasonable expectation of privacy exists in the contents of first-class mail and of sealed packages. *United States v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984); *State v. Jackson*, 82 Wash. App. 594, 603, 918 P.2d 945, 950 (1996), *review denied*, 131 Wash. 2d 1006 (1997) (seizure of mail occurs when a package is detained or removed from the normal flow of delivery; though temporary seizure is justified if authorities have a reasonable and articulable suspicion of criminal activity); *State v. Bishop*, 43 Wash. App. 17, 18, 714 P.2d 1199, 1199 (1986). Senders of mail, however, have no reasonable expectation of privacy as to their names and addresses on the mail and to the surrounding area of the package from a canine sniff. *State v. Stanphill*, 53 Wash. App. 623, 627, 769 P.2d 861, 863 (1989) (release of information at request of police regarding arrival of package did not unreasonably intrude into private affairs). Senders of parcels by common carriers have only a limited expectation of privacy; common carriers have the right to search parcels if they have reason to believe that they contain contraband. *State v. Gross*, 57 Wash. App. 549, 551, 789 P.2d 317, 319 (1990); *State v. Wolohan*, 23 Wash. App. 813, 817, 598 P.2d 421, 424 (1979). *See infra* § 5.31.

Placing a beeper inside an object does not in and of itself constitute a search. *United States v. Karo*, 468 U.S. 705, 712, 104 S. Ct. 3296, 3302, 82 L. Ed. 2d 530, 539-40 (1984); *State v. Young*, 123 Wash. 2d 173, 182, 867 P.2d 593, 597 (1994). Monitoring the beeper and thereby tracking the object may constitute a search of the location but not of the object. *Id.* at 722, 104 S. Ct. at 3307, 82 L. Ed. 2d at 549 (tracking of either container into home infringes on privacy interest in home); *cf. United States v. Knotts*, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983) (monitoring beeper in chloroform container invaded no reasonable expectation of privacy because monitoring occurred only while container was taken from store and transported in automobile on public highways and did not occur when container was moved into a residence); *Young*, 123 Wash. 2d at 181, 867 P.2d at 597. *See also supra* § 1.3(e).

1.3(h) Special Environments: Prisons, Schools, and Borders

Prisoners are not accorded the same expectations of privacy in their cells and effects as citizens generally enjoy in their homes and effects. *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S. Ct. 3194, 3202,

82 L. Ed. 2d 393, 405 (1984). Routine searches of inmates' cells are reasonable because security interests of the institution outweigh the minimal intrusion into inmates' privacy. *State v. Brown*, 33 Wash. App. 843, 848, 658 P.2d 44, 47-48 (1983) (reasonableness of an inmate search must be determined by balancing the need for particular search against the invasion of personal rights; the strip search of an inmate after a visit with his wife during which there was considerable contact was reasonable); *State v. Justice*, 29 Wash. App. 460, 460, 629 P.2d 454, 454 (1981). Probationers and parolees have a limited expectation of privacy, permitting a search if reasonable. *State v. Lucas*, 56 Wash. App. 236, 240, 783 P.2d 121, 124 (1989); *see also In re A, B, C, D, E*, 121 Wash. 2d 80, 92, 847 P.2d 455, 460 (1993) (mandatory HIV testing of sexual offenders does not violate the right to privacy). *See infra* §§ 6.0, 6.2.

Customs officials may search persons and vehicles crossing the border into the United States under 19 U.S.C. § 1467 (1994). *United States v. Sheikh*, 654 F.2d 1057, 1068 (5th Cir. 1981). Nevertheless, the statute does not obviate the requirement that a particular search or seizure be reasonable within the meaning of the Fourth Amendment. *See Almeida-Sanez v. United States*, 413 U.S. 266, 272, 93 S. Ct. 2535, 2539, 37 L. Ed. 2d 596, 602 (1973) (although a statute authorizes customs searches without probable cause or mere suspicion, no act of Congress can authorize a violation of the Constitution). Customs officers may not conduct warrantless searches based on less than probable cause at locations other than an actual border. *State v. Quick*, 59 Wash. App. 228, 233, 796 P.2d 764, 767 (1990). *See infra* §§ 6.0, 6.3.

Federal and state constitutional prohibition against unreasonable searches and seizures also applies to school officials acting under the authority of state. *State v. Slattery*, 56 Wash. App. 820, 822-23, 787 P.2d 932, 933 (1990) (warrantless search of high school student's car and locked briefcase fell within "school search" exception to warrant requirement; initial search of locker in response to a tip revealed $200 in small bills but no marijuana). *See infra* §§ 6.0-6.1.

1.4 Defining Seizures of the Person

A seizure occurs when an officer, by physical force or by show of authority, restrains an individual's freedom of movement. *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). Yet, a person may be "seized" for purposes of the Fourth Amendment even when an arrest has not occurred. *See Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889,

903 (1968); *see also State v. Lyons*, 85 Wash. App. 268, 270-71, 932 P.2d 188, 189-90 (1997). However, not every encounter with a police officer will amount to a seizure. *State v. Crespo Aranguren*, 42 Wash. App. 452, 455, 711 P.2d 1096, 1097 (1985).

The objective test for seizure states that a seizure occurs when law enforcement officers give "a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'" *Florida v. Royer*, 460 U.S. 491, 502, 103 S. Ct. 1319, 1326, 75 L. Ed. 2d 229, 239 (1983) (plurality opinion) (citation omitted); *see also Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 572 (1988) (finding no seizure when police caught up with and drove alongside a fleeing individual for a short distance without any show of authority or command to stop); *State v. Thorn*, 129 Wash. 2d 347, 352, 917 P.2d 108, 112 (1996) (affirming that the test is whether under a totality of the circumstances a person would feel free to leave or decline the officer's requests and terminate the encounter). For example, an officer's request for identification or other information relating to one's identity is unlikely to be viewed as an unlawful seizure unless additional circumstances are present. *See I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 1762, 80 L. Ed. 2d 247, 255 (1984) (finding no seizure by INS officers even though agents were stationed at exits); *State v. Crespo Aranguren*, 42 Wash. App. 452, 456, 711 P.2d 1096, 1098 (1985) (finding that police acted properly in stopping defendants and using "permissive" language to ask if they had come from the area of the reported vandalism). On the other hand, the fact that a person is unconscious does not mean that he or she is not seized. *See Seattle v. Sage*, 11 Wash. App. 481, 484-85, 523 P.2d 942 (1974). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(a) (3d ed. 1996). For a discussion of the level of proof needed to make seizures of the person, see *infra* §§ 2.1 (arrest) and 2.9(b) (*Terry* stop).

However, the United States Supreme Court has shifted to a more subjective test in determining when a seizure has occurred in the context of a show of authority absent physical force. *California v. Hodari D.*, 499 U.S. 621, 625, 111 S. Ct. 1547, 1552, 113 L. Ed. 2d 690, 699 (1991). The federal *Hodari D.* test shifts the focus onto the particular defendant's actions by requiring that the defendant actually submit to the show of authority for a seizure to occur. *Id.* Washington courts have rejected the *Hodari D.* test. Instead, Washington has a strictly objective test to determine whether a person's private affairs have been disturbed without lawful authority. *State v. Young*, 135

Wash. 2d 498, 510, 957 P.2d 681, 687 (1998) (a seizure occurs when a reasonable person would believe that he or she is not free to leave, regardless of what the defendant actually believed).

1.4(a) Consensual Encounters

A consensual encounter with an officer does not trigger the Fourth Amendment, even when the individual has been approached by, and is aware of the officer's identity as, an officer. *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229, 236 (1983); *see State v. Belanger*, 36 Wash. App. 818, 820, 677 P.2d 781, 783 (1984). Factors reviewed by the court in determining whether the scope of a *Terry* stop, *infra* 2.9(b), has been exceeded and whether an arrest has occurred are the degree to which the physical intrusion restrains the suspect's liberty, the duration of the detention, and whether the detention was related to the initial stop. *State v. Armenta*, 134 Wash. 2d 1, 11, 948 P.2d 1280, 1285 (1997) (engaging in a conversation in a public place and asking for identification alone was not sufficient); *State v. Rivard*, 131 Wash. 2d 63, 75-76, 929 P.2d 413, 419 (1997) (reading of *Miranda* rights alone was not sufficient). *But see State v. Williams*, 102 Wash. 2d 733, 740, 689 P.2d 1065, 1069 (1984) (detaining suspect for thirty-five minutes was excessive).

The degree of intrusion must also be appropriate with regard to the type of crime under investigation and the probable dangerousness of the suspect. *State v. Wheeler*, 108 Wash. 2d 230, 235, 737 P.2d 1005, 1007 (1987). In *State v. Williams*, the court specifically overruled *State v. Byers*, 88 Wash. 2d 1, 559 P.2d 1334 (1977), which held that "[t]he amendment is triggered, however, when an individual is not free to leave an officer's presence and is aware that his or her liberty is restrained, even when the officer couches the forcible stop in terms of a request." *Byers*, 88 Wash. 2d at 5-6 n.5, 559 P.2d at 1336 n.5. Thus, the *Williams* court held that neither the Fourth Amendment nor article I, section 7 was implicated by the suspect being handcuffed and placed in a patrol car due to concerns for police safety. *See Williams*, 102 Wash. 2d at 148, 689 P.2d at 1069.

The "free to go" standard has not been abandoned under federal law. *Michigan v. Chestnut*, 486 U.S. 567, 573-74, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 572 (1988). The United States Supreme Court has held that questioning by law enforcement officers remains consensual until a reasonable person would believe that he or she could not leave the presence of the officers or until he or she refuses to respond to their inquiries and the police take further action. *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 1763, 80 L. Ed. 2d 247,

255 (1984) (finding no seizure of the workplace or of the individual workers when INS agents moved systematically through the factory inquiring about the workers' citizenship while other INS agents were stationed at the exits). *See generally infra* § 5.10 (discussing what constitutes consent).

Police action does not exceed the proper purpose and scope of a *Terry* stop (*see supra* § 1.4, *infra* § 2.9(b)) when the purpose of the stop is directly related to detaining and investigating the defendant in connection with a robbery. *State v. Thornton*, 41 Wash. App. 506, 512, 705 P.2d 271, 275 (1985). While an unfounded hunch is insufficient to justify a stop, the police may reasonably act on an individualized hunch or on circumstances that appear incriminating to the officer based on his or her past experience. *State v. Samsel*, 39 Wash. App. 564, 570-71, 694 P.2d 670, 675 (1985). *See generally, infra* § 4.7(a). For post-*Terry* analysis, see generally 3 LAFAVE, SEARCH AND SEIZURE § 8.1(c).

1.4(b) Seizures in Vehicles

A seizure of a person in an automobile occurs as soon as an officer in a police car switches on the flashing light. *State v. DeArman*, 54 Wash. App. 621, 624, 774 P.2d 1247, 1248 (1989); *State v. Owens*, 39 Wash. App. 130, 132, 692 P.2d 850, 851 (1984); *State v. Stroud*, 30 Wash. App. 392, 394-96, 634 P.2d 316, 318 (1981).

A seizure also occurs when an officer stops automobiles pursuant to a systematic "spot check" for drivers' licenses or vehicle registration, or for "sobriety checks." *Seattle v. Mesiani*, 110 Wash. 2d 454, 457, 755 P.2d 775, 777 (1988); *State v. Marchand*, 104 Wash. 2d 434, 437, 706 P.2d 225, 226 (1985). To determine the reasonableness of spot checks or vehicle checkpoints, the court will weigh the government's interest in the checkpoints, the extent the program advances the goals, and the amount of intrusion on the individual motorist. *State v. Williams*, 85 Wash. App. 271, 278-79, 932 P.2d 665, 668 (1997); *see, e.g., Marchand*, 104 Wash. 2d 434, 706 P.2d 225 (finding a statute that authorized drivers' licenses and vehicle equipment spot checks unconstitutional because of officers' unbridled discretion and lack of evidence as to its effectiveness). *See* 4 LAFAVE, SEARCH AND SEIZURE § 10.8(a), at 666-82; *see also supra* § 1.3(e), and *infra* § 5.21.

1.4(c) Seizures in Homes

The Fourth Amendment is triggered even though a person is detained in his or her own home. *Michigan v. Summers*, 452 U.S. 692, 696, 101 S. Ct. 2587, 2590-91, 69 L. Ed. 2d 340, 345 (1981); *see State*

v. Holeman, 103 Wash. 2d 426, 428, 693 P.2d 89, 90 (1985); *see also supra* § 1.3(a).

1.4(d) Civil Offenses

The Fourth Amendment is also triggered by a seizure of the person even though seizure pertains to civil, and not criminal, offenses. *See State v. Klinker*, 85 Wash. 2d 509, 514-15, 537 P.2d 268, 274 (1975). However, a seizure cannot occur without some governmental participation. *State v. Jackson*, 82 Wash. App. 594, 603, 918 P.2d 945, 950 (1996), *review denied*, 131 Wash. 2d 1006 (1997).

1.5 Defining Seizures of Property

The Fourth Amendment protects a person's possessory interest in effects as well as his or her privacy interest. *See United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644, 77 L. Ed. 2d 110, 120 (1983). A seizure of property "occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984); *State v. Jackson*, 82 Wash. App. 594, 603, 918 P.2d 945, 950 (1996), *review denied*, 131 Wash. 2d 1006 (1997). Put differently, an object is seized for purposes of the Fourth Amendment when government agents exercise "dominion and control" over the object. *Jacobsen*, 466 U.S. at 120, 104 S. Ct. at 1660, 80 L. Ed. 2d at 99; *Jackson*, 82 Wash. App. at 603-04, 918 P.2d at 950-51. Thus, impounding a room or securing a home constitutes a seizure under the Fourth Amendment. *State v. Ng*, 104 Wash. 2d 763, 770, 713 P.2d 63, 67 (1985) (citing *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)).

In some circumstances, interference with an individual's possessory interests may also implicate an individual's liberty interests. *United States v. Place*, 462 U.S. 696, 708, 103 S. Ct. 2637, 2645, 77 L. Ed. 2d 110, 122 (1983) (seizure of luggage at airport "can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return"); *see also* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6, at 307 (3d ed. 1996).

1.6 Standing to Raise Search and Seizure Claim

Traditionally, a criminal defendant alleging an infringement of Fourth Amendment rights first had to show "standing" to raise the claim. The defendant's burden was to demonstrate that the interest in

the outcome of the controversy stemmed from a violation of his or her rights rather than from the violation of the rights of some third party. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3, at 116 (3d ed. 1996).

The "automatic standing" exception to this rule was created for the defendant who is charged with an offense involving possession of property as an element when the defendant challenges the search or seizure of the property. *Jones v. United States*, 362 U.S. 257, 263-64, 80 S. Ct. 725, 732, 4 L. Ed. 2d 697, 704 (1960); *State v. Michaels*, 60 Wash. 2d 638, 646, 374 P.2d 989, 993-94 (1962) (adopting the "automatic standing" exception for Washington).

In 1978, the United States Supreme Court merged the concept of standing into Fourth Amendment privacy analysis. *Rakas v. Illinois*, 439 U.S. 128, 138-40, 99 S. Ct. 421, 427-29, 58 L. Ed. 2d 387, 397-99 (1978). Under this analysis, a defendant may challenge a search or seizure only when he or she possesses a personal privacy interest in the area searched or the object seized. *United States v. Salvucci*, 448 U.S. 83, 92, 100 S. Ct. 2547, 2553, 65 L. Ed. 2d 619, 623-24 (1980) (overruling *Jones* and the concept of "automatic standing"). *But see State v. Simpson*, 95 Wash. 2d 170, 181, 622 P.2d 1199, 1206 (1980) (maintaining "automatic standing" for Washington based on protections under article I, section 7 of the Washington Constitution). *See also State v. Hayden*, 28 Wash. App. 935, 938-41, 627 P.2d 973, 975-77 (1981) (search and seizure of a stolen purse upheld after defendant permitted officers to view purse in the glove compartment of the automobile because defendant had no personal privacy interest in stolen purse). For example, when an individual has no expectation of privacy in "checks and deposit slips retained by [the] bank," he or she may not object to their seizure. *United States v. Payner*, 447 U.S. 727, 732, 100 S. Ct. 2439, 2444, 65 L. Ed. 2d 468, 474 (1980). A defendant may not object to the admission of evidence as a violation of the Fourth Amendment when the evidence "was seized unlawfully from a third party not before the court." *Id.*, 447 U.S. at 735, 100 S. Ct. at 2446, 65 L. Ed. 2d at 476.

As the *Rakas* concept of "personal" privacy interest developed, the Supreme Court indicated some types of situations in which a defendant does or does not have such an interest. Generally, an individual "who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas*, 439 U.S. at 144 n.12, 99 S. Ct. at 431 n.12, 58 L. Ed. 2d at 401 n.12; *see also State v. Mathe*, 102 Wash. 2d 537, 688 P.2d 859 (1984). But, although:

> [P]roperty ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of [the] inquiry . . . . [An] illegal search only violates the rights of those who have "a legitimate expectation of privacy in the invaded place."

Salvucci, 448 U.S. at 91-92, 100 S. Ct. at 2553, 65 L. Ed. 2d at 628 (internal citation omitted) (unlawful possession of stolen goods stored in the apartment of another does not confer on thieves a reasonable expectation of privacy as to the interior of apartment). A person who resides in an apartment with the permission of the lessee and who has a key to the apartment may assert a privacy interest in the interior of the apartment. *See Rakas*, 439 U.S. at 141-42, 99 S. Ct. at 429-30, 58 L. Ed. 2d at 399-400 (citing *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)).

A mere passenger in a motor vehicle may not assert a personal privacy interest in the interior of the vehicle, but may challenge his or her own seizure. *Rakas*, 439 U.S. at 148-50, 99 S. Ct. at 433-34, 58 L. Ed. 2d at 404-05; *State v. Takesgun*, 89 Wash. App. 608, 611, 949 P.2d 845, 846-47 (1998). Yet, a person who is driving the vehicle with the owner's permission may also assert a privacy interest in the interior of the vehicle. *United States v. Lopez*, 474 F. Supp. 943, 946 (D.C. Cal. 1979). *See generally* Comment, *Possession and Presumption: The Plight of the Passenger Under the Fourth Amendment*, 48 FORDHAM L. REV. 1027 (1980). An employee who maintains a separate office secured by a locked door may assert a privacy interest in that office for public employees. *Ortega v. O'Connor*, 764 F.2d 703, 705-06 (9th Cir. 1985), *rev'd on other grounds*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987). In *Ortega*, the Ninth Circuit Court of Appeals relied on the absence of a general inspection policy permitting access by other employees to the defendant's office to distinguish other decisions in which the court found no expectation of privacy in the workplace. *Ortega*, 764 F.2d at 706. On appeal, the Supreme Court upheld the Ninth Circuit's privacy analysis, but applied a reasonableness standard rather than a probable cause standard for public employees. *Ortega*, 480 U.S. at 719-21, 107 S. Ct. at 1498-99, 94 L. Ed. 2d at 724-26.

By merging the standing issue with a privacy analysis, the federal courts abandoned the concept of automatic standing. *United States v. Salvucci*, 448 U.S. 83, 92-93, 100 S. Ct. 2547, 2553, 65 L. Ed. 2d 619, 629 (1980). Hence, although the Fourth Amendment no longer governs searches of stolen goods, it does apply to searches of legally possessed items discovered in the search of stolen goods. For example,

there is a protected privacy interest in closed boxes contained in a stolen car. *See People v. Dalton*, 598 P.2d 467, 470 (Cal. 1979). Similarly, defendants who claimed that a stolen footlocker belonged to their brother established a possessory interest as bailees sufficient to have standing under *Rakas*. *State v. Grundy*, 25 Wash. App. 411, 416, 607 P.2d 1235, 1237 (1980). But a defendant may not claim an expectation of privacy in the interior of an acquaintance's purse into which he has placed his belongings. *Rawlings v. Kentucky*, 448 U.S. 98, 106, 100 S. Ct. 2556, 2562, 65 L. Ed. 2d 633, 642 (1980). For an examination of the impact *Salvucci* may have on an accused's rights, see Note, *United States v. Salvucci, The Problematic Absence of Automatic Standing*, 8 PEPP. L. REV. 1045 (1981).

Unlike the Fourth Amendment, article I, section 7 of the Washington Constitution invests automatic standing upon anyone charged with a possessory crime. *See State v. Simpson*, 95 Wash. 2d 170, 179, 622 P.2d 1199, 1206 (1980) (plurality opinion) (upholding the use of "automatic standing" based on the state constitution). *See also State v. Johnston*, 38 Wash. App. 793, 793-94 690 P.2d 591, 594 (1984). *But see State v. Coss*, 87 Wash. App. 891, 895-98, 943 P.2d 1126, 1127-29 (1997), *review denied*, __ Wash. 2d __, 958 P.2d 318 (1998) (recognizing lack of binding authority for automatic standing in Washington due to plurality opinion of *Simpson*); *State v. Carter*, 127 Wash. 2d 836, 850-51, 904 P.2d 290, 296-97 (1995) (affirming, but taking issue with Division One's abandonment of automatic standing doctrine); *State v. Zakel*, 119 Wash. 2d 563, 569-71, 834 P.2d 1046, 1049-50 (1992) (affirming the decision of Division Two, but refusing to decide whether the state constitution requires the automatic standing doctrine because the facts presented did not properly raise the issue).

Although Washington's "automatic standing" doctrine has been criticized by some courts, it has arguably retained its validity under the state constitution through *Simpson's* plurality opinion. *See State v. Simpson*, 95 Wash. 2d at 179, 622 P.2d at 1206; *see also Carter*, 127 Wash. 2d at 850-51, 904 P.2d at 290; *Zakel*, 119 Wash. 2d at 569-71, 834 P.2d at 1049-50; *Coss*, 87 Wash. App. at 895-98, 934 P.2d at 1127-29. In fact, the Washington Supreme Court has gone beyond *Rakas* on the basis of state statute. Thus, in *State v. Williams*, 94 Wash. 2d 531, 544, 617 P.2d 1012, 1020 (1980), a defendant was accorded standing to challenge the use of a codefendant's conversation that had been recorded in violation of the Washington Privacy Act. WASH. REV. CODE § 9.73.030 (1987). *Cf. Alderman v. United States*, 394 U.S. 165, 175, 89 S. Ct. 961, 966-68, 22 L. Ed. 2d 176, 187-88 (1969).

However, in order to invoke the automatic standing exception to the general standing requirements in Washington, two requirements must be met: (1) possession must be an "essential" element of the offense for which the defendant is charged, and (2) the defendant must be in possession of the seized property at the time of the contested search. *Simpson*, 95 Wash. 2d at 181, 622 P.2d at 1206-07; *Belieu*, 50 Wash. App. 834, 838, 751 P.2d 321, 323 (1988).

The State may not raise the issue of lack of standing for the first time on its appeal of a suppression order. *State v. Grundy*, 25 Wash. App. 411, 415, 607 P.2d 1235, 1237 (1980) (distinguishing *Combs v. United States*, 408 U.S. 224, 92 S. Ct. 2284, 33 L. Ed. 2d 308 (1972), where standing was raised on appeal by the government as respondent). *See also State v. Coss*, 87 Wash. App. at 895-98, 943 P.2d at 1127-29 (recognizing that State, as respondent, may raise standing issue on appeal for the first time).

CHAPTER 2: STANDARDS OF PROOF

2.0 Nature of Probable Cause: Introduction

This chapter summarizes the standards for probable cause for searches and seizures conducted with or without a warrant. Sections 2.1 and 2.2 discuss the nature of the standard; Sections 2.3 through 2.8 discuss specific types of information considered in the probable cause determination. The final section, 2.9, summarizes the types of searches and seizures for which probable cause is not required or a lesser standard is applied.

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy. *See generally Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949) (probable cause must be based on more than mere suspicion). Police officers must have probable cause even for searches and seizures in which no warrant is required. In the case of a valid search or seizure without a warrant, police may make the initial determination of whether probable cause exists. The grounds for the search or seizure, however, must be strong enough to obtain a warrant. *Wong Sun v. United States*, 371 U.S. 471, 479-81, 83 S. Ct. 407, 412-13, 9 L. Ed. 2d 441, 450-51 (1963). For a warrant to be issued, a neutral and detached magistrate must make the probable cause determination based on independent grounds. In addition, when a suspect is arrested

without a warrant, he or she may not be detained for an extended period of time without a judicial determination of probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 124-25, 95 S. Ct. 854, 868-69, 43 L. Ed. 2d 54, 71-72 (1975). *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1 (3d ed. 1996).

Similarly, article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. Because Washington courts have held that this provision provides more protection than the Fourth Amendment, Washington State has rejected the federal standard of the totality of circumstances when an informant tip is the basis of probable cause and, instead, continues to adhere to the *Aguilar-Spinelli* test, which requires a showing of the informant's basis of knowledge and reliability. *State v. Huft*, 106 Wash. 2d 206, 209-10, 720 P.2d 838, 840 (1986); *State v. Jackson*, 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984).

Federal officers working in concert with state officials must comply with the state constitution. *State v. Johnson*, 75 Wash. App. 692, 699, 879 P.2d 984, 988 (1994) (aerial photography by state officers working in concert with federal drug operation required federal officers' compliance with state constitution). However, where a federal warrant is served, the federal standard for probable cause applies even though the evidence will be used in state courts. *In re Teddington*, 116 Wash. 2d 761, 772-73, 808 P.2d 156, 161-62 (1991); *State v. Cotten*, 75 Wash. App. 669, 678 n.8, 879 P.2d 971, 977 n.8 (1994); *State v. Gwinner*, 59 Wash. App. 119, 124-25, 796 P.2d 728, 730 (1990); *State v. Stanphill*, 53 Wash. App. 623, 632, 769 P.2d 861, 866 (1989). *See also State v. Bradley*, 105 Wash. 2d 898, 902-03, 719 P.2d 546, 548-49 (1986).

The validity of a search warrant is reviewed for abuse of discretion. *State v. Cord*, 103 Wash. 2d 361, 366, 693 P.2d 81, 84-85 (1985); *State v. Kennedy*, 72 Wash. App. 244, 248, 864 P.2d 410, 412 (1993); *State v. Remboldt*, 64 Wash. App. 505, 509, 827 P.2d 282, 284-85 (1992). Both an officer's decision and a magistrate's warrant authorization are subject to judicial review, but the magistrate's determination is given great deference by the reviewing court. *State v. Cole*, 128 Wash. 2d 262, 286, 906 P.2d 925, 939 (1995); *Huft*, 106 Wash. 2d at 211, 720 P.2d at 841; *State v. Smith*, 93 Wash. 2d 329, 352, 610 P.2d 869, 883 (1980); *State v. Carter*, 79 Wash. App. 154, 158, 901 P.2d 335, 337 (1995); *Kennedy*, 72 Wash. App. at 248, 864 P.2d at 412. All doubts are resolved in favor of the warrant's validity.

State v. Young, 123 Wash. 2d 173, 195, 867 P.2d 593, 604 (1994); *State v. Kalakosky*, 121 Wash. 2d 525, 531, 852 P.2d 1064, 1067 (1993); *State v. Partin*, 88 Wash. 2d 899, 904, 567 P.2d 1136, 1139 (1977); *State v. Olson*, 73 Wash. App. 348, 354, 869 P.2d 110, 113-14 (1994); *State v. Kennedy*, 72 Wash. App. at 248, 864 P.2d at 412; *State v. Wilke*, 55 Wash. App. 470, 476, 778 P.2d 1054, 1058 (1989).

The probable cause requirement may be satisfied even when police make a reasonable mistake of fact. *State v. Seagull*, 95 Wash. 2d 898, 908, 632 P.2d 44, 50 (1981) (warrant valid even though officer misidentified tomato plant as marijuana). But when police make a mistake of law and incorrectly believe that certain conduct is unlawful, a search or seizure based on that belief is invalid. *State v. Melrose*, 2 Wash. App. 824, 828, 470 P.2d 552, 555 (1970).

2.1 Probable Cause Standard: Arrest Versus Search

Probable cause to arrest requires the same sufficiency of evidence as probable cause to search. However in a given situation, probable cause for a search does not always constitute probable cause for arrest, and probable cause for arrest does not necessarily justify a search. For a search, the officer must have probable cause to believe that the items to be seized are connected with criminal activity and will be found in the place to be searched. *State v. Maxwell*, 114 Wash. 2d 761, 769, 791 P.2d 223, 227 (1990). To justify an arrest, an officer must have probable cause to believe that an offense has been or is being committed and that the person to be arrested committed the offense. In addition, searches and seizures must be supported by probable cause whether or not an arrest is made. *State v. Hudson*, 124 Wash. 2d 107, 112, 874 P.2d 160, 163 (1994); *State v. Harrell*, 83 Wash. App. 393, 399, 923 P.2d 698, 701 (1996).

Probable cause to arrest exists when the arresting officer has information which would lead a person of reasonable caution to conclude that the suspect has committed a crime. *State v. Terrovona*, 105 Wash. 2d 632, 643, 716 P.2d 295, 301 (1986). Probable cause to arrest is a nontechnical standard and exists based on the facts and circumstances known to the officer at the time. *State v. Graham*, 130 Wash. 2d 711, 724, 927 P.2d 227, 234 (1996); *State v. Baxter*, 68 Wash. 2d 416, 420, 413 P.2d 638, 641 (1966); *State v. Lewellyn*, 78 Wash. App. 788, 798, 895 P.2d 418, 423 (1995), *aff'd*, 130 Wash. 2d 215, 922 P.2d 811 (1996) (two DUI arrests supported by officer's observations, defendants' driving, and field sobriety tests); *State v. Garcia*, 63 Wash. App. 868, 871-75, 824 P.2d 1220, 1222-24 (1992) (hotel maid's observations of folded papers in a drawer, a diesel fuel

smell, and telephone calls at all hours were not sufficient by themselves, but, when combined with the police information of the suspect's car on a drug trafficking tip sheet, did constitute sufficient probable cause); *State v. Griffith*, 61 Wash. App. 35, 39, 808 P.2d 1171, 1173 (1991) (police had probable cause to arrest the defendant on a DWI charge when the defendant drove erratically, hit a roadway construction sign, did not stop in response to police emergency flashers, and proceeded to a home); *State v. Fore*, 56 Wash. App. 339, 343-44, 783 P.2d 626, 629 (1989) (officer observation of drug transactions in area with reported activity and performed in a manner similar to undercover buys made by the officer). *But see generally State v. Mance*, 82 Wash. App. 539, 918 P.2d 527 (1996) (probable cause cannot be supported by information subsequently obtained). The facts and circumstances known to the officer must also be reasonably trustworthy information. *State v. Smith*, 102 Wash. 2d 449, 455, 688 P.2d 146, 149 (1984).

2.2 Probable Cause Standard: Characteristics

2.2(a) Objective Test

Under both the federal and state constitutions, the probable cause standard is an objective one. *Beck v. Ohio*, 379 U.S. 89, 96, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142, 147 (1964); *State v. Bonds*, 98 Wash. 2d 1, 8, 653 P.2d 1024, 1029 (1982); *State v. Huff*, 64 Wash. App. 641, 645-46, 826 P.2d 698, 700-01 (1992). The officer's subjective belief is not determinative. An officer's good faith is not enough to justify a search absent probable cause, and an officer's belief that probable cause was not present is also not determinative. *State v. Rodriguez-Torres*, 77 Wash. App. 687, 693, 893 P.2d 650, 653 (1995); *Huff*, 64 Wash. App. at 645-46, 826 P.2d at 701; *State v. Vanzant*, 14 Wash. App. 679, 681, 544 P.2d 786, 788 (1975).

The probable cause standard is determined with reference to a reasonable person with the expertise and experience of the officer in question. *See United States v. Ortiz*, 422 U.S. 891, 897-98, 95 S. Ct. 2585, 2591, 45 L. Ed. 2d 623, 629 (1975) (border patrol officers are entitled to draw inferences in light of their prior experience with aliens and smugglers); *State v. Seagull*, 95 Wash. 2d 898, 906-07, 632 P.2d 44, 49 (1981). As a result, an officer's particular training and expertise is highly important. *State v. Cole*, 128 Wash. 2d 262, 289, 906 P.2d 925, 941 (1995) (officer's drug enforcement experience and ability to identify marijuana smell). *See also State v. Smith*, 93 Wash. 2d 329, 352, 610 P.2d 869, 883 (1980) (officer's ability to identify marijuana). The information regarding the basis of knowledge and an officer's

specific training and experience must be included in the affidavit so that the magistrate may make an independent determination of probable cause and establish more than the officer's personal belief. *State v. Johnson*, 79 Wash. App. 776, 780, 904 P.2d 1188, 1189-90 (1995), *review denied*, 128 Wash. 2d 1023 (1996).

The affidavit establishing probable cause for a search warrant must set forth sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity and that the evidence of the crime may be found in the place to be searched. *State v. Cole*, 128 Wash. 2d 262, 286, 906 P.2d 925, 939 (1995) (reliable informant and police observation of marijuana smell established probable cause); *State v. Young*, 123 Wash. 2d 173, 195, 867 P.2d 593, 604 (1994); *State v. Maxwell*, 114 Wash. 2d 761, 769, 791 P.2d 223, 226-27 (1990) (informant tips not enough to substitute for utility consumption information illegally obtained from utility company); *State v. Goble*, 88 Wash. App. 503, 509, 945 P.2d 263, 266 (1997) (magistrate did not have probable cause to believe methamphetamine contraband would be found at a house to be searched since the informant provided only that the drugs came to the suspect's post office box); *State v. O'Neil*, 74 Wash. App. 820, 824-25, 879 P.2d 950, 953 (1994); *State v. Bittner*, 66 Wash. App. 541, 545, 832 P.2d 529, 531 (1992); *State v. Garcia*, 63 Wash. App. 868, 871, 824 P.2d 1220, 1222 (1992); *State v. Cord*, 103 Wash. 2d 361, 365-66, 693 P.2d 81, 85 (1985) (police officer with 13 years substantial drug identification experience). The item to be seized need not be at the place to be searched at the time of the issuance of the warrant, but the magistrate must have reasonable grounds to believe it will be there at the time of the search. *Goble*, 88 Wash. App. at 509, 945 P.2d at 266. *See also United States v. Ruddell*, 71 F.3d 331, 333 (9th Cir. 1995); *United States v. Hendricks*, 743 F.2d 653, 655 (9th Cir. 1984). "Facts arising later are immaterial, unless they were reasonably inferable at the time of the issuance of the warrant. . . . " *Goble*, 88 Wash. App. at 509, 945 P.2d at 266; *cf. State v. Mance*, 82 Wash. App. 539, 542, 918 P.2d 527, 529 (1996) (information obtained after the event needing probable cause). *See also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.7(d), at 372 (3d ed. 1996).

The facts set forth to establish probable cause need not be admissible in evidence at trial. *Bokor v. Dep't of Licensing*, 74 Wash. App. 523, 526, 874 P.2d 168, 169 (1994). *See* 2 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 49.

2.2(b) Probability

Probable cause is a quantum of evidence "less than . . . would justify . . . conviction," yet "more than [bare] suspicion." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879, 1890 (1949). To make an arrest, the officer need not have facts sufficient to establish guilt beyond a reasonable doubt, but only reasonable grounds for suspicion coupled with evidence of circumstances sufficiently strong in themselves to warrant a cautious and disinterested person in believing that the suspect is guilty. *State v. Scott*, 93 Wash. 2d 7, 11-12, 604 P.2d 943, 944-45 (1980) (officers possessing description of car used in robbery and license number of similar car used in robbery involving similar modus operandi had probable cause to arrest persons at address where car was parked).

The exact quantum of evidence is unclear and may depend in part on the nature of the intrusion and the seriousness of the offense. *See generally* 1 LAFAVE, SEARCH AND SEIZURE § 3.2(e).

2.2(c) Individualized Suspicion

Police have probable cause to arrest an individual only if they possess reasonable grounds to believe that the particular individual has committed the crime. *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 344, 62 L. Ed. 2d 238, 245 (1979); *State v. Smith*, 102 Wash. 2d 449, 454, 688 P.2d 146, 149 (1984). *See State v. Larson*, 93 Wash. 2d 638, 645, 611 P.2d 771, 774 (1980); *State v. DeArman*, 54 Wash. App. 621, 625, 774 P.2d 1247, 1249 (1989).

There must be a sufficient nexus between the suspects to be searched and the criminal activity. *State v. Carter*, 79 Wash. App. 154, 158-61, 901 P.2d 335, 337-39 (1995) (search warrant for "all persons present" at suspected drug trafficking premises was invalid because there was not a nexus linking the defendant to the apartment where the drug transaction took place or to criminal activity).

Several exceptions exist, however, to establish authority of law without a warrant. Individual suspicion is not required in a plan involving neutral criteria. *But see Seattle v. Mesiani*, 110 Wash. 2d 454, 458, 755 P.2d 775, 777 (1988) (sobriety checkpoints violate state constitution); *State v. Yeager*, 67 Wash. App. 41, 46-47, 834 P.2d 73, 76 (1992) (*Terry* stop to check validity of license when car had special license plate tabs indicating restricted license). A warrantless search without individualized suspicion may also be upheld in order to permit officers to investigate if the officers reasonably believe that a felony has been committed and if there is a high probability that the suspect will

be found in the place to be searched. *State v. Silvernail*, 25 Wash. App. 185, 190-91, 605 P.2d 1279, 1283 (1980) (roadblock in which police stopped all cars exiting a ferry because the police had probable cause to believe that suspects in violent felony were on board).

Individualized suspicion is not required for some administrative searches as well. *See generally infra* § 6.4(b) & (c).

2.3 Information Considered: In General

A court reviewing a probable cause determination considers only the information that was available to the magistrate at the time that the warrant was issued to the officer. *See Wong Sun v. United States*, 371 U.S. 471, 481-82, 83 S. Ct. 407, 414, 9 L. Ed. 2d 441, 451-52 (1963); *State v. Murray*, 110 Wash. 2d 706, 709-10, 757 P.2d 487, 488 (1988); *State v. Dalton*, 73 Wash. App. 132, 136, 868 P.2d 873, 875 (1994). Probable cause must be based on facts and not on mere conclusions. *Aguilar v. Texas*, 378 U.S. 108, 112-13, 84 S. Ct. 1509, 1513, 12 L. Ed. 2d 723, 727 (1964). In addition, probable cause must exist at the actual time of arrest or search; it may not be stale. *See United States v. Leon*, 468 U.S. 897, 904, 104 S. Ct. 3405, 3411, 82 L. Ed. 2d 677, 686 (1984).

Affidavits for search warrants must be tested in a commonsense, nonhypertechnical manner. *State v. Fisher*, 96 Wash. 2d 962, 965, 639 P.2d 743, 745 (1982); *State v. Barnes*, 85 Wash. App. 638, 659, 932 P.2d 669, 681 (1997); *State v. Gebaroff*, 87 Wash. App. 11, 15, 939 P.2d 706, 708 (1997); *State v. Johnson*, 79 Wash. App. 776, 780, 904 P.2d 1188, 1189-90 (1995), *review denied*, 128 Wash. 2d 1023 (1996); *State v. Remboldt*, 64 Wash. App. 505, 510-11, 827 P.2d 282, 285 (1992); *State v. Cahsengnou*, 43 Wash. App. 379, 386-87, 717 P.2d 288, 291 (1986). *See infra* § 2.5. "The support for issuance of a search warrant is thus sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application." *Fisher*, 96 Wash. 2d at 965, 639 P.2d at 745 (quoting *State v. Clay*, 7 Wash. App. 631, 637, 501 P.2d 603, 607 (1972)). All doubts are resolved in favor of the warrant's validity. *State v. Young*, 123 Wash. 2d 173, 195, 867 P.2d 593, 604 (1994); *State v. Olson*, 73 Wash. App. 348, 354, 869 P.2d 110, 113-14 (1994); *State v. Kennedy*, 72 Wash. App. 244, 248, 864 P.2d 410, 412 (1993); *State v. Wilke*, 55 Wash. App. 470, 476, 778 P.2d 1054, 1058 (1989).

Information need not be admissible at trial in order to support probable cause. *Brinegar v. United States*, 338 U.S. 160, 173, 69 S. Ct. 1302, 1309, 93 L. Ed. 1879, 1889 (1949); *Bokor v. Dep't of Licensing*,

74 Wash. App. 523, 526, 874 P.2d 168, 169 (1994). Marital privilege does not prevent a spouse's statements from being used to establish probable cause. *State v. Bonaparte*, 34 Wash. App. 285, 289, 660 P.2d 334, 336 (1983). *See generally infra* § 7.3.

"[A] search warrant [will] not [be] rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information." *State v. Coates*, 107 Wash. 2d 882, 887, 735 P.2d 64, 67 (1987).

2.3(a) Hearsay

Hearsay from an informant can establish probable cause for a warrantless search as long as there is evidence providing reason to believe that the informant is reliable and has an adequate basis of knowledge. *State v. Huft*, 106 Wash. 2d 206, 209-10, 720 P.2d 838, 839-40 (1986) (tip regarding marijuana growing operation was found insufficient because the basis of the informant's knowledge was not shown); *State v. Jackson*, 102 Wash. 2d 432, 433, 688 P.2d 136, 137-38 (1984); *State v. Lund*, 70 Wash. App. 437, 449-50 n.9, 853 P.2d 1379, 1387 n.9 (1993); *State v. Patterson*, 37 Wash. App. 275, 277-78, 679 P.2d 416, 419 (1984); *State v. Northness*, 20 Wash. App. 551, 554, 582 P.2d 546, 548 (1978). As a result, a magistrate may rely on a police officer's affidavit or other testimony that relays hearsay information based on a fellow officer's personal knowledge. *State v. Lodge*, 42 Wash. App. 380, 386, 711 P.2d 1078, 1083 (1985). The affidavit may also relate hearsay from informants as long as there is a basis for crediting it. *Huft*, 106 Wash. 2d at 209-10, 720 P.2d at 839-40; *Lund*, 70 Wash. App. at 449-50 n.9, 853 P.2d at 1387 n.9.

Multiple hearsay may also be considered if the requirements are met for each person in the chain of information. *See Huft*, 106 Wash. 2d at 209-10, 720 P.2d at 840 (concerned citizen information not sufficient without basis of informant's knowledge); *State v. Vanzant*, 14 Wash. App. 679, 683, 544 P.2d 786, 789 (1975) (information passed to second detective by detective with personal knowledge of informant's reliability sufficient to establish probable cause for arrest). *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2(d), at 50-51 (3d ed. 1996).

2.3(b) Prior Arrests, Prior Convictions, and Reputation

A magistrate or police officer making a probable cause determination may consider prior arrests and convictions that have probative value to the specific probable cause inquiry. *Brinegar v. United States*,

338 U.S. 160, 173-74, 69 S. Ct. 1302, 1309-10, 93 L. Ed. 1879, 1889 (1949); *State v. Sterling*, 43 Wash. App. 846, 851, 719 P.2d 1357, 1359 (1986) (occupant's two prior convictions for narcotics can be a factor in determining probable cause). Without additional evidence, a prior record of the same type of criminal conduct is insufficient to establish probable cause. *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142, 148 (1964); *State v. Hobart*, 94 Wash. 2d 437, 446, 617 P.2d 429, 434 (1980). But prior acts may establish probable cause when the modus operandi is similar and distinctive. *See* 4 LAFAVE, SEARCH AND SEIZURE § 9.4.

A prior criminal record does not justify a warrantless search. *Hobart*, 94 Wash. 2d at 446, 617 P.2d at 434; *State v. Duncan*, 81 Wash. App. 70, 78, 912 P.2d 1090, 1095, *review denied*, 130 Wash. 2d 1001 (1996). *See* 2 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 51-53.

A general assertion of criminal reputation is insufficient to establish probable cause. *Spinelli v. United States*, 393 U.S. 410, 416, 89 S. Ct. 584, 589, 21 L. Ed. 2d 637, 643-44 (1969). *But see United States v. Harris*, 403 U.S. 573, 583, 91 S. Ct. 2075, 2081-82, 29 L. Ed. 2d 723, 733 (1971) (plurality opinion). Specific facts leading to a conclusion that a suspect has a bad reputation may be considered. *See* 2 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 55-58.

2.3(c) Increased Power Consumption

Standing alone, an increase in power use does not constitute sufficient probable cause to issue a search warrant. *State v. Olson*, 73 Wash. App. 348, 356, 869 P.2d 110, 114 (1994); *State v. Sterling*, 43 Wash. App. 846, 851, 719 P.2d 1357, 1360 (1986); *State v. McPherson*, 40 Wash. App. 298, 301, 698 P.2d 563, 564 (1985). Evidence of increased power consumption is an innocuous fact and cannot corroborate an anonymous tip of suspected criminal activity, absent other information. *State v. Young*, 123 Wash. 2d 173, 196, 867 P.2d 593, 604 (1994). *See also State v. Huft*, 106 Wash. 2d 206, 211, 720 P.2d 838, 840 (1986) ("[T]here are too many possible reasons for increased electrical use to allow a search warrant to be issued based on increased consumption"). When the increase in power consumption is combined with other factors, however, the increase may be considered in determining whether probable cause exists. *Young*, 123 Wash. 2d at 195, 867 P.2d at 604; *Sterling*, 43 Wash. App. at 851-52, 719 P.2d at 1360 (400-500% increase in power usage combined with suspicious facts supported probable cause for search warrant). *But see State v. Rakovsky*, 79 Wash. App. 229, 239, 901 P.2d 364, 370 (1995) (evidence of power use three to four times greater than the previous

occupant's, as well as the absence of accumulated snow on the roof when neighboring buildings had 20-30 inches, did not constitute probable cause). An individual has a protected privacy interest in power usage records such that a disclosure of this information is prohibited unless there is written notice to the utility company that the person is suspected of criminal activity. *State v. Maxwell*, 114 Wash. 2d 761, 767-69, 791 P.2d 223, 225-26 (1990) (telephonic request for utility record not admissible because request was in violation of WASH. REV. CODE § 42.17.314) (1996); *In re Rosier*, 105 Wash. 2d 606, 615, 717 P.2d 1353, 1359 (1986).

2.4 First-Hand Observation

Because the existence of probable cause is dependent on a fact-based inquiry, it is impossible to broadly define when an officer's observations are sufficient to constitute probable cause. However, below are some common factual situations that may provide some general guidance.

2.4(a) Particular Crimes: Stolen Property

Suspicious conduct suggesting that property is stolen does not always establish probable cause. For example, when officers saw two men park a car in an alley, load it with cartons, drive away, and later return and repeat their conduct, the officers did not have probable cause to believe that the cartons contained stolen property. *Henry v. United States*, 361 U.S. 98, 103, 80 S. Ct. 168, 171-72, 4 L. Ed. 2d 134, 139 (1959).

In a Washington case, officers stopped a vehicle after learning that its owner had an outstanding warrant for a traffic violation. The police then saw an unpadded, unsecured television in the open trunk. A passenger in the car claimed ownership of the set, but was unable to identify the brand. The court held that the police had reasonable cause to believe that the television was stolen. *State v. Glasper*, 84 Wash. 2d 17, 21, 523 P.2d 937, 940 (1974). Similarly, items wrapped in a blanket on a street and thrown into bushes when police approached were indicative of stolen property when police had previous experience with similar situations. *State v. Barber*, 118 Wash. 2d 335, 337-38, 823 P.2d 1068, 1069 (1992). However, in another case, the existence of an expensive briefcase in a car not reported stolen was not sufficient to establish probable cause for a car search. *State v. Ozuna*, 80 Wash. App. 684, 688-89, 911 P.2d 395, 397-98 (1996), *review denied*, 129 Wash. 2d 1030 (1996). *See also State v. Lewis*, 62 Wash. App. 350, 352, 814 P.2d 232, 233-34 (1991); *State v. Connor*, 58 Wash. App. 90,

99-100, 791 P.2d 261, 265-66 (1990) (stolen wallet). *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.6(a) (3d ed. 1996).

2.4(b) Particular Crimes: Illegal Substances

The odor of an illegal substance may establish probable cause, as long as its detection is by someone trained and experienced in detecting illegal substances. *State v. Olson*, 73 Wash. App. 348, 356, 869 P.2d 110, 114 (1994) (trained officer's detection of marijuana odor); *State v. Vonhof*, 51 Wash. App. 33, 41-42, 751 P.2d 1221, 1226 (1988) (odor combined with experience in smelling the illegal substance constituted probable cause). The affidavit must set forth the officer's training and experience in identifying the odor. *See State v. Remboldt*, 64 Wash. App. 505, 510, 827 P.2d 282, 285 (1992). Odor may also be used in concert with other suspicious activities to establish probable cause. *See State v. Huff*, 64 Wash. App. 641, 647-48, 826 P.2d 698, 701-02 (1992) (odor of methamphetamine combined with furtive gestures and lying to police during car stop).

In the case of a drug enforcement dog sniff, an alert establishes probable cause if the dog's training and reliability are known to the officers and set forth in the affidavit for a warrant. *State v. Jackson*, 82 Wash. App. 594, 606-07, 918 P.2d 945, 952-53 (1996), *review denied*, 131 Wash. 2d 1006 (1997) (alert by police dog after seizure of temporarily seized Federal Express package constituted probable cause); *State v. Flores-Moreno*, 72 Wash. App. 733, 740-41, 866 P.2d 648, 652-53 (1994) (police tip of entering city with drugs seen placed in car trunk combined with positive canine sniff); *State v. Stanphill*, 53 Wash. App. 623, 632, 769 P.2d 861, 866 (1989) (express mail package). *See also United States v. Lingenfelter*, 997 F.2d 632 (9th Cir. 1993) (canine sniff alone may constitute probable cause if the dog's track record is set forth in the warrant application).

Identification of substances must also be accompanied by evidence of the officer's expertise and training in identifying the substance in order to establish probable cause. *State v. Graham*, 130 Wash. 2d 711, 724, 927 P.2d 227, 234 (1996); *State v. Solberg*, 66 Wash. App. 66, 79, 831 P.2d 754, 761 (1992), *rev'd on other grounds*, 122 Wash. 2d 688, 861 P.2d 460 (1993); *State v. Fore*, 56 Wash. App. 339, 343-44, 783 P.2d 626, 629 (1989) (officer training relevant to surveillance of drug transactions in park). Absolute certainty as to the identity of the substance is not required. *Graham*, 130 Wash. 2d at 725, 927 P.2d at 234 (quoting *Fore*, 56 Wash. App. at 345, 783 P.2d at 630). However, the officer's experience and training on the characteristics of those who

cultivate illegal substances, without more, is not enough to establish probable cause. *Olson*, 73 Wash. App. at 357, 869 P.2d at 115 (officer's experience that those who cultivate marijuana usually hide records and materials in a safe house under their control does not satisfy probable cause for search warrant of the safe house premises). *See* 2 LAFAVE, SEARCH AND SEIZURE § 3.6(b), at 289-306.

2.4(c) Association: Persons and Places

Because of the individualized suspicion requirement, mere association with a person with whom police have grounds to arrest does not constitute probable cause for arrest. *United States v. Di Re*, 332 U.S. 581, 587, 68 S. Ct. 222, 225, 92 L. Ed. 210, 216 (1948) (search of a car passenger unjustified when the driver is arrested for possession of counterfeit ration coupons). Mere proximity to others suspected of criminal activity does not in itself establish probable cause to search the associate. *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238, 245 (1979). Race or color alone, including "racial incongruity" ("a person of any race allegedly being 'out of place' in a particular geographic area") can never constitute probable cause of criminal activity. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87, 95 S. Ct. 2574, 2582-83, 45 L. Ed. 2d 607, 619-20 (1975); *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982); *State v. Barber*, 118 Wash. 2d 335, 346, 823 P.2d 1068, 1065 (1992).

An individual's presence in a high crime area is not sufficient by itself. *See Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357, 362-63 (1979). Suspicion of dangerousness must relate to the person searched, not to the area in which he is found. *State v. Smith*, 102 Wash. 2d 449, 452-53, 688 P.2d 146, 148 (1984) (general practice of frisking individuals in particularly dangerous area of the city is not justified by probable cause). *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 3.6(g).

2.4(d) Furtive Gestures and Flight

A suspect's furtive gestures or flight, without more, cannot establish probable cause; however, they may be a factor in determining whether probable cause exists. *See Sibron v. New York*, 392 U.S. 40, 66-67, 88 S. Ct. 1889, 1904, 20 L. Ed. 2d 917, 936-37 (1968) (probable cause existed when strangers tiptoed from apartment and fled from police officer); *State v. Graham*, 130 Wash. 2d 711, 726, 927 P.2d 227, 234 (1996); *State v. Hobart*, 24 Wash. App. 240, 243, 600 P.2d 660, 662 (1979), *rev'd on other grounds*, 94 Wash. 2d 437, 617 P.2d 429 (1980).

Furtive gestures, evasive behavior, and flight from police are circumstantial evidence of criminal activity. *Graham*, 130 Wash. 2d at 725-26, 927 P.2d at 234 (concealing item that looked like rock cocaine in hand, ignoring an officer's request to stop, and profuse sweating in cold temperature); *State v. Glover*, 116 Wash. 2d 509, 514-15, 806 P.2d 760, 762-63 (1991) (defendant's conduct of turning away from the officers, walking faster, playing with his ballcap, and looking toward the officers and then looking away, coupled with officer's disbelief of defendant's statement that he lived at housing complex constituted probable cause for criminal trespass); *State v. Baxter*, 68 Wash. 2d 416, 421-22, 413 P.2d 638, 642 (1966) (flight is an element of probable cause); *State v. Huff*, 64 Wash. App. 641, 647, 826 P.2d 698, 701 (1992) (furtive movements and lying to police about identity support probable cause). *Cf. State v. Larson*, 93 Wash. 2d 638, 645, 611 P.2d 771, 775 (1980) (suspect's leaving at the time a police cruiser arrives does not necessarily lead to the conclusion that it is reasonable to suspect the person of committing a crime); *State v. Rakovsky*, 79 Wash. App. 229, 241, 901 P.2d 364, 371 (1995) (Sweeney, J., dissenting) (use of alias when talking with police while car was stuck in the snow and use of real name only when asked for driver's license was not sufficient).

However, probable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities. *Graham*, 130 Wash. 2d at 725, 927 P.2d at 234 (quoting *Fore*, 56 Wash. App. at 344, 783 P.2d at 629). Absolute certainty as to the identity of a suspicious substance is not required. *Graham*, 130 Wash. 2d at 725, 927 P.2d at 234 (quoting *State v. Fore*, 56 Wash. App. at 344, 783 P.2d at 630).

2.4(e) Response to Questioning

When combined with other circumstances, a suspect's response to police questioning can establish probable cause. *United States v. Ortiz*, 422 U.S. 891, 897, 95 S. Ct. 2585, 2588, 45 L. Ed. 2d 623, 629 (1975) (border patrol may consider nature of responses to questioning to help establish probable cause). *See also Huff*, 64 Wash. App. at 647, 826 P.2d at 701-02 (lying to police about identity coupled with furtive gestures and identification of illegal substance odor); *State v. Glover*, 116 Wash. 2d 509, 514, 806 P.2d 760, 762-63 (1991) (officer's disbelief of defendant's statement that he lived at housing complex, combined with suspicious gestures, constituted probable cause for criminal trespass); *cf. State v. Rakovsky*, 79 Wash. App. 229, 241, 901

P.2d 364, 371 (1995) (Sweeney, J., dissenting) (lying to police by using an alias, combined with furtive behavior, not sufficient).

A suspect's failure or refusal to answer an officer's questions, however, may not be taken into account. *State v. White*, 97 Wash. 2d 92, 106, 640 P.2d 1061, 1069 (1982). *See Brown v. Texas*, 443 U.S. 47, 53 n.3, 99 S. Ct. 2367, 2641 n.3, 61 L. Ed. 2d 357, 363 n.3 (1979). *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 3.6(f). Similarly, a suspect's silence after *Miranda* warnings have been given may not be considered in determining probable cause. *Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91, 97-98 (1976). Nor may the suspect's failure to challenge the officer's actions be considered. *United States v. Di Re*, 332 U.S. 581, 594, 68 S. Ct. 222, 228, 92 L. Ed. 210, 220 (1948) (officers could not infer probable cause from suspect's failure to protest arrest or to proclaim innocence).

2.5 *Information from an Informant: In General*

Traditionally under the Fourth Amendment, information from an informant could establish probable cause only when the facts and circumstances available to the police satisfied the two-prong *Aguilar-Spinelli* test requiring that an informant's basis of knowledge and reliability be established. *Spinelli v. United States*, 393 U.S. 410, 415-16, 89 S. Ct. 584, 588-89, 21 L. Ed. 2d 637, 643 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 1514, 12 L. Ed. 2d 723, 729 (1964). *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3, at 121 (3d ed. 1996).

Under the "basis of knowledge" prong of the test, facts must be revealed that enable the person making the probable cause determination to decide whether the informant had a basis for the allegation of criminal conduct. Under the "veracity" prong, facts must be presented so that the magistrate can determine either the inherent credibility of the informant or the reliability of the informant on the particular occasion. *Spinelli*, 393 U.S. at 415-16, 89 S. Ct. at 588-89, 21 L. Ed. 2d at 643; *State v. Jackson*, 102 Wash. 2d 432, 435, 688 P.2d 136, 138-39 (1984). An informant's tip may provide police with grounds to stop a person only if there is some indicia of reliability. *State v. Smith*, 102 Wash. 2d 449, 455, 688 P.2d 146, 150 (1984) (officers' reliance on street kids to lead them to suspect is not permissible when the officers questioned the reliability of children). So long as each link in the chain of information satisfies the two-prong test, multiple hearsay may be considered. *United States v. Carmichael*, 489 F.2d 983, 986 (7th Cir. 1973); *State v. Morehouse*, 41 Wash. App. 334, 336, 704

P.2d 168, 169 (1985); *cf. State v. Luellen*, 17 Wash. App. 91, 94, 562 P.2d 253, 255 (1977).

In 1983, the United States Supreme Court replaced the *Aguilar-Spinelli* test with a totality of the circumstances approach for determining when an informant's tip may establish probable cause. *Illinois v. Gates*, 462 U.S. 213, 231-32, 103 S. Ct. 2317, 2320, 76 L. Ed. 2d 527, 530 (1983). The Washington State Supreme Court, however, has held that article I, section 7 of the state constitution requires adherence to the two-prong *Aguilar-Spinelli* test. A Washington trial court may not use the "totality of the circumstances" test of *Gates*. *State v. Huft*, 106 Wash. 2d 206, 209-10, 720 P.2d 838, 840 (1986); *State v. Jackson*, 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984); *State v. Adame*, 39 Wash. App. 574, 576, 694 P.2d 676, 678 (1985). *See* 2 LAFAVE, SEARCH AND SEIZURE § 3.3(a), at 97.

2.5(a) Satisfying the "Basis of Knowledge" Prong by Personal Knowledge

The best way to satisfy the "basis of knowledge" prong is to show that the informant based his or her information on personal knowledge. *See, e.g., Aguilar*, 378 U.S. at 114, 84 S. Ct. at 1514, 12 L. Ed. 2d at 729; *State v. Wolken*, 103 Wash. 2d 823, 827, 700 P.2d 319, 321 (1985); *State v. Jackson*, 102 Wash. 2d 432, 437, 688 P.2d 136, 140 (1984). For example, an informant's statement that he had observed the defendant selling narcotics will satisfy the basis of knowledge prong. *McCray v. Illinois*, 386 U.S. 300, 304, 87 S. Ct. 1056, 1059, 18 L. Ed. 2d 62, 67 (1967). *But see* 2 LAFAVE, SEARCH AND SEIZURE § 3.3(a), at 91 (criticizing *McCray* for failing to require a showing that the informant know the substance was a narcotic). The basis of an informant's knowledge may also be established by hearsay. *See State v. Huft*, 106 Wash. 2d 206, 211, 720 P.2d 838, 841 (1986); *Jackson*, 102 Wash. 2d at 437, 688 P.2d at 140. Similarly, an informant's statement from which the court may infer the informant's first-hand knowledge of criminal activity will satisfy this prong. *State v. Anderson*, 41 Wash. App. 85, 95, 702 P.2d 481, 489 (1985), *rev'd on other grounds*, 107 Wash. 2d 745, 733 P.2d 517 (1987). However, innocuous facts indicating that the informant has personal knowledge of the defendant are insufficient to satisfy this prong without allegations establishing the informant's personal knowledge of the criminal act. *State v. Young*, 123 Wash. 2d 173, 196, 867 P.2d 593, 603 (1994); *Huft*, 106 Wash. 2d at 211, 720 P.2d at 840.

Under article I, section 7, a deficiency in the basis of the knowledge prong may be remedied by "independent police investigato-

ry work that corroborates the tip to such an extent that it supports the missing [element] . . . ." *Jackson*, 102 Wash. 2d at 438, 688 P.2d at 140. *See also State v. Kennedy*, 72 Wash. App. 244, 249-50, 864 P.2d 410, 413-14 (1993); *State v. Adame*, 39 Wash. App. 574, 576-77, 694 P.2d 676, 678 (1985). Thus, the credibility of an informant may be established by police verification of the informant's statement of detailed criminal activity not generally known or readily available. *State v. Anderson*, 41 Wash. App. 85, 94-95, 702 P.2d 481, 489 (1985), *rev'd on other grounds*, 107 Wash. 2d 745, 733 P.2d 517 (1987). The corroborated information must itself suggest criminal activity. "Merely verifying 'innocuous details,' commonly known facts or easily predictable events should not suffice to remedy [the] deficiency. . . ." *State v. Jackson*, 102 Wash. 2d 432, 438, 688 P.2d 136, 140 (1984). *See also State v. Kennedy*, 72 Wash. App. 244, 249-50, 864 P.2d 410, 413-14 (1993) (innocuous facts combined with suspicious activity in outdoor resort area suggested drug activity); *State v. Maxwell*, 114 Wash. 2d 761, 769-70, 791 P.2d 223, 227 (1990) (informant's observation of frequent visitors, tin foil on windows, and suspicious conversation not sufficient evidence of illegal activity); *State v. Chatmon*, 9 Wash. App. 741, 746, 515 P.2d 530, 534 (1973). The information may also be used to corroborate other cognizable information if the informant's basis of knowledge is not shown. *State v. Lund*, 70 Wash. App. 437, 450 n.10, 853 P.2d 1379, 1387-88 n.10 (1993) (anonymous police informant's tip of possible drug activity in prison not enough to establish probable cause, but could be considered in corroborating another police informant's similar information and for independent police investigation of tip); *State v. Lair*, 95 Wash. 2d 706, 712, 630 P.2d 427, 431 (1981). *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 3.3(f).

2.5(b) Satisfying the "Veracity" Prong by Past Performance

The veracity prong of the *Aguilar-Spinelli* test may be met if the affidavit supporting the search warrant contains sufficient facts from which a magistrate can independently determine the veracity of the informant. *See State v. Paradiso*, 43 Wash. App. 1, 6, 714 P.2d 1193, 1196 (1986). A mere conclusion that the informant is a "credible person" is insufficient; reasons for believing the informant to be credible must be presented. *Aguilar*, 378 U.S. at 112, 84 S. Ct. at 1515, 12 L. Ed. 2d at 727; *State v. Jackson*, 102 Wash. 2d 432, 437, 688 P.2d 136, 139-40 (1984); *State v. Lund*, 70 Wash. App. 437, 449-50 & n.10, 853 P.2d 1379, 1387-88 & n.10 (1993).

The fact that an informant's past information has led to convictions is a sufficient showing of reliability. *Jackson*, 102 Wash. 2d at 437, 688 P.2d at 139-40. An informant's reliability may also be established if the informant has previously provided information that was proven to be reliable, even though it did not result in an arrest. *See* 2 LAFAVE, SEARCH AND SEIZURE § 3.3(b).

Courts have held that an informant who assists in an arrest is credible. The arrest does not need to be lawful, and the facts learned following the arrest do not have to verify the informant's tip. Some courts have read *Aguilar* to hold that general statements alleging past reliability of the defendant are sufficient. *See* 2 LAFAVE, SEARCH AND SEIZURE § 3.3(b).

In the absence of circumstances showing unreliability, an officer need not have personal knowledge of the informant's track record, but may rely on information from fellow officers. *State v. Vanzant*, 14 Wash. App. 679, 681-82, 544 P.2d 786, 788 (1975). *See infra* § 2.7(b).

2.5(c) Satisfying the "Veracity" Prong by Admissions Against Interest and by Motive

Hearsay from an informant can establish probable cause for a warrantless search, as long as there is evidence of reason to believe that the informant is reliable, including the motive for the informant to be truthful. *State v. Bean*, 89 Wash. 2d 467, 469-71, 572 P.2d 1102, 1103-04 (1978) (offer of a favorable sentence recommendation gave informant a strong motive to provide accurate information); *State v. Lund*, 70 Wash. App. 437, 439-40, 449-50 n.9, 853 P.2d 1379, 1382, 1387-88 n.9 (1993) (strong motive for reliable information regarding drug smuggling into prison provided by inmate informant in return for benefits to his own criminal case); *State v. Estorga*, 60 Wash. App. 298, 305, 803 P.2d 813, 817 (1991) (offer to drop charges in exchange for accurate information established strong motive to be truthful); *State v. Hall*, 53 Wash. App. 296, 299, 766 P.2d 512, 514 (1989) (citing with approval *Bean* and *State v. Smith*); *State v. Smith*, 39 Wash. App. 642, 647, 694 P. 2d 660, 663 (1984) (offer of charge reduction from felony to misdemeanor gave strong motive to be truthful). A statement against penal interest can also establish an adequate basis of knowledge. *Spinelli v. United States*, 393 U.S. 410, 425, 89 S. Ct. 584, 593, 21 L. Ed. 2d 637, 649 (1969) (White, J., concurring); *State v. Lund*, 70 Wash. App. 437, 449-50 n.10, 853 P.2d 1379, 1387-88 n.10 (1993) (informant heard inmate's admission against penal interest that he was receiving drugs smuggled into the prison by his attorney).

2.6 *Citizen Informants: Victim/Witness Informants in General*

The *Aguilar-Spinelli* test also applies to the use of information from a citizen informant, such as a victim or witness. Again, multiple hearsay is acceptable as long as each instance in the chain meets the two-prong test. *See, e.g., United States v. Wilson*, 479 F.2d 936, 940-41 (7th Cir. 1973) (tip by service station employee about stolen credit card from phone call to American Express was reliable). *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.4 (3d ed. 1996).

Naming an informant is not a sufficient ground on which to credit an informer; it is, however, considered in the determination of whether the informant is actually a citizen informant. *State v. Duncan*, 81 Wash. App. 70, 78, 912 P.2d 1090, 1095 (1996), *review denied*, 130 Wash. 2d 1001 (1996); *State v. Rodriguez*, 53 Wash. App. 571, 576, 769 P.2d 309, 312 (1989).

2.6(a) Satisfying the "Basis of Knowledge" Prong

The basis for the citizen informant's knowledge must be established. *See State v. Sieler*, 95 Wash. 2d 43, 48, 621 P.2d 1272, 1275 (1980). Information showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the basis of the knowledge prong. *State v. Smith*, 110 Wash. 2d 658, 663, 756 P.2d 722, 725 (1988); *State v. Jackson*, 102 Wash. 2d. 432, 437, 688 P.2d 136, 140 (1984). However, if the facts come from one who is not the eyewitness, or when the information requires some expertise, such as the identification of the odor of marijuana, the basis of the informant's knowledge must be demonstrated. *See* 1 LAFAVE, SEARCH AND SEIZURE § 3.4(b), at 224.

2.6(b) Satisfying the "Veracity" Prong by Partial Corroboration of Informant's Tip and by Self-Verifying Detail

Washington courts require a showing of reliability for citizen informants. *State v. Ibarra*, 61 Wash. App. 695, 698-99, 812 P.2d 114, 117 (1991); *see also State v. Woodall*, 100 Wash. 2d 74, 77, 666 P.2d 364, 366 (1983); *State v. Fisher*, 96 Wash. 2d 962, 965, 639 P.2d 743, 745 (1982). However, the burden for establishing an identified citizen informant's credibility is generally a reduced standard. *State v. Ibarra*, 61 Wash. App. 695, 699, 812 P.2d 114, 117 (1991); *State v. Franklin*, 49 Wash. App. 106, 109, 741 P.2d 83, 85 (1987). The standard is generally not relaxed, however, when the citizen informant remains unidentified to the magistrate. *State v. Huft*, 106 Wash. 2d

206, 211, 720 P.2d 838, 841 (1986); *Ibarra*, 61 Wash. App. at 699, 812 P.2d at 117; *State v. Rodriguez*, 53 Wash. App. 571, 574-75, 769 P.2d 309, 311 (1989); *State v. Northness*, 20 Wash. App. 551, 557, 582 P.2d 546, 549 (1978).

Police must present the issuing magistrate with sufficient facts to determine either the informant's inherent credibility or reliability. *State v. Duncan*, 81 Wash. App. 70, 76, 912 P.2d 1090, 1095 (1996); *State v. Huff*, 33 Wash. App. 304, 307-08, 654 P.2d 1211, 1213 (1982). Naming an informant is not a sufficient ground upon which to credit an informer; however, independent police corroboration of criminal activity along the lines suggested by the defendant may suffice. *State v. Jackson*, 102 Wash. 2d 432, 438, 688 P.2d 136, 140 (1984); *State v. Duncan*, 81 Wash. App. 70, 77, 912 P.2d 1090, 1095 (1996). Corroboration must suggest criminal activity, not just innocuous facts. *State v. Young*, 123 Wash. 2d 173, 195-96, 867 P.2d 593, 603 (1994); *State v. Rakovsky*, 79 Wash. App. 229, 239, 901 P.2d 364, 370 (1995) (absent information on marijuana growing, no reasonable inference of criminal activity). The corroborating information must point to suspicious activities along the lines suggested by the informant. *State v. Maxwell*, 114 Wash. 2d 761, 769, 791 P.2d 223, 227 (1990).

2.6(c) Sufficiency of Information Supplied

Factors that have been considered in determining whether sufficient information has been provided include: (1) the particularity of the description of the offender or the vehicle; (2) the size of the area in which the perpetrator might be found; (3) the number of persons in the area; (4) the direction of flight; (5) the activity or condition of the person arrested; and (6) the person's knowledge that his vehicle has been involved in other similar criminal activity. *See* 1 LAFAVE, SEARCH AND SEIZURE § 3.4(c), at 236.

When a citizen can identify a suspect by name or by photograph, the information is sufficient to establish probable cause. The use of photo identification, however, is subject to challenge on certain deficiencies. *Simmons v. United States*, 390 U.S. 377, 384-86, 88 S. Ct. 967, 971-72, 19 L. Ed. 2d 1247, 1253-54 (1968) (initial misidentification of suspect could be retained on witness' memory).

Washington cases discussing particular fact patterns include the following: *State v. Palmer*, 73 Wash. 2d 462, 464-65, 438 P.2d 876, 878 (1968) (finding probable cause for arrest forty-five minutes after robbery victim identified automobile by make, year, color, and dirty white top and described suspect by hair color and attire); *State v.*

Kohler, 70 Wash. 2d 599, 605, 424 P.2d 656, 660 (1967) (finding probable cause when two witnesses provided police with descriptions of vehicle, clothing, and build of suspects, and when probability of two similar cars traveling within limited area of Seattle at 12:30 a.m. was slight); *State v. Baker*, 68 Wash. 2d 517, 520, 413 P.2d 965, 967-68 (1966) (finding probable cause when robbery victims identified make, color, and license number of suspect vehicle).

2.7 Police as Informants

2.7(a) Satisfying the "Veracity" and "Basis of Knowledge" Prongs

As with citizen informants under federal law, the veracity of police informants' statements may be presumed. *See United States v. Ventresca*, 380 U.S. 102, 110, 85 S. Ct. 741, 747, 13 L. Ed. 2d 684, 690 (1965). *But see State v. Vanzant*, 14 Wash. App. 679, 681, 544 P.2d 786, 788 (1975) ("[P]robable cause may rest upon hearsay received from an informant if a reasonable person could conclude that, first, the present information is reliable; and second, the informant himself is reliable.").

Generally, there must be a showing that the officer had a basis for his or her knowledge. In limited, complex situations, when explaining the grounds for the belief may be difficult, conclusory allegations will be sufficient. *Jaben v. United States*, 381 U.S. 214, 224-25, 85 S. Ct. 1365, 1370, 14 L. Ed. 2d 345, 352 (1965) (in tax evasion case, affidavit need not explain every basis of the allegation).

2.7(b) Multiple Hearsay

An arresting officer need not have personal knowledge of the facts establishing probable cause, but may rely on another officer's assessment. *Whiteley v. Warden*, 401 U.S. 560, 568, 91 S. Ct. 1031, 1037, 28 L. Ed. 2d 306, 313 (1971) ("fellow officer rule"). However, probable cause must actually still exist for the arrest to be valid. *Id.* at 568-69, 91 S. Ct. at 1037-38, 28 L. Ed. 2d at 313-14. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.5(b), at 253 (3d ed. 1996).

Although determining probable cause on the basis of collective information in an agency is generally permissible, the chain of communication must be shown. *See, e.g., State v. Johnson*, 12 Wash. App. 309, 310, 529 P.2d 873, 874 (1974). *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 3.5(c).

2.8 *Information from Anonymous or Unknown Informants: Satisfying the "Veracity" Prong*

Generally, an anonymous informant's tip fails to meet the *Aguilar-Spinelli* requirements of basis of knowledge and veracity without further corroboration. *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct. 584, 587, 21 L. Ed. 2d 637, 641-42 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 1514, 12 L. Ed. 2d 723, 729 (1964); *State v. Young*, 123 Wash. 2d 173, 195, 867 P.2d 593, 604 (1994); *cf. State v. Murray*, 110 Wash. 2d 706, 711, 757 P.2d 487, 489 (1988). A named but unknown informant is not presumed reliable. *See State v. Sieler*, 95 Wash. 2d 43, 48, 621 P.2d 1272, 1275 (1980) (reliability of named but unknown telephone informant not significantly different from anonymous telephone informant). If, however, a police investigation corroborates the informant's information and constitutes more than public or innocuous facts, the *Aguilar-Spinelli* test may otherwise be satisfied. *Young*, 123 Wash. 2d at 195, 867 P.2d at 604; *State v. Jackson*, 102 Wash. 2d 432, 438, 688 P.2d 136, 140 (1984).

2.9 *Special Searches and Seizures Requiring Greater or Lesser Levels of Proof*

2.9(a) Administrative Searches

The protections of the Fourth Amendment and article I, section 7 of the Washington Constitution extend to administrative and regulatory searches. *Camara v. Municipal Court*, 387 U.S. 523, 523-32, 87 S. Ct. 1727, 1727-33, 18 L. Ed. 2d 930, 930-38 (1967). Therefore, such searches must either be conducted pursuant to a warrant or fall within one of the narrowly drawn exceptions to the warrant requirement. *Id.*; *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wash. App. 171, 183, 931 P.2d 208, 215 (1997), *review denied*, 132 Wash. 2d 1010 (1997). Probable cause must exist for warrants issued for health and safety inspections. *Seattle v. McCready*, 123 Wash. 2d 260, 280, 868 P.2d 134, 144-45 (1994) (*McCready I*); *Thurston County Rental Owners Ass'n*, 85 Wash. App. at 183, 931 P.2d at 215. If voluntary consent is given, a warrant is not required, and therefore, probable cause is not required. *Seattle v. McCready*, 131 Wash. 2d 266, 272-73, 931 P.2d 156, 159-60 (1997) (*McCready III*); *Seattle v. McCready*, 124 Wash. 2d 300, 303-04, 877 P.2d 686, 688 (1994) (*McCready II*); *Thurston County Rental Owners Ass'n*, 85 Wash. App. at 183, 931 P.2d at 215; *State v. Browning*, 67 Wash. App. 93, 96, 834 P.2d 84, 85 (1992) (building inspector's entry

into apartment without consent of occupant was unlawful because statute required consent of the occupant).

A municipal court may not issue an administrative warrant for inspection of a civil infraction, even if the infraction is supported by probable cause; the authority extends only for criminal violations. *McCready II*, 124 Wash. 2d at 309, 877 P.2d at 691 (administrative warrant issued for search of the common areas of an apartment house over the objections of the landlords); *McCready I*, 123 Wash. 2d at 272, 868 P.2d at 140. There is no statutory or rule-based authority to allow municipal courts to issue warrants on less than probable cause for suspected civil infractions. *McCready I*, at 272-76, 868 P.2d at 134-38.

Inventory searches can also be justified without probable cause. *Colorado v. Bertine*, 479 U.S. 367, 374, 107 S. Ct. 738, 741-42, 93 L. Ed. 2d 739, 745 (1987) (inventory search of car after drunk driving arrest). The inventory search must be made pursuant to reasonable regulations. *Florida v. Wells*, 495 U.S. 1, 3-4, 110 S. Ct. 1632, 1635, 109 L. Ed. 2d 1, 6 (1990) (opening of locked container during inventory search held unconstitutional because there were no regulations to give police discretion to open containers). Washington, however, provides greater protection against inventory searches.

For a discussion of administrative searches in general, see *infra* § 6.4.

2.9(b) *Terry* Stops and Frisks

Police may stop an individual for investigation with less than probable cause if they have reasonable and articulable facts that point toward criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); *State v. Kennedy*, 107 Wash. 2d 1, 5, 726 P.2d 445, 447-48 (1986); *State v. Mitchell*, 80 Wash. App. 143, 145, 906 P.2d 1013, 1015 (1995); *State v. Pressley*, 64 Wash. App. 591, 595, 825 P.2d 749, 751 (1992) (two women on street corner acted suspiciously by hiding a package and expressing surprise when police approached); *State v. Walker*, 66 Wash. App. 622, 626, 834 P.2d 41, 44 (1992). *But see State v. DeArman*, 54 Wash. App. 621, 624-25, 774 P.2d 1247, 1248-49 (1989).

An investigatory stop requires a lower standard than probable cause: reasonable suspicion. As a result, a lesser showing as to an informant's veracity, reliability, and basis of knowledge is required to meet the reasonable suspicion standard. *Alabama v. White*, 496 U.S. 325, 330, 1108 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 309 (1990). However, an investigative stop is not justified if there is no indepen-

dent basis to rely on an anonymous informant's tip. *Kennedy*, 107 Wash. 2d at 7, 726 P.2d at 448-49; *State v. Sieler*, 95 Wash. 2d 43, 47, 621 P.2d 1272, 1274-75 (1980); *State v. Vandover*, 63 Wash. App. 754, 822 P.2d 784 (1992). "'Indicia of reliability' requires: (1) knowledge that the source of the information is reliable; and (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation." *State v. Jones*, 85 Wash. App. 797, 799-800, 934 P.2d 1224, 1226 (1997) (hand signal from unknown informant is not sufficient indicia of reliability), *review denied*, 133 Wash. 2d 1012 (1997).

Officers are also allowed to search and temporarily seize persons and property when necessary to protect officer safety. *State v. King*, 89 Wash. App. 612, 618-19, 949 P.2d 856, 860-61 (1998) (temporary seizure of person who was in the apartment with a gun during a consent search); *State v. Cotten*, 75 Wash. App. 669, 683, 879 P.2d 971, 980 (1994).

A valid *Terry* stop may include a search of the interior of a suspect's car when necessary to guarantee officer safety. *Kennedy*, 107 Wash. 2d at 12, 726 P.2d at 451; *State v. Larson*, 88 Wash. App. 849, 855, 946 P.2d 1212, 1215 (1997). *But see State v. Henry*, 80 Wash. App. 544, 553, 910 P.2d 1290, 1294 (1995). Similarly, frisking a suspect for weapons is justified if the officer has reasonable grounds to believe the person is armed and presently dangerous. *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884, 20 L. Ed. 2d at 910-11; *State v. Hudson*, 124 Wash. 2d 107, 112, 874 P.2d 160, 164 (1994); *State v. Hobart*, 94 Wash. 2d 437, 441, 617 P.2d 429, 431 (1980).

2.9(c) Intrusions into the Body

Under article I, section 7 of the Washington Constitution, when a blood sample is taken, it is a search and seizure that must be supported by probable cause. *State v. Judge*, 100 Wash. 2d 706, 711, 675 P.2d 219, 222 (1984); *State v. Dunivin*, 65 Wash. App. 501, 507, 828 P.2d 1150, 1154 (1992). In one case, the court upheld the seizure of blood when officers believed a defendant who committed vehicular homicide was driving while intoxicated. *Dunivin*, 65 Wash. App. at 507, 828 P.2d at 1154 (authority under WASH. REV. CODE § 46.20.308(1) (1998)); *State v. Rangitsch*, 40 Wash. App. 771, 775, 700 P.2d 382, 385 (1985). If there is probable cause, neither an adversarial hearing nor notice to defense counsel is required before a search warrant to obtain a blood sample may be issued. *State v. Kalakosky*, 121 Wash. 2d 525, 534-36, 852 P.2d 1064, 1069-70 (1993)

(search warrant to obtain a blood sample from a suspect who had been arrested but not charged).

The Fourth Amendment allows warrantless searches, including body searches of convicted persons, even without probable cause or individualized suspicion. *State v. Audley*, 77 Wash. App. 897, 904, 894 P.2d 1359, 1363 (1995) (no greater protection under state constitution). But general privacy rights must be protected by requiring "special needs beyond normal law enforcement" for withdrawing blood. *State v. Olivas*, 122 Wash. 2d 73, 93, 856 P.2d 1076, 1086 (1993) (DNA testing of convicted violent or sex offenders).

CHAPTER 3: SEARCH WARRANTS

3.0 Introduction: Fourth Amendment Requirements for Search Warrants

The Fourth Amendment provides that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. This provision was enacted partly in response to the evils of general warrants in England and writs of assistance in the colonies. *See Boyd v. United States*, 116 U.S. 616, 626-27, 6 S. Ct. 524, 530, 29 L. Ed. 746, 749-50 (1886); *State v. Fields*, 85 Wash. 2d 126, 128, 530 P.2d 284, 285 (1975). Such warrants and writs had provided law enforcement officers virtually unlimited discretion to search whenever, wherever, and whomever they chose. In adopting the Fourth Amendment, the Framers sought to curb the abuses that accompanied these unconstrained licenses to search. This chapter focuses on the interpretation of the Fourth Amendment's requirements for a valid search warrant and its execution.

Searches and seizures must generally be made pursuant to a warrant. *See, e.g., United States v. Ventresca*, 380 U.S. 102, 106, 85 S. Ct. 741, 744, 13 L. Ed. 2d 684, 687 (1965). The basic purpose of the warrant process is to interpose a neutral and detached magistrate between the law enforcement authorities and the individual whose effects are to be search. Once issued, the warrant also serves the purpose of limiting the scope of the search to the areas and items specified in the warrant. In order to be lawful, a warrant must meet the following requirements: (1) it must be issued by a neutral and detached magistrate; (2) the magistrate must determine whether there is probable cause to search or arrest and must support this determination by oath or affirmation; and (3) the warrant must describe with

particularity the place to be searched and the items or persons to be seized. *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436, 440 (1948); *see also United States v. Heldt*, 668 F.2d 1238, 1256 (D.C. Cir. 1981).

There are, however, a number of situations when searches and seizures may be made without warrants—even when it would be feasible to obtain them—and there are some circumstances when warrants alone are insufficient. *See infra* § 3.3(a)-(d). For the most part, the standards discussed below apply to arrest as well as to search warrants. Issues pertaining specifically to arrests are discussed in Chapter 4.

3.1 Types of Items That May Be Searched and Seized

Warrants may be issued not only for contraband or instrumentalities of crime, but also for "mere evidence." When the State seeks a warrant for evidence, it must show cause to believe that the evidence will aid in apprehending or convicting the suspect. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642, 1650, 18 L. Ed. 2d 782, 792 (1967); *see also* WASH. CR.R. 2.3(b); CR.R. L. J. 2.2(a). Warrants may be issued for evidence containing incriminating statements; the Fifth Amendment protects a person only from producing evidence, not from its production by others. *Andresen v. Maryland*, 427 U.S. 463, 473, 96 S. Ct. 2737, 2745, 49 L. Ed. 2d 627, 638 (1976).

3.2 Who May Issue Warrants: Neutral and Detached Magistrate Requirements

One aspect of the protection provided by a warrant is the determination of probable cause by a neutral and detached magistrate rather than by a police officer. *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S. Ct. 367, 369, 92 L. Ed. 436, 440 (1948):

> The point of the Fourth Amendment that often is not grasped by zealous officers is not that it denies law enforcement the support of the usual inferences that reasonable men draw from evidence. Its protection consists of requiring that those usual inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

In Washington State criminal matters, a district court's territorial jurisdiction is within the boundaries of the county. WASH. REV. CODE § 3.66.060 (1996). Thus, on probable cause, a district court judge may issue a warrant for the search and seizure of controlled

substances outside the court's district, but within the county, without the approval of the prosecutor. WASH. REV. CODE § 69.50.509 (1996); *State v. Uhtoff*, 45 Wash. App. 261, 264, 724 P.2d 1103, 1106 (1986).

A district court may issue a warrant relating to the case even after felony information has been filed in superior court. *State v. Stock*, 44 Wash. App. 467, 475, 722 P.2d 1330, 1335 (1986); WASH. REV. CODE § 69.50.509 (1996). *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.2(a)-(f) (3d ed. 1996).

3.2(a) Qualifications of a "Magistrate"

Constitutional provisions, statutes, and court rules identify the requirements for qualification of a magistrate. The Fourth Amendment does not require that a magistrate be an attorney or a judge so long as he or she is "neutral and detached" and "capable of determining whether probable cause exists for the requested arrest or search." *Shadwick v. Tampa*, 407 U.S. 345, 350, 92 S. Ct. 2119, 2122-23, 32 L. Ed. 2d 783, 788 (1972); *State v. Porter*, 88 Wash. 2d 512, 515, 563 P.2d 829, 830-32 (1977). *But see* 2 LAFAVE, SEARCH AND SEIZURE § 4.2(c), at 446 (because search warrants are more complex than arrest warrants, the use of nonlawyers to issue search warrants should be constitutionally suspect).

Even when the person issuing the warrant is a magistrate in title, he or she must make an independent probable cause determination and may not simply rubber-stamp warrants. *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 1512, 12 L. Ed. 2d 723, 727 (1964); *State v. Klinker*, 85 Wash. 2d 509, 517, 537 P.2d 268, 275-76 (1975).

States may impose more stringent requirements than those required by the Fourth Amendment. Washington limits the power to issue warrants to magistrates, which are identified as supreme court, court of appeals, superior court, and district court judges, and "all municipal officers authorized to exercise the powers and perform the duties of district judges." WASH. REV. CODE § 2.20.020 (1996). Case law has also specifically included court commissioners. *See Porter*, 88 Wash. 2d at 524, 463 P.2d at 830. *But see* 2 LAFAVE, SEARCH AND SEIZURE § 4.2(c), at 447-49.

3.2(b) Neutrality

A magistrate who is capable of determining probable cause may nevertheless be disqualified from issuing a warrant for failing to meet the "neutral requirement." Thus, a state officer who acts as prosecutor

or investigator in a case is automatically disqualified from acting as a magistrate in the same case. *Coolidge v. New Hampshire*, 403 U.S. 443, 450, 91 S. Ct. 2022, 2029-30, 29 L. Ed. 2d 564, 573 (1971). Similarly, an unsalaried magistrate who receives a fee for each search warrant issued is not considered neutral. *Connally v. Georgia*, 429 U.S. 245, 250, 97 S. Ct 546, 548, 50 L. Ed. 2d 444, 448 (1977) (having a pecuniary interest in issuing warrants compared with denying them renders a magistrate neither neutral nor detached).

For the same reason, an administrative "warrant" signed by the parole officer conducting a search is invalid. *Hocker v. Woody*, 95 Wash. 2d 822, 825-26, 631 P.2d 372, 375 (1981). Similarly, the magistrate's involvement in the execution of a warrant may constitute nonneutrality. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27, 99 S. Ct. 2319, 2324, 60 L. Ed. 2d 920, 928-29 (1979) (a judge who accompanied police on a raid of pornographic bookstore was not neutral and detached when he added new materials observed at the store to the previously signed search warrant).

On the other hand, the *per se* rule of *Coolidge* was held not to apply to a case in which the *pro tempore* judge issuing the warrant was also a prosecutor, but had not been involved in the prosecution of that particular case. *State v. Hill*, 17 Wash. App. 678, 683, 564 P.2d 841, 943 (1977). A search warrant's issuance has been upheld, however, when the issuing judicial officer was aware from the affidavit that he might be a witness against the defendant. *State v. Smith*, 16 Wash. App. 425, 428, 558 P.2d 265, 268 (1976); 2 LAFAVE, SEARCH AND SEIZURE § 4.2(b), at 444-45.

Washington has also refused to apply the *Coolidge* rule of *per se* disqualification to a judge who issued a search warrant in a case that was before him on special inquiry. *State v. Neslund*, 103 Wash. 2d 79, 88, 690 P.2d 1153, 1158-59 (1984). In *Neslund*, the judge had been appointed to investigate the suspected criminal activity of the defendant and one of the defendant's brothers. During the special inquiry proceedings, the judge asked another brother some questions; the judge did not, however, question other witnesses, discuss the investigation, or discuss the brother's testimony with anyone else involved in the investigation. The *Neslund* court did not *per se* disqualify the judge from issuing warrants authorizing a search of the defendant's premises and the seizure of particular items of the defendant's personal property; rather, the court based its holding in part on the fact that the warrants were not issued in subsequent court proceedings "arising" from the inquiry. *Id.* at 82-83, 690 P.2d at 1156; *cf.* WASH. REV. CODE § 10.27.180 (1996) (special-inquiry judges

disqualified from participating in subsequent court proceedings arising from special inquiry).

A magistrate's initial probable cause determination is not a final order. Principles of collateral estoppel or res judicata do not preclude the government from presenting the same evidence to a second judicial officer so long as the government notifies the second officer that the application was previously denied. The presentation of the same evidence to a second magistrate is not tantamount to forum shopping unless the government visits numerous magistrates before convincing one to issue the disputed warrant. *United States v. Savides*, 658 F. Supp. 1399, 1404 (N.D. Ill. 1987); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 4.2(e), at 454-55; *cf. United States v. Davis*, 346 F. Supp. 435 (S.D. Ill. 1972) (magistrate shopping to obtain a warrant after party has been denied by another magistrate has been condemned).

3.2(c) Burden of Proof

Unless a magistrate is disqualified under the *per se* rule of *Coolidge*, the defendant bears the burden of proving a magistrate's lack of neutrality. *State v. Hill*, 17 Wash. App. 678, 683, 564 P.2d 841, 843 (1977).

3.3 Content of the Warrant

3.3(a) Oath or Affirmation; Multiple Affidavits

The oath or affirmation clause of the Fourth Amendment requires that the person presenting the supporting affidavit swear to the information the affidavit contains. U.S. CONST. amend. IV. The Washington Supreme Court has upheld a warrant, however, when the affidavit was not sworn to, but was signed in the presence of the magistrate. *State v. Douglas*, 71 Wash. 2d 303, 309-10, 428 P.2d 535, 539 (1967). Lower courts have split on the question of whether a fictitious name affidavit is defective. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.3(f), at 476-78 (3d ed. 1996).

3.3(b) Information Considered

The information establishing probable cause must not be stale at the time it is presented to the judge. "It is not enough . . . to set forth [the fact] that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal activity was occurring at or about the time the warrant was issued." *State v. Higby*, 26 Wash. App. 457, 460, 613 P.2d 1192,

1194 (1980) (one sale of a small amount of marijuana did not provide probable cause to search two weeks later); *see also State v. Petty*, 48 Wash. App. 615, 621, 740 P.2d 879, 882-83 (1987) (factors to be considered: the amount of time between the known criminal activity and the issuance of the warrant, the nature and scope of the suspected criminal activity, and the nature of the items to be seized); *State v. Anderson*, 41 Wash. App. 85, 95, 702 P.2d 481, 490 (1985), *rev'd on other grounds*, 107 Wash. 2d 745, 733 P.2d 517 (1987) (evidence must be sufficient to support a magistrate's decision that evidence sought is still on the person or premises to be searched); *cf. supra* § 2.3.

The fact that a valid warrant could have been obtained had the affiant provided sufficient information to the magistrate will not validate a warrant issued in the absence of that information. *See Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 565-66, 91 S. Ct. 1031, 1035-36, 28 L. Ed. 2d 306, 311-12 (1971). Thus, an otherwise insufficient affidavit cannot be rehabilitated by a later production of information that the affiant possessed, but did not disclose, to the magistrate when seeking the warrant. *Id.* (permitting the record to be expanded with information known to the police, but not disclosed to the magistrate, would "render the warrant requirements of the Fourth Amendment meaningless"); *cf. Seattle v. Leach*, 29 Wash. App. 81, 85, 627 P.2d 159, 162 (1981) (affidavit in support of administrative warrant not sufficient when it alleged comprehensive inspection program but failed to describe the program). *But see State v. Smith*, 16 Wash. App. 425, 428, 558 P.2d 265, 268 (1976) (warrant to search for documents valid and not overbroad).

On the other hand, the Washington Supreme Court has ruled that when a warrant is facially valid and an omission is neither intentional nor made with a reckless disregard for the truth, the warrant can be valid even though it is based on an affidavit containing an omission. *See State v. Cord*, 103 Wash. 2d 361, 368-69, 693 P.2d 81, 85-86 (1985). In *Cord*, the court held that although an affidavit in support of a search warrant failed to state the altitude at which the officer allegedly observed marijuana plants, the affidavit otherwise provided a sufficient basis for the issuing judge to conclude that a crime had probably been committed. *But see id.* at 371, 693 P.2d at 87 (Williams, C.J., dissenting) (when aerial views are the means utilized to show probable cause, the affidavit must reveal the altitude from which the identification was made so that courts can guard against the issuance of warrants following unreasonably low, intrusive searches and so that courts make sure officers do not engage in unreasonably high views of questionable reliability).

An affidavit must set forth the underlying facts; conclusory information sworn to by the prosecutor is not enough to establish probable cause. *See Albrecht v. United States*, 273 U.S. 1, 5, 47 S. Ct. 250, 251, 71 L. Ed. 505, 508 (1927); *cf. State v. Klinker*, 85 Wash. 2d 509, 517-18, 537 P.2d 268, 276 (1975). A *prima facie* showing of criminal activity is not required, although the affidavit must go beyond mere suspicion or personal belief that evidence of a crime will be found on the premises to be searched. *State v. Chasengnou*, 43 Wash. App. 379, 385, 717 P.2d 288, 291 (1986) (citing *State v. Rangitsch*, 40 Wash. App. 771, 780, 700 P.2d 382, 388 (1985)); *State v. White*, 44 Wash. App. 215, 218, 720 P.2d 873, 875 (1986). At the same time, however, affidavits for search warrants must be tested in a common-sense manner rather than hypertechnically. *State v. Olson*, 73 Wash. App. 348, 355, 869 P.2d 110, 114 (1994) (citing *State v. Garcia*, 63 Wash. App. 868, 871, 824 P.2d 1220, 1222 (1992)). Generally, an affidavit establishes probable cause to support a search warrant if the affidavit sets forth facts sufficient to allow a reasonable person to conclude both that the defendant is involved in criminal activity and that evidence of the crime can be found at the place to be searched. *See State v. Maxwell*, 114 Wash. 2d 761, 769, 791 P.2d 223, 227 (1990).

Evidence from a prior warrantless search conducted under an exception to general search and seizure rules may be used by the issuing magistrate in determining probable cause. A magistrate may also rely on hearsay statements from a police officer's affidavits. *Chasengnou*, 43 Wash. App. at 384, 717 P. 2d at 291; *see also supra* § 2.7(b).

3.3(c) Oral Testimony and Oral Warrants

In Washington, a search warrant may be based on a single affidavit, on several affidavits, or on oral testimony. WASH. CR.R. 2.3(c); CR.R. L. J. 2.2(a). The judge must record a summary of any additional evidence on which the warrant was based. WASH. CR.R. 2.3(c).

Some states, including Washington, permit oral search warrants in which an affiant makes a sworn telephonic statement to a judge. WASH. CR.R. 2.3(c); WASH. J.CR.R. 7.5(b). *See State v. Ringer*, 100 Wash. 2d 686, 701, 674 P.2d 1240, 1249 (1983), *overruled on other grounds by State v. Stroud*, 106 Wash. 2d 144, 151, 720 P.2d 436, 440 (1986). However, when other means are available to memorialize an affiant's sworn testimony, the State is not allowed to instead use a reconstruction of the entire telephonic affidavit if no original recording

of the statement exists. WASH. CR.R. 2.3; *State v. Myers*, 117 Wash. 2d 332, 338, 815 P.2d 761, 765, 768 (1991). For a discussion of various objections to this procedure, see 2 LAFAVE, SEARCH AND SEIZURE § 4.3(c), at 469.

3.3(d) Administrative Warrants

An administrative warrant may be based either on specific evidence of an existing violation or on a general inspection program based on reasonable legislative or administrative standards that are derived from neutral sources. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320, 98 S. Ct. 1816, 1824, 56 L. Ed. 2d 305, 316 (1978); *Seattle v. Leach*, 29 Wash. App. 81, 84, 627 P.2d 159, 161-62 (1981). *See generally infra* § 6.4. However, an administrative warrant issued by a magistrate without authority is no more valid than a warrant signed by a private citizen. *Seattle v. McCready*, 123 Wash. 2d 260, 272, 868 P.2d 134, 140 (1994) (invalidating a warrant to enforce housing codes issued on less than probable cause). A right of entry does not authorize the issuance of search warrants for enforcement purposes unless there is probable cause or a statute authorizing the court to issue warrants on less than probable cause. *Id.* at 278, 868 P.2d at 143.

3.4 Particular Description of Place to Be Searched

3.4(a) General Considerations

By requiring a particular description of the places to be searched, the Fourth Amendment furthers two purposes: (1) it limits the risk that a search will be conducted in the wrong location, and (2) it helps determine whether probable cause is present. *Steele v. United States*, 267 U.S. 498, 503, 45 S. Ct. 414, 416, 69 L. Ed. 757, 760 (1925). The description must be such that "the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." *Id.*; *State v. Smith*, 39 Wash. App. 642, 648-49, 694 P.2d 660, 664 (1984). The Fourth Amendment requirement that the places to be searched be described with particularity serves to prevent general searches and leaves nothing to the discretion of the officers executing the warrant. *See Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 76, 72 L. Ed. 231, 237 (1927); *State v. Perrone*, 119 Wash. 2d 538, 545, 834 P.2d. 611, 614-15 (1992); *State v. Rivera*, 76 Wash. App. 519, 522, 888 P.2d 740, 742 (1995). However, carelessness on the part of the officers executing the warrant will not necessarily render the warrant insufficient. Officers executing a warrant need only use "reasonable effort" to confine their search to the areas delineated in the warrant.

See State v. Cockrell, 102 Wash. 2d 561, 570, 689 P.2d 32, 37 (1984) (warrant identified place to be searched but did not list an address; officers attempted to serve warrant on persons outside the described area); *see also State v. Fisher*, 96 Wash. 2d 962, 967, 639 P.2d 743, 746-47 (1982).

If a warrant is invalid because it fails to specifically describe the place to be searched, a search under the warrant cannot be upheld on the ground that a magistrate made a probable cause determination; however, the evidence seized may sometimes be admissible. *See generally infra* § 7.2. The use of a generic term or general description in a warrant is not a *per se* violation of the Fourth Amendment if a more specific description is impossible and if probable cause is shown. *Perrone*, 119 Wash. 2d at 547, 834 P.2d at 616; *see also State v. Riley*, 121 Wash. 2d 22, 28, 846 P.2d 1365, 1369 (1993) ("When the nature of the underlying offense precludes a descriptive itemization, generic classifications such as lists are acceptable."). Furthermore, if a warrant separately and distinctly describes two targets and it is thereafter determined that probable cause existed for issuance of the warrant as to one target, but not the other, the warrant may be treated as severable and upheld as to the one target. *State v. Halverson*, 21 Wash. App. 35, 37, 584 P.2d 408, 409 (1978); *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.6(f), at 582-83 (3d ed. 1996). On the other hand, the severability doctrine must not be applied when doing so would render the particularity standards of the Fourth Amendment meaningless. *Perrone*, 119 Wash. 2d at 588, 834 P.2d at 621 (holding that a warrant authorizing a general search of materials protected by the First Amendment was impermissibly broad and invalid in its entirety).

The initial determination of whether a description is adequate is made with reference only to the warrant itself. *See State v. Stenson*, 132 Wash. 2d 668, 691-93, 940 P.2d 1239, 1252-54 (1997). The affidavit and other incorporated documents may be considered if they are attached to the warrant. A description may appear adequate on its face, but on execution be found to be ambiguous or to contain errors. *Id.* Whether such a warrant will be deemed sufficient depends on the availability of other information that permits the officer to identify the intended premises with reasonable certainty. *Id.*; *State v. Rood*, 18 Wash. App. 740, 743-44, 573 P.2d 1325, 1327-28 (1977).

Three types of information may be considered in determining a warrant's adequacy: (1) physical descriptions of the premises contained in the warrant or in the attached affidavit; (2) information based on the officer's personal knowledge of the location or its occupants; and (3)

the officer's personal observations at the time of execution. *Rood*, 18 Wash. App. at 744-45, 573 P.2d at 1328; *see also State v. Smith*, 39 Wash. App. 642, 649, 694 P.2d 660, 664 (1984) (search warrant identifying place to be searched as 2415 Carl Road, *Sumas*, Washington, rather than correct address of 2415 Carl Road, *Everson*, Washington was such that police officer could, with reasonable effort, ascertain and identify intended place); *State v. Cohen*, 19 Wash. App. 600, 604, 576 P.2d 933, 936 (1978) (requiring only reasonable particularity). *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 4.5(a)-(e), at 512-48. Earlier Washington cases include *State v. Davis*, 165 Wash. 652, 654-55, 5 P.2d 1035, 1036 (1931) (warrant sufficient despite incorrect street name because name listed was properly known and no one could have been misled) and *State v. Andrich*, 135 Wash. 609, 612, 238 P. 638, 639 (1925) (warrant's error in house number was immaterial when officer knew where accused lived and officer searched the correct house).

3.4(b) Particular Searches: Places

In urban areas, places are usually identified by a street address. The address is unnecessary, however, if other facts make it clear that a particular place is intended. *State v. Trasvina*, 16 Wash. App. 519, 522-23, 557 P.2d 368, 370 (1976) (warrant describing premises as two-story, white-frame house located directly behind particular address sufficient when no evidence presented that more than one house met description or that premises failed to conform to description except for incorrect address); *see also State v. Chisholm*, 7 Wash. App. 279, 283, 499 P.2d 81, 84 (1972) (warrant that failed to specify street location was sufficiently clear when officers could identify premises with reasonable certainty and when reason for failure to specify street was included in affidavit for warrant). Rural areas may be described by a legal description of the property. *See State v. Cohen*, 19 Wash. App. 600, 603-04, 576 P.2d 933, 935-36 (1978).

When a warrant contains errors, the burden is on the party challenging the warrant to show that errors could have resulted in a search of the wrong premises. *State v. Fisher*, 96 Wash. 2d 962, 967, 639 P.2d 743, 747 (1982); *see also State v. Smith*, 39 Wash. App. 642, 649, 694 P.2d 660, 664 (1984) (although incorrect town identified in warrant, search upheld because the defendant made no showing that a similar address existed that could have been mistakenly searched or even that a street of the same name existed in the wrongly identified town). Even so, the test is not whether an officer could hypothetically or theoretically search the wrong premises, but whether, under the

circumstances presented, an officer could reasonably determine the correct premises to be searched. *State v. Bohan*, 72 Wash. App. 335, 339, 864 P.2d 26, 28 (1993). If an officer can so determine, the warrant will be valid. *Id.*

Generally, unless there is probable cause to search all living units of a multiple-occupancy building, the description must single out a particular subunit. *People v. Avery*, 478 P.2d 310, 312 (Colo. 1970). But if the building looks like a single occupancy structure from the outside and the officers have no reason to know that it is a multiple-unit structure, the warrant is not defective for failing to specify a subunit. *Chisholm*, 7 Wash. App. at 282-83, 499 P.2d at 83.

Another exception, the "community living unit" rule, will generally apply when several people occupy the entire premises in common, but have separate bedrooms. Under the community living unit rule, a single warrant describing the entire premises is valid and justifies a search of the entire premises. *State v. Alexander*, 41 Wash. App. 152, 156, 704 P.2d 618, 619 (1985).

Additional exceptions to the particularity rule are outlined in *United States v. Whitten*, 706 F.2d 1000, 1009 (9th Cir. 1983). A warrant may authorize a search of an entire street address while reciting probable cause as to only a portion of the premises if the premises are occupied in common rather than individually; a multiunit building is used as a single entity; the defendant is in control of the whole premises; or if the entire premises is suspect. *Id.* at 1008. *See also* 2 LAFAVE, SEARCH AND SEIZURE § 4.5(b), at 531.

A warrant authorizing the search of an apartment may also include the search of a padlocked locker located in a storage room next to the defendant's apartment. *State v. Llamas-Villa*, 67 Wash. App. 448, 453, 836 P.2d 239, 242 (1992). The *Llamas-Villa* court concluded that because the storage locker did not comprise a separate building and was not intentionally excluded from the warrant, the officers did not exceed the scope of the warrant when they searched the locker. However, in another situation, the officers' search of "outbuildings" exceeded the scope of a search warrant that authorized the search of a residence and the attached carport, but did not authorize the search of "outbuildings," which included a barn and a garage. *State v. Kelley*, 52 Wash. App. 581, 586, 762 P.2d 20, 23-24 (1988). Probable cause to search a house does not provide probable cause to search outbuildings when the outbuildings are under the control of other persons. *State v. Gebaroff*, 87 Wash. App. 11, 16-17, 939 P.2d 706, 709-10 (1997).

Under a search warrant for a premises, the personal effects of the owner may be searched so long as they are likely repositories for items named in the warrant. *State v. Worth*, 37 Wash. App. 889, 892, 683 P.2d 622, 624 (1984). Such personal effects include articles of clothing left on the floor, even though the clothing does not belong to the owner or resident of the premises. *State v. Hill*, 123 Wash. 2d 641, 647, 870 P.2d 313, 316 (1994).

Although search warrants for vehicles are uncommon because of the many exceptions allowing warrantless searches, *see infra* § 5.21, such warrants are governed by the same principles discussed above. *See State v. Cohen*, 19 Wash. App. 600, 604, 576 P.2d 933, 936 (1978); 2 LAFAVE, SEARCH AND SEIZURE § 4.5(b), at 541. A warrant issued to search a defendant's premises includes the defendant's automobile if it is located on the premises. *State v. Huff*, 33 Wash. App. 304, 309-10, 654 P.2d 1211, 1214 (1982) (reasoning that the automobile was defendant's personal property and, thus, subject to a search under the warrant). However, a warrant to search a house does not include a search of a vehicle that is not within the curtilage—the area contiguous to the occupant's home. *State v. Graham*, 78 Wash. App. 44, 51-52, 896 P.2d 704, 710 (1995). Additionally, when the automobile is neither owned nor under the control of the defendant, such warrantless searches violate the particularity requirement of the Fourth Amendment. *State v. Rivera*, 76 Wash. App. 519, 525-26, 888 P.2d 740, 744 (1995) (overruling *State v. Frye*, 26 Wash. App. 276, 613 P.2d 152 (1980) insofar as *Frye* authorized the search of vehicles unrelated to the occupant of a premises); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 4.10(d), at 668-69.

3.4(c) Particular Searches: Persons

Search warrants may be issued for persons, as well as for places, if there is probable cause to believe that a specific individual has evidence on his or her person. *State v. Rollie M.*, 41 Wash. App. 55, 58, 701 P.2d 1123, 1124-25 (1985). When a search warrant is issued for a person, the general rule requiring particularity applies. *State v. Martinez*, 51 Wash. App. 397, 399-400, 753 P.2d 1011, 1012 (1988) (a warrant is sufficient if it provides a detailed description of the person to be searched, including the person's place of residence); *State v. Douglas S.*, 42 Wash. App. 138, 140, 709 P.2d 817, 818 (1985) (a warrant is insufficient if it does not have a description of the persons to be searched); *Rollie M.*, 41 Wash. App. at 88, 701 P.2d at 1124-25 (warrant that authorized search of a person found in general vicinity of a specified place was found insufficient); *see also* 2 LAFAVE, SEARCH

AND SEIZURE § 4.5(e), at 542. Additionally, if officers have a warrant to search a person, they may conduct a strip search of the defendant to procure evidence if such search is conducted in a reasonable manner and place as prescribed by statute. *State v. Colin*, 61 Wash. App. 111, 114-15, 809 P.2d 228, 230 (1991).

For a discussion of when a premises search warrant authorizes the search of persons not named in the warrant, see *infra* § 3.8(a). Generally, when a premises search warrant is executed, police may conduct a warrantless search of a person only if they have individualized probable cause to search that person. *See Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238, 245 (1979); *State v. Rivera*, 76 Wash. App. 519, 524, 888 P.2d 740, 743 (1995); *see also infra* § 5.1. Nonetheless, a warrant authorizing the search of all persons present at a location to be searched will be upheld if the warrant establishes a nexus between all persons present and the criminal activity. *See State v. Carter*, 79 Wash. App. 154, 161, 901 P.2d 335, 339 (1995).

3.5 Particular Description of Things to Be Seized

Because the facts in each case differ greatly, the fact patterns of prior cases generally are not referred to when determining whether a warrant describes the things to be seized with sufficient particularity. *See State v. Helmka*, 86 Wash. 2d 91, 93, 542 P.2d 115, 117 (1975). Instead, courts look to the purposes of the "particular description" requirement to: (1) prevent general exploratory searches; (2) protect against "seizure of objects on the mistaken assumption that they fall within" the warrant; and (3) ensure that probable cause is present. *See Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 76, 72 L. Ed. 231, 237 (1927); *State v. Stenson*, 132 Wash. 2d 668, 691, 940 P.2d 1239, 1252 (1997); *State v. Perrone*, 119 Wash. 2d 538, 545, 834 P.2d 611, 614-15 (1992). Although a description need not be detailed, a search warrant must describe an officer's actions so that the reviewing court is able to determine that the search was based on probable cause and particular descriptions. *United States v. Gomez-Soto*, 723 F.2d 649, 653 (9th Cir. 1984). *See State v. Weaver*, 38 Wash. App. 17, 22, 683 P.2d 1136, 1139 (1984) (although cardboard box bearing defendant's name would not generally be considered "paper," police could seize box because the obvious purpose of the warrant was seizure not only of controlled substances, but also of evidence enabling state to demonstrate defendant's dominion and control over the premises); *see also Stenson*, 132 Wash. 2d at 693-94, 940 P.2d at 1253 (holding that a warrant was sufficiently particularized

because it contained language that limited items to be seized to business, financial, and personal records that indicated a relationship between the parties involved); *State v. Reid*, 38 Wash. App. 203, 212, 687 P.2d 861, 867 (1984) ("the phrase 'any other evidence of homicide' specifically limited the warrant to the crime under investigation [and] specific items listed, such as a shotgun and shotgun shells[,] provided additional guidelines for the officers conducting the search"); *State v. Lingo*, 32 Wash. App. 638, 641, 649 P.2d 130, 132 (1982) (warrant not constitutionally defective when items to be seized are limited). *But see Weaver*, 38 Wash. App. at 24, 683 P.2d at 1140 (Ringold, J., dissenting) (because the box with defendant's name was not seized to show dominion and control, but solely to carry contraband that had been uncovered during the warrant search, majority's "dominion and control" argument is merely a *post hoc* attempt to justify seizure, and cocaine later found in the box should have been suppressed). *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.6(a)-(f) (3d ed. 1996).

3.5(a) General Rules

A few general principles can be gleaned from the cases to indicate when a warrant is sufficiently definite to allow the executing officer to identify the property with reasonable certainty:

(1) More ambiguity is tolerated when the police have acquired the most complete description that could reasonably be expected. *See State v. Withers*, 8 Wash. App. 123, 127, 504 P.2d 1151, 1154 (1972).

(2) A more general description will suffice when the precise identity of items sought cannot be determined at the time the warrant is issued and if probable cause is shown. *See Perrone*, 119 Wash. 2d at 547, 834 P.2d at 616. However, in such instances, "the search warrant must [also] be circumscribed by reference to the crime under investigation." *State v. Riley*, 121 Wash. 2d 22, 29, 846 P.2d 1365, 1369 (1993) (a warrant functions ". . . not only to limit the executing officer's discretion, but to inform the person subject to the search what items the officer may seize").

(3) A less precise description is adequate for controlled substances. *See State v. Cowles*, 14 Wash. App. 14, 19, 538 P.2d 840, 844 (1975) (when an affidavit states that narcotics and, specifically, marijuana were observed, a search warrant authorizing seizure of "controlled substances" is "reasonable and practical under the circumstances and thus satisfie[s] the constitutional requirement of 'particularity'").

(4) Failure to provide all available descriptive facts is not fatal when the omitted facts could not have assisted the officer in a more circumscribed search. *See State v. Salinas*, 18 Wash. App. 455, 461, 569 P.2d 75, 78 (1977).

(5) An error is not fatal if the officer was able to determine what was intended from the other facts provided in the warrant. *State v. Cohen*, 19 Wash. App. 601, 604, 576 P.2d 933, 936 (1978).

(6) Greater care is required for documents than for physical objects because of the potential for intrusion into personal privacy. *See Stenson*, 132 Wash. 2d at 692, 940 P.2d at 1252.

(7) Greater care and particularity is required when property sought is "inherently innocuous" as opposed to property that is "inherently illegal." *See State v. Olson*, 32 Wash. App. 555, 557-58, 648 P.2d 476, 478 (1982).

3.5(b) Circumstances Requiring Greater Scrutiny

Search warrants for documents and for telephone conversations require greater scrutiny because of the potential for intrusion into personal privacy. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 2749 n.11, 49 L. Ed. 2d 627, 643 n.11 (1976). At the same time, the Supreme Court has upheld a search warrant that listed specific documents pertaining to a particular crime but that then added the catch-all phrase "together with other fruits, instrumentalities, and evidence of crime." *Id.* at 479, 96 S. Ct. at 2748, 49 L. Ed. 2d at 642. In *Andresen*, the search was constitutional because the catch-all phrase was to be read as authorizing a search only for evidence relating to the defined crime. *Id.* at 480-82, 96 S. Ct. at 2748-49, 49 L. Ed. 2d at 642-43; *see also State v. Legas*, 20 Wash. App. 535, 541, 581 P.2d 172, 175 (1978) (citing *Andresen* as authority for the proposition that each item seized need not have been specified in the warrant so long as the item is related to the crime charged); *cf. Reid*, 38 Wash. App. 203, 212, 687 P.2d 861, 867 (1984) (holding that a search warrant sufficiently limited officer's discretion when the warrant described the items to be seized, including "any other evidence of the homicide"). *But see* 2 LAFAVE, SEARCH AND SEIZURE § 4.6(d), at 573-75. (*Andresen* should not be read as approval for loose descriptions because the Supreme Court was influenced by the fact that the description was as specific as possible). When a search is for particular contents of documents, the invasion of privacy can be minimized by impounding the documents and then imposing conditions on a further search. *See* 2 LAFAVE, SEARCH AND SEIZURE § 4.6(d), at 575 n.104.

The particularity requirement is afforded its most exacting enforcement when the items to be seized implicate First Amendment rights, including warrants for books, pictures, films, or recordings. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S. Ct. 1970, 1981, 56 L. Ed. 2d 525, 541 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 511-12, 13 L. Ed. 2d 431, 437 (1965); *Perrone*, 119 Wash. 2d at 547, 834 P.2d at 616 (holding that allegedly obscene publications and films implicate First Amendment protections). In addition, the officers executing the search warrant are constitutionally prohibited from using their own discretion to determine whether materials are unlawful. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325, 99 S. Ct. 2319, 2324, 60 L. Ed. 2d 920, 927-28 (1979). The need to particularize in the warrant the specific papers sought does not apply, however, to papers that merely evidence ownership or control over premises. *State v. Legas*, 20 Wash. App. 535, 540-41, 581 P.2d 172, 175 (1978).

Circumstances indicating that an individual has taken precautions to ensure privacy may cause greater court scrutiny. *See, e.g., State v. Butterworth*, 48 Wash. App. 152, 156, 737 P.2d 1297, 1299-1300 (1987). In *Butterworth*, the police located the defendant's residence by requesting his address from the telephone company. The court noted that the listing was unpublished, indicating that the defendant specifically requested privacy regarding his address and phone number. Because the defendant had taken precautions regarding his privacy, the police were required to obtain a warrant or subpoena prior to seizing information. The holding in *Butterworth*, however, has not been extended to protect addresses located on the outside of envelopes and postal packages. *See State v. Stanphill*, 53 Wash. App. 623, 627, 769 P.2d 861, 863 (1989).

3.6 Execution of the Warrant: Time of Execution

Washington is one of several states that by court rule requires warrants to be executed within a certain time period. The warrant "shall command the officer to search, within a specific period of time not to exceed 10 days." WASH. CR.R. 2.3(c). *See* WASH. REV. CODE § 69.50.509 (1996) (three-day limit for execution of search warrant for controlled substances); *see also State v. Thomas*, 121 Wash. 2d 504, 507, 512-13, 851 P.2d 673, 675, 678 (1993); *State v. Wallaway*, 72 Wash. App. 407, 414, 865 P.2d 531, 535-36 (1994). A delay in execution may render a warrant invalid because it may mean that probable cause no longer exists at the time the warrant is executed. *See State v. Higby*, 26 Wash. App. 457, 460, 613 P.2d 1192, 1194 (1980); *see generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE:

A TREATISE ON THE FOURTH AMENDMENT § 4.7(a), at 584-88 (3d ed. 1996).

Unlike other states, Washington does not restrict the execution of warrants to daytime hours. *See* WASH. CR.R. 2.3(c) (providing that a warrant may be served at any time of day); *see also State v. Smith*, 15 Wash. App. 716, 719-20, 552 P.2d 1059, 1062 (1976) (nighttime search is not unreasonable). The United States Supreme Court has not decided whether the Fourth Amendment requires additional justification for nighttime search warrants. *But see Gooding v. United States*, 416 U.S. 430, 460, 94 S. Ct. 1780, 1795, 40 L. Ed. 2d 250, 269 (1974) (Marshall, J., dissenting) ("The purpose of the restriction upon nighttime searches was to limit such intrusions to those instances where there is 'some justification for it'"); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 4.7(b), at 588-89 nn.22-24 (constitutionality of a nighttime search depends on whether it was necessary to make the search at that time).

A search warrant may be executed even when the occupants are not present. *See, e.g., United States v. Gervato*, 474 F.2d 40, 44 (3d Cir. 1973) (presence of occupant while search warrant is being executed is neither a common law nor a constitutional requirement); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 4.7(c), at 593-97.

3.7 Entry Either Without Notice or by Force: "Knock and Announce" Requirement

Absent exigent circumstances, officers executing a warrant must give notice of their authority and purpose prior to entering the private premises. *See Ker v. California*, 374 U.S. 23, 37-40, 83 S. Ct. 1623, 1632-33, 10 L. Ed. 2d 726, 740-42 (1963). This "knock and announce" or "knock and wait" requirement applies to the execution of both arrest and search warrants. *Id.*; *State v. Alldredge*, 73 Wash. App. 171, 178, 868 P.2d 183, 187 (1994). The Supreme Court determined that the common law knock and announce requirement was governed by the reasonableness clause of the Fourth Amendment and left the lower courts to determine when an unannounced entry might be reasonable. *Wilson v. Arkansas*, 514 U.S. 927, 936, 115 S. Ct. 1914, 1919, 131 L. Ed. 2d 976, 984 (1995). See *infra* §§ 5.16-5.19 for a discussion of exigent circumstances.

Washington is one of many states that has codified the knock and announce requirement. Washington law provides that "[t]o make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building or any other enclosure, if, after notice of his office and purpose, he be refused

admittance." WASH. REV. CODE § 10.31.040 (1996). Although the statute expressly refers to arrests, it applies to the execution of search warrants as well. *State v. Young*, 76 Wash. 2d 212, 217, 455 P.2d 595, 598 (1969); *State v. Shelly*, 58 Wash. App. 908, 910, 795 P.2d 187, 188 (1990).

The purposes of the knock and announce rule are: (1) to reduce the potential for violence; (2) to prevent the physical destruction of property; and (3) to protect privacy. *See United States v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973); *State v. Coyle*, 95 Wash. 2d 1, 5, 621 P.2d 1256, 1258 (1980); *State v. Garcia-Hernandez*, 67 Wash. App. 492, 496, 837 P.2d 624, 627 (1992). Strict compliance with the knock and announce rule is required unless the State can demonstrate either exigent circumstances or futility of compliance. *Coyle*, 95 Wash. 2d at 9-11, 621 P.2d at 1260-61; *State v. Richards*, 87 Wash. App. 285, 289, 941 P.2d 710, 713 (1997). *But see State v. Reid*, 38 Wash. App. 203, 210, 687 P.2d 861, 867 (1984) (entry is in conformity with the knock and announce statute when compliance is substantial).

An officer's actions are judged by a standard of reasonableness, determined both by the purposes supporting the knock and announce rule and by the particular facts and circumstances of the individual case. *See, e.g., Ker*, 374 U.S. at 33, 83 S. Ct. at 1629-30, 10 L. Ed. 2d at 737; *Alldredge*, 73 Wash. App. at 176-77, 868 P.2d at 186-87. *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.8(a) (3d ed. 1996).

3.7(a) Types of Entry Requiring Notice

The phrase "break open" in the Washington knock and announce statute refers to all nonconsensual entries, not simply to those involving forcible breaking. *See Coyle*, 95 Wash. 2d at 5-6, 621 P.2d at 1258-59 (knock and wait statute violated when officers grabbed occupant who had opened door just as police were about to knock and announce themselves; officers then entered through open door without alerting other occupants); *State v. Miller*, 7 Wash. App. 414, 419, 499 P.2d 241, 244-45 (1972) (execution of search warrant unlawful when police entered through partially opened door without knocking or announcing their purpose). A consensual entry, however, is not a "breaking open." *State v. Hartnell*, 15 Wash. App. 410, 418, 550 P.2d 63, 69 (1976) (finding that because defendant's wife invited unidentified officer into house, entry was consensual and announcement of purpose was not required).

Notice is required for entry by use of a pass key. *Ker*, 374 U.S. at 37-41, 83 S. Ct. at 1631-34, 10 L. Ed. 2d at 740-42. Notice is also

required for entry through a closed but unlocked door. *Miller*, 7 Wash. App. at 416, 499 P.2d at 243. Although courts in other jurisdictions are divided on the question of whether passage through an open door requires notice, Washington courts require notice in such situations. *See id.* (finding that Fourth Amendment and WASH. REV. CODE § 10.31.040 prohibit an officer executing a search warrant from entering a house without providing notice of office and purpose, even though door through which officer entered was open far enough to permit passage); *see also State v. Talley*, 14 Wash. App. 484, 490-91, 543 P.2d 348, 352-53 (1975) (holding that officer entering dwelling must give notice of his office and purpose even though door to apartment was partially open). However, an officer's failure to knock and announce himself before entering a fenced backyard through an unlocked gate does not violate WASH. REV. CODE § 10.31.040 when the officer can observe that the backyard is unoccupied and, thus, can establish that there is little risk of violating the purposes of the rule. *State v. Schimpf*, 82 Wash. App. 61, 65, 914 P.2d 1206, 1208 (1996).

The Washington Supreme Court has held that when consent to enter is obtained by deception, it is still effective consent. *State v. Myers*, 102 Wash. 2d 548, 553, 689 P.2d 38, 42 (1984). Thus, an officer who deceives a suspect into allowing him or her to enter need not announce his office and purpose. In *Myers*, the police had been aware that the doors and windows to the defendant's house were covered by iron bars. They had also been told by an informant that the defendant kept a handgun within reach whenever he opened the door. The police prepared a fictitious warrant for the defendant's arrest for a traffic offense, knowing that the defendant had no outstanding traffic violations. Upon being permitted to enter his house to execute the arrest warrant, the police executed the search warrant. The court held that even though the officers failed to announce their office and purpose, the occupant of the house had granted "valid permission" for them to enter. *Id.* at 554, 689 P.2d at 42; *see also State v. Coyle*, 95 Wash. 2d 1, 5, 621 P.2d 1256, 1259 (1980).

Courts have reasoned that an occupant's right to privacy is not infringed by the fact that permission to enter was obtained by ruse, because the occupant may not deny entry to police who possess a valid search warrant. *Myers*, 102 Wash. 2d at 555, 560, 689 P.2d at 43, 45-46 (Dimmick, J., concurring in result) (execution of search warrants requires case-by-case evaluation of tactics used to reduce violence and to prevent destruction of property; prohibiting use of a ruse may result in police having to approach houses massively armed and with weapons drawn, or in police having to destroy building entrances).

Entry by ruse, subterfuge, or deception is not a violation of the knock and announce statute because no "breaking" occurs within the term of the statute. *State v. Williamson*, 42 Wash. App. 208, 211, 710 P.2d 205, 207 (1985). Such an entry is approved because the interests underlying the statute are well served by an entry gained with permission of the occupant. *Id.*; *see also State v. Hashman*, 46 Wash. App. 211, 216, 729 P.2d 651, 655 (1986) (officer used ruse to gain entry in order to obtain probable cause to support a search warrant; court held that police may use ruse to gain entry when they have justifiable and reasonable basis to suspect criminal activity in a residence).

Washington Courts of Appeal cases involving entry by deception include *State v. Ellis*, 21 Wash. App. 123, 129, 584 P.2d 428, 432 (1978) (when officer was unable to gain entry through use of a false name, subsequent forcible entry absent exigent circumstances was unlawful without compliance with the knock and wait statute); and *State v. Huckaby*, 15 Wash. App. 280, 290, 549 P.2d 35, 37 (1976) (when undercover officers gain entry into suspect's home with suspect's consent and for apparent purpose of drug transaction, knock and announce statute inapplicable); *cf. Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424, 17 L. Ed. 2d 312 (1966) (entry lawful when undercover officer telephoned suspect and misrepresented his identity in order to gain invitation into suspect's home). *But see State v. Collier*, 270 So. 2d 451, 453-54 (Fla. Dist. Ct. App. 1972) (undercover officer who leaves gathering at defendant's home that appears to be a "pot party" may not return and reenter home in order to execute a search warrant without first providing "due notice of his authority and purpose" within the meaning of the Florida knock and announce statute, FLA. STAT. ANN. § 933.09 (West 1971)). Subsequent to the court's decision in *Collier*, the Florida courts have permitted re-entry without a knock and announce if there is an implied invitation to return. *See State v. Schwartz*, 398 So. 2d 460, 461 (Fla. Dist. Ct. App. 1981); *State v. Steffani*, 398 So. 2d 475, 477 (Fla. Dist. Ct. App. 1981). *See generally* James O. Pearson, Jr., Annotation, *What Constitutes Compliance with Knock-and-Announce Rule in Search of Private Premises—State Cases*, 70 A.L.R. 3d 217 (1976).

The Washington knock and announce statute requires notice prior to entry through inner as well as outer doors. WASH. REV. CODE § 10.31.040 (1996). *But see* 2 LAFAVE, SEARCH AND SEIZURE § 4.8(c), at 610 (federal rule does not require separate notice for different rooms in one house).

3.7(b) Compliance with Requirements

The police must identify themselves as police officers and indicate to the person in apparent control of the premises that they are present to execute a warrant. *State v. Ellis*, 21 Wash. App. 123, 129, 584 P.2d 428, 432 (1978). It is not sufficient to make this announcement simultaneously with a forcible entry. *Id.*; *State v. Lowrie*, 12 Wash. App. 155, 157, 528 P.2d 1010, 1011-12 (1974) ("Announcing your identity as you kick in the door is not compliance with the general [knock and wait] rule."). Police are not required, however, to give a detailed or completely accurate description of their purpose, as long as they comply with the statute. *But see State v. Myers*, 102 Wash. 2d 548, 555, 689 P.2d 38, 43 (1984) (use by police of fictitious arrest warrant to gain entry into defendant's house in order to execute a valid search warrant did not violate knock and announce requirements because officers announced identity and stated that purpose was to execute a warrant); *State v. Reid*, 38 Wash. App. 203, 210-11, 687 P.2d 861, 866-67 (1984).

After giving notice, officers must allow the occupants an opportunity to "refuse admittance" before entering. *State v. Garcia-Hernandez*, 67 Wash. App. 492, 495, 837 P.2d 624, 626 (1992). However, the officers need not wait until occupants affirmatively deny their entry. *Id.*; *State v. Jones*, 15 Wash. App. 165, 167, 547 P.2d 906, 908 (1976) (officers' entry after ten-second wait held reasonable considering the nighttime hour and the fact that defendant and his family were in bed). The holding in *Jones* is questioned by Wayne R. LaFave in 2 LAFAVE, SEARCH AND SEIZURE § 4.8(c), at 608.

Denial of admittance may be implied from the occupant's lack of response. *State v. Schmidt*, 48 Wash. App. 639, 643, 740 P.2d 351, 355 (1987). The length of time that officers must wait before using force to enter a residence depends on the circumstances of each case. *Id.* at 646, 740 P.2d at 354. However, the waiting period ends not later than when the purposes of the knock and announce rule have been fulfilled. *See State v. Richards*, 87 Wash. App. 285, 290, 941 P.2d 710, 713-14 (1997) (holding that officers need not wait for defendant to permit entry once they have announced their identity and purpose); *State v. Alldredge*, 73 Wash. App. 171, 181-82, 868 P.2d 183, 184 (1994) (holding that the waiting period is over once "the door of the premises is open, attended by an occupant, and the police have announced their identity and purpose while face-to-face with the occupant").

In executing a search warrant, police officers must act reasonably. *See generally State v. Myers*, 102 Wash. 2d 548, 689 P.2d 38 (1984). Whether an officer acted reasonably is "a factual determination to be made primarily by the trial court and depends on the circumstances of each case." *Garcia-Hernandez*, 67 Wash. App. at 496, 837 P.2d at 627 (finding police acted reasonably when they identified themselves and their purpose before entering without defendant's consent, and yelled "police" before entering defendant's bedroom); *State v. Berlin*, 46 Wash. App. 587, 593-94, 731 P.2d 548, 552 (1987) (when the defendant's wife answered the officer's knock but failed to open the door after a thirty-second wait, the officers were justified in opening the door after the wait, entering, and restating their identity and purpose; the fact that the police had been told that the defendant had weapons and a history of violence was not enough to waive compliance with the knock and announce rule, but did "bear upon the reasonableness of the length of time that the police waited after announcing themselves"); *Schmidt*, 48 Wash. App. at 646, 740 P.2d at 356 (holding that officers' delay of 3 seconds after they knocked and announced and before they entered to be reasonable); *State v. Woodall*, 32 Wash. App. 407, 411, 647 P.2d 1051, 1054 (1982), *rev'd on other grounds*, 100 Wash. 2d 74, 666 P.2d 364 (1983) ("[I]n light of the information concerning the number of people at the party, danger of violence, the concern for destruction of the evidence, and the deputy's testimony that someone inside the clubhouse saw [the officers] long before they reached the door," a three or four-second wait after the officers announced their identity and purpose made the entry reasonable.); *State v. Haggerty*, 20 Wash. App. 335, 336-38, 579 P.2d 1031, 1033 (1978) (when officers knocked on door and announced office and purpose, and when door opened after thirty-second wait, officers were justified in believing door was opened in response to announcement and did not need to repeat office and purpose); *Lowrie*, 12 Wash. App. at 157, 528 P.2d at 1012 ("Failure to answer a knock at the door within fifteen seconds and then merely walking away from door is insufficient" refusal when officers have not announced their identity and purpose nor explicitly demanded entry, even if occupant might have recognized one of the officers).

Circumstances must reasonably indicate that the occupant has consented to the officer's entry. *See State v. Sturgeon*, 46 Wash. App. 181, 183, 730 P.2d 93, 94 (1986) (holding that the knock and announce statute was violated when the police knocked, the defendant shouted "yeah," and the police entered the apartment). Washington courts have also rejected the contention that the officers' failure to wait long

enough to permit the occupants a reasonable opportunity to grant or deny admission violated the knock and announce rule. *See State v. Lehman*, 40 Wash. App. 400, 404, 698 P.2d 606, 609 (1985). In *Lehman*, the plain-clothes police officers knocked and a defendant opened the door approximately twelve inches. The officers displayed their badges and advised the defendant that they had a warrant to search the house. One officer looked through the open door and saw two men sitting in the living room. Without waiting for the defendant to grant or deny permission to enter, the officers entered the house and conducted the search. The *Lehman* court distinguished the case from *Coyle* by noting that, unlike in *Coyle*, there was an announcement by the police. It was not necessary that all occupants be aware of the announcement; hence, the court found sufficient compliance with the knock and announce statute. *Lehman*, 40 Wash. App. at 404, 698 P.2d at 608.

The announcement of office and purpose may be made to the person answering the door even when that person is not in possession of the premises. *See State v. Sainz*, 23 Wash. App. 532, 537 n.3, 596 P.2d 1090, 1094 n.3 (1979).

Unnecessary roughness in executing a warrant "does not rise to constitutional magnitude . . . or negate prior compliance with [WASH. REV. CODE] § 10.31.040." *Id.* at 538-39, 596 P.2d at 1095.

The fact that an undercover agent is present who could legally seize the evidence does not excuse other officers from knocking and waiting. *See State v. Dugger*, 12 Wash. App. 74, 77, 528 P.2d 274, 276 (1974).

3.7(c) Exceptions

Under the "useless gesture" exception, compliance with the knock and announce rule is excused if the authority and purpose of the police are already known to those within the premises. *See Ker v. California*, 374 U.S. 23, 55, 83 S. Ct. 1623, 1640, 10 L. Ed. 2d 726, 750-51 (1963) (Brennan, J., dissenting in part); *State v. Coyle*, 95 Wash. 2d 1, 11, 621 P.2d 1256, 1261-62 (1980); *State v. Shelly*, 58 Wash. App. 908, 911, 795 P.2d 187, 188 (1990). Washington has required that officers be "virtually certain" that occupants of a dwelling are aware of the officers' presence. *Coyle*, 95 Wash. 2d at 11, 621 P.2d at 1261-62. *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 4.8(f), at 620-21.

Once the defendant has opened the door and the police officers have identified themselves and their purpose, any grant or denial of entrance by the defendant was held to be a useless gesture. *See Shelly*, 58 Wash. App. at 911, 795 P.2d at 188 (holding strict compliance with

the waiting period to be a useless gesture when the police, armed with a valid search warrant, could enter the premises whether defendant granted or denied them permission); *see also Lehman*, 40 Wash. App. at 404, 698 P.2d at 608-09.

The useless gesture exception has also been applied by implication to justify a police officer's forcible entry when the officer identified himself, but was unable to state his purpose before the suspect tried to close the door. *State v. Neff*, 10 Wash. App. 713, 717, 519 P.2d 1328, 1330 (1974). But closing a door on an officer not in uniform, under ambiguous circumstances, will not excuse the officer from complying with the knock and announce rule. *State v. Ellis*, 21 Wash. App. 123, 127, 584 P.2d 428, 431 (1978); *see also Coyle*, 95 Wash. 2d at 13, 621 P.2d at 1262.

Police need not comply with the knock and announce requirement, but may instead enter immediately and with force when exigent circumstances are present. *Ker*, 374 U.S. at 37-40, 83 S. Ct. at 1632-33, 10 L. Ed. 2d at 740-42; *State v. Young*, 76 Wash. 2d 212, 214, 455 P.2d 595, 598 (1969).

A police officer's reasonable belief that the items identified in the search warrant will be destroyed or removed constitutes one type of exigent circumstance. The fact that the items could easily be destroyed is insufficient. The police must possess specific information indicating that the items are in actual imminent danger of destruction or removal. *See Young*, 76 Wash. 2d at 215-16, 455 P.2d at 597-98 (belief of exigent circumstances cannot be based on suspicion or ambiguous acts); *Coleman v. Reilly*, 8 Wash. App. 684, 687, 508 P.2d 1035, 1038 (1973) ("[T]here must be more than mere suspicion on behalf of the police officers that evidence will be destroyed before [the police] are justified in making an unannounced entry."); *see also State v. Harris*, 12 Wash. App. 481, 492-94, 530 P.2d 646, 653-54 (1975) (police justified in not complying strictly with knock and announce requirements when they had reliable information that suspect kept heroin in condoms that he would swallow if confronted by police).

Washington has rejected the blanket rule, favored by some courts, which permits an unannounced entry when the warrant is for easily disposed of items, such as drugs. *State v. Jeter*, 30 Wash. App. 360, 362, 634 P.2d 312, 314 (1981); *see also State v. Edwards*, 20 Wash. App. 648, 652, 581 P.2d 154, 157 (1978). Specific factual situations are discussed in *State v. Dugger*, 12 Wash. App. 74, 81-82, 528 P.2d 274, 278 (1974). *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 4.8(d), at 610-16.

A police officer's reasonable belief that announcing his or her office and purpose would jeopardize police or public safety is a second type of exigent circumstance. *See Reid*, 38 Wash. App. at 208, 687 P.2d at 866-67; *State v. Carson*, 21 Wash. App. 318, 321, 584 P.2d 990, 992 (1978). A mere good faith concern for safety, however, is not sufficient. Police must know from prior information or from direct observation that the suspect both keeps weapons and has a propensity to use them. *Jeter*, 30 Wash. App. at 363, 634 P.2d at 314 (no exigent circumstances exist when officer had prior knowledge only of defendant's possession of gun but not of any propensity for defendant to use it to resist arrest); *see also State v. Allyn*, 40 Wash. App. 27, 30, 696 P.2d 45, 48 (1985) (police knew from undercover agent that the defendant had several firearms in his dwelling and had a strong propensity to use them; hence, police were justified in executing a search warrant without complying with the knock and announce rule); *Dugger*, 12 Wash. App. at 82, 528 P.2d at 278; *People v. Dumas*, 512 P.2d 1208, 1214 (Cal. 1973) (information that defendant habitually answered door armed with firearm constituted exigent circumstances); 2 LAFAVE, SEARCH AND SEIZURE § 4.8(e), at 616-20.

For a discussion of exigent circumstances justifying the absence of a warrant, see *infra* §§ 5.16-5.19.

Finally, law enforcement officers need not comply with the notice requirements when covert entry of the premises is the only way to effectively execute the warrant. *Dalia v. United States*, 441 U.S. 238, 247, 99 S. Ct. 1682, 1688, 60 L. Ed. 2d 177, 186 (1979) (covert entry onto premises to install listening device authorized by warrant is constitutional, even when entry is not specifically authorized by warrant); *State v. Myers*, 102 Wash. 2d 548, 550, 689 P.2d 38, 40 (1984) (police justified in using ruse to gain entry when informant had stated that defendant usually had handgun within reach when answering door and all doors and windows were covered by bars).

3.8 Search and Detention of Persons on Premises Being Searched

3.8(a) Search of Persons on Premises Being Searched

Generally, a premises search warrant justifies a search of personal effects of the owner found therein [that] "are plausible repositories for the objects named in the warrant." *State v. Hill*, 123 Wash. 2d 641, 643, 870 P.2d 313, 317 (1994) (holding that the search of sweatpants found on the floor do not constitute an impermissible search of defendant's person, thus overruling *State v. Lee*, 68 Wash. App. 253,

842 P.2d 515 (1992)); *State v. Worth*, 37 Wash. App. 889, 892, 683 P.2d 622, 624 (1984).

A premises search warrant or a warrant to search the person and premises of one occupant does not authorize a search of other occupants or visitors who happen to be on the premises while the search is taking place, nor does it automatically justify a search of personal effects belonging to such other occupants or visitors. *See State v. Douglas S.*, 42 Wash. App. 138, 140-42, 709 P.2d 817, 818-19 (1985) (frisk of a juvenile entering the residence not justified when there were no grounds to believe that the juvenile had dominion and control over the objects specified in the warrant because the father had admitted that the marijuana plants found on the premises were his); *State v. Galbert*, 70 Wash. App. 721, 727, 855 P.2d 310, 314 (1993) (rejecting "mere presence" of contraband as a justification to search persons who are merely located at the search scene); *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.9(b), at 629 (3d ed. 1996).

Although some states have approved the use of warrants authorizing "search of all persons present," those states limit that use to situations when the evidence tendered to the issuing "magistrate supports the conclusion that it is probable [that] anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence [of the criminal activity] on his person." 2 LAFAVE, SEARCH AND SEIZURE § 4.5(e), at 546-47. Washington courts, however, have held that such a rule fails to establish a sufficient nexus between the persons present and the criminal activity. *State v. Rivera*, 76 Wash. App. 519, 524, 888 P.2d 740, 743 (1995). "[I]ndividualized probable cause is a prerequisite to an evidence search of any person on the premises." *Id.* (citing *Ybarra v. Illinois*, 444 U.S. 85, 94, 100 S. Ct. 338, 343, 62 L. Ed. 2d 238, 245 (1979)).

There are several circumstances, however, in which persons on the premises may be searched. First, a warrant may describe a person to be searched. *See supra* § 3.4(c). Because warrants are to be interpreted with common sense, a warrant stating that there is probable cause to believe evidence is concealed on a person allows a search of that person even though the command portion of the warrant mentions only "places and premises." *State v. Williams*, 90 Wash. 2d 245, 246, 580 P.2d 635, 636 (1978). Second, a search may be conducted incident to arrest. *State v. Cottrell*, 86 Wash. 2d 130, 133, 542 P.2d 771, 773 (1975), *rev'd on other grounds*, 86 Wash. 2d 130, 542 P.2d 771 (1975); *see also infra* § 5.1. In *Cottrell*, the warrant authorized a search of the

defendant's residence or "person . . . if found thereon." *Cottrell*, 86 Wash. 2d at 131, 542 P.2d at 771. The court upheld the search of the defendant's person once the officer had probable cause to place the defendant under control because the defendant exited a car parked in front of the residence. *Id.* at 131, 542 P.2d at 772.

When the warrant itself gives no express or implied authorization to search persons on the premises and the police do not have probable cause to arrest them, officers may search such persons in two situations. First, a person not named in the warrant but present on the premises may be searched if the police "have reasonable cause to believe [that the person] has the articles for which the search is instituted upon his person." *State v. Halverson*, 21 Wash. App. 35, 38, 584 P.2d 408, 410 (1978) (citations omitted). "Reasonable cause" requires that the person engage in some type of suspicious activity. *Id.* Thus, in the execution of a search warrant for narcotics, police were justified in searching an occupant's fists when at the time of the officer's entry, the occupant was observed kneeling in front of a weighing scale and then rising with his fists clenched. *Id.* at 36-37, 584 P.2d at 408-10. Police were not justified in searching an occupant's purse, however, when the occupant gave no evidence of suspicious behavior. *State v. Worth*, 37 Wash. App. 889, 893, 683 P.2d 622, 624 (1984); *cf. State v. Carter*, 79 Wash. App. 154, 162, 901 P.2d 335, 339 (1995) (finding no probable cause to search defendant during a valid premises search when defendant was asleep and officers testified that they did not believe defendant was armed and dangerous). *See generally* 2 LAFAVE, SEARCH AND SEIZURE § 4.9(c), at 631-32.

Courts are divided over whether persons who enter a place being searched may legally be searched without a warrant if they have no opportunity to conceal any named items. *See* 2 LAFAVE, SEARCH AND SEIZURE § 4.9(c), at 632-33. In these situations, the scope of the search of a bystander is limited to that necessary for detecting the items sought. Thus, police may not search a person if the search warrant is for a television set. *Id.* at 632 n.30.

Second, police may conduct a limited search for weapons to protect themselves during the execution of the warrant. *See, e.g.*, *Ybarra*, 444 U.S. at 93, 100 S. Ct. at 343, 62 L. Ed. 2d at 247; *Halverson*, 21 Wash. App. at 38, 584 P.2d 408, 409-10 (1978); *State v. Galloway*, 14 Wash. App. 200, 202, 540 P.2d 444, 446 (1975); *Worth*, 37 Wash. App. at 893, 683 P.2d at 624. The police must, however, have a reasonable suspicion that the person searched is armed. *Ybarra*, 444 U.S. at 92-94, 100 S. Ct. at 343, 62 L. Ed. 2d at 246-47. Moreover, the search must be limited to ascertaining whether

the individual is armed. *State v. Allen*, 93 Wash. 2d 170, 172, 606 P.2d 1235, 1236 (1980) (holding that an officer conducting a pat down of an individual who knocked on the door of a residence being searched may not examine the contents of a wallet found on the individual "after satisfying himself that the 'bulge' [wallet] was not a weapon"); *cf. Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889, 911 (1968) (holding that police may conduct limited weapons search to protect themselves during lawful investigatory stop). Slightly different considerations may control in search situations, as opposed to *Terry* stops, because the encounter in the search situation is more lengthy than that in a *Terry* stop. *See* 2 LAFAVE, SEARCH AND SEIZURE § 4.9(d), at 636-38.

3.8(b) Detention of Persons on Premises Being Searched

A valid search warrant "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595, 69 L. Ed. 2d 340, 351 (1981) (footnotes omitted). The authority to detain exists even if the occupant is initially found outside the home. *State v. Flores-Moreno*, 72 Wash. App. 733, 739, 866 P.2d 648, 652 (1994).

A brief detention is permissible even when the police do not have probable cause to believe that the objects of the search are on the person detained. *Summers*, 452 U.S. at 705, 101 S. Ct. at 2595, 69 L. Ed. 2d at 351. In addition, the police may ascertain whether any individual arriving on the scene might interfere with the search and may determine what business, if any, the individual has at the premises. *Galloway*, 14 Wash. App. at 201, 540 P.2d at 446 (citing *State v. Howard*, 7 Wash. App. 668, 502 P.2d 1043 (1972)). Such a limited stop, however, is not a license to detain and frisk all persons approaching within 100 feet of the location of the search. *State v. Melin*, 27 Wash. App. 589, 592, 618 P.2d 1324, 1325 (1980); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 4.9(d), at 636.

3.9 Permissible Scope and Intensity of Search

Assuming that a search warrant describes the area and items with the requisite particularity, the remaining question is the permissible scope and intensity of the search. "As a general rule search warrants must be strictly construed and their execution must be within the specificity of the warrant." *State v. Cottrell*, 12 Wash. App. 640, 643, 532 P.2d 644, 646 (1975), *rev'd on other grounds*, 86 Wash. 2d 130, 542 P.2d 771 (1975).

Just how intense a search may be is governed by the nature of the items to be seized. Generally, a premises search warrant "justifies a search of personal effects of the owner found therein [that] are plausible repositories for the objects specified in the warrant." *State v. Worth*, 37 Wash. App. 889, 892, 683 P.2d 662, 624 (1984) (citing *State v. White*, 13 Wash. App. 949, 538 P.2d 860 (1975)); *see also State v. Anderson*, 41 Wash. App. 85, 702 P.2d 481 (1985), *rev'd on other grounds*, 107 Wash. 2d 745, 733 P.2d 517 (1987) (holding that a warrant to search for clothing used in a robbery extended to the entire residence where clothing might be found, including the inside of a garbage-can-sized commercial vacuum cleaner). Similarly, a valid search warrant for a defendant's home, trailer, and vehicles is sufficient means by which to obtain a blood test. *State v. Kalakosky*, 121 Wash. 2d 525, 532, 852 P.2d 1064, 1068 (1993).

The United States Supreme Court has recognized that officers searching for documents must, out of necessity, examine documents not specifically listed in the warrant. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 2749 n.11, 49 L. Ed. 2d 627, 643 n.11 (1976). In the course of such a search, officers may also seize evidence found that is not specifically described in the warrant if "it will aid in a particular apprehension or conviction, or [if it] has a sufficient nexus with the crime under investigation." *State v. Stenson*, 132 Wash. 2d 668, 695, 940 P.2d 1239, 1254 (1997) (finding that officers did not exceed the scope of the search warrant when they examined and seized documents not specifically listed in the warrant).

Once the purpose of the warrant has been carried out, the authority to search ends. *See State v. Legas*, 20 Wash. App. 535, 541, 581 P.2d 172, 176 (1978) (holding that a warrant permitting a search in a bedroom for papers linking defendant to the premises did not justify a search of a small box after such papers had been discovered).

3.9(a) Area

A search may extend to the entire area covered by the warrant's description. *See generally Cottrell*, 12 Wash. App. at 644, 532 P.2d at 647. But, police "must execute a search warrant strictly within the bounds set by the warrant." *State v. Kelley*, 52 Wash. App. 581, 585, 762 P.2d 20, 22 (1988). A warrant that authorizes the search of a house but that does not mention outbuildings does not include a search of outbuildings not under defendant's control, and vice versa. *Kelley*, 52 Wash. App. at 585-86, 762 P.2d at 23 (suppressing evidence located in a barn and garage that were not specified in the warrant); *see also State v. Gebaroff*, 87 Wash. App. 11, 939 P.2d 706 (1997). A

search of a padlocked locker and a storage room that did not comprise a separate building does not exceed the scope of a warrant to search the premises. *State v. Llamas-Villa*, 67 Wash. App. 448, 452-53, 836 P.2d 239, 241-42 (1992).

Police may enter areas not explicitly named in the warrant when such entry is necessary to execute the warrant. *See, e.g., Dalia v. United States*, 441 U.S. 238, 257, 99 S. Ct. 1682, 1693, 60 L. Ed. 2d 177, 193 (1979) (holding that a warrant explicitly authorizing planting of hidden microphone implicitly authorized covert entry onto premises). Additionally, officers may search for items thrown outside of the premises if such action was provoked by the knowledge of police presence at the premises. *State v. Dearinger*, 73 Wash. 2d 563, 567, 439 P.2d 971, 973 (1968) (finding that officers acted within ambit of warrant in seizing a sack and its contents thrown by occupant into the adjoining yard during the search).

On the other hand, authority to search a vehicle does not include authority to break into a garage where the vehicle was parked when the officers knew at the time they applied for the warrant that the vehicle was in the garage, and they could have included the garage in the warrant. *People v. Sciacca*, 379 N.E.2d 1153, 1155 (N.Y. 1978). It has been suggested that police may enter adjacent areas if they reasonably fear for their safety. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.10(a), at 659 (3d ed. 1996).

3.9(b) Personal Effects

Personal effects found on the premises and belonging to the occupant may be searched if the effects can reasonably be expected to contain the described items. *See, e.g., State v. Hill*, 123 Wash. 2d 641, 643, 870 P.2d 313, 314 (1994); *Worth*, 37 Wash. App. 889, 892, 683 P.2d 622, 624 (1984). Ordinarily, however, the police may not search those effects that they know belong to other occupants. *See Worth*, 37 Wash. App. at 893, 683 P.2d at 624-25. Even when a warrant authorizes a search of the entire premises, it does not justify the search of another person residing on the premises who was not mentioned in the affidavit, nor does it justify a search of a purse belonging to that other person if she was holding the purse or in proximity to it. *Id.*

In *Worth*, the court rejected a distinction between personal effects worn on or held by the person and those effects nearby the person at the time of the search. *Id.*; *cf. State v. Biggs*, 16 Wash. App. 221, 556 P.2d 247 (1976). "A narrow focus on whether a person is holding or

wearing a personal item would tend to undercut the purpose of the Fourth Amendment and leave vulnerable readily recognizable effects, such as [a] purse, which an individual has under [her] control and seeks to preserve as private." *Worth*, 37 Wash. App. at 893, 683 P.2d at 625; *cf.* 2 LAFAVE, SEARCH AND SEIZURE § 4.10(b), at 661 (suggesting that the proper test in a case involving visitors is whether police have a reasonable belief that the items described would be concealed in the visitor's belongings); *State v. Scott*, 21 Wash. App. 113, 117, 584 P.2d 423, 425 (1978) (holding that a warrant authorizing search of "spa" business records to uncover evidence of prostitution did not permit search of employees' purses for customers' names). One court has attempted to avoid this problem by holding that one has no privacy interest in items left at another's house. *Biggs*, 16 Wash. App. at 224-25, 556 P.2d at 249 (visitor who departed without his jacket no longer had expectation of privacy regarding the jacket and thus jacket could be searched).

For a case involving abandoned personal effects, see *United States v. Oswald*, 783 F.2d 663 (6th Cir. 1986). In *Oswald*, the defendant abandoned his briefcase containing cocaine in the locked trunk of an automobile and made no effort to recover it or to notify authorities. The *Oswald* court held that such abandonment carries no expectation of privacy and it makes no difference that the defendant may have had some hope of regaining possession of the briefcase in the future. *Id.* at 667 (noting that a determination of true abandonment is individualized to the particular circumstances of the instant case). *See* 1 LAFAVE, SEARCH AND SEIZURE § 2.6(b), at 579-80.

Despite the Supreme Court's holding that there is no expectation of privacy in garbage left beyond the curtilage of a home, Washington has recognized a privacy right in one's garbage, thus requiring a warrant to search such refuse. *Compare California v. Greenwood*, 486 U.S. 35, 210-41, 108 S. Ct. 1625, 1628-29, 100 L. Ed. 2d 30, 36-37 (1988), *with State v. Boland*, 115 Wash. 2d 571, 576-77, 800 P.2d 1112, 1115 (1990) (rejecting *Greenwood* on state law grounds). *See also supra* § 1.3(g).

3.9(c) Vehicles

Police who have authority to search a residence for illegal drugs also have authority to search vehicles that are under the control of the defendant and that are located on the premises to be searched. *State v. Claflin*, 38 Wash. App. 847, 853, 690 P.2d 1186, 1191 (1984). *But see* 2 LAFAVE, SEARCH AND SEIZURE § 4.5(d), at 539-40 (evidence must tend to show that vehicles on the premises were likely places of

concealment for the items to be seized). However, police have no authority to search vehicles that are not within the curtilage—the area contiguous to a home in which the occupant has a reasonable expectation of privacy. *See, e.g., State v. Graham*, 78 Wash. App. 44, 51-52, 896 P.2d 704, 709-10 (1995) (holding that a truck parked next to and slightly in, a public street where there was no fence or other barrier between the occupant's yard and the street is not within the curtilage of the house); *State v. Pourtes*, 49 Wash. App. 579, 581, 744 P.2d 644, 645-46 (1987) (holding that the street and the shoulder of the roadway are not within the curtilage of the residence); *State v. Niedergang*, 43 Wash. App. 656, 662, 719 P.2d 576, 579 (1986) (vehicle is not within the curtilage of a house when it is parked in a space that lawfully could be used by anyone coming to the adjoining house on legitimate business). A trailer that is used as a residence is treated as a residential outbuilding rather than as a vehicle. *State v. Gebaroff*, 87 Wash. App. 11, 16, 939 P.2d 706, 709 (1997).

3.10 Seizure of Unnamed Items: Requirements in General

Items not listed in the search warrant may be seized when the seizure falls within one of the general exceptions to the warrant requirement. *See, e.g., State v. Hendrickson*, 129 Wash. 2d 61, 70, 917 P.2d 563, 568 (1996) (search incident to arrest); *State v. Rose*, 128 Wash. 2d 388, 392, 909 P.2d 280, 283 (1996) (open view); *State v. Myers*, 117 Wash. 2d 332, 346, 815 P.2d 761, 769 (1991) (plain view). For a discussion of search incident to arrest see *infra* § 5.1. *See generally infra* ch. 5.

The plain view doctrine is an exception to the warrant requirement that applies after police lawfully invade an area where there is a reasonable expectation of privacy. *Myers*, 117 Wash. 2d at 345-46, 815 P.2d at 769. The plain view doctrine requires that (1) the officers have prior justification for the intrusion, and (2) the officers immediately recognize they have found contraband. *Id.* Traditionally, inadvertent discovery was a third requirement. That element is no longer required under the Fourth Amendment and has never been required under article I, section 7 of the Washington Constitution. *See, e.g., Horton v. California*, 496 U.S. 128, 140, 110 S. Ct. 2301, 2309-10, 110 L. Ed. 2d 112, 125 (1990); *State v. Goodin*, 67 Wash. App. 623, 627, 838 P.2d 135, 138 (1992).

Under the plain view doctrine, officers have justification for seizing contraband not specified in the warrant if it is found during the course of a valid search and is within the scope of a valid warrant. *Goodin*, 67 Wash. App. at 627, 838 P.2d at 138; *see also State v.*

Wright, 61 Wash. App. 819, 810 P.2d 935 (1991) (holding that a handgun discovered at the crime scene was within the plain view exception). However, officers do not have justification under the plain view doctrine for seizing contraband discovered during a general exploratory search after they have found what they sought under the warrant. *State v. Legas*, 20 Wash. App. 535, 542, 581 P.2d 172, 176 (1978) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S. Ct. 2022, 2024, 29 L. Ed. 2d 564, 583 (1971)) ("Plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.").

The open view doctrine differs from the plain view doctrine in that the open view doctrine applies when officers discover contraband from a nonintrusive vantage point. *State v. Dykstra*, 84 Wash. App. 186, 191-92, 926 P.2d 929, 932 (1996). For example, a residential front porch may be considered a nonintrusive vantage point if it has a "natural access route to the residence and is impliedly open to the public." *Rose*, 128 Wash. 2d at 391-92, 909 P.2d at 283; *see also Myers*, 117 Wash. 2d at 345, 815 P.2d at 769 (contraband was in open view when police officers approached home in daylight by direct access and spoke with occupant from porch and did not "spy" or act secretively); *State v. Seagull*, 95 Wash. 2d 898, 905, 632 P.2d 44, 48-49 (1981) (slight deviation from the most direct route was not unreasonable intrusion on occupant's privacy). However, officers violate the open view exception when they intrude on the defendant's reasonable expectation of privacy. *State v. Daugherty*, 94 Wash. 2d 263, 266-67, 616 P.2d 649, 651 (1980) (violation occurred when officer questioned a suspect outside the residence and a second officer walked around a vehicle in the driveway to look into an obscure garage at the back of the lot).

3.11 Delivering Warrant and Inventory: Requirements for Execution of Warrants

Statutes or court rules may impose requirements on the execution of warrants beyond those mandated by the federal Constitution. Washington court rules provide:

> The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose

> possession or premises the property is taken, or in the presence of a least one person other than the officer. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

WASH. CR.R. 2.3(d). The requirement that an inventory be made in the presence of another person is designed to prevent error in the inventory. The requirement is satisfied by the presence of another police officer. *State v. Wraspir*, 20 Wash. App. 626, 624, 581 P.2d 182, 184 (1978).

Washington follows the majority rule that defects relating to the return of a search warrant are ministerial and do not compel invalidation of the warrant, absent a showing of prejudice. *State v. Smith*, 15 Wash. App. 716, 719, 552 P.2d 1059, 1062 (1976). *But see* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.12(c), at 721-22 (3d ed. 1996) (suggesting that if no return was made, the search should be unconstitutional).

3.12 Challenging the Content of an Affidavit

3.12(a) Informant's Identity

Although a defendant is generally entitled to examine an affidavit in order to challenge whether the warrant was issued on probable cause, the court may excise portions of the affidavit that identify a confidential or unnamed informant to protect the State's interest in maintaining the confidentiality of such informants. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667, 682 (1978); *State v. Mathiesen*, 27 Wash. App. 257, 260, 616 P.2d 1255, 1257 (1980); *see also* WASH. REV. CODE § 5.60.060(5) (1995) ("[A] public officer shall not be examined as a witness as to communications made . . . in official confidence, when the public interest would suffer by disclosure."); WASH. CR.R. 4.7(f)(2) (State's insistence on an informant's secrecy is based on the "informant's privilege," recognized by both statute and court rule). When the information is secret, however, the defendant lacks access to the very information he or she needs to challenge the veracity of an affidavit. *State v. Casal*, 103 Wash. 2d 812, 818, 699 P.2d 1234, 1238 (1985). Thus, "fundamental fairness" may require the disclosure of an informant's identity when the informant's potential testimony at trial would be relevant to the determination of the defendant's innocence. *See Casal*, 103 Wash. 2d at 815-16, 699 P.2d at 1236-37 (citing *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)). A defendant under

these circumstances is entitled to an *in camera* hearing on the truthfulness of the informant's information if the defendant "casts a reasonable doubt on the veracity of material representations made by the affiant." *State v. White*, 50 Wash. App. 858, 865, 751 P.2d 1202, 1206 (1988) (quoting *Casal*, 103 Wash. 2d at 820, 699 P.2d at 1238). All the defendant must show is a "minimal showing of inconsistency." *White*, 50 Wash. App. at 865, 751 P.2d at 1206 (quoting *United States v. Brian*, 507 F. Supp. 761 (D. R.I. 1981)). Even so, "a *Casal* hearing is required only whe[n] a search warrant affidavit contains no other independent basis for establishing probable cause." *White*, 50 Wash. App. at 865 n.4, 751 P.2d at 1206 n.4.

When the defendant presents evidence that casts doubt on the veracity of representations in the officer's affidavit and the officer has related information provided by a secret informant, the court, in its discretion, may order an *in camera* hearing to examine the informant. *Casal*, 103 Wash. 2d at 820-21, 699 P.2d at 1239. If the informant verifies the affiant's story and the judge is convinced that probable cause existed, the informant's identity is not to be disclosed. *Id.* at 822, 699 P.2d at 1239. But if the judge finds a substantial showing of falsehood, an open evidentiary hearing is required. *Id.*

3.12(b) Misrepresentations and Omissions in Affidavit

A defendant may challenge the validity of a warrant based on a misrepresentation of fact in the supporting affidavit. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978). The defendant must first make a substantial showing that a false statement in the affidavit (1) was either made knowingly and intentionally or in reckless disregard for the truth, and (2) was necessary or material to the finding of probable cause. *Id.* at 155-56, 98 S. Ct. at 2676, 57 L. Ed. 2d at 668-69; *State v. Garrison*, 118 Wash. 2d 870, 872, 827 P.2d 1388, 1389-90 (1992). The *Franks* test also applies to allegations of material omissions. *State v. Cord*, 103 Wash. 2d 361, 367, 693 P.2d 81, 85 (1985). The substantial showing must be based on specific facts and offers of proof rather than on conclusory assertions. *Garrison*, 118 Wash. 2d at 872, 827 P.2d at 1389. "'Allegations of negligence or innocent mistake are insufficient.'" *State v. Seagull*, 95 Wash. 2d 898, 908, 632 P.2d 44, 50 (1981) (quoting *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682); *State v. Olson*, 74 Wash. App. 126, 131-32, 872 P.2d 64, 68 (1994); *State v. Taylor*, 74 Wash. App. 111, 116, 872 P.2d 53, 56 (1994).

If the defendant fails to meet these formidable preconditions, the inquiry ends. But if the defendant is successful in proving the truth of his allegations and the false statements or omitted material is relevant to the establishment of probable cause, the affidavit must be examined. *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684-85, 57 L. Ed. 2d at 682; *Garrison*, 118 Wash. 2d at 873, 827 P.2d at 1390. Once false statements are deleted or the omissions are inserted into the affidavit, if the affidavit then supports a finding of probable cause the defendant's motion to suppress fails and no hearing is required. *Garrison* at 873, 827 P.2d at 1390. However, if the modified affidavit is insufficient to support a finding of probable cause, the defendant is entitled to an evidentiary hearing under the Fourth Amendment. *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684-85, 57 L. Ed. 2d at 682; *Garrison*, 118 Wash. 2d at 873, 827 P.2d at 1390.

3.13 Special Situations

3.13(a) First Amendment Limitations

The Fourth Amendment requirement of particularity in the description of items to be seized is afforded its most scrupulous enforcement when the items implicate First Amendment rights, such as in the case of literature, pictures, films, and recordings. *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 511, 13 L. Ed. 2d 431, 437 (1965); *State v. Perrone*, 119 Wash. 2d 538, 546-47, 834 P.2d 611, 616 (1992). Furthermore, "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas [that] they contain." *Stanford*, 379 U.S. at 485, 85 S. Ct. at 511-12, 13 L. Ed. 2d at 437; *State v. J-R Distrib., Inc.*, 111 Wash. 2d 764, 774, 765 P.2d 281, 286 (1988). When the First Amendment is involved, nothing should be left to the discretion of the officer executing the warrant. *Stanford*, 379 U.S. at 485, 85 S. Ct. at 512, 13 L. Ed. 2d at 437.

Thus, a warrant that commands the executing officer to seize "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas," fails the scrupulous exactitude requirement of the Fourth Amendment. *Stanford*, 379 U.S. at 478, 85 S. Ct. at 508, 13 L. Ed. 2d at 433 (holding that a general search for objectionable publications was constitutionally intolerable).

However, the scrupulous exactitude standard has not been extended to all searches and seizures involving the First Amendment.

State v. Walter, 66 Wash. App. 862, 869, 833 P.2d 440, 444 (1992) (determining that greater scrutiny was not required merely because photographs were involved); *see also New York v. P.J. Video, Inc.*, 475 U.S. 868, 875, 106 S. Ct. 1610, 1615, 89 L. Ed. 2d 871, 880 (1986) (rejecting contention that more than warrant was required to seize photographs from newspaper office); *Heller v. New York*, 413 U.S. 483, 490, 93 S. Ct. 2789, 2793, 37 L. Ed. 2d 745, 752-53 (1973) (holding that the First Amendment does not require a hearing prior to seizure of a film so long as the seizure does not prevent the film from being exhibited).

The scrupulous exactitude standard is typically triggered when the warrant commands the seizure of allegedly obscene material. *See Perrone*, 119 Wash. 2d at 553, 834 P.2d at 619; *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.6(e), at 578 (3d ed. 1996). Clearly, a warrant authorizing the seizure of material that the executing officer deems to be "child pornography" provides the executing officer broad discretion and therefore violates the Fourth Amendment and the scrupulous exactitude standard. *Perrone*, 119 Wash. 2d at 553, 834 P.2d at 619. "Rather, what is required is a description of these materials by title or [by] similar identifying characteristic, or by a specific statement as to the type of contents [that] would render the materials presumptively obscene." 2 LAFAVE, SEARCH AND SEIZURE § 4.6(e), at 579.

3.13(b) Intrusions into the Body

In 1952, the United States Supreme Court considered whether a physical intrusion into a person's body violates due process and determined that due process is violated if the intrusion "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209, 96 L. Ed. 183, 190 (1952) (concluding that stomach pumping without a warrant to obtain evidence violated due process). Subsequent to *Rochin*, however, the Supreme Court reversed itself, and applied the Fourth Amendment exclusionary rule to the states. *See Mapp v. Ohio*, 367 U.S. 643, 657, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081, 1091 (1961). Consequently, the Court has not relied on the *Rochin* "shocks the conscience" standard exclusively but has instead applied a Fourth Amendment reasonableness analysis in cases like *Rochin* that involve highly intrusive searches and seizures. *See generally United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985); *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985); *Schmerber v. California*, 384 U.S. 757, 766-72, 86 S. Ct. 1826, 1833-36, 16 L. Ed. 2d 908, 917-20

(1966). Thus, for example, "[a] compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Winston*, 470 U.S. at 759, 105 S. Ct. at 1616, 84 L. Ed. 2d at 668. *But see Schmerber*, 384 U.S. at 770-72, 86 S. Ct. at 1835-36, 16 L. Ed. 2d at 916-20 (holding that blood alcohol content may be obtained under certain circumstances). An intrusion that is reasonable is one in which:

(1) there is a clear indication, rather than a mere chance, that the intrusion will produce the desired evidence;

(2) the intrusive procedure is reasonably suited to obtaining the evidence, as for example, a blood test used for determining blood alcohol levels; and

(3) the intrusive procedure is performed in a reasonable manner, as, for example, a blood test performed by medical personnel rather than by officers at the station house. 2 LAFAVE, SEARCH AND SEIZURE § 4.1(e), at 413.

Thus, for example, taking a blood sample from a defendant charged with negligent homicide is valid when the police have probable cause to believe that evidence of intoxication will be found and that the test used to measure blood alcohol content is reasonable and performed in a reasonable manner. *State v. Curran*, 116 Wash. 2d 174, 185, 804 P.2d 558, 564 (1991), *abrogated by State v. Berlin*, 133 Wash.2d 541, 947 P.2d 700 (1997). *See also State v. Kalakosky*, 121 Wash. 2d 525, 532, 852 P.2d 1064, 1068 (1993) (valid search warrant based on probable cause is constitutionally sufficient to obtain blood sample from suspect); *State v. Komoto*, 40 Wash. App. 200, 208, 697 P.2d 1025, 1031 (1985) (probable cause established if person appears intoxicated and intoxication is an element of the crime for which the suspect is arrested).

Washington has also upheld mandatory blood testing in cases of putative fathers, *see State v. Meacham*, 93 Wash. 2d 735, 739, 612 P.2d 795, 798 (1980), and has upheld mandatory HIV and DNA testing of convicted sexual offenders, *see State v. Kalakosky*, 121 Wash. 2d at 536, 852 P.2d at 1070 (mandatory HIV testing of sexual offenders presents a minimal Fourth Amendment intrusion for which the State's reasons are compelling). *See also State v. Olivas*, 122 Wash. 2d 73, 93, 856 P.2d 1076, 1086 (1993) (statute requiring mandatory DNA testing of convicted sexual offenders in order to establish DNA databank is constitutionally permissible).

More intrusive procedures may be permitted in special environments such as prisons and jails. *See Bell v. Wolfish*, 441 U.S. 520,

560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979) (full body cavity searches of prison inmates following contact visits not unreasonable, even when searches are routine and not based on probable cause); *State v. Harris*, 66 Wash. App. 636, 642, 833 P.2d 402, 405 (1992) (exigent circumstances justify strip search of juvenile before placement in holding cell when police had prior experience with gang members taping razor blades to their skin). Similar intrusive procedures may be allowed at borders. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S. Ct. 3304, 3308, 87 L. Ed. 2d 381, 388-89 (1985) (suspect fitting profile for alimentary canal drug smuggler may be subjected to rectal cavity search when search warrant was based on profile and suspect's unwillingness to eat, drink, or defecate during sixteen-hour confinement). *See generally infra* §§ 6.2 (prisons), 6.3 (borders).

The Washington State Constitution affords no greater protection to an arrestee for warrantless body strip searches than does the federal Constitution. *State v. Audley*, 77 Wash. App. 897, 907, 894 P.2d 1359, 1364 (1995) (warrantless strip search of arrestee in local detention center is reasonable when security needs of local jail outweigh privacy interest of arrestee).

Other factors considered include whether the search is necessary for a fair determination of the charges and whether opportunities for an adversary hearing and interlocutory appellate review are available. *See* 2 LAFAVE, SEARCH AND SEIZURE § 4.1(d), at 424; *see also Winston*, 470 U.S. at 762, 105 S. Ct. at 1617-18, 84 L. Ed. 2d at 670 (holding that the community's interest in determining the guilt or innocence of a party is a balancing measure).

3.13(c) Warrants Directed at Nonsuspects

In 1978, the Supreme Court held that the Fourth Amendment provides the same special protections against search and seizure for the possessor of evidence who is not the suspect of a crime. *Zurcher v. Stanford Daily*, 436 U.S. 547, 559-60, 98 S. Ct. 1970, 1978, 56 L. Ed. 2d 525, 537-38 (1978) (holding that probable cause to issue a valid search warrant merely requires that officers demonstrate that the fruits, instrumentalities, or evidence of a crime be located on the premises to be searched). Critics have argued that a search warrant of a third party is *per se* unreasonable and that a subpoena *duces tecum* can adequately protect law enforcement interests. *See* Note, *The Reasonableness of Warranted Searches of Nonsuspect Third Parties*, 44 ALB. L. REV. 212, 232-35 (1979) (criticizing *Zurcher* for failing to adopt a less drastic alternative or less intrusive practice test in Fourth Amendment cases).

In response to *Zurcher*, Congress enacted the Privacy Protection Act of 1980 (PPA), 42 U.S.C. § 2000aa-12 (1994). *See* S. REP. NO. 96-874 at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3950, 3950. The PPA prohibits the government from searching or seizing any work product material "possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" without first issuing a subpoena *duces tecum*. 42 U.S.C. § 2000 99(a). The PPA "affords the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment." S. REP. NO. 96-874 at 4, *reprinted in* 1980 U.S.C.C.A.N. 3950, 3950. Such protections of nonsuspects, however, has not been extended outside the media. *See United States v. Humphreys*, 982 F.2d 254, 258 (8th Cir. 1992) (upholding a warrant to search an attorney's office on probable cause that attorney was evading taxes); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (finding that the protections of client confidentiality, attorney-client privilege, attorney work product, and a criminal defendant's constitutional right to counsel cannot keep enforcement officers from rummaging through documents in search of items to be seized when such officers possess a warrant to search an attorney's office). *See also* 2 LAFAVE, SEARCH AND SEIZURE § 4.1(f)-(h), at 434-37.

CHAPTER 4: SEIZURE OF THE PERSON: ARRESTS AND STOP-AND-FRISKS

4.0 Seizure: Introduction

This chapter deals with principles that are unique to seizure of the person. Related issues are discussed *supra* ch. 2 (probable cause); *supra* § 3.7 (knock and announce); and *infra* § 5.1 (search incident to arrest).

For purposes of the Fourth Amendment, a seizure occurs when an officer, by physical force or by show of authority, restrains an individual's freedom of movement. *See United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). Restraint amounting to a seizure occurs when a reasonable person would not feel free to leave the area. *See Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889, 903 (1968). This objective test considers the coercive effect of the officer's conduct in the particular situation to determine the impression conveyed to a reasonable person in a similar situation. *See Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 572 (1988).

Recently, the United States Supreme Court shifted to a more subjective test in defining Fourth Amendment seizures when they are based on a show of authority. *California v. Hodari D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 1551, 113 L. Ed. 2d 690, 698 (1991). The Court shifted the focus to the defendant's behavior rather than the officer's conduct by requiring that for a seizure to occur, the defendant must submit to a show of authority. *Id.* (holding that although officer's pursuit was a show of authority, there was no seizure because defendant fled instead of submitting to that authority).

In contrast, the Washington Constitution has generally been interpreted as providing greater protection for individual privacy interests than does the Fourth Amendment. *See State v. Young*, 86 Wash. App. 194, 201-02, 935 P.2d 1372, 1376 (1997), *aff'd*, 135 Wash. 2d 498, 957 P.2d 681 (1998). Thus, the Washington Supreme Court has rejected the *Hodari D.* test and has not required a defendant's submission to authority in order for a seizure to occur. *See State v. Gunwall*, 106 Wash. 2d 54, 58-63, 720 P.2d 808, 811-13 (1986).

Under Washington law, a seizure occurs when a reasonable person, under the totality of the circumstances, would not feel free either to leave or otherwise decline the officer's requests. WASH. CONST. art. I, § 7; *State v. Thorn*, 129 Wash. 2d 347, 352, 917 P.2d 108, 112 (1996). Whether a reasonable person would feel free to leave is not based on the defendant's behavior, but on the officer's coercive conduct. *See id.* at 353, 917 P.2d at 112; *see also State v. Knox*, 86 Wash. App. 831, 839, 939 P.2d 710, 714 (1997). Moreover, the officer's coercive conduct is established by a series of acts, rather than a single act, that convey a seizure. *See State v. Soto-Garcia*, 68 Wash. App. 20, 25, 841 P.2d 1271, 1273 (1992) (when officer asked defendant both whether he had drugs on his person and whether the officer could search him, the situation was of such a nature as to prevent a reasonable person from feeling free to leave); *cf. State v. Toney*, 60 Wash. App. 804, 807-08, 810 P.2d 929, 931 (1991) (holding no seizure because there was no evidence that the officer drove aggressively or intentionally singled defendant out).

4.1 Arrest

Although a seizure restrains an individual's freedom of movement, not all seizures amount to an arrest. *See California v. Hodari D.*, 499 U.S. 621, 624-25, 111 S. Ct. 1547, 1549-50, 113 L. Ed. 2d 690, 696 (1991) (defining arrest as "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence"); *see also State v. Lyons*,

85 Wash. App. 268, 270, 932 P.2d 188, 189-90 (1997). For instance, police activities such as requesting identification or engaging citizens in conversation do not convert casual encounters into seizures. *See State v. Knox*, 86 Wash. App. 831, 838, 939 P.2d 710, 714 (1997). Thus, the relevant inquiry to determine whether a person is in custody is whether a reasonable person in the suspect's position would have thought he or she was in custody. *See State v. Rivard*, 131 Wash. 2d 63, 75, 929 P.2d 413, 419 (1997) (finding no arrest because defendant was not physically apprehended, restrained, handcuffed, placed in a police vehicle, or approached by officers who had weapons drawn).

It is no defense to a criminal prosecution that a defendant was illegally arrested. However, the legality of the arrest affects the legality of the searches and confessions taking place subsequent to the arrest and affects the admissibility of evidence derived from the arrest. *See generally infra* ch. 7.

4.2 *Arrests Without Warrants: Public Versus Home Arrests*

Arrests are not subject to the same strict warrant requirements as searches, and an officer may make a warrantless felony arrest with probable cause in a public place even though he or she had time to obtain a warrant. *See United States v. Watson*, 423 U.S. 411, 422-23, 96 S. Ct. 820, 827-28, 46 L. Ed. 2d 598, 608-09 (1976); *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993); *see also* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(b), at 14-15 (3d ed. 1996). Nonetheless, such arrests must still be supported by probable cause. Probable cause, however, is not subject to calculation by formula or by mathematical certainty. *See State v. Morgan*, 78 Wash. App. 208, 212, 896 P.2d 731, 733 (1995). Thus, a defendant is entitled to a prompt judicial determination of probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 126, 95 S. Ct. 854, 869, 43 L. Ed. 2d 54, 72 (1975); *see also infra* § 4.5(c).

Although police may make a warrantless arrest in a public area, in the absence of exigent circumstances they may not make a warrantless arrest after a nonconsensual entry into a suspect's home. *Payton v. New York*, 445 U.S. 573, 589-90, 100 S. Ct. 1371, 1381-82, 63 L. Ed. 2d 639, 652-53 (1980). Exigent circumstances exist when the time required to obtain a warrant would result in the suspect's escape, injury to either the officers or the public, or the destruction of evidence. *See Gooch*, 6 F.3d at 679. Fact patterns constituting exigent circumstances are described in detail, *infra* §§ 5.16-5.20. *See generally*, William C. Donnino & Anthony J. Girese, *Exigent Circumstances for a Warrantless*

Home Arrest, 45 ALB. L. REV. 90 (1980). The *Payton* prohibition on a warrantless nonconsensual entry of a suspect's home has been applied to several Washington cases, including *State v. White*, 129 Wash. 2d 105, 109, 915 P.2d 1099, 1101-02 (1996) (declining to extend *Payton* beyond the protection of the home) and *State v. Griffith*, 61 Wash. App. 35, 41, 808 P.2d 1171, 1174 (1991).

Under the Fourth Amendment, police who make a warrantless arrest outside an arrestee's home may then accompany the arrestee into his or her home even if the arrestee, with the officer's consent, enters the home for such purpose as obtaining identification. *See Washington v. Chrisman*, 455 U.S. 1, 6-7, 102 S. Ct. 812, 817, 70 L. Ed. 2d 778, 785-86 (1982) (risk of danger to officer and possibility of confederates' escape justified police officer's act of accompanying arrested person into dwelling; police need no affirmative indication of likelihood of danger or escape).

Washington, however, has rejected the bright-line rule that an officer may, in all circumstances, accompany an arrestee into the arrestee's home. *See State v. Chrisman*, 100 Wash. 2d 814, 820-21, 676 P.2d 419, 423 (1984). Under article I, section 7, when a person is arrested for a minor violation, the arresting officer may not follow the arrestee into his or her home unless the officer can reasonably conclude that the officer's safety is endangered, that evidence might be destroyed, or that escape is a strong possibility. *See Gooch*, 6 F.3d at 679 (reiterating factors that constitute exigent circumstances). A police officer may accompany an arrestee into his or her residence without a warrant if the officer knows of specific, articulable facts that indicate a threat to the officer's safety. *State v. Wood*, 45 Wash. App. 299, 308-09, 725 P.2d 435, 440 (1986) (finding that sufficient reason existed to accompany the arrestee into residence for security purposes when officer was executing an arrest warrant for a felony parole violation).

An officer may also enter a home without a warrant in response to a medical emergency. *State v. Angelos*, 86 Wash. App. 253, 258, 936 P.2d 52, 54-55 (1997) (evidence of drugs not excluded when officer entered home in response to a 911 emergency call for drug overdose and searched for drugs upon learning that small children were in the home because he perceived a safety hazard to the children).

In contrast, the arrest of a suspect who is standing in the doorway of his or her home is treated the same as an arrest in the home. *See State v. Solberg*, 122 Wash. 2d 688, 697, 861 P.2d 460, 465 (1993) (citing *State v. Holeman*, 103 Wash. 2d 426, 429, 693 P.2d 89, 91 (1985)). As such, for Fourth Amendment purposes the location of the suspect, and not the location of the officer, is material to the issue of

whether an arrest occurs in the home. *See Holeman*, 103 Wash. 2d at 429, 693 P.2d at 91. Thus, an officer is prohibited from arresting a suspect standing in the doorway of the home without a warrant unless exigent circumstances exist. *See Solberg*, 122 Wash. 2d at 697, 861 P.2d at 465. However, an arrest of a suspect who is on a front porch, as opposed to in the doorway, is considered a public arrest. *See id.* at 698, 861 P.2d at 466 (stating that the "conclusion that a warrantless arrest on a porch is an illegal arrest conflicts with authority from other Washington decisions, other jurisdictions, and scholarly comment").

4.3 Arrests Without Warrants: Felony Versus Misdemeanor Arrests

4.3(a) Felony Arrest

The following section discusses differences in the warrant requirements for felony and misdemeanor arrests. For a discussion of custodial arrests for misdemeanor offenses, see *infra* § 4.4(d). Under the common law standard and the Fourth Amendment, an officer's authority to make a warrantless arrest in public generally applies to felonies. *See United States v. Watson*, 423 U.S. 411, 422-23, 96 S. Ct. 820, 827-28, 46 L. Ed. 2d 598, 608-09 (1976). While some states have placed restrictions on warrantless felony arrests, Washington has codified the common law rule. WASH. REV. CODE § 10.31.100 (1996 & Supp. 1998).

4.3(b) Misdemeanor Arrest

Under the common law, an officer may arrest a person who breaches the peace. *See Kalmas v. Wagner*, 133 Wash. 2d 210, 218, 943 P.2d 1369, 1373 (1997) (citing *Pavish v. Meyers*, 129 Wash. 605, 606-07, 225 P. 633, 633-34 (1924)); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(b), at 13 (3d ed. 1996). Thus, an officer is required to have probable cause to believe that a misdemeanor has been committed in his presence. *State v. Thompson*, 69 Wash. App. 436, 441, 848 P.2d 1317, 1320 (1993). The common law misdemeanor rule has not been held to be constitutionally required, and many states have enacted statutes applying the misdemeanor rule to felonies. *See United States v. Watson*, 423 U.S. 411, 418-21, 96 S. Ct. 820, 825-27, 46 L. Ed. 2d 598, 606-08 (1976). Some states that require warrants for misdemeanors have held that a statutory, as opposed to a constitutional, violation is not grounds for the suppression of evidence obtained as a result of the arrest. *See, e.g., State v. Eubanks*, 196 S.E.2d 706, 708-09 (N.C. 1973).

Similarly, Washington permits an officer to make a warrantless misdemeanor arrest only when the offense is committed in the officer's presence. WASH. REV. CODE § 10.31.100 (1996 & Supp. 1998). However, the statute sets out several exceptions that permit an officer to make a warrantless misdemeanor arrest if the offense is not committed in the officer's presence. An officer may make a warrantless misdemeanor arrest if the offense: (1) involves physical harm or the threat of physical harm to persons or property, (2) is for possession of marijuana, (3) is for violation of a restraining order, (4) is witnessed by another officer, or (5) is for one of a number of specified traffic offenses. *See id. But compare State ex rel. McDonald v. Whatcom County Dist. Ct.*, 92 Wash. 2d 35, 38, 593 P.2d 546, 547 (1979) (officer may not make an arrest at a location other than the accident scene), *with State v. Teuber*, 19 Wash. App. 651, 654-55, 577 P.2d 147, 149-50 (1978) (officer may make lawful misdemeanor arrest for offense committed four hours earlier when offense involves physical harm to property).

The "in the presence" requirement of WASH. REV. CODE § 10.31.100 is satisfied whenever the officer directly perceives facts permitting a reasonable inference that a misdemeanor is being committed. *See Snohomish v. Swoboda*, 1 Wash. App. 292, 295, 461 P.2d 546, 548-49 (1969). Questions arise as to whether the officer must view all the elements of a crime and as to what types of information may be used to fill in "gaps." *Id.* (satisfying "in the presence" requirement when from 150 feet away, police officers, as part of "sting" operation, observed person handing an object to another; even though police could not positively identify the object, the nature of the operation permitted a reasonable inference the object was contraband); *see also State v. Silverman*, 48 Wash. 2d 198, 202-03, 292 P.2d 868, 870-71 (1956) (satisfying "in the presence" requirement for possession of obscene pictures with intent to show them when officer entered establishment as member of public and viewed "peep shows").

Originally, the misdemeanor offense of possessing or consuming alcohol by a person under twenty-one years of age (WASH. REV. CODE § 66.44.270 (1955)) was not committed in an officer's presence if the officer did not witness the person's ingestion of the alcohol. However, the legislature realized that such a requirement was overly burdensome. Thus, in 1987, the legislature amended WASH. REV. CODE § 66.44.270 to allow an officer to arrest a person under the age of 21 for possessing or consuming alcohol if the officer had probable cause to believe that the person had alcohol or other drugs in his system. *See State v. Preston*, 66 Wash. App. 494, 497-98, 832 P.2d 513, 515-

16 (1992) (citing *State v. Hornaday*, 105 Wash. 2d 120, 713 P.2d 71 (1986)). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 5.1(c).

4.4 Arrest with Warrants

The principles governing the procurement and execution of search warrants also apply to arrest warrants. *See supra* ch. 3; WASH. CR.R. 2.2; WASH. REV. CODE §§ 10.31.030, .040 (1996). Thus, an invalid warrant will not support an arrest. *See Whiteley v. Warden*, 401 U.S. 560, 568-69, 91 S. Ct. 1031, 1037, 28 L. Ed. 2d 306, 313 (1971); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(g), at 55 (3d ed. 1996).

A seizure is lawful if an officer has reasonably articulable grounds to believe that the suspect is the intended arrestee named in the warrant. *State v. Smith*, 102 Wash. 2d 449, 453-54, 688 P.2d 146, 149 (1984). If doubt arises as to the identity, the officer is expected to immediately take reasonable steps to confirm or deny whether the warrant applies to the person being held. *Id.* at 454, 688 P.2d at 149. The initial arrest, however, must be based on more than the individual's similarity to the general physical description set forth in the warrant. *See Smith*, 102 Wash. 2d at 454, 688 P.2d at 149 (applying the test articulated in *Sanders v. United States*, 339 A.2d 373, 379 (D.C. App. 1975), the *Smith* court found seizure of "chako sticks" to be unlawful).

4.5 Arrests: Miscellaneous Requirements

4.5(a) Use of Force

Under traditional common law, an officer was permitted to use reasonable force to make an arrest, and the officer could use deadly force if such force reasonably appeared necessary to prevent a suspect's escape from a felony arrest. *See Tennessee v. Garner*, 471 U.S. 1, 13-15, 105 S. Ct. 1694, 1702-03, 85 L. Ed. 2d 1, 10-12 (1985). The common law rule has been restricted, however, and an arresting officer may use deadly force only when he or she "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 11, 105 S. Ct. 1694, 1696-97, 85 L. Ed. 2d 1, 3 (police not permitted to shoot unarmed, fleeing burglary suspect).

In Washington, the amount of force an officer may use is governed by statute to the extent that the statute is consistent with *Garner*. *See, e.g.*, WASH. REV. CODE § 10.31.050 (1996) ("If after notice of the intention to arrest the defendant, he either flee[s] or

forcibly resist[s], the officer may use all necessary means to effect the arrest."); WASH. REV. CODE § 9A.16.040 (1996) (listing specific situations in which officer is justified in using deadly force).

In a Washington case decided before *Garner*, the court upheld the use of a chokehold to prevent destruction of evidence even though the officers did not fear harm to themselves or to the public. *See State v. Taplin*, 36 Wash. App. 664, 666, 676 P.2d 504, 506 (1984) (chokehold used to prevent defendant from swallowing balloons suspected of containing heroin did not violate due process or Fourth Amendment rights because defendant was capable of breathing when chokehold was applied); *cf. infra* §§ 5.2(a) and 5.18(a). The legislature specifically limited the use of deadly force under WASH. REV. CODE § 9A.16.040(1)(c) in instances in which the officer has "probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer . . . or others." WASH. REV. CODE § 9A.16.040(2) (1996). The use of deadly force by a public officer is justified "when necessar[y] . . . to overcome actual resistance to the execution of the legal process . . . or in the discharge of a legal duty." WASH. REV. CODE § 9A.16.040(1)(b) (1996). In particular, deadly force is justified when either a public officer or a person acting under his command and in the officer's aid assists the officer by:

> i) arrest[ing] or apprehend[ing] a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;
> ii) prevent[ing] the escape . . . or in retak[ing] a person who escapes from a [federal or state correctional] facility; or
> iii) prevent[ing] the escape of a person from a county or city jail . . . if the person has been arrested for, charged with, or convicted of a felony; or
> iv) lawfully suppress[ing] a riot if the actor or another participant is armed with a deadly weapon.

WASH. REV. CODE § 9A.16.040(1)(c) (1996).

In construing a prior statute, the Washington Supreme Court held that deadly force may be used even when a felony has not in fact occurred so long as the officer reasonably believes that a felony has been committed. *See Reese v. Seattle*, 81 Wash. 2d 374, 379-80, 503 P.2d 64, 69-70 (1972). In *Reese*, the court stated that "[g]reat caution must be exercised by an officer in the use of deadly force and it must be resorted to by an officer only when all other reasonable efforts to apprehend a person fleeing from a *lawful arrest* for a felony have failed." *Id.* at 382-83, 503 P.2d at 71 (emphasis in original). In light of *Garner* and recent amendments to WASH. REV. CODE § 10.31.050,

an officer must now show probable, rather than merely reasonable, cause.

4.5(b) Significance of Booking and Crime Charged: Pretextual Arrests

Courts differ as to the significance of a suspect being booked for one offense yet being formally charged with another. Conflicting considerations underlie the decisions. On the one hand, if the booking and formal charges need not be similar, police can use an arrest as a pretext for detaining a suspect for questioning about an unrelated crime for which the police lack probable cause. On the other hand, at the time police first establish probable cause for one crime, they may not possess sufficient information to establish probable cause for another. *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(e) (3d ed. 1996).

In Washington, the formal charge may differ from the booking charge. *See State v. Teuber*, 19 Wash. App. 651, 655-56, 577 P.2d 147, 150 (1978). The booking charge has no significance after a formal charge has been lodged, and booking "for investigation" is permissible provided that probable cause for an arrest on any charge is present. *See State v. Thompson*, 58 Wash. 2d 598, 606-07, 364 P.2d 527, 532 (1961).

When a suspect is arrested for a misdemeanor not committed in the officer's presence, the arrest is not illegal if the arresting officer has knowledge of a felony for which the suspect could have been arrested. *See State v. Stebbins*, 47 Wash. App. 482, 485, 735 P.2d 1353, 1355 (1987).

4.5(c) Judicial Review

A person arrested without a warrant is entitled to a post-arrest probable cause determination. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 863, 43 L. Ed. 2d 54, 65 (1975) ("Once the suspect is in custody, . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate."). A neutral and detached magistrate must make the probable cause determination, but the hearing may be *ex parte*. *See id.* at 119-23, 95 S. Ct. at 865-68, 43 L. Ed. 2d at 68-71.

The issue of whether a violation of the *Gerstein* rule requires suppression of evidence seized after the arrest has not been resolved. *See* 3 LAFAVE, SEARCH AND SEIZURE § 5.1(f), at 48; *see also Williams v. State*, 348 N.E.2d 623, 627-28 (Ind. 1976) (defendant's voluntary confession suppressed when, following probable cause arrest, defendant

was held for eight days without judicial determination of probable cause and confession was made during that detention).

4.5(d) Custodial Arrests for Minor Offenses

The United States Supreme Court has not yet addressed whether probable cause always justifies an arrest. Lower court decisions, however, have held that for certain offenses an arrest is unconstitutional in the absence of a special need for custody. *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 5.1(h).

When civil, as opposed to criminal, proceedings are involved, custodial arrests may be improper. The Washington Supreme Court has held unconstitutional a statute authorizing the custodial arrest of any person against whom a paternity complaint is filed. *See State v. Klinker*, 85 Wash. 2d 509, 537 P.2d 268 (1975). Thus, in the absence of a contrary showing, the usual summons and complaint procedure for civil cases is deemed adequate for securing the defendant's presence at trial. *See id.* at 522, 537 P.2d at 278. However, criminal cases are treated differently because the public interest in restraining the defendant is greater. *See id.* at 520, 537 P.2d at 277; *see also* 3 LAFAVE, SEARCH AND SEIZURE § 5.1(h), at 61-62.

Under Washington law, "as a matter of public policy . . . custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs [a] promise to appear" in court. *State v. Hehman*, 90 Wash. 2d 45, 47, 578 P.2d 527, 528 (1978); *cf.* 3 LAFAVE, SEARCH AND SEIZURE § 5.2(e), at 86. In one case, the Washington Supreme Court held that an officer was prohibited from making a custodial arrest for a minor traffic violation unless the officer had "other reasonable grounds [for the arrest] apart from the minor traffic violation itself." *Hehman*, 90 Wash. 2d at 50, 578 P.2d at 529. In 1979, the legislature amended WASH. REV. CODE § 46.64.015 to clarify when an officer must issue a citation and when an officer may arrest without a warrant. *See State v. Reding*, 119 Wash. 2d 685, 689, 835 P.2d 1019, 1021 (1992). Thus, custodial arrests for minor traffic violations are limited to situations involving specific statutory violations, a defendant's refusal to sign a promise to appear, and nonresident arrestees. *See State v. Terrazas*, 71 Wash. App. 873, 876, 863 P.2d 75, 77 (1993).

Custodial arrests are permissible, however, for offenses that are not minor such as reckless driving. *See Reding*, 119 Wash. 2d at 688, 835 P.2d at 1020. Further, a custodial arrest is not inappropriate merely because the offense is traffic-related. *See State v. Carner*, 28 Wash. App. 439, 444, 624 P.2d 204, 207 (1981) (arrest proper when

minor tried to evade police on his motorcycle); *cf.* WASH. REV. CODE § 46.64.015 (1996) (police may detain suspect who refuses to sign a promise to appear in court).

A police officer may make a custodial arrest for a traffic violation when the violation is a crime rather than merely a traffic infraction, or when the circumstances surrounding the arrest dictate transferring the violator to another location for completion of the arrest process. *See State v. LaTourette*, 49 Wash. App. 119, 125, 741 P.2d 1033, 1036 (1987) (finding that officers' decision to move arrestee to another location to complete arrest for reckless driving was proper when hostile crowd gathered in parking lot); *see also Welsh v. Wisconsin*, 466 U.S. 740, 756-64, 104 S. Ct. 2091, 2101-04, 80 L. Ed. 2d 732, 747-52 (1984) (White, J., dissenting) (finding that State acted within its proper police power in dealing with perceived seriousness of drunk driving when it enacted a statute permitting a warrantless arrest for the misdemeanor); *State v. McIntosh*, 42 Wash. App. 573, 576, 712 P.2d 319, 321 (1986) (finding arrest justified when arrestee for misdemeanor traffic violation had no identification, did not claim to own the vehicle he was driving, and related a suspicious account of his activities).

4.6 Stop-and-Frisk: Introduction

Police investigatory stops that fall short of arrests may be based on proof less than probable cause. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968). Although these brief detentions fall within the scope of the Fourth Amendment, the public interest in crime detection and the relative nonintrusiveness of a stop permit a lower standard of proof. *See id.* at 20-27, 88 S. Ct. at 1879-83, 20 L. Ed. 2d at 905-09. Thus, the investigatory stop is tested against the Fourth Amendment's general proscription of unreasonable searches and seizures, rather than by the Amendment's probable cause requirement. *See id.* at 21, 88 S. Ct. at 1879, 20 L. Ed. 2d at 905.

Regardless of whether article I, section 7 of the Washington Constitution or Fourth Amendment protection is at issue, for a seizure to be permissible, an officer must have "specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity." *Id.* at 22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. Reasonable suspicion is not based on the officer's subjective belief, but on an objective view of all of the facts. *See id.* at 22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906; *see also State v. Mitchell*, 80 Wash. App. 143, 145, 906 P.2d 1013, 1015 (1995). *See generally supra* § 2.9(b).

Once an officer possesses a reasonable suspicion, he or she may forcibly stop the suspect, but the stop must be a more limited intrusion than an arrest. *See Dunaway v. New York*, 442 U.S. 200, 209, 99 S. Ct. 2248, 2255, 60 L. Ed. 2d 824, 834 (1979). The reasonableness of the officer's conduct may be determined by the circumstances of the stop, including whether the officer was following standard procedures or routine practices in effecting the stop. *State v. Chapin*, 75 Wash. App. 460, 468, 879 P.2d 300, 305 (1994). Further, an investigatory stop will be held "reasonable" when "the limited violation of individual privacy" is outweighed by the public's "interests in crime prevention and detection." *Dunaway*, 442 U.S. at 209, 99 S. Ct. at 2255, 60 L. Ed. 2d at 834. Although a balancing test determines the permissible scope of a stop, once an intrusion is substantial enough to constitute an arrest, probable cause is necessary regardless of how substantial the public's interest is. *See id.* at 212-16, 99 S. Ct. at 2256-58, 60 L. Ed. 2d at 835-38 (custodial detention requires probable cause even when charges not filed and suspect not told that he is under arrest). *But cf. United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) (special governmental interest in detaining smugglers at border justifies holding suspect sixteen hours based on reasonable suspicion of transporting contraband); *see also infra* § 6.3.

Reasonable suspicion justifying an investigatory stop may ripen into probable cause for arrest if the totality of the circumstances would lead a reasonably cautious and prudent police officer with the arresting officer's experience to believe that the suspect had committed a crime. *State v. McIntosh*, 42 Wash. App. 579, 583-84, 712 P.2d 323, 326 (1986) (suspects' inability to give rational account of appearance and presence in a high burglary area late at night, absence of identification, and presence of what appeared to be burglar's tools gave rise to probable cause to arrest). A temporary seizure of a suspect that falls short of an arrest does not require that the officer give the suspect *Miranda* warnings because a *Terry* stop is not a custodial interrogation. *State v. King*, 89 Wash. App. 612, 624-25, 949 P.2d 856, 863 (1998). However, if the officer's suspicion ripens into probable cause for arrest, a *Miranda* warning must be given. *State v. Mercer*, 45 Wash. App. 769, 777, 727 P.2d 676, 682 (1986); *see also State v. Cameron*, 47 Wash. App. 878, 885-86, 737 P.2d 688, 692 (1987); *State v. Marshall*, 47 Wash. App. 322, 324-25, 737 P.2d 265, 267 (1987).

Terry stops are permitted both to prevent ongoing or future criminal activity and to investigate completed crimes. *See United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). For a discussion of the use of the reasonable suspicion

standard in special environments, see *infra* §§ 6.1 (schools) and 6.3 (border). *See generally* Peter Preiser, *Confrontations Initiated by Police on Less Than Probable Cause*, 45 ALB. L. REV. 57 (1980); 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1(a)-(e) (3d ed. 1996).

4.7 Satisfying the Reasonable Suspicion Standard

4.7(a) Factual Basis and Individualized Suspicion

The reasonable suspicion standard requires the officer's belief to be based on objective facts. *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357, 362 (1979). *See also State v. Perea*, 85 Wash. App. 339, 340-42, 932 P.2d 1258, 1259-60 (1997); *State v. Seitz*, 86 Wash. App. 865, 869, 941 P.2d 5, 8 (1997). The facts must be both "specific and articulable"; thus, an "inarticulate hunch" is not sufficient. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); *State v. Thompson*, 93 Wash. 2d 838, 842, 613 P.2d 525, 527 (1980). *See also Florida v. Rodriguez*, 469 U.S. 1, 105 S. Ct. 308, 83 L. Ed. 2d 165 (1984); *United States v. Cortez*, 449 U.S. 411, 422, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981). As a result of his or her experience, however, an officer may be able to perceive a reasonable suspicion in conduct that an ordinary citizen would consider to be innocent. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85, 95 S. Ct. 2574, 2582, 45 L. Ed. 2d 607, 619 (1975); *see also State v. Rice*, 59 Wash. App. 23, 29, 795 P.2d 739, 742 (1990) (holding that an officer's experience will be considered when determining whether suspicion of wrongdoing was justified).

Individualized suspicion is generally required for a *Terry* stop. *Brown*, 443 U.S. at 51, 99 S. Ct. at 2640-44, 61 L. Ed. 2d at 362; *State v. Kennedy*, 38 Wash. App. 41, 45-46, 684 P.2d 1326, 1329 (1984), *aff'd*, 107 Wash. 2d 1, 726 P.2d 445 (1986). There are, however, several exceptions. For example, in some circumstances a stop may be based on less than individualized suspicion when "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51, 99 S. Ct. at 2640-41, 61 L. Ed. 2d at 362. Border checkpoints may constitute such a circumstance. *See infra* § 6.3. When individualized suspicion is lacking, however, officer discretion must be limited. For example, police officers stopping vehicles for driver's license and vehicle registration checks may not select the vehicles at random. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673-74 (1979). *See also State v. Thorp*, 71 Wash. App. 175, 856 P.2d 1123 (1993)

(holding that officers who lack probable cause or a reasonable suspicion may not randomly stop moving vehicles for questioning). For a discussion of stops not requiring individualized suspicion, see *infra* §§ 6.3 (stops at or near borders) and 5.24 (vehicle spot checks). *See generally* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3(c) (3d ed. 1996).

4.7(b) Particular Applications: Informants

When stops are based on information provided by informants, the information does not have to meet the same criteria required for probable cause. *See, e.g., Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612, 617 (1972). *See generally supra* § 2.5. The information must, however, carry some "indicia of reliability." *Adams*, 407 U.S. at 147, 92 S. Ct. at 1924, 32 L. Ed. 2d at 617 (finding sufficient indicia when the informant was known personally to the officer and had provided information in the past). *See also United States v. Butler*, 74 F.3d 916, 920-21 (9th Cir. 1996) (stating that detailed information provided by the informant plus independent observations by the officers involved were sufficient indicia of reliability to justify stop); *State v. Conner*, 58 Wash. App. 90, 95, 791 P.2d 261, 263 (1990) (stating that a stop based solely on information provided by an informant is impermissible absent either (1) circumstances suggesting the informant's reliability, or (2) some corroborative observation suggesting either the presence of criminal activity or that the information was reliable). However, the Washington Supreme Court has distinguished between the reliability of information provided by a citizen and the reliability of information provided by an informant. *See State v. Garcia*, 125 Wash. 2d 239, 242, 883 P.2d 1369, 1370 (1994) (holding that information provided by a citizen does not require a showing of the same degree of reliability as an informant because a citizen is not a "professional" informant).

Potential danger to the public is a factor that bears on the reasonableness of a police officer's temporary investigatory detention of the suspect. *State v. Franklin*, 41 Wash. App. 409, 413, 704 P.2d 666, 669 (1985) (finding an investigatory stop justified when an anonymous informant observed a person displaying a gun in a public restroom and a police officer verified the informant's report of the person's attire and location). For a summary of cases interpreting *Adams*, see 4 LAFAVE, SEARCH AND SEIZURE § 9.4(h), at 220-21.

Police may also make a *Terry* stop on the basis of information provided by other divisions or agencies. *See United States v. Hensley*, 469 U.S. 221, 230, 105 S. Ct. 675, 681, 83 L. Ed. 2d 604, 615 (1985);

see also Butler, 74 F.3d at 920 (noting probable cause may be demonstrated through the collective knowledge of the officers involved in an investigation). Furthermore, the "fellow officer" rule justifies an arrest on the basis of a police bulletin, such as a hot sheet, as long as the issuing agency has sufficient information for probable cause. *See Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 568, 91 S. Ct. 1031, 1037, 28 L. Ed. 2d 306, 313 (1971). However, the arresting officer is not insulated from problems concerning the sufficiency or reliability of the information. *State v. Mance*, 82 Wash. App. 539, 542, 918 P.2d 527, 529 (1996). Consequently, if the issuing agency lacks probable cause, so does the arresting officer. *Id.* Further, an investigatory stop may be based on information regarding a completed crime provided by other police agencies so long as the length and the intrusiveness of the detention do not exceed that which would have been effected by the police agency providing the information. *State v. Dorsey*, 40 Wash. App. 459, 470, 698 P.2d 1109, 1115-16 (1985).

In Washington, police must have some reason to believe that an informant is reliable and possesses "[s]ome underlying factual justification for the informant's conclusion" that a crime is being committed. *State v. Sieler*, 95 Wash. 2d 43, 48, 621 P.2d 1272, 1275 (1980). No reliability may be inferred from an anonymous informant or from a named but unknown telephone informant, nor may the basis for the informant's knowledge be inferred from conclusory allegations. *Id.* Conclusory allegations may be sufficient, however, when independent police observations corroborate the presence of criminal activity or the reliability of the manner in which the information was obtained. *See id.*; *see also State v. Lesnick*, 84 Wash. 2d 940, 944, 530 P.2d 243, 246 (1975); *State v. Kennedy*, 38 Wash. App. 41, 684 P.2d 1326 (1984), *aff'd*, 107 Wash. 2d 1, 726 P.2d 445 (1986); *State v. Sykes*, 27 Wash. App. 111, 115-16, 615 P.2d 1345, 1347-48 (1980); *State v. McCord*, 19 Wash. App. 250, 254, 576 P.2d 892, 895 (1978).

An informant's tip may be sufficiently reliable to support a stop even when it would not support an arrest. *See, e.g., State v. Moreno*, 21 Wash. App. 430, 436-37, 585 P.2d 481, 483 (1978) (finding cause to stop, but not to arrest, when defendant arrived on flight specified by anonymous informant); *State v. Chatmon*, 9 Wash. App. 741, 748-49, 515 P.2d 530, 535 (1973) (finding that an officer's failure to establish an anonymous informant's reliability by failing to obtain a description of the informant and by failing to learn both the informant's purpose for being at scene of crime and reason for wanting to remain anonymous does not invalidate the investigative stop, but because circum-

stances did not indicate probable cause, the subsequent search was invalid).

The Washington Supreme Court has suggested that when the tip involves a serious crime, less reliability is required for a stop than is required in other circumstances. *State v. Lesnick*, 84 Wash. 2d at 944-45, 530 P.2d at 246; *Sieler*, 95 Wash. 2d at 50, 621 P.2d at 1276. See 4 LAFAVE, SEARCH AND SEIZURE § 9.4(h), at 229, for a discussion of *State v. Lesnick* and the argument that lesser indicia of reliability should be necessary for serious crimes.

4.7(c) Particular Applications: Nature of the Offense

Terry stops have been upheld for offenses ranging from aggravated robbery, *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985), to possession of narcotics, *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). For arguments that *Terry* stops should be limited to investigations of serious offenses, see *Adams*, 407 U.S. at 151-53, 92 S. Ct. at 1926-27, 32 L. Ed. 2d at 619-21 (Brennan, J., dissenting). *See generally* 4 LAFAVE, SEARCH AND SEIZURE § 9.2(c). *Cf. State v. Moreno*, 21 Wash. App. 430, 434, 585 P.2d 481, 483 (1978) (characterizing possession of narcotics as a "serious" offense).

4.7(d) Examples of Satisfying or Failing to Satisfy the Reasonable Suspicion Standard

The mere fact that a suspect is in a high crime area will not justify a stop. *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357, 362-63 (1979). *See also State v. Barber*, 118 Wash. 2d 335, 346, 823 P.2d 1068, 1075 (1992) (holding that a person of a specific race being "out of place" in a particular geographic area can never amount to a reasonable suspicion); *State v. Seitz*, 86 Wash. App. 865, 867-70, 941 P.2d 5, 7-8 (1997) (holding that officers lacked reasonable suspicion to stop where officers saw occupants of a car speaking to a man on the sidewalk but did not observe drugs, money, or anything else change hands); *State v. Soto-Garcia*, 68 Wash. App. 20, 25, 841 P.2d 1271, 1274 (1992) (stating that merely walking in the street in a known drug area late at night does not suggest that someone has committed criminal activity).

A person leaving a crime scene when police arrive is not the proper subject of a stop in the absence of other circumstances. *Brown*, 443 U.S. at 51, 99 S. Ct. at 2639, 61 L. Ed. 2d at 360; *State v. Walker*, 66 Wash. App. 622, 629, 834 P.2d 41, 45 (1992). Similarly, officers may not stop an individual merely because the individual is in

proximity to others who are suspected of criminal activity. *State v. Thompson*, 93 Wash. 2d 838, 841, 613 P.2d 525, 527 (1980). *See supra* § 4.7(b). *But cf. Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595-96, 69 L. Ed. 2d 340, 351 (1981) (valid search warrant for residence allows detention of occupants during search). *See generally* 4 LAFAVE, SEARCH AND SEIZURE § 9.4(d), (g), (i) (discussing and evaluating state and federal case law on the common *Terry* stop situations).

Washington case law continues to support an officer's use of a *Terry* stop. *See State v. Garcia*, 125 Wash. 2d 239, 242, 883 P.2d 1369, 1370 (1994) (information given to police combined with an officer's experience in narcotics and knowledge of location as high crime area justified investigative restraint); *State v. Little*, 116 Wash. 2d 488, 497-98, 806 P.2d 749, 753 (1991) (officers had sufficient suspicion to conduct a *Terry* stop where officers were generally familiar with residents of a complex, the officers did not recognize suspects, and the defendant subsequently fled from the officers); *State v. Young*, 86 Wash. App. 194, 201, 935 P.2d 1372, 1375 (1997) (suspect dropping a soda can when illuminated by an officer's spotlight, in an area known for drug activity, supported an investigatory stop); *State v. Alcantara*, 79 Wash. App. 362, 366-67, 901 P.2d 1087, 1089 (1995) (holding that to permit a warrantless search would impermissibly blur the distinction between a *Terry* stop and those cases where the evidence provides probable cause for arrest); *State v. Rodriguez-Torres*, 77 Wash. App. 687, 693, 893 P.2d 650, 652 (1995) (reasoning that the *Terry* rationale for limited searches for potential weapons was based on concern for officer safety).

Other Washington decisions upholding *Terry* stops include: *State v. Thorn*, 129 Wash. 2d 347, 917 P.2d 108 (1996); *State v. Pressley*, 64 Wash. App. 591, 597, 825 P.2d 749, 752 (1992) (finding that the manner in which the defendant reacted to the officers' presence was consistent with behavior suggesting a drug buy); *State v. Rice*, 59 Wash. App. 23, 28, 795 P.2d 739, 742 (1990) (firing of shots indicates the presence of firearms and probable illegal conduct).

4.8 Dimensions of a Permissible Stop

4.8(a) Time, Place, and Method

An investigatory stop may be based on less than probable cause when the intrusion on individual freedom is relatively minor. *Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889, 911 (1968). When an investigatory stop becomes as intrusive as an

arrest, the stop is considered an arrest and requires probable cause. *Dunaway v. New York*, 442 U.S. 200, 216, 99 S. Ct. 2248, 2258, 60 L. Ed. 2d 824, 838 (1979).

A valid stop must be limited as to length, movement of the suspect, and investigative techniques employed. *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 299, 238 (1983). *See also State v. Mitchell*, 80 Wash. App. 143, 143-45, 906 P.2d 1013, 1013-15 (1995); *State v. Fowler*, 76 Wash. App. 168, 172-73, 883 P.2d 338, 339-40 (1994) (holding that an officer exceeded the scope of a permissible stop when he removed a cigarette pack containing LSD from the suspect's pocket knowing that it was not a weapon). *See generally* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2(f) (3d ed. 1996). Generally, the level of suspicion required for an investigative stop of a pedestrian is the same as required for an investigative stop of a vehicle. *See State v. Kennedy*, 107 Wash. 2d 1, 6, 726 P.2d 445, 448 (1986).

The United States Supreme Court has declined to set an absolute limit on the permissible duration of a *Terry* stop in terms of minutes or hours. The duration of a stop is evaluated in terms of whether "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [suspect]." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605, 616 (1985). *See Royer*, 460 U.S. at 500, 103 S. Ct. at 1325, 75 L. Ed. 2d at 238 (noting that a stop may "last no longer than is necessary to effectuate the purpose of the stop").

Detaining a suspect to preserve the "status quo" while police investigate suspicious circumstances justifying an investigatory stop may not exceed the scope of a *Terry* stop. *See State v. Perea*, 85 Wash. App. 339, 342, 932 P.2d 1258, 1259-60 (1997) (holding that officers may temporarily detain a suspect pending results of a police radio check); *State v. Moon*, 45 Wash. App. 692, 695, 726 P.2d 1263, 1265 (1986) (finding a proper *Terry* stop where an officer detained a suspect in room approximately twenty minutes while a robbery victim was brought to the room for identification and appellant was not searched or otherwise restrained in the interim). The means of investigation need not be the least intrusive available, provided the police do not act unreasonably "in failing to recognize or to pursue" a less intrusive alternative. *Sharpe*, 470 U.S. at 687, 105 S. Ct. at 1576, 84 L. Ed. 2d at 616. For example, a Washington court has held that an officer did not use the least intrusive means reasonably available to confirm or dispel his suspicion that a house was being burglarized

when he ordered three juveniles out of the house at gunpoint. *State v. Johnston*, 38 Wash. App. 793, 798-99, 690 P.2d 591, 594 (1984).

The investigative methods employed in a *Terry* stop must be less intrusive than those employed in arrests in all respects, not merely duration. *Dunaway*, 442 U.S. at 210-11, 99 S. Ct. at 2255-56, 60 L. Ed. 2d at 834-35. For example, police may not transport a nonconsenting suspect in a patrol car to the police station and subject the suspect to custodial interrogation based only on a reasonable suspicion. *See id.* at 212, 99 S. Ct. at 2256, 60 L. Ed. 2d at 836; *see also Hayes v. Florida*, 470 U.S. 811, 816-18, 105 S. Ct. 1643, 1647, 84 L. Ed. 2d 705, 710-11 (1985) (finding that police may not transport a suspect to the police station for fingerprinting absent probable cause; although based on reasonable suspicion, police may take fingerprints while stopping and questioning suspect); *Royer*, 460 U.S. at 496, 103 S. Ct. at 1323, 75 L. Ed. 2d at 235 (finding that seizing a suspect's luggage at an airport and directing the suspect to a room for interrogation constituted an arrest); *State v. Gonzales*, 46 Wash. App. 388, 396, 731 P.2d 1101, 1107 (1986) (noting that handcuffing and transporting a suspect to a police station before probable cause to arrest arises, *i.e.*, before knowledge that a crime has been committed, may constitute an illegal arrest under the Fourth Amendment and article I, section 7). A radio call summoning the investigating officers to an apparently unrelated crime scene, however, may give rise to a reasonable suspicion sufficient to justify the officers transporting the suspect with them. *See State v. Sweet*, 44 Wash. App. 226, 232-33, 721 P.2d 560, 564 (1986); *cf. State v. Byers*, 85 Wash. 2d 783, 787, 539 P.2d 833, 836 (1975) (discussing transportation to crime scene).

Transporting a suspect a short distance to obtain identification is within the permissible scope of a *Terry* stop when the police have knowledge of a reported crime, but the search may not be proper when there is only an observation of suspicious conduct. *See State v. Wheeler*, 108 Wash. 2d 230, 237, 737 P.2d 1005, 1008 (1987); *State v. Hoffpauir*, 44 Wash. App. 195, 198, 722 P.2d 113, 115 (1986) (suspect voluntarily consented to transportation to the crime scene for identification purposes); *see also Sweet*, 44 Wash. App. at 232-33, 721 P.2d at 564 (finding that a suspect's demonstrated propensity to flee justified his being placed in patrol car and transported to an apparently unrelated crime scene).

Other Washington cases involving *Terry* stops include: *United States v. Salas*, 879 F.2d 530 (9th Cir. 1989) (stating that it would be reasonable for an officer to assume that a dealer in narcotics could be armed and dangerous if he had recently used cocaine); *State v. Collins*,

121 Wash. 2d 168, 173-74, 847 P.2d 919, 922 (1993) (holding that a *Terry* stop was justified where darkness prevented the officer from seeing clearly and the defendant had previously been arrested on an outstanding felony warrant); *State v. Glover*, 116 Wash. 2d 509, 514, 806 P.2d 760, 762 (1991) (finding that under the totality of circumstances presented to the officer, including the officer's experience, the location, and the conduct of the defendant, sufficient reasonable suspicion existed to justify an investigatory stop); *State v. Randall*, 73 Wash. App. 225, 230-31, 868 P.2d 207, 210 (1994) (holding that the officer had a reasonable suspicion justifying the stop when he observed two males fitting the description of the robbery suspects standing in a park six blocks from the site of the robbery); *State v. Biegel*, 57 Wash. App. 192, 195, 787 P.2d 577, 578 (1990) (stating that although an officer was justified in making a *Terry* stop where the officer suspected the defendant was engaged in a drug buy, the officer lacked probable cause to arrest without more justification).

4.8(b) Detention of Persons in Proximity to Suspect

The Washington Supreme Court has held that under the Fourth Amendment the mere fact of an individual's proximity to one independently suspected of criminal activity is insufficient to justify a stop. *State v. Thompson*, 93 Wash. 2d 838, 842, 613 P.2d 525, 528 (1980) (a stop based on driver's parking violation does not reasonably provide grounds to require identification of passengers absent an independent cause to question passengers). *Cf. State v. Serrano*, 14 Wash. App. 462, 466-68, 544 P.2d 101, 104-05 (1975). *See generally* 4 LAFAVE, SEARCH AND SEIZURE § 9.2(b) and (c).

4.9 Constitutional Limitations on Compelled Responses to Investigatory Questions

Guarantees under the Fourth Amendment prohibit an officer from forcibly stopping an individual in the absence of at least a reasonable suspicion of criminal activity. *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357, 362-63 (1979). However, even when a police officer possesses a reasonable suspicion and forcibly detains and questions the suspect, the officer may not compel the suspect to answer. *Davis v. Mississippi*, 394 U.S. 721, 727 n.6, 89 S. Ct. 1394, 1397 n.6, 22 L. Ed. 2d 676, 681 n.6 (1969); *State v. White*, 97 Wash. 2d 92, 105-06, 640 P.2d 1061, 1069 (1982). Furthermore, a suspect's refusal to answer an investigating officer's questions cannot provide the basis for an arrest. *See White*, 97 Wash. App. at 105-06, 640 P.2d at 1069.

A number of states, including Washington, have enacted stop-and-identify statutes or other legislation designed in part to facilitate police investigation of ongoing or imminent crimes. *See, e.g., id.* at 95, 640 P.2d at 1063; *see also Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (addressing a California statute requiring loiterers to identify themselves to peace officers when requested). Some of these statutes have been struck down as unconstitutionally vague. *See, e.g., White*, 97 Wash. 2d at 98-101, 640 P.2d at 1065-66; *Kolender*, 461 U.S. at 361, 103 S. Ct. at 1860, 75 L. Ed. 2d at 911. The statutes can be challenged on a number of grounds, such as the implication of (1) the First Amendment free speech right; (2) the Fifth Amendment right against self-incrimination; (3) the Fourteenth Amendment due process right; and (4) the Fourth Amendment right. *White*, 97 Wash. 2d at 97 nn.1 & 2, 640 P.2d at 1064 nn.1 & 2. *See generally* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2(f) (3d ed. 1996). Thus, a *Terry* stop that survives a Fourth Amendment challenge may collapse under a challenge brought under another amendment.

4.10 Grounds for Initiating a Frisk

An officer conducting a *Terry* stop may conduct a limited search for weapons in order to protect himself or herself or persons nearby from physical harm. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968); *State v. Alcantara*, 79 Wash. App. 362, 366, 901 P.2d 1087, 1089 (1995). Even such a limited intrusion, however, is a "search" within the Fourth Amendment. *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884, 30 L. Ed. 2d at 910.

The prerequisites to a pat-down for weapons is that the officer is legitimately in the presence of the party to be frisked and has grounds for a forcible stop. *See id.* at 32-33, 88 S. Ct. at 1885-86, 20 L. Ed. 2d at 912-13 (Harlan, J., concurring). A frisk may then be undertaken if the officer reasonably believes that the suspect "may be armed and presently dangerous" to the officer or others and if nothing in the course of an initial investigation dispels that fear. *Id.* at 30, 88 S. Ct. at 1884, 20 L. Ed. 2d at 911. A frisk may not be used as a pretext to search for incriminating evidence when the officer has no reasonable grounds to believe that the suspect is armed. *Sibron v. New York*, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917, 935 (1968).

Lower federal courts have read *Terry* to mean that for certain crimes in which the offender is likely to be armed, the right to conduct a protective search is "automatic"; for other crimes, such as possession

of marijuana, additional circumstances must be present. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5(a), at 254-57 (3d ed. 1996).

Washington requires that the officer have an individualized suspicion that the suspect is presently dangerous. *State v. Collins*, 121 Wash. 2d 168, 173, 847 P.2d 919, 922 (1993). *See State v. Smith*, 102 Wash. 2d 449, 452-53, 688 P.2d 146, 148 (1984) (noting that the fact that detention occurs in high crime area is not in itself sufficient to justify search); *State v. Harper*, 33 Wash. App. 507, 511, 655 P.2d 1199, 1201 (1982) (an officer must have a "sufficient basis" to believe that an individual is armed in order to conduct a self-protective search). Thus, police may not take intrusive protective measures when they cannot articulate a reason for believing that a suspect is dangerous other than that the suspect was seen leaving in his car from the scene of a possible burglary. *State v. Williams*, 102 Wash. 2d 733, 740-41, 689 P.2d 1065, 1069-70 (1984). An overt, threatening gesture is not a condition precedent to a seizure. *State v. Perez*, 41 Wash. App. 481, 484-86, 704 P.2d 625, 628-29 (1985) (an officer's observation of a gun on the floor of suspect's car, the driver's bloodshot eyes, and the smell of alcohol constituted reasonable grounds to believe that the suspect was armed and might gain access to the weapon). Frisks have been permitted in a variety of situations. For example, in *State v. Guzman-Cuellar*, 47 Wash. App. 326, 332, 734 P.2d 966, 970 (1987), the officer was justified in initiating a frisk where the suspect matched the description of a murder suspect. *See also State v. Sweet*, 44 Wash. App. 226, 232-33, 721 P.2d 560, 565 (1986) (a suspect's flight from a high crime area when he saw officers and the fact that he dropped a ski mask when apprehended justified reasonable suspicion he was armed and dangerous); *State v. Harvey*, 41 Wash. App. 870, 875, 707 P.2d 146, 149 (1985) (an officer was justified in making a protective search of a burglary suspect on the grounds that it is well-known that burglars often carry weapons); *State v. Galloway*, 14 Wash. App. 200, 202, 540 P.2d 444, 446 (1975) (the defendant entered an apartment during execution of a search warrant and suspiciously kept his hand in his overcoat pocket during police questioning); *State v. Howard*, 7 Wash. App. 668, 673-74, 502 P.2d 1043, 1046-47 (1972) (the defendant parked a car near a residence being searched, and an officer had prior knowledge that defendant carried a concealed knife); *State v. Brooks*, 3 Wash. App. 769, 774-75, 479 P.2d 544, 548 (1970) (the defendant matched the description of a suspect who had fired shots at other officers moments before the stop).

Under certain circumstances, a search may be conducted pursuant to a *Terry* stop even in the absence of grounds for believing that the suspect is armed and dangerous. For example, a police officer may seize property from a suspect if the suspect's actions give rise to a reasonable suspicion that evidence of crime is in danger of being destroyed or lost. *State v. Dorsey*, 40 Wash. App. 459, 472, 698 P.2d 1109, 1117 (1985) (an officer detaining a suspect for questioning about credit card theft observed the suspect shaking his coat so as to apparently dislodge an envelope from the coat pocket that could have contained credit cards).

4.10(a) Scope of a Permissible Frisk

A frisk must be justified not only in its inception, but also in its scope. *State v. Hudson*, 124 Wash. 2d 107, 112, 874 P.2d 160, 163 (1994). The scope of a valid frisk is strictly limited to what is necessary for the discovery of weapons which might be used to harm the officer or others nearby. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968). *See also State v. Alcantara*, 79 Wash. App. 362, 366, 901 P.2d 1087, 1089 (1995) (a search exceeded the scope of *Terry* stop because the officer gave no indication that the search was based on concerns for officer's safety). *Cf. infra* § 5.1 (discussing search incident to arrest). Pat-down searches are permitted if the police officer has reasonable grounds to believe that a suspect is armed and presently dangerous. *State v. Broadnax*, 98 Wash. 2d 289, 293-94, 654 P.2d 96, 101 (1982); *State v. Hobart*, 94 Wash. 2d 437, 441, 617 P.2d 429, 431 (1980). *See also State v. Samsel*, 39 Wash. App. 564, 573, 694 P.2d 670, 676 (1985) (holding that a frisk was reasonable when officers stopped suspects seen entering a taxicab in close spacial and temporal proximity to a robbery, the suspects matched the victim's description of the robbers, and, after stopping the taxicab, officers observed marijuana and a gun holster on the floor of the passenger compartment). A frisk need not conform to the conventional pat-down. *See Adams v. Williams*, 407 U.S. 143, 147-49, 92 S. Ct. 1921, 1923-24, 32 L. Ed. 2d 612, 617-18 (1972) (finding an officer was justified in reaching through a window and removing a revolver from the suspect's waistband when, after the officer had received information that a narcotics suspect was seated in a nearby car and carried a gun in his waistband, the first suspect refused to comply with officer's request to step out of the car); *see also* 4 LAFAVE, SEARCH AND SEIZURE § 9.5(b), at 271; *supra* § 4.7(c)-(d).

A Washington court has upheld an officer's grab at a suspect's hand when the suspect furtively withdrew his hand from his pocket

and thrust it behind his back. *State v. Serrano*, 14 Wash. App. 462, 469, 544 P.2d 101, 106 (1975). Although the court reasoned that the officer's reflexive action was not actually a search, the *Terry* principle that officers may act to protect themselves also justified the interference. *Id.*

While the scope of the search should be sufficient to assure the officer's safety, it should be strictly limited to the purpose for which it is permitted. *State v. Franklin*, 41 Wash. App. 409, 414, 704 P.2d 666, 670 (1985) (finding that a search of a suspect's tote bag is allowed when (1) an officer is informed that the suspect had a gun, (2) the officer immediately confronted the suspect, and (3) the suspect admitted that a weapon was in the tote bag). When in the course of a frisk an officer feels what may be a weapon, the officer may take only such action as is necessary to examine the object. *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884-85, 20 L. Ed. 2d at 911. Once police ascertain that no weapon is involved, their authority to conduct even a limited search ends. *Hudson*, 124 Wash. 2d. at 111, 874 P.2d at 163 (once an officer ascertains that the defendant has no weapon, the officer's limited authority to search is spent absent probable cause). *See also Hobart*, 94 Wash. 2d at 446, 617 P.2d at 433. *See generally* 4 LAFAVE, SEARCH AND SEIZURE § 9.5(c).

4.10(b) Frisks of Persons in Proximity to Suspect

Police may not frisk persons present on the premises of a place being lawfully searched absent a reasonable suspicion that such persons are armed. *See Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *supra* § 3.8(a). Similarly, police may not take protective measures such as searching the purse of a vehicle's passenger when the driver is stopped on the basis of a traffic violation absent a reasonable suspicion that the passenger is involved in criminal conduct. *State v. Larson*, 93 Wash. 2d 638, 642, 611 P.2d 771, 774 (1980). When an officer makes a lawful investigative stop and has objective reasons for believing that there may be a weapon in the vehicle, the officer may make a limited search of the passenger compartment for weapons within the area of control of the suspect and any other passenger in the vehicle. *State v. Kennedy*, 107 Wash. 2d 1, 12, 726 P.2d 445, 451 (1986). Thus, a passenger in a vehicle stopped for a traffic offense committed by the driver may be frisked if there are reasonable grounds to believe that he is armed and dangerous. *See State v. McIntosh*, 42 Wash. App. 579, 582-83, 712 P.2d 323, 325 (1986) (investigating officer noticed the driver was armed with a knife and saw a weapon-like object under front seat of the car); *see also State*

v. Coahran, 27 Wash. App. 664, 620 P.2d 116 (1980) (when the driver is lawfully stopped for reasons pertaining to handgun possession and threats of violence, a protective frisk of a passenger is permitted). One commentator suggests that the appropriate inquiry is whether the officer is under a reasonable apprehension of danger—a determination that depends on the nature of the crime, the time and place of the arrest, the number of officers and suspects, and whether the companion has made any threatening movements. *See* 4 LAFAVE, SEARCH AND SEIZURE § 9.5(a), at 263-64.

4.10(c) Other Protective Measures Besides Frisks

An officer may take self-protective measures other than a frisk. For instance, a police officer may order a driver who has been validly stopped to get out of his or her car, regardless of whether the driver is suspected of being armed or dangerous or whether the offense under investigation is a serious one. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 333, 54 L. Ed. 2d 331, 337 (1977) (noting that intrusion is de minimis while risks confronting an officer are substantial). *See also State v. Kennedy*, 107 Wash. 2d 1, 726 P.2d 445 (1986). Lower courts have not agreed on whether *Mimms* extends to passengers. *See* 3 LAFAVE, SEARCH AND SEIZURE § 5.2(h), at 97-98.

4.10(d) Search of Area: Measures Besides Frisks

Officers may extend a *Terry* search for weapons to the passenger compartment of a detained person's vehicle when the police have a reasonable belief that the suspect is both dangerous and within easy access of a weapon in the vehicle. *Michigan v. Long*, 463 U.S. 1032, 1049-50, 103 S. Ct. 3469, 3481, 77 L. Ed. 2d 1201, 1220 (1983). *See also State v. Kennedy*, 107 Wash. 2d 1, 12, 726 P.2d 445, 451 (1986) (while stopping a suspect's vehicle for investigation of possible drug buy, an officer observed the suspect leaning forward as though to place something under seat); *State v. McIntosh*, 42 Wash. App. 579, 582-84, 712 P.2d 323, 325 (1986) (finding a search appropriate when the driver of a vehicle was armed with a knife and a weapon-like object visibly protruded from under passenger seat); *State v. Perez*, 41 Wash. App. 481, 485, 704 P.2d 625, 629 (1985). A police officer may search a container carried by a suspect who is detained for questioning if the officer reasonably believes that the suspect possesses a weapon and that the suspect has told the officer that a weapon is in the container. *See State v. Franklin*, 41 Wash. App. 409, 415, 704 P.2d 666, 670 (1985) (backpack). For a discussion of whether an officer may search items

carried by a suspect, *see generally* 4 LAFAVE, SEARCH AND SEIZURE § 9.5(e).

CHAPTER 5: WARRANTLESS SEARCHES AND SEIZURES: THE EXCEPTIONS TO THE WARRANT REQUIREMENT

5.0 Introduction

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967) (footnotes omitted). *See also Minnesota v. Dickerson*, 508 U.S. 366, 371-72, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334, 343-44 (1993); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564, 576 (1971).

The following sections examine the various "jealously and carefully drawn" exceptions to the warrant requirement. *Coolidge*, 403 U.S. at 454-55, 91 S. Ct. at 2031-32, 29 L. Ed. 2d at 564; *State v. Hendrickson*, 129 Wash. 2d 61, 71, 917 P.2d 563, 569 (1996). Note that the burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the Fourth Amendment requirement. *State v. Johnson*, 128 Wash. 2d 431, 447, 909 P.2d 293, 302 (1996). In addition, even when a search or seizure falls within one of the exceptions to the warrant requirement, it may be invalid if other rights are infringed. *See, e.g., United States v. Sherwin*, 572 F.2d 196, 200 (9th Cir. 1977) (plain view seizure of photographs of sexual activity invalid; the officers' determination that photographs were obscene violated the First Amendment).

5.1 Search Incident to Arrest

Police may conduct a warrantless search and seizure incident to a lawful arrest.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary item must, of course, be governed by a like rule. . . . There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate con-

> trol"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2039-40, 23 L. Ed. 2d 685, 693-94 (1969).

The "search incident to arrest" exception to the warrant requirement applies only when: (1) there was a valid arrest, and (2) the search incident to the arrest was "restricted in time and place in relation to the arrestee and the arrest" as opposed to "wide-ranging, exploratory[] rummaging[] [and] ransacking." *State v. Smith*, 88 Wash. 2d 127, 135, 559 P.2d 970, 974 (1977).

As the following section will demonstrate, the search incident to arrest exception to the warrant requirement is subject to a different analysis under the Washington Constitution than under the Fourth Amendment.

5.1(a) Lawful Arrest

The criteria for a lawful arrest are discussed in Chapter 4, *supra*. If the arrest is invalid, then the search incident to the arrest is invalid. *State v. Hehman*, 90 Wash. 2d 45, 50, 578 P.2d 527, 529 (1978); *State v. Terrazas*, 71 Wash. App. 873, 878, 863 P.2d 75, 78-79 (1993). *Cf. State v. Rife*, 133 Wash. 2d 140, 150, 943 P.2d 266, 270 (1997) (the police conducted an unauthorized warrant check after stopping a pedestrian for jaywalking and illegally seizing the defendant; the court found that heroin discovered during the subsequent search incident to the arrest was inadmissible).

If an arrest is lawful, then a search incident to that arrest is permissible. *State v. Johnson*, 77 Wash. App. 441, 443, 892 P.2d 106, 108 (1995), *aff'd*, 128 Wash. 2d 431, 909 P.2d 293 (1996). *See also State v. White*, 129 Wash. 2d 105, 112, 915 P.2d 1099, 1102-03 (1996) (a warrantless search is not presumed to be invalid under the Fourth Amendment if it is made incident to a lawful arrest); *State v. Stroud*, 106 Wash. 2d 144, 164, 720 P.2d 436, 440-41 (1986). Even when an arrest is valid, however, a search is not properly "incident" to the arrest if the arrest is merely a pretext for conducting a search to obtain evidence of a different offense. *State v. Johnson*, 71 Wash. 2d 239, 242-43, 427 P.2d 705, 707 (1967). *Cf. State v. Carner*, 28 Wash. App.

439, 445, 624 P.2d 204, 208 (1981) (holding that a second body search made after the decision to release the defendant and in retaliation for his remarks was invalid, even when the arrest and initial search were valid).

Property seized incident to a lawful arrest may be used to prosecute the arrested person for a crime other than the one for which the person was initially arrested so long as the initial arrest was not merely a pretext to conduct a search for evidence of some other offense. *State v. Smith*, 119 Wash. 2d 675, 681, 835 P.2d 1025, 1029 (1992) (finding that after a lawful arrest for consuming liquor in public, drug paraphernalia found in the defendant's fanny pack during the search was admissible). *See also State v. Gammon*, 61 Wash. App. 858, 863, 812 P.2d 885, 888 (1991); *State v. LaTourette*, 49 Wash. App. 119, 127-29, 741 P.2d 1033, 1037-38 (1987); *State v. White*, 44 Wash. App. 276, 278, 722 P.2d 118, 119 (1986).

The search incident to arrest exception requires a custodial arrest. *See Hehman*, 90 Wash. 2d at 50, 578 P.2d at 529. In Washington, a custodial arrest for minor traffic violations is generally not permitted. With limited exceptions, moreover, officers are required to cite and release motorists stopped for minor traffic offenses if the motorist gives a signed promise to appear in court. *See* WASH. REV. CODE § 46.64.015 (1996); *State v. Reding*, 119 Wash. 2d 685, 689-90, 835 P.2d 1019, 1021-22 (1992). Moreover, under Washington law, officers explicitly do not have the authority to arrest after witnessing only a minor traffic infraction. WASH. REV. CODE § 46.63.020 (1996). Thus, a search incident to a stop for a minor traffic violation is generally unlawful. *See State v. Terrazas*, 71 Wash. App. 873, 875, 863 P.2d 75, 77 (1993).

Police officers are authorized to make a custodial arrest for a traffic violation if: (1) the motorist refuses to sign a written promise to appear in court; (2) the motorist is a nonresident arrestee; or (3) the violation is one of the "nonminor" traffic violations specifically designated in WASH. REV. CODE § 10.31.100 (1996). *See* WASH. REV. CODE § 46.64.015(1)-(3) (1996). So long as one of these three conditions is met, police need no additional justification for a search. In the absence of one of these conditions, however, police need other reasonable grounds to arrest and conduct a valid search incident to arrest if a motorist is stopped for a "minor" traffic violation. *See State v. Reding*, 119 Wash. 2d 685, 691-92, 835 P.2d 1019, 1022-23 (1992) (upholding custodial arrest for the nonminor offense of reckless driving); *Terrazas*, 71 Wash. App. at 875-78, 863 P.2d at 77 (an officer may arrest a defendant for driving without a valid driver's

license only if facts suggest the defendant will not appear in court if cited and released).

5.1(b) "Immediate Control"

In determining whether, under the Fourth Amendment, the area searched or the object seized was within the "immediate control" of the defendant, courts have recognized that "there can be no hard and fast rule." *People v. Williams*, 311 N.E.2d 681, 685 (Ill. 1974). Factors that have been considered include: (1) whether the arrestee was physically restrained; (2) the position of the officer in relation to the defendant and the place searched; (3) the difficulty of gaining access into the container or enclosure searched; and (4) the number of officers present as compared with the number of arrestees or other persons. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.3(c), at 306-07 (3d ed. 1996). *See also* 3 LAFAVE, SEARCH AND SEIZURE § 7.1(b), at 438-40. For the purposes of a search incident to an arrest, an object or container is considered to be within the control of an arrestee if the object is within the arrestee's reach immediately prior to, or at the moment of, the arrest. *Smith*, 119 Wash. 2d at 681-82, 835 P.2d at 1029 (upholding search of a fanny pack that was within one or two steps of the defendant at the time of the arrest). *See also United States v. Turner*, 926 F.2d 883, 888 (9th Cir. 1991) (plastic baggies under arrestee's pillow); *United States v. Andersson*, 813 F.2d 1450, 1455 (9th Cir. 1987) (closed suitcase on the bed next to arrestee).

Under the Fourth Amendment and in certain limited situations, some courts have permitted police to extend a search incident to an arrest in the home into an area that is beyond the arrestee's immediate control. If the police permit an arrestee to move into other rooms to gather clothing, for example, the police may accompany the arrestee and search the rooms and any areas, such as closets or bureau drawers, where the arrestee has been. *See* 3 LAFAVE, SEARCH AND SEIZURE § 6.4(a), at 313-15. Courts have also permitted police to search premises to determine whether accomplices who could aid the arrestee are present, *id.* § 6.4(b), at 320, and to conduct a protective sweep of the premises when the officers fear that third parties may offer resistance, *id.* § 6.4(c), at 323-25. *See also Maryland v. Buie*, 494 U.S. 325, 333-36, 110 S. Ct. 1093, 1098-99, 108 L. Ed. 2d 276, 288 (1990).

Article I, section 7 of the Washington Constitution provides greater restraints on the police than the Fourth Amendment when the arrestee is in his or her home. Entry into rooms beyond the immediate control of the suspect requires a reasonable fear for police safety or a

belief that the arrestee is about to destroy evidence or escape. *See State v. Chrisman*, 100 Wash. 2d 814, 821, 676 P.2d 419, 423 (1984); *State v. McKinney*, 49 Wash. App. 850, 857, 746 P.2d 835, 839 (1987) (finding a warrantless entry into a home justified by the risk that the suspect identified in a search warrant might escape); *cf. Washington v. Chrisman*, 455 U.S. 1, 7, 102 S. Ct. 812, 817, 70 L. Ed. 2d 778, 785 (1982); 3 LAFAVE, SEARCH AND SEIZURE §§ 6.3(c), at 305-06; 6.4(a)-(c), at 312-35; 7.1(b), at 438.

For a discussion of automobile searches incident to arrest, see *infra* § 5.2(b).

5.2 Immediate Control or Permissible Scope: Particular Applications

5.2(a) The Defendant

Under the Fourth Amendment, an officer may search an arrestee who has been taken into custody even when the officer does not believe that the arrestee is armed or in possession of evidence of the crime for which the suspect was arrested. *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 477, 38 L. Ed. 2d 427, 440-41 (1973). The lawful arrest establishes the authority to search the arrestee; the arresting officer need not have a subjective fear that an arrestee is armed or will destroy evidence. *Gustafson v. Florida*, 414 U.S. 260, 263-64, 94 S. Ct. 488, 491, 38 L. Ed. 2d 456, 460 (1973). Thus, the rule applies even when the custodial arrest follows a stop for a minor traffic violation unless such an arrest would be illegal. *Robinson*, 414 U.S. at 235, 94 S. Ct. at 477, 38 L. Ed. 2d at 440-41. *See State v. Reding*, 119 Wash. 2d 685, 691-92, 835 P.2d 1019, 1022-23 (1992).

Under article I, section 7 of the Washington Constitution, an arrestee has a diminished expectation of privacy that permits an officer to search an arrestee's clothing, including small containers found on it. *State v. Smith*, 119 Wash. 2d 675, 681-82, 835 P.2d 1025, 1029 (1992) (upholding search of fanny pack following lawful arrest); *State v. Gammon*, 61 Wash. App. 858, 864, 812 P.2d 885, 888 (1991) (upholding search of prescription pill bottle found on defendant following lawful arrest); *State v. White*, 44 Wash. App. 276, 278, 722 P.2d 118, 120 (1986) (upholding police examination of cosmetic case found in arrestee's coat pocket). However, a greater expectation of privacy is extended to possessions that are not closely related to the person's clothing, such as "purses, briefcases or luggage," and some additional reason justifying the search of those items must be present. *White*, 44 Wash. App. at 279, 722 P.2d at 121. *See also State v. Kealey*, 80 Wash. App. 162, 170, 907 P.2d 319, 324 (1995) (stating

that "a purse is inevitably associated with an expectation of privacy"). In addition, an arrestee does not have to be in actual physical possession of a container at the time of the search, so long as the container is within the arrestee's reach. *Smith*, 119 Wash. 2d at 681, 835 P.2d at 1028-29; *Gammon*, 61 Wash. App. at 863-64, 812 P.2d at 888. Note that purses voluntarily left in automobiles may be searched incident to a lawful arrest of either the passenger or driver as part of the search of the passenger compartment of an automobile. *State v. Fladebo*, 113 Wash. 2d 388, 395, 779 P.2d 707, 711-12 (1989). For a discussion of the search of purses in conjunction with automobile searches, see *infra* § 5.2(b).

Evidence seized pursuant to the search of an arrestee's person does not need to relate to the crime for which the defendant was arrested, nor must the grounds for the initial search encompass the evidence seized. *See Smith*, 119 Wash. 2d at 681, 835 P.2d at 1029 (allowing admission of drug paraphernalia found in a fanny pack during a search subsequent to a lawful arrest for consuming liquor in public); *see also Gammon*, 61 Wash. App. at 863, 812 P.2d at 888; *State v. LaTourette*, 49 Wash. App 119, 127-28, 741 P.2d 1033, 1037-38 (1987); *White*, 44 Wash. App. at 278, 722 P.2d at 119.

An intrusion into a suspect's body, such as by drawing blood samples, is a search and seizure under the Fourth Amendment and article I, section 7 of the state constitution, and is not, therefore, justifiable under the search incident to arrest exception to the warrant requirement. *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *State v. Dunivin*, 65 Wash. App. 501, 507, 828 P.2d 1150, 1153-54 (1992). However, such intrusions may be justified by the exigent circumstances exception. *Schmerber*, 384 U.S. at 770-71, 86 S. Ct. at 1835-36, 16 L. Ed. 2d at 919-20. *See generally infra* § 5.18(a) and *supra* § 3.13(b); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.3(c), at 135 (3d ed. 1996). In Washington, blood tests of motorists arrested for vehicular homicide are authorized by statute and justified by the implied consent exception to the warrant requirement. WASH. REV. CODE § 46.20.308 (1996); *State v. Curran*, 116 Wash. 2d 174, 184-85, 804 P.2d 558, 564-65 (1991), *abrogated on other grounds by State v. Berlin*, 133 Wash. 2d 541, 547-49, 947 P.2d 700, 703 (1997).

The *Schmerber* rule does not apply to less intrusive physical measures such as a chokehold intended to prevent a suspect from swallowing apparent contraband. *See State v. Taplin*, 36 Wash. App. 664, 666-67, 676 P.2d 504, 506 (1984); *State v. Williams*, 16 Wash. App. 868, 871-72, 560 P.2d 1160, 1163 (1977). Officers attempting

to prevent a suspect from swallowing evidence may not, however, prevent the suspect from breathing or obstruct the suspect's blood supply to the head, although they may pinch his mouth shut. *Williams*, 16 Wash. App. at 872, 560 P.2d at 1163. More aggressive conduct, such as jumping on the suspect, is likely to violate due process rights. *Id.* at 870, 560 P.2d at 1162. *See Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209-11, 96 L. Ed. 183, 190 (1952). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 5.2(i). For a brief discussion of post-detention body searches, see *infra* § 6.2(d).

5.2(b) Vehicles and Containers

Under both article I, section 7 and the Fourth Amendment, police may search the passenger compartment of an automobile as a search incident to the arrest of an occupant. *New York v. Belton*, 453 U.S. 454, 460-62, 101 S. Ct. 2860, 2864-65, 69 L. Ed. 2d 768, 775-76 (1981); *State v. Stroud*, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986). *See also State v. Hill*, 68 Wash. App. 300, 308, 842 P.2d 996, 1000 (1993) (search of passenger compartment incident to arrest of passenger was valid under article I, section 7). Under the Fourth Amendment, the passenger compartment is considered within the arrestee's immediate control even after the arrestee has been placed in police custody. *Belton*, 453 U.S. at 460, 101 S. Ct. at 2864, 69 L. Ed. 2d at 774.

Under article I, section 7, however, such a search must take place "immediately subsequent" to the suspect's arrest and his or her placement in the police car. *State v. Fladebo*, 113 Wash. 2d 388, 395-97, 779 P.2d 707, 712 (1989); *Stroud*, 106 Wash. 2d at 152, 720 P.2d at 441; *State v. Cass*, 62 Wash. App. 793, 795-97, 816 P.2d 57, 58-59 (1991). When a subject has stepped out of a vehicle during a lawful investigative stop, the officer may make a limited search of the passenger compartment for weapons within the area of the suspect's control and the control of any other passenger in the vehicle if the police officer has objective reasons for believing that there may be a weapon in the vehicle. *State v. Kennedy*, 107 Wash. 2d 1, 12-13, 726 P.2d 445, 451-52 (1986) (finding that a limited search was justified after an officer saw the defendant lean forward as if putting something under the seat); *State v. Larson*, 88 Wash. App. 849, 850-51, 946 P.2d 1212, 1214 (1997). The justification for a warrantless search incident to an arrest is lost if the defendant is removed from the scene. *State v. Boyce*, 52 Wash. App. 274, 277-78, 758 P.2d 1017, 1018-19 (1988).

Under the Fourth Amendment, any containers in the passenger compartment may be searched, whether the containers are locked or

unlocked. *Belton*, 453 U. S. at 460-61, 101 S. Ct. at 2864, 69 L. Ed. 2d at 768. Under article I, section 7, the search may not include any locked containers, including a locked glove compartment. *Stroud*, 106 Wash. 2d at 152, 720 P.2d at 440; *State v. Perea*, 85 Wash. App. 339, 343-44, 932 P.2d 1258, 1260 (1997). The lawful scope does, however, extend to "all space reachable without exiting the vehicle," including the sleeper compartment of a tractor-trailer rig. *State v. Johnson*, 77 Wash. App. 441, 444-45, 892 P.2d 106, 109 (1995) (citing 3 LAFAVE, SEARCH AND SEIZURE § 7.1(c), at 450-51), *aff'd*, 128 Wash. 2d 431, 909 P.2d 293 (1996). *See also State v. Davis*, 79 Wash. App. 355, 360-62, 901 P.2d 1094, 1097-98 (1995).

Purses voluntarily left in the passenger compartment may be searched incident to arrest of an occupant whether the purse is owned by the arrestee or another occupant. *See Fladebo*, 113 Wash. 2d at 395-96, 779 P.2d at 711-12; *State v. Parker*, 88 Wash. App. 273, 280, 944 P.2d 1081, 1085 (1997). Washington courts currently disagree as to whether the search of a purse is lawful when the defendant involuntarily leaves her purse in the vehicle. *Compare State v. Nelson*, 89 Wash. App. 179, 183, 948 P.2d 1314, 1316 (1997) (determining that police may not search a purse that is involuntarily left in the passenger compartment), *with State v. Hunnel*, 89 Wash. App. 638, 639-43, 949 P.2d 847, 850 (1998) (finding that a purse is a searchable container under *Belton* when a police officer ordered the defendant to leave the purse behind when she exited the vehicle). Note that the valid arrest of a driver does not justify the warrantless search of a passenger's purse where the purse is on the passenger's person and the passenger is outside the vehicle unless police have some articulable suspicion that criminal conduct has occurred or is about to occur. *State v. Seitz*, 86 Wash. App. 865, 869, 941 P.2d 5, 8 (1997).

The locked trunk of an automobile that is inaccessible from the interior of the car is not considered part of the passenger compartment; a search warrant is, therefore, required to conduct a lawful search. *See Belton*, 453 U.S. at 460 n.4, 101 S. Ct. at 2684 n.4, 69 L. Ed. 2d at 775 n.4 ("interior of the passenger compartment . . . does not encompass the trunk"); *Davis*, 79 Wash. App. at 361, 901 P.2d at 1097. Federal courts have interpreted "passenger compartment" to encompass the hatch area of a hatchback automobile. *See, e.g., United States v. Doward*, 41 F.3d 789, 793 (1st Cir. 1994). The engine compartment is not considered to be part of the passenger compartment and cannot be searched without a warrant under the search incident to arrest exception. *State v. Mitzlaff*, 80 Wash. App. 184, 188, 907 P.2d 328, 330 (1995). A warrantless search of an automobile

is not permitted incident to an arrest if the defendant lawfully exits and locks the vehicle prior to arrest. *Perea*, 85 Wash. App. at 344-45, 932 P.2d at 1260-61.

When police have probable cause to believe that an automobile contains contraband or evidence, whether or not they have probable cause to arrest the vehicle's occupants, they may have authority to search the vehicle without a warrant pursuant to one of the other exceptions to the warrant requirement. *See generally infra* §§ 5.21-5.23. Under the Fourth Amendment, the police may search any container located within an automobile, even if they lack probable cause to search the vehicle as a whole, if they have probable cause to believe that the container itself holds contraband. *California v. Acevedo*, 500 U.S. 565, 573, 111 S. Ct. 1982, 1988, 114 L. Ed. 2d 619, 630 (1991). In order to provide the necessary added protection guaranteed by article I, section 7, however, the court will require "virtual certainty that the container, in the circumstances viewed, holds contraband, as if transparent." *State v. Courcy*, 48 Wash. App. 326, 332, 739 P.2d 98, 102 (1987) (during a lawful *Terry* stop an officer viewed a precisely folded paper "bindle," commonly used to package cocaine, in the suspect's identification folder; the officer was justified in seizing the "bindle" and opening it). However, an automobile occupant does not have a legitimate expectation of privacy in property viewed through a vehicle window, and such objects may fall within the "open view" or "plain view" warrant exceptions. *State v. Ozuna*, 80 Wash. App. 684, 689-90, 911 P.2d 395, 399 (1996); *State v. Gonzales*, 46 Wash. App. 388, 397, 731 P.2d 1101, 1107 (1986).

5.3 Pre-Arrest Search

If a warrantless search is closely related in time and place to a lawful arrest, even if it occurs before the arrest, the search may be considered incidental to the arrest and, therefore, valid as long as probable cause to arrest exists at the time of the search. *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 2564, 65 L. Ed. 2d 633, 645-46 (1980); *State v. Smith*, 88 Wash. 2d 127, 138, 559 P. 2d 970, 975 (1977); *State v. Harrel*, 83 Wash. App. 393, 400, 923 P.2d 698, 702 (1996). Note, however, that if probable cause does not exist at the time of the search, a search that provides probable cause is not considered a valid search incident to arrest. *Smith v. Ohio*, 494 U.S. 541, 543, 110 S. Ct. 1288, 1290, 108 L. Ed. 2d 464, 467-68 (1990) (the warrantless search of the defendant's paper bag could not be justified as a search incident to arrest when the bag contained drug paraphernalia and the search was followed by the arrest of the

defendant for drug abuse). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.5(a)-(d) (3d ed. 1996).

Under limited circumstances, pre-arrest searches are permitted even when the arrest does not closely follow the search. A search may be considered incident to the arrest of a suspect when the police have probable cause, believe the suspect is in the process of destroying highly evanescent evidence, and when the evidence can be preserved by a limited search. *Cupp v. Murphy*, 412 U.S. 291, 296, 93 S. Ct. 2000, 2004, 36 L. Ed. 2d 900, 906 (1973). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 5.4(b); *Smith*, 88 Wash. 2d at 137-38, 559 P.2d at 975 (upholding an officer's seizure of evidence prior to arrest because of exigent circumstance of its possible destruction). Pre-arrest searches are *Terry* searches and should be subject to the same standard applied and discussed *supra* §§ 4.5-4.9.

5.4 *Post-Detention Searches: Searches Incident to Arrest and Inventory Searches*

5.4(a) Post-Detention Searches Incident to Arrest

The search incident to arrest exception can apply both to a search at the place of detention as well as to a search at the place of arrest. *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.3(a) (3d ed. 1996). However, a significant delay between the arrest and the search will render the search unreasonable, since the search is no longer contemporaneous with the arrest. *State v. Smith*, 119 Wash. 2d 675, 683, 835 P.2d 1025, 1030 (1992) (delay of seventeen minutes between arrest and search of a fanny pack was not unreasonable under the circumstances). Whether a delay is sufficient to render a search unreasonable and no longer valid under the search incident to arrest exception depends on the facts of the individual case. *Id.* at 683 n.4, 835 P.2d at 1030 n.4. *See also United States v. Vasey*, 834 F.2d 782, 787-88 (9th Cir. 1987).

Any post-arrest search is unlawful, however, if probable cause to arrest dissipates by the time the suspect is taken into custody. A difficult question arises when a suspect is detained only because the police have failed to comply with laws allowing release. *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 5.3(d).

Under the Fourth Amendment, when an arrestee is searched upon booking, officers may later conduct a warrantless "second look" into the arrestee's belongings. *United States v. Edwards*, 415 U.S. 800, 805, 94 S. Ct. 1234, 1238, 39 L. Ed. 2d 771, 777 (1974) (a search of the

defendant's personal belongings long after the defendant had been searched and placed in a jail cell was a permissible search incident to an arrest). *See* 3 LAFAVE, SEARCH AND SEIZURE § 5.3(b), at 123 (*Edwards* requires that (1) the object seized must come into plain view at the time of arrival at the place of detention, (2) later investigation must establish that the object has evidentiary value, and (3) the object must remain in police custody as part of the arrestee's inventoried property); *see also United States v. Passaro*, 624 F.2d 938, 943 (9th Cir. 1980).

Under Washington law, probable cause is required for a "second look." When the actions of the person detained in the course of an investigative stop give rise to a reasonable suspicion by an officer that the person is attempting to destroy or rid himself or herself of evidence, seizure of that evidence is permissible. *State v. Dorsey*, 40 Wash. App. 459, 472, 698 P.2d 1109, 1116-17 (1985) (officers observed the detainee's attempt to rid himself of an envelope that protruded from detainee's coat pocket). If probable cause to arrest exists or the elements of "plain view" are satisfied, no warrant is necessary to further examine that evidence. *State v. Alcantara*, 79 Wash. App. 362, 366, 901 P.2d 1087, 1089 (1995); *State v. Pressley*, 64 Wash. App. 591, 598, 825 P.2d 749, 753 (1992). *See also State v. Simpson*, 95 Wash. 2d 170, 194, 622 P.2d 1199, 1214 (1980) (Utter, J., concurring) (probable cause was required for a detailed, post-booking search through the arrestee's personal belongings stored in a police property box).

A search conducted after police have decided to release a suspect is improper when there is no probability that the suspect possesses relevant evidence or weapons. *State v. Carner*, 28 Wash. App. 439, 445, 624 P.2d 204, 207-08 (1981). *See also generally* 3 LAFAVE, SEARCH AND SEIZURE § 5.3(a)-(d).

5.4(b) Post-Detention Inventory Search

Under the Fourth Amendment and article I, section 7, police officers may search containers or packages as part of an inventory of the arrestee's possessions prior to storage of the items for safekeeping. *Illinois v. Lafayette*, 462 U.S. 640, 643-48, 103 S. Ct. 2605, 2608-09, 77 L. Ed. 2d 65, 69-71 (1983); *State v. Smith*, 76 Wash. App. 9, 16, 882 P.2d 190, 194 (1994). These "caretaking procedures" are constitutionally permissible under the Fourth Amendment's standard of "reasonableness." *South Dakota v. Opperman*, 428 U.S. 364, 369-70, 96 S. Ct. 3092, 3097-98, 49 L. Ed. 2d 1000, 1005-06 (1976). The police need not have probable cause to believe that the containers

conceal evidence of a crime, nor must they fear concealed weapons. *United States v. Chadwick*, 433 U.S. 1, 10 n.5, 97 S. Ct. 2476, 2482-83 n.5, 53 L. Ed. 2d 538, 547 n.5 (1977). However, an inventory search which is "a ruse for a general rummaging in order to discover incriminating evidence" is unreasonable. *Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 1635, 109 L. Ed. 2d 1, 6 (1990). *See also State v. Mireles*, 73 Wash. App. 605, 612, 871 P.2d 162, 165-66 (1994). The police have some obligation to safeguard the container and its contents when they seize it. *Chadwick*, 433 U.S. at 19, 97 S. Ct. at 2487, 53 L. Ed. 2d at 553. The ability of police to do an inventory search without a warrant makes it significant whether the defendant is arrested in a private place or in a public place. *Id.* (when a person is arrested in a public place, it is reasonable for police to take custody of the arrestee's property rather than to leave the property in the public place while a warrant is obtained). Lower courts have reached consistent results as to whether police may conduct an item-by-item inventory of contents. *See* 3 LAFAVE, SEARCH AND SEIZURE § 5.5(b), at 183-84.

Consistent with the greater protection provided under article I, section 7, inventory searches in Washington must be conducted "in good faith for the purposes of (1) finding, listing, and securing from loss during detention, property belonging to a detained person, (2) protecting police from liability due to dishonest claims of theft, and (3) protecting temporary storage bailees against false charges." *Smith*, 76 Wash. App. at 16, 882 P.2d at 194. *See also State v. Houser*, 95 Wash. 2d 143, 154, 622 P.2d 1218, 1225 (1980); *State v. Gluck*, 83 Wash. 2d 424, 428, 518 P.2d 703, 706-07 (1974). Search of a defendant's purse upon arrival at jail has been upheld under article I, section 7. *Smith*, 76 Wash. App. at 15-16, 882 P.2d at 194-95. *But see State v. Smith*, 56 Wash. App. 145, 151, 783 P.2d 95, 98 (1989) (holding that a booking search of an arrestee's purse was unlawful).

Under both the Fourth Amendment and article I, section 7, the police may conduct an inventory search of a validly impounded automobile, and containers discovered during the inventory search may be opened without a warrant. *See Colorado v. Bertine*, 479 U.S. 367, 374-75, 107 S. Ct. 738, 742-43, 93 L. Ed. 2d 739, 747-48 (1987); *State v. McFadden*, 63 Wash. App. 441, 448, 820 P.2d 53, 56 (1991); *see also infra* § 5.28. The scope of a lawful inventory search of an automobile is not exceeded if the police access the trunk via an automatic release button located in the passenger compartment. *State v. White*, 83 Wash. App. 770, 779, 924 P.2d 55, 59 (1996).

5.5 Searches Conducted in Good Faith and Without Purpose of Finding Evidence: Community Caretaking and Medical Emergency

If officers undertake a search in good faith for a reason other than investigating a crime—for example, to aid someone who has been injured—any evidence they discover may be admissible under the Fourth Amendment. *United States v. Rodriguez-Morales* 929 F.2d 780, 784-85 (1st Cir. 1991); *State v. Gocken*, 71 Wash. App. 267, 274-77, 857 P.2d 1074, 1079-81 (1993); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.4(c), at 163 (3d ed. 1996). These searches are justified on the basis of police "community caretaking" functions, such as rendering aid to individuals in danger of physical harm and providing services on an emergency basis. *See Kalmas v. Wagner*, 133 Wash. 2d 210, 216-17, 943 P.2d 1369, 1372 (1997) (no Fourth Amendment violation for a warrantless entry when police responded to a 911 call asking for police assistance); *State v. Lynch*, 84 Wash. App. 467, 476-79, 929 P.2d 460, 465 (1996). Thus, even when police lack probable cause to believe a crime has been committed, they may conduct a warrantless search of a premises when the premises contain persons in imminent danger of death or harm; objects likely to burn, explode, or otherwise cause harm; or information that will disclose the location of a threatened victim or the existence of such a threat. *Cf. State v. Menz*, 75 Wash. App. 351, 353-56, 880 P.2d 48, 49-50 (1994) (police entry was justified when in response to a domestic violence call). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 5.5(d).

Under article I, section 7, for an officer's warrantless entry to come within the medical emergency exception to the warrant requirement, (1) the officer must subjectively believe that someone is in need of assistance for health or safety reasons; (2) a reasonable person in the same situation would also believe a need for assistance exists; and (3) a reasonable basis must exist for associating the need for assistance with the place searched. *State v. Davis*, 86 Wash. App. 414, 420, 937 P.2d 1110, 1114 (1997); *Gocken*, 71 Wash. App. at 274-77, 857 P.2d at 1079-80. The officer's warrantless entry must be motivated by a need to render assistance and not merely a pretext for obtaining evidence that would otherwise be unavailable. *Gocken*, 71 Wash. App. at 275, 857 P.2d at 1080. Consequently, the officer must be able to articulate specific facts and reasonable inferences drawn therefrom which justify the warrantless entry. *Davis*, 86 Wash. App. at 420-22, 937 P.2d at 1114 (entry was proper when, after check-out time, the

motel occupant did not respond to repeated telephone calls and knocks at the door).

Police may make a warrantless entry into a residence in response to a report of domestic violence under the emergency exception. *Menz*, 75 Wash. App. at 353, 880 P.2d at 49. "Police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants" of a residence. *State v. Raines*, 55 Wash. App. 459, 465, 778 P.2d 538, 542 (1989).

When the medical emergency is a homicide, the officer may not only enter to attempt aiding the victim, but may also make a quick check to see if the perpetrator or other victims are present. *See Thompson v. Louisiana*, 469 U.S. 17, 22, 105 S. Ct. 409, 412, 83 L. Ed. 2d 246, 251 (1984) (no "murder scene" warrant exception; other exceptions justify warrantless search); *State v. Stevenson*, 55 Wash. App. 725, 729-30, 780 P.2d 873, 876 (1989). Thus, any evidence observed in plain view during the course of legitimate police emergency activities at the scene may be seized. *Stevenson*, 55 Wash. App. at 730, 780 P.2d at 876. Any such search must be brief; a general exploratory search lasting several hours is not permissible. *Thompson*, 469 U.S. at 22, 105 S. Ct. at 412, 83 L. Ed. 2d at 251. *Cf. supra* § 5.1(b).

In the course of rendering aid, police may conduct a warrantless search of a victim's personal effects so long as the search is motivated by a need to render assistance. *State v. Loewen*, 97 Wash. 2d 562, 568, 647 P.2d 489, 493 (1982) (the search of the defendant's tote bag for identification was improper when the defendant regained consciousness prior to the search); *see also Chavis v. Wainwright*, 488 F.2d 1077, 1078 (5th Cir. 1973) (police were justified in making an inventory search of the defendant's clothing and effects when removed in the hospital during the defendant's treatment and when police were required to keep the clothing and effects as evidence of possible homicide); *United States v. Dunavan*, 485 F.2d 201, 203 (6th Cir. 1973) (when taking a person to the hospital, police may search his or her briefcase for the purpose of establishing identity); *cf. State v. Dempsey*, 88 Wash. App. 918, 922, 947 P.2d 265, 268-69 (1997) (a search associated with emergency civil commitment was justified under the emergency exception; the scope of the search may extend to whatever is reasonable to conduct the caretaking function). *But see Loewen*, 97 Wash. 2d at 568, 647 P.2d at 493 (necessity must exist at time of search).

Similarly, police may make a warrantless entry to protect property and may seize evidence within their plain view. *State v. Bakke*, 44

Wash. App. 830, 839-41, 723 P.2d 534, 538-40 (1986) (police may make a warrantless entry into a private residence in response to a reported burglary and may then seize contraband within their plain view); *State v. Campbell*, 15 Wash. App. 98, 100, 547 P.2d 295, 297 (1976) (police entry to investigate alleged burglary permissible). Firefighters may enter a house to extinguish a fire and immediately thereafter conduct a limited warrantless investigation to determine the fire's cause. *Michigan v. Taylor*, 436 U.S. 499, 510, 98 S. Ct. 1942, 1950, 56 L. Ed. 2d 486, 500 (1978). Once a fire has been extinguished, however, a warrant is required for arson investigators to search the premises to discover a possible criminal cause of a fire. *Michigan v. Clifford*, 464 U.S. 287, 293, 104 S. Ct. 641, 649, 78 L. Ed. 2d 477, 484 (1984); *Taylor* at 511, 98 S. Ct. at 1951, 56 L. Ed. 2d at 500.

Police officers may enter a private residence without a warrant when officials of another government agency have validly entered the residence and have discovered contraband. *State v. Bell*, 108 Wash. 2d 193, 201, 737 P.2d 254, 259 (1987) (a marijuana growing operation discovered in plain view by firemen justified a warrantless entry and seizure by police). Seizure of immediately recognizable contraband by firefighters is valid if it is inadvertently discovered while they are engaged in their firefighting activities. *Id.* at 197, 737 P.2d at 257. Exigent circumstances are not required to justify such a seizure. Police officers, then, step into the firefighters' shoes and may subsequently enter a residence without a warrant and seize the contraband so long as they do not exceed the scope of the prior intrusion. *Id.* at 201, 737 P.2d at 259. *Cf. State v. Browning*, 67 Wash. App. 93, 97, 834 P.2d 84, 86 (1992) (contraband sighted during an unlawful entry by the building inspector could not be used as the basis for later police entry under warrant).

5.6. *The Plain View Doctrine: Distinction Between "Plain View" and "Open View"*

This section discusses the warrantless seizure of objects based on the plain view exception to the warrant requirement. Courts have used the term "plain view" to describe three types of searches: (1) when an officer observes an item that is exposed to public view in a public place or in a location that is not constitutionally protected; (2) when an officer intrudes into a constitutionally protected area—either lawfully or unlawfully—and there observes a clearly exposed object; and (3) when an officer, standing in a nonprotected area, observes an object that is located inside a constitutionally protected area. *State v.*

O'Herron, 380 A.2d 728, 729-30 (N.J. Super. Ct. App. Div. 1977). 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(a), at 396 (3d ed. 1996).

These three situations are distinguished by the nature of the defendant's expectation of privacy in the object. In the first situation, the discovery of an object in a public place or in a location that is not constitutionally protected is not a true search, for the defendant has no reasonable expectation of privacy in an object that is exposed to the public view. *State v. Rose*, 128 Wash. 2d 388, 392, 909 P.2d 280, 282-83 (1996). Generally, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967). *See generally supra* §§ 1.1-1.3. Thus, the first situation is more accurately referred to as "open view" and not "plain view." *State v. Dykstra*, 84 Wash. App. 186, 191 n.4, 926 P.2d 929, 932 n.4 (1996).

For the same reason, the mere observation of an object located in a protected area from a vantage point in a nonprotected area does not constitute a search. *Rose*, 128 Wash. 2d at 392, 909 P.2d at 283; *State v. Seagull*, 95 Wash. 2d 898, 901, 632 P.2d 44, 46-47 (1981); 1 LAFAVE, SEARCH AND SEIZURE § 2.2(a), at 397-98. Privacy rights are implicated, however, when police enter the constitutionally protected area to seize the object. "Seeing something in open view does not . . . dispose, *ipso facto*, of the problem of crossing constitutionally protected thresholds . . . . Light waves cross thresholds with a constitutional impunity not permitted arms and legs. Wherever the eye may go, the body of the policeman may not necessarily follow." Charles E. Moylan, Jr., *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1096 (1975) (italics added). *See also Dykstra*, 84 Wash. App. at 192-93, 926 P.2d at 933.

Although the open view doctrine may justify observing an object located in a constitutionally protected area, it will not justify seizing the object; the search is in the entry, not in the inspection. *See Dykstra*, 84 Wash. App. at 192-93, 926 P.2d at 933; *State v. Mierz*, 72 Wash. App. 783, 791, 866 P.2d 65, 71, *opinion corrected*, 875 P.2d 1228 (1994), *aff'd*, 127 Wash. 2d 460, 901 P.2d 286 (1995) (view of unpermitted coyote pups from legal vantage point outside of the defendant's fence did not justify an officer's warrantless entry onto property). An "open view" sighting of contraband from a nonconstitutionally protected vantage point may, however, be used as a basis for

securing a search warrant. *State v. Ferro*, 64 Wash. App. 181, 182, 824 P.2d 500, 501 (1992).

If no entry or additional search is required, seizure of an object may be permissible if an officer is virtually certain that a container holds contraband, "[b]ecause of the appearance of the container itself, the contents [are] in effect in open view." *State v. Coursey*, 48 Wash. App. 326, 330, 739 P.2d 98, 101 (1987) (a paper "bindle" containing cocaine was observed by an officer during a lawful investigative stop). Consequently, the suspect does not have a reasonable expectation of privacy that would prevent opening the container or field testing its contents. *Id.* at 330, 739 P.2d at 101.

The plain view doctrine has been used to justify the seizure of objects without a warrant. The following sections discuss the criteria for falling within the exception to the warrant requirement in the second and third situations: the discovery and seizure of an object after entry into a constitutionally protected area, and the entry into a protected area and the seizure of an object that was viewed from an unprotected area.

5.7 Criteria for Falling Within the "Plain View" Exception

5.7(a) Discovery of Object in Plain View Following Entry into Constitutionally Protected Area

The most common plain view situation occurs when the officer lawfully enters a constitutionally protected area and unexpectedly discovers incriminating evidence. *See, e.g., State v. Rodriguez*, 65 Wash. App. 409, 416, 828 P.2d 636, 640 (1992).

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. . . . The extension of the original jurisdiction is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S. Ct. 2022, 2038, 29 L. Ed. 2d 564, 583 (1971).

For a warrantless seizure to fall within the plain view exception, three requirements must be met as follows: (1) the police must have a *prior justification* for the intrusion into the constitutionally protected area; (2) the police must immediately realize that the object they observe is evidence—that is, the incriminating character of the evidence must be *immediately apparent*; and (3) the discovery of the incriminating evidence must be *inadvertent*. *State v. Myers*, 117 Wash. 2d 332, 346, 815 P.2d 761, 769 (1991). Note that under the Fourth Amendment, inadvertent discovery is no longer required to justify a seizure under the plain view exception. *Horton v. California*, 496 U.S. 128, 130, 110 S. Ct. 2301, 2304, 110 L. Ed. 2d 112, 118 (1990). *See* discussion, *infra* this subsection, part (2) regarding Washington's adoption of *Horton*.

(1) Prior Justification for Intrusion

The plain view doctrine applies only when the police are justified in occupying the position from which they observe the illegal object or activity. *State v. Dykstra*, 84 Wash. App. 186, 191 n.4, 926 P.2d 929, 932 n.4 (1996). Thus, if an initial entry into a residence or onto property is illegal, confiscation of evidence will constitute an illegal seizure. *Id. See also State v. Daugherty*, 94 Wash. 2d 263, 269, 616 P.2d 649, 652 (1980), *rejected on other grounds in State v. Hill*, 123 Wash. 2d 641, 870 P.2d 313 (1994). Similarly, when the initial stop of a vehicle is unlawful—the police therefore having no right to be in a position to observe the vehicle's interior—the observation of contraband within the vehicle constitutes an unlawful search. *State v. Lesnick*, 84 Wash. 2d 940, 942-43, 530 P.2d 243, 245 (1975). *See also Washington v. Chrisman*, 455 U.S. 1, 9, 102 S. Ct. 812, 818, 70 L. Ed. 2d 778, 787 (1982), *on remand*, 100 Wash. 2d 14, 676 P.2d 419 (1984). Because the plain view exception to the warrant requirement rests on the lawfulness of the officer's presence, plain view cases will have different outcomes under the federal and state constitutions when the two constitutions differ as to that lawfulness. For example, when an officer has accompanied an arrestee to the arrestee's dormitory room and follows the arrestee into the room, the inspection of objects within the room may be lawful under the Fourth Amendment, yet unlawful under article I, section 7. *Chrisman*, 455 U.S. at 7, 9, 102 S. Ct. at 817-18, 70 L. Ed. 2d at 785-87 (Fourth Amendment permits officer to accompany arrestee wherever arrestee goes), *on remand*, 100 Wash. 2d at 822, 676 P.2d at 424 (article I, section 7 prohibits officer from entering misdemeanor arrestee's home unless officer can demonstrate

threat to officer's safety, possibility of destruction of evidence of misdemeanor charged, or strong likelihood of escape).

(2) Inadvertent Discovery

Under the Fourth Amendment, the plain view exception previously did not apply when an officer expected to find the incriminating object; the officer had to discover the object inadvertently. *Coolidge*, 403 U.S. at 471, 91 S. Ct. at 2040-41, 29 L. Ed. 2d at 586. More recently, however, the United States Supreme Court held that "even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition." *Horton*, 496 U.S. at 130, 110 S. Ct. at 2304, 110 L. Ed. 2d at 118-19. Thus, under *Horton*, an object may be seized under the plain view exception if an officer has the subjective expectation that he or she will find evidence in a location where he or she is conducting a lawful search. The discovery does not have to be an unexpected surprise. *See id.*, 496 U.S. at 138-40, 110 S. Ct. at 2309-10, 110 L. Ed. 2d at 124-25. Note, however, that several states continue to require inadvertence under their own constitutions. *See State v. Meyer*, 893 P.2d 159, 165 (Haw. 1995); *People v. Manganaro*, 561 N.Y.S.2d 379, 383 (1990).

Washington courts have adopted the *Horton* approach to the plain view exception and no longer require the inadvertence prong of the *Coolidge* test. *See State v. Hudson*, 124 Wash. 2d 107, 114 n.1, 874 P.2d 160, 164 n.1 (1994) (noting the *Horton* revision to the plain view test); *State v. Goodin*, 67 Wash. App. 623, 627-30, 838 P.2d 135, 138-39 (1992) (discussing *Horton* and suggesting that the inadvertence requirement was never explicitly required under article I, section 7). Recent cases set forth the test for the plain view exception as articulated in *Horton*:

> For evidence to be admissible under "plain view" doctrine, the prosecution must prove that (1) the officer lawfully occupied the vantage point from which the evidence was discovered, (2) the officer immediately recognized the incriminating character of the object seized, and (3) the officer had a lawful right of access to the object itself.

State v. Tzintzun-Jimenez, 72 Wash. App. 852, 855-56, 866 P.2d 667, 669 (1994). Thus, in Washington, the focus of the third prong of the test for admissibility under the "plain feel" exception is now on the officer's lawful access to the object seized, rather than his or her subjective state of mind at the time of the search. *See id. But see State v. Mierz*, 72 Wash. App. 783, 786 n.2, 866 P.2d 65, 68 n.2 (1994)

(listing the requirements of the plain view exception as prior justification, immediate knowledge, and inadvertent discovery).

(3) Immediate Knowledge: Incriminating Character Immediately Apparent

The plain view exception applies only when the police immediately recognize the incriminating nature of the object seized. *Coolidge*, 403 U.S. at 466, 91 S. Ct. at 2038, 29 L. Ed. 2d at 583. For example, the discovery of a shotgun in a bombing suspect's bedroom did not come within the plain view doctrine, despite the validity of entry under warrant, because it was not immediately apparent to the FBI officers that the shotgun was evidence of a crime. *State v. Cotten*, 75 Wash. App. 669, 683, 879 P.2d 971, 979 (1994). *See also State v. Murray*, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1307 (1974) (a warrantless entry into an apartment to search for stolen office equipment was justified because the owner gave consent; however, seizure of a television under the plain view doctrine not justified because evidence of the television being stolen was not readily apparent—officers tilted the television to obtain serial numbers); *State v. Gocken*, 71 Wash. App. 267, 278, 857 P.2d 1074, 1081-82 (1993) (a warrantless entry was justified under the emergency exception; evidence of foul play was immediately apparent). *But see generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.11(c), at 691-98 (3d ed. 1996).

If an object has to be moved or tampered with in any way to determine whether it is evidence of a crime, the "immediately apparent" prong of the plain view test will fail. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 328, 107 S. Ct. 1149, 1154, 94 L. Ed. 2d 347, 356 (1987) (the scope of plain view was exceeded when police lifted stereo components to read serial numbers). In other words, police must connect items to a crime based solely on what is exposed to their view, and there is a distinction between "looking at a suspicious object in plain view and moving it even a few inches." *Id.* at 325, 107 S. Ct. at 1152, 94 L. Ed. 2d at 354; *see generally* 2 LAFAVE, SEARCH AND SEIZURE § 4.11(b), at 687-91, (c), at 691-98 (suggesting that for officers to inspect items, they must be aware of facts that justify a reasonable suspicion that the items are incriminating; for officers to seize the items, they must have probable cause).

The officer's knowledge that the object is evidence of a crime need not be certain; it is sufficient that the officer has probable cause to believe that the object or substance constitutes incriminating evidence. *See Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 1543, 75 L.

Ed. 2d. 502, 514 (1983) (interpreting the term "immediately apparent" to mean "requiring probable cause in the ordinary case"); *State v. Sistrunk*, 57 Wash. App. 210, 214, 787 P.2d 937, 939 (1990). Thus, in *State v. Gonzales*, 46 Wash. App. 388, 400-01, 731 P.2d 1101, 1108-09 (1986), a clear vial of capsules and pills, in context of other items of drug paraphernalia, was properly seized although consent was given only for jewelry and other items. However, a closed brown paper bag containing marijuana was improperly seized since its weight immediately indicated that it could not contain items within the scope of consent, and the marijuana was clearly not within plain view. *Id.* at 400, 731 P.2d at 1109. *See also Sistrunk*, 57 Wash. App. at 214, 787 P.2d at 939 (no probable cause to seize empty beer cans in open view when the condition of cans was consistent with driver's explanation that they had been picked up for recycling); *State v. Anderson*, 41 Wash. App. 85, 96, 702 P.2d 481, 490 (1985), *rev'd on other grounds*, 107 Wash. 2d 745, 733 P.2d 517 (1987) (although warrant was limited to a search for clothing, police properly seized weapons and weapon components discovered within the allowable area of the search, which were probable instrumentalities of the crime under investigation).

A useful synthesis of Washington cases and doctrine pertaining to the issue of when an object's incriminating nature is immediately apparent is found in *State v. Legas*, 20 Wash. App. 535, 542, 581 P.2d 172, 176 (1978) (officers may inspect for serial numbers on radio equipment when they have a well-founded suspicion that the equipment is stolen based upon knowledge of other stolen property on the premises, past criminal activities of the person having access to premises, and a peculiarly large quantity of equipment). *See also State v. McCrea*, 22 Wash. App. 526, 528, 590 P.2d 367, 368 (1979) (when federal officers executing a warrant for a machine gun came upon items they thought might be controlled substances and called local officers to identify items, seizure was unlawful because the incriminating nature was not immediately apparent to the federal officers and local officers had no prior justification for intrusion); *State v. Keefe*, 13 Wash. App. 829, 832-35, 537 P.2d 795, 797-99 (1975) (a typewriter sample could not be seized under the "plain view" doctrine while police executed a search warrant for a stolen gun).

For objects seized under the plain view exception to be incriminating, they must be fruits, instrumentalities, or evidence of crime. Evidence includes objects having a "sufficient nexus" with the crime under investigation, and officers may also seize objects that will aid in apprehension or conviction of a suspect. *State v. Stenson*, 132 Wash. 2d 668, 695, 940 P.2d 1239, 1254 (1997); *State v. Terrovona*, 105

Wash. 2d. 632, 648, 716 P.2d 295, 303 (1986); *State v. Turner*, 18 Wash. App. 727, 729, 571 P.2d 955, 957 (1977).

An officer's knowledge and experience is relevant to determining whether an object is legally seized under the plain view exception. *Andresen v. Maryland*, 427 U.S. 463, 483, 96 S. Ct. 2737, 2749, 49 L. Ed. 2d 627, 644 (1976) (use of specially trained investigators supported the seizure of business records with nexus to crime under investigation). Thus, an officer's experience and knowledge that plastic baggies are common receptacles for marijuana will enable the officer to immediately recognize the incriminating nature of a baggie, even when its contents are not observed. *State v. Kennedy*, 107 Wash. 2d 1, 13, 726 P.2d 445, 452 (1986).

5.7(b) Seizure of Object from Protected Area After Observing Object from Nonprotected Area

The "open view" doctrine applies in those cases when the police officer is in a public or nonprotected area at the time he or she observes contraband within a constitutionally protected area. The officer's mere visual observation, without physical intrusion, does not constitute a "search" because there is no reasonable expectation of privacy in objects observed where the open view doctrine is satisfied. *State v. Rose*, 128 Wash. 2d 388, 392, 909 P.2d 280, 283 (1996); *State v. Seagull*, 95 Wash. 2d 898, 902, 632 P.2d 44, 47 (1981). *See also State v. Campbell*, 103 Wash. 2d 1, 23, 691 P.2d 929, 942 (1984) (when an officer peered into the defendant's car on a public street and saw blood on the door handle and jewelry similar to that observed at a homicide scene, his observation fell within the open view doctrine); 1 LAFAVE, SEARCH AND SEIZURE § 2.2(a), at 397-98.

When an officer enters a constitutionally protected area to seize an object observed from outside the area, the plain view doctrine will not justify the absence of a warrant. *State v. Mierz*, 72 Wash. App. 783, 791 n.6, 866 P.2d 65, 71 n.6 (1994); *State v. Ferro*, 64 Wash. App. 181, 182, 824 P.2d 500, 501 (1992) (lawful aerial observation of marijuana plants did not justify a warrantless intrusion onto the property and seizure of the plants).

> [P]lain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court

> has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

Coolidge v. New Hampshire, 403 U.S. 443, 468, 91 S. Ct. 2022, 2039, 29 L. Ed. 2d 564, 584 (1971) (emphasis in original). *See also Taylor v. United States*, 286 U.S. 1, 5-6, 52 S. Ct. 466, 467, 76 L. Ed. 951, 953 (1932) (although police were standing where they had a right to be when they looked through a small opening in a garage and saw contraband, their warrantless entry to seize the contraband was unconstitutional).

Thus, a police officer who lawfully observes contraband within a constitutionally protected area may enter the area without a warrant only if the officer can justify the entry by one of the other exceptions to the warrant requirement. *See State v. Drumhiller*, 36 Wash. App. 592, 596-97, 675 P.2d 631, 633 (1984) (defendant was observed through a window snorting cocaine; exigent circumstances justified warrantless entry); 1 LAFAVE, SEARCH AND SEIZURE § 2.2(a), at 400; *see also State v. O'Herron*, 380 A.2d 728, 733-34 (N.J. Super. Ct. App. Div. 1977) (warrantless entry into defendant's vegetable garden to seize lawfully observed marijuana plants was unconstitutional where no warrant exception was shown).

5.7(c) Curtilage as a Protected Area

The curtilage of a residence is defined as that area "so intimately tied to the home itself that it should be placed under the 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 300-01, 107 S. Ct. 1134, 1139-40, 94 L. Ed. 2d 326, 334-35 (1987). Thus, heightened Fourth Amendment protection extends to a home's curtilage. *State v. Ridgway*, 57 Wash. App. 915, 918, 790 P.2d 1263, 1265 (1990). Open view observations, visual and otherwise, made by police from the curtilage have been upheld in Washington under both the Fourth Amendment and article I, section 7, and police conducting legitimate business may enter areas of a home's curtilage that are impliedly open. *See State v. Gave*, 77 Wash. App. 333, 337, 890 P.2d 1088, 1090 (1995). Thus, in connection with an investigation, officers may approach a residence from any common access route, including a "driveway, walkway, or access route leading to the residence or to the porch of the residence," without violating the resident's reasonable expectation of privacy. *State v. Hoke*, 72 Wash. App. 869, 874, 866 P.2d 670, 673 (1994). In essence, officers may intrude to the same extent as any reasonably respectful citizen, and they may do so with their "eyes open." *State v. Petty*, 48 Wash. App. 615, 620, 740 P.2d 879, 882 (1987); *State v. Seagull*, 95 Wash. 2d 898, 902, 632 P.2d 44,

47 (1981). *See also State v. Rose*, 128 Wash. 2d 388, 394, 909 P.2d 280, 283 (1996) (no reasonable expectation of privacy in what is viewed through uncurtained windows). For an in-depth discussion of cases upholding intentional viewing by police officers at residences through unobstructed windows, see *id.* at 394-97, 909 P.2d at 283-84.

The facts of each case determine whether a portion of the curtilage is impliedly open to the public. *State v. Hornback*, 73 Wash. App. 738, 744, 871 P.2d 1075, 1078 (1994). Factors to be considered in determining whether an officer exceeded the scope of "open view" include whether the officer: (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct access route to the house; (5) attempted to talk to the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally. *State v. Myers*, 117 Wash. 2d 332, 345, 815 P.2d 761, 769 (1991). The posting of "no trespassing" signs is not dispositive on the issue of privacy, but is an additional factor which may be considered. *Gave*, 77 Wash. App. at 337, 890 P.2d at 1090; *Hornback*, 73 Wash. App. at 744, 871 P.2d at 1078; *State v. Johnson*, 75 Wash. App. 692, 702, 879 P.2d 984, 990 (1994).

Thus, the open view doctrine applies when officers approach a suspect's residence during daylight, by a direct access, and with no spying or secretive actions, but not when police activity exceeds reasonable bounds. *Compare Myers*, 117 Wash. 2d at 345, 815 P.2d at 769 (officer approached the home during daylight via the most direct access route), *with Dykstra*, 84 Wash. App. at 193, 926 P.2d at 933 (open view inapplicable where police officers climbed onto the back porch at 3:00 a.m. despite the homeowner's protests, yanked the door out of the homeowner's hands, and entered the dwelling). *See also Hornback*, 73 Wash. App. at 743, 871 P.2d at 1078 (scope of open view exceeded where officers substantially and unreasonably departed from the area of curtilage impliedly open to the public by entering into a side yard); *State v. Graffius*, 74 Wash. App. 23, 28, 871 P.2d 1115, 1118 (1994) (marijuana bud observed in a partially opened garbage can in the curtilage area did not exceed the scope of open view).

5.7(d) Open Field as a Protected Area

Open fields are not entitled to protection from unreasonable search and seizure under the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 179, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214, 224 (1984). In contrast, Washington courts have rejected the notion that an open field can never be subject to an unreasonable search and seizure. Rather, under article I, section 7, a case-by-case determination

is made to determine whether a particular search and seizure unconstitutionally intrudes into a person's private affairs. *State v. Johnson*, 75 Wash. App. 692, 707, 879 P.2d 984, 992 (1994). *See State v. Hansen*, 42 Wash. App. 755, 714 P.2d 309 (1986), *aff'd on other grounds*, 107 Wash. 2d 331, 728 P.2d 593 (1986) (warrantless search of a garden upheld under article I, section 7 and open fields doctrine where the field was not posted and contents were clearly visible to any passerby); *State v. Myrick*, 102 Wash. 2d 506, 513-14, 688 P.2d 151, 155 (1984) (aerial surveillance of marijuana from 1500 feet without visual enhancement devises did not violate article I, section 7). *See also Johnson*, 75 Wash. App. at 707-08, 879 P.2d at 993 (conduct of DEA agents violated article I, section 7 when they acted in concert with state officials and ignored property owner's fence, gate, and no trespassing signs and trespassed on property); *State v. Crandall*, 39 Wash. App. 849, 854, 697 P.2d 250, 253 (1985) (isolated trespass of a deputy into an open, unposted field frequented by hunters did not violate article I, section 7).

5.8. Plain View: Aiding the Senses with Enhancement Devices

Under both the Fourth Amendment and article I, section 7, the police may use flashlights to aid their observations, provided that (1) the observation is from a location where the officer has a right to be, and (2) the observation could have taken place without flashlights in daylight. *State v. Rose*, 128 Wash. 2d 388, 401, 909 P.2d 280, 287 (1996) (no search when police used a flashlight from the lawful vantage point of the front porch; marijuana observed in plain view through an unobstructed window). The use of flashlights is permitted on the theory that what is observed with the aid of a flashlight is "no more invasive than observations with natural eyesight during daylight would have been." *Id. See also State v. Young*, 28 Wash. App. 412, 417, 624 P.2d 725, 729 (1981) (tools suspected of being used in a robbery were properly seized when an officer observed the tools after shining a flashlight on the front seat of a car with the door left open). *See generally United States v. Booker*, 461 F.2d 990, 992 (6th Cir. 1972); *Marshall v. United States*, 422 F.2d 185 (5th Cir. 1970); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(b), at 407-17 (3d ed. 1996).

The rule governing magnification is similar to the one governing the use of flashlights. Under both the Fourth Amendment and article I, section 7, the police may use binoculars and telescopes to observe that which is in the open and subject to some scrutiny by the naked eye from the same location, or to observe that which they lawfully

could have observed from a closer location. *State v. Jones*, 33 Wash. App. 275, 277, 653 P.2d 1369, 1370 (1982). *See also State v. Manly*, 85 Wash. 2d 120, 125, 530 P.2d 306, 309 (1975); *State v. Ludvik*, 40 Wash. App. 257, 264 n.1, 698 P.2d 1064, 1068 n.1 (1985). *See generally* 1 LAFAVE, SEARCH AND SEIZURE § 2.2(c), at 417-28. The binocular/telescope rule is based on the theory that the sense-enhancing capability of the devices merely provides information that could have been otherwise obtained. *State v. Young*, 123 Wash. 2d 173, 183 n.1, 867 P.2d 593, 598 n.1 (1994). Consequently, the rule does not permit enhanced observations that enable an officer to observe objects or activities that could not have been observed by the naked eye; in these circumstances, the defendant may have a legitimate expectation of privacy in the objects or activities. *See, e.g., United States v. Kim*, 415 F. Supp. 1252, 1256 (D. Haw. 1976) (plain view exception does not apply to FBI agents' use of 800 millimeter telescope to observe activities in the defendant's apartment one-fourth mile away when no observation was possible from a closer location); *State v. Kender*, 588 P.2d 447, 450-51 (Haw. 1978) (plain view exception is inapplicable when an officer climbed up the fence on neighboring defendant's backyard that otherwise would have been concealed by a fence and heavy foliage). *But see Commonwealth v. Hernley*, 263 A.2d 904, 906 (Pa. Super. Ct. 1970) (applying the plain view exception to binocular observation, from atop a four-foot ladder, of activity that could not have been seen with the naked eye).

A particularly intrusive method of viewing which reveals evidence that is not exposed to the general public may be considered a search. *See State v. Young*, 123 Wash. 2d 173, 182-84, 867 P.2d 593, 597-98 (1994). For example, the Washington Supreme Court held that the warrantless infrared surveillance of a home violates both article I, section 7 and the Fourth Amendment since the heat distribution patterns detected were undetectable by the naked eye or other senses. *Young*, 123 Wash. 2d at 183, 867 P.2d at 598. *Cf. United States v. Penny-Feeny*, 773 F. Supp. 220, 225-28 (D. Haw. 1991), *aff'd on other grounds*, 984 F.2d 1053 (9th Cir. 1993) (upholding infrared surveillance of navigable airspace above defendant's residence).

Aerial surveillance is generally not considered to be an enhancement that gives rise to a search violating the Fourth Amendment or article I, section 7, so long as the search occurs from public, navigable airspace and is conducted in a physically unintrusive fashion. *California v. Ciraolo*, 476 U.S. 207, 213-15, 106 S. Ct. 1809, 1813, 90 L. Ed. 2d. 210, 217-18 (1986); *State v. Myrick*, 102 Wash. 2d 506, 513-14, 688 P.2d 151, 155 (1984) (holding aerial surveillance of open

fields at 1500 feet, without the use of visual enhancement, not unreasonably intrusive). *See also Florida v.* Riley, 488 U.S. 445, 451, 109 S. Ct. 693, 697, 102 L. Ed. 2d 835, 842-43 (1989) (suggesting an aerial surveillance might violate the Fourth Amendment if it revealed "intimate details" or caused "excessive noise or other disturbances"); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239, 106 S. Ct. 1819, 1827, 90 L. Ed. 2d 226, 238 (1986) (upholding high altitude aerial photographic surveillance by EPA).

5.9 Extensions of the Plain View Doctrine

5.9(a) Plain Hearing

Courts in other jurisdictions have recognized a "plain hearing" analog to the plain view doctrine. For example, defendants have been held to have no reasonable expectation of privacy regarding motel room conversations that are overheard with unaided ears in the motel room next door. *See United States v. Jackson*, 588 F.2d 1046, 1051-52 (5th Cir. 1979); *see also United States v. Baranek*, 903 F.2d 1068, 1069 (6th Cir. 1990) (inadvertently intercepted nontelephonic conversations were authorized under "plain view" exception to the warrant requirement); *State v. Texeira*, 609 P.2d 131, 135 (Haw. 1980) (aural observations of gambling activities overheard by officer who trespassed on adjacent property to gain vantage point admissible); *State v. Gil*, 561 N.W.2d 760, 765-66 (Wis. Ct. App. 1997) (surveillance evidence of attempted robbery and attempted homicide admissible under "plain hearing" exception). Use of hearing enhancement devices may "raise very different and far more serious questions" from visual enhancement devices when determining the reasonable expectation of privacy of defendants and, consequently, whether a warrant is required. *Dow Chem. Co. v. United States*, 476 U.S. 227, 238-39, 106 S. Ct. 1819, 1827, 90 L. Ed. 2d 226, 238 (1986).

In Washington, eavesdropping by means of an electronic device or the interception of private telephone, telegraph, radio, or other electronic communications is governed by Washington's Violating Right of Privacy Act, WASH. REV. CODE ch. 9.73 (1996). Even tape recordings made by federal agents pursuant to the federal wiretap statute are inadmissible in state courts when the recordings are made in violation of the Washington statute. *State v. Williams*, 94 Wash. 2d 531, 541, 617 P.2d 1012, 1018 (1980). Police testimony about such recorded conversation is also inadmissible. *Cf. infra* § 7.3(c) (use of illegally obtained evidence at probable cause hearings).

5.9(b) Plain Smell

Courts have generally accepted the "plain smell" exception as a branch of the plain view doctrine. Thus, odor has been used to justify both warrantless entries and seizure of evidence so long as the officer was lawfully in the location where the odor was detected. *See, e.g., United States v. Morin*, 949 F.2d 297, 300 (10th Cir. 1991) (odor of marijuana can justify search of automobile or luggage); *State v. Lueck*, 678 F.2d 895, 903 (11th Cir. 1982) (contents of packages could be inferred where the packages "reeked of marijuana"); *United States v. Pagan*, 395 F. Supp. 1052, 1061 (D.C.P.R. 1975) (plain view doctrine has been expanded to cover evidence perceived by sense of smell), *aff'd*, 537 F.2d 554 (1st Cir. 1976); *Mazen v. Seidel*, 940 P.2d 923, 929 (Ariz. 1997) (smell of burning marijuana is an exigent circumstance justifying warrantless entry); *People v. Mendez*, 948 P.2d 105, 108 (Colo. Ct. App. 1997) (legislature never intended to bar a finding of probable cause based on smell of burning marijuana). *But see United States v. Fernandez*, 943 F. Supp. 295 (S.D.N.Y. 1996) (odor of marijuana noticed on defendant during *Terry* stop and frisk did not justify search inside clothing); *People v. Taylor*, 564 N.W.2d 24, 29-30 (Mich. 1997) (odors alone not sufficient probable cause to search vehicle; totality of circumstances to be considered). *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(a), at 396-407 (3d ed. 1996).

Washington has permitted the warrantless seizure of an object based on its odor when the odor established probable cause or when the odor was in "open view." *See State v. Myers*, 117 Wash. 2d 332, 345, 815 P.2d 761, 769 (1991) (odor of marijuana was in "open view"); *State v. Huckaby*, 15 Wash. App. 280, 291, 549 P.2d 35, 42 (1976); *see also State v. Hammone*, 24 Wash. App. 596, 600, 603 P.2d 377, 379 (1979) (marijuana odor emanating from vehicle); *State v. Compton*, 13 Wash. App. 863, 864-65, 538 P.2d 861, 861-62 (1975) (smell of marijuana and discovery of greenish-brown vegetable substance was a legal warrantless search). Odor can also support warrantless entry and can serve as probable cause for a search warrant. *See State v. Gave*, 77 Wash. App. 333, 336, 890 P.2d 1088, 1090 (1995) (odor of marijuana supported warrant probable cause requirement); *State v. Gocken*, 71 Wash. App. 267, 278, 857 P.2d 1074, 1081 (1993) (odor of decaying flesh justified warrantless entry at homicide scene).

5.9(c) Plain Feel

The "plain feel" or "plain touch" doctrine has been recognized as a corollary of the plain view doctrine. Under the plain touch exception to the warrant requirement, police may seize nonthreatening contraband which is detected through the officer's sense of touch during a legitimate patdown search so long as the search does not exceed the scope delineated by *Terry*. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 2137-38, 124 L. Ed. 2d 334, 345-46 (1993). The object will be admissible only if its "contour or mass makes its identity immediately apparent." *Id.* However, any "squeezing, sliding or otherwise manipulating" the object extends the search beyond the scope of *Terry*, thus rendering the search constitutionally invalid. *Id.* at 376-77, 113 S. Ct. at 2137-38, 124 L. Ed. 2d at 346.

For examples of cases in other jurisdictions applying the *Minnesota v. Dickerson* plain touch rule, see *United States v. Rivers*, 121 F.3d 1043, 1047 (7th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 582 (1997) (seizure of crack cocaine from pocket of defendant permissible under "plain feel" doctrine); *State v. Ashley*, 37 F.3d 678, 681 (D.C. Cir. 1994) (crack cocaine was admissible when found in the defendant's underwear during consensual search); *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) (search was impermissible where the officer concluded that no weapon was present and yet continued to explore the bag in the defendant's jacket); *State v. Denis*, 691 So. 2d 1295, 1300 (La. Ct. App. 1997) (finding no justification under "plain feel" for the seizure of a bag of cocaine when the officer testified that he did not believe the bulge in the defendant's waistband was a weapon).

Washington has adopted the *Minnesota v. Dickerson* Fourth Amendment analysis in the context of the plain feel doctrine, and the doctrine has been analyzed only under the Fourth Amendment. *See State v. Hudson*, 124 Wash. 2d 107, 116-17, 874 P.2d 160, 165-66 (1994); *State v. Tzintzun-Jimenez*, 72 Wash. App. 852, 857, 866 P.2d 667, 670 (1994) (cocaine seized during a valid frisk was suppressed where the officer had no probable cause to support the belief that the "slippery material" in the defendant's pocket was contraband). At the time this article was submitted for publication, no Washington cases have analyzed the plain feel doctrine under article I, section 7. *See* Laura T. Bradley, *The Plain Feel Doctrine in Washington: An Opportunity to Provide Greater Protections of Privacy to Citizens of This State*, 19 SEATTLE U. L. REV. 131, 133 (1995).

5.10 Consent Searches: Introduction

A warrantless search is constitutional when valid consent is granted. *State v. Cantrell*, 124 Wash. 2d 183, 187, 875 P.2d 1208, 1210 (1994); *Washington v. Chrisman*, 455 U.S. 1, 9, 102 S. Ct. 812, 818, 70 L. Ed. 2d 778, 787 (1982). A valid consent search requires that: (1) the consent be "voluntary"; (2) the consent be granted by a party having the authority to consent; and (3) the search be limited to the scope of the consent granted. *State v. Hastings*, 119 Wash. 2d 229, 234, 830 P.2d 658, 661 (1992). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1 (3d ed. 1996). Furthermore, "where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an *essential* element of which is knowledge of the right to refuse consent." *State v. Ferrier*, 136 Wash. 2d 103, 116, 960 P.2d 927, 933 (1998) (quoting *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975)) (emphasis in original).

5.11. Voluntariness of Consent: Burden of Proof

The State has the burden of proving that consent to a search was given voluntarily. *State v. Ferrier*, 136 Wash. 2d 103, 116, 960 P.2d 927, 933 (1998) (citing *State v. Smith*, 115 Wash. 2d 775, 789, 801 P.2d 975, 983 (1990)). The level of proof required is "clear and convincing evidence." *Smith*, 115 Wash. 2d at 789, 801 P.2d at 983.

For a discussion of the distinctions between voluntariness of consent and waiver of constitutional rights, see generally 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1(a), at 598-606 (3d ed. 1996).

5.12 Factors Considered in Determining Voluntariness

The validity or voluntariness of a consent to search is analyzed in a similar manner as the voluntariness of a confession. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2058-59, 36 L. Ed. 2d 854, 875 (1973). *But cf. State v. Wethered*, 110 Wash. 2d 466, 471, 755 P.2d 797, 800 (1988) (consent to search is distinguished from testimonial admissions since the prior is consistent with innocence). In Washington, the issue "is clearly an interest of local concern . . . due to '[t]he heightened protection afforded *state* citizens against unlawful intrusion into private dwellings [that] places an onerous burden upon the government to show a compelling need to act outside our warrant requirement.'" *State v. Ferrier*, 136 Wash. 2d 103, 114,

960 P.2d 927, 932 (1998) (quoting *State v. Chrisman*, 100 Wash. 2d 814, 822, 676 P.2d 419, 824-25 (1984)) (emphasis in original).

Under article I, section 7, the Washington Supreme Court adopted the following rule to be applied when consent to search a home is at issue.

> [T]hat when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Ferrier, 136 Wash. 2d at 118-19, 960 P.2d at 934.

5.12(a) Police Claim of Authority to Search

An express or implied claim by the police that they will proceed immediately to conduct the search even without the individual's consent is likely to indicate that the subsequent consent was involuntary. *See Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 803 (1968); *State v. Browning*, 67 Wash. App. 93, 98, 834 P.2d 84, 87 (1992) (acquiescence to a claim of authority is not equivalent to freely and voluntarily consenting to a search). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(a), at 637-43 (3d ed. 1996).

A threat to seek a warrant if the person refuses to allow a search does not, however, automatically invalidate a consent. *See State v. Smith*, 115 Wash. 2d 775, 790, 801 P.2d 975, 984 (1990) (no coercion where the defendant was told officers would seek a search warrant if consent to search the trunk of car was not given); *State v. Murray*, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1307 (1974) (initial intrusion justified where defendant gave consent to enter apartment); *State v. Bellows*, 72 Wash. 2d 264, 268, 432 P.2d 654, 656 (1967) (officer's search of motel room justified when defendant's consent was given); *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wash. App. 171, 183, 931 P.2d 208, 215 (1997), *review denied*, 132 Wash. 2d 1010 (1997) (threats to obtain search warrant may invalidate consent when grounds for obtaining a warrant do not exist; coercion is a question of fact determined from totality of circumstances). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.2(c).

Note that police misrepresentation regarding the existence of a search warrant may invalidate consent to a search or seizure under the Fourth Amendment. *See Bumper*, 391 U.S. at 548, 88 S. Ct. at 1790, 20 L. Ed. 2d at 802; *McCrorey*, 70 Wash. App. at 112 n.8, 851 P.2d at 1239 n.8.

5.12(b) Coercive Surroundings

If the police make a show of force at the time the consent is sought, or if the surroundings are coercive in another respect, the consent will generally not be considered voluntary. *See McNear v. Rhay*, 65 Wash. 2d 530, 537, 398 P.2d 732, 737 (1965); *State v. Dresker*, 39 Wash. App. 136, 139, 692 P.2d 846, 848 (1984); *State v. Werth*, 18 Wash. App. 530, 535, 571 P.2d 941, 943-44 (1977) (when the defendant was placed under physical restraint and not informed of the right to refuse consent to search, and when the police had searched her home illegally without consent two days previously, the defendant did not voluntarily consent to the search of her home even if she verbalized consent); *see supra* § 1.4(a); *cf. INS v. Delgado*, 466 U.S. 210, 219, 104 S. Ct. 1758, 1765, 80 L. Ed. 2d 247, 258 (1984) (INS agents moving systematically through a factory asking workers about their citizenship while other INS agents were stationed at the factory exits did not constitute a seizure). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.2(b). Coercive effects can, however, "be mitigated by requiring officers who conduct [knock and talk searches] to warn home dwellers of their right to refuse consent to a warrantless search." *Ferrier*, 136 Wash. 2d at 116, 960 P.2d at 933.

The fact that a defendant is in custody when he or she consents to a search, however, does not by itself establish coercion or involuntariness of consent. *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820, 828, 46 L. Ed. 2d 598, 609 (1976); *McNear*, 65 Wash. 2d at 538, 398 P.2d at 737-38. Consent was held to be voluntary and uncoerced when the defendant, arrested on the porch of his home in midwinter wearing only pants and a t-shirt, consented to officers accompanying him into his home; the arresting officers had given the defendant the alternative of proceeding to the police station as he was, but indicated that if he returned inside, they would have to accompany him. *State v. Nelson*, 47 Wash. App. 157, 163-64, 734 P.2d 516, 520 (1987). Defendant's fear that his behavior might appear "crazy" if he accepted arrest without his jacket and keys was not considered equal to coercion. *Id.* at 163, 734 P.2d at 520. Custodial restraint is, however, a significant factor in assessing voluntariness. *See Werth*, 18

Wash. App. at 535-36, 571 P.2d at 944; *State v. Rodriguez*, 20 Wash. App. 876, 881, 582 P.2d 904, 907 (1978).

5.12(c) Awareness of the Constitutional Right to Withhold Consent

Although an individual's knowledge of the right to refuse a search is taken into account in determining whether consent to a search is voluntary, the State may prove that consent was voluntary without establishing such knowledge. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854, 863 (1973); *McCrorey*, 70 Wash. App. at 112, 851 P.2d at 1239. *See also Shoemaker*, 85 Wash. 2d at 212, 533 P.2d at 125; *Werth*, 18 Wash. App. at 535-36, 571 P.2d at 944; *cf. Rodriguez*, 20 Wash. App. at 880-81, 582 P.2d at 907 (consent was voluntary despite the defendant's assertion that he was not told and did not know of the right to refuse consent). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.2(i). Where police seek to justify a warrantless search of a private home, however, knowledge of the right to refuse consent is an essential element. *Ferrier*, 136 Wash. 2d at 116, 960 P.2d at 933. "[T]he only sure way to give such a protection substance is to require a warning of its existence." *Id.* In *Ferrier*, the Washington Supreme Court enunciated an explicit rule for law enforcement officers conducting a "knock and talk" for the purpose of obtaining consent to search a home without a warrant.

> [Police officers] must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Id. at 118-19, 960 P.2d at 934.

Washington and the majority of other jurisdictions hold that the failure to give *Miranda* warnings to a defendant in custody does not automatically invalidate a consent to search. *Nelson*, 47 Wash. App. at 162, 734 P.2d at 519. *See also McCrorey*, 70 Wash. App. at 111, 851 P.2d at 1239 (whether *Miranda* warnings were given is one factor to consider in the totality of the circumstances).

5.12(d) Prior Illegal Police Action

A prior illegal act by the police may suggest that the defendant's consent was involuntary. *See, e.g., Werth*, 18 Wash. App. at 535, 571 P.2d at 943-44 ("In view of the additional circumstance that two days

before, Werth's home had been searched illegally without her consent, it is apparent that overall, the situation was rife with coercion."). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.2(d). Thus, a prior illegal search or arrest may taint the subsequent consent and thereby render the consent invalid. *See generally McCrorey*, 70 Wash. App. at 111, 851 P.2d at 1239 (prior illegal police activity is one factor when considering the totality of the circumstances); 3 LAFAVE, SEARCH AND SEIZURE § 8.2(a), at 666-73.

The State has the burden of proving that a consent search was not obtained by the exploitation of a prior illegal search. A court determines whether the subsequent consent was tainted by the earlier illegality by considering, among other factors, the period of time between the illegal search and the subsequent consent, the presence of intervening circumstances, the purpose and flagrancy of the prior official misconduct, and whether the person who consented to the search received *Miranda* warnings. No single factor is dispositive. *See State v. Jensen*, 44 Wash. App. 485, 489, 723 P.2d 443, 445 (1986) (although only two hours intervened between the illegal search and the consent, the consent was valid because in the intervening period the defendant was advised of his right to refuse consent, had verbally consented twice, was allowed to call his sister, and there was no evidence that police did anything to frighten or intimidate defendant); *see also Taylor v. Alabama*, 457 U.S. 687, 690, 102 S. Ct. 2664, 2667, 73 L. Ed. 2d 314, 319 (1982); *State v. Tijerina*, 61 Wash. App. 626, 629, 811 P.2d 241, 243 (1991).

5.12(e) Maturity, Sophistication, and Mental or Emotional State

The sophistication and emotional state of the defendant are always considered in assessing the voluntariness of the consent. *Schneckloth*, 412 U.S. at 248, 93 S. Ct. at 2058, 36 L. Ed. 2d at 875 ("The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, [and] low intelligence. . . ."); *Shoemaker*, 85 Wash. 2d at 212, 533 P.2d at 125 (determination of voluntariness should include consideration of "the degree of education and intelligence of the consenting person"). *See also United States v. Mendenhall*, 446 U.S. 544, 558, 100 S. Ct. 1870, 1879, 64 L. Ed. 2d 497, 507 (1980). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.2(e).

Thus, while the mental condition of a defendant is a significant factor in determining voluntariness, the presence of mental illness itself is insufficient to render a consent to search invalid. *See State v. Sondergaard*, 86 Wash. App. 656, 662, 938 P.2d 351, 354 (1997); *cf.*

Colorado v. Connelly, 479 U.S. 157, 164, 107 S. Ct. 515, 520, 93 L. Ed. 2d 473, 482 (1986) (voices directing the psychotic defendant to confess to murder were not the result of police coercion).

5.12(f) Prior Cooperation or Refusal to Cooperate

A prior voluntary confession or other type of cooperation with the police will weigh in favor of a finding that the consent to search was voluntary. A prior refusal to consent to a search will suggest that a subsequent consent was not voluntary. *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.2(e).

A suspect's behavior may indicate consent even when verbal consent is withheld. *See State v. Raines*, 55 Wash. App. 459, 462, 778 P.2d 538, 541 (1989) (failure to expressly object after police requested permission to enter "to look around" amounted to implied waiver of right to exclude them); *State v. Sabbot*, 16 Wash. App. 929, 938, 561 P.2d 212, 218-19 (1977) (although the undercover investigator followed the defendant into the defendant's home after the defendant had told him to wait outside, the investigator's presence in house was with the defendant's tacit acquiescence).

5.12(g) Police Deception as to Identity or Purpose

The use of deception by a police officer does not necessarily affect the voluntariness of a consent to search. Police may use a ruse to gain entry to a residence to conduct a criminal investigation if they have a justifiable and reasonable basis to suspect criminal activity within the residence. *State v. Hastings*, 119 Wash. 2d 229, 233, 830 P.2d 658, 660 (1992) (the defendant had no constitutionally protected expectation of privacy in the residence where undercover officers had purchased cocaine); *State v. Hashman*, 46 Wash. App. 211, 216, 729 P.2d 651, 655 (1986) (a police officer disguised as a building contractor gained entry into a residence after another officer, who had lawfully been within the residence, reported evidence of a marijuana growing operation). *See also State v. Williamson*, 42 Wash. App. 208, 212-13, 710 P.2d 205, 207-08 (1985) (the fact that officers concealed their identity and intent to effect an arrest did not abrogate the validity of consent); *State v. Huckaby*, 15 Wash. App. 280, 285-88, 549 P.2d 35, 39-41 (1976). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.2 (m)-(n).

5.13 Scope of Consent

A consensual search must be limited to the area covered by the authority given by the consenting party. *State v. Davis*, 86 Wash.

App. 414, 423, 937 P.2d 1110, 1114 (1997), *review denied*, 133 Wash. 2d 1028 (1997). The scope of consent may be reduced in duration, area, or intensity by the express or implied limitation of the consenting party. *Id.* Any search exceeding the scope of consent is invalid, since exceeding the scope of consent is considered comparable to exceeding the scope of a search warrant. *Id. See, e.g., State v. Hendrickson*, 129 Wash. 2d 61, 72, 917 P.2d 563, 568-69 (1996) (consent to search vehicle when used as transportation for work release program did not extend to time when defendant was no longer involved in program); *State v. Murray*, 84 Wash. 2d 527, 534, 527 P.2d 1303, 1307 (1974) (when defendant consented to search by officers who said they were looking only for office and video equipment, search could not include inspection of television serial numbers not in plain view). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1(c) (3d ed. 1996).

Although an object may be outside the limits of a valid consent, items may be seized so long as the requirements of the plain view doctrine are met. *See State v. Cotten*, 75 Wash. App. 669, 683, 879 P.2d 971, 979 (1994) (shotgun discovered during consensual search did not come within the plain view doctrine when it was not immediately apparent to FBI officers that the gun was evidence of a crime); *State v. Rodriguez*, 65 Wash. App. 409, 416-17, 828 P.2d 636, 640 (1992) (boots, towel and shirt validly seized during consensual search of apartment); *supra* § 5.7. The officer's knowledge that an object is contraband need not be certain; it is sufficient that the officer has probable cause to believe that an object or substance constitutes incriminating evidence. *State v. Gonzales*, 46 Wash. App. 388, 399-401, 731 P.2d 1101, 1108 (1986) (although consent was given to search for jewelry and other items stolen in recent burglaries, a clear vial of capsules and pills, surrounded by other items of drug paraphernalia, was properly seized; however, a closed, brown paper bag containing marijuana was improperly seized because its weight immediately indicated that it could not contain items within the scope of consent).

Whether a consent to search applies to a later search depends on the time elapsed between the searches and whether the second search has the same objectives and is conducted by the same officers as the first search. *State v. Koepke*, 47 Wash. App. 897, 906, 738 P.2d 295, 300 (1987) (warrant was based on observations made following valid third-party consent to search a room; later search was validated by the original consent even though the warrant was defective because the second search was conducted by the same officer within twenty-four hours and with the same objective as the first search).

A general and unqualified consent to search an area for a particular type of material permits a search of personal property within the area in which the material could be concealed. For example, in *State v. Jensen*, 44 Wash. App. 485, 723 P.2d 443 (1986), the defendant consented to a "complete" search of his vehicle for materials of any evidentiary value. Officers conducting the search found cocaine in the pocket of a jacket found in the back seat of the defendant's car. The court held that the officers did not exceed the scope of consent since the defendant had consented to the search for evidence of the size and nature that could reasonably be in the jacket pocket, and he never expressly or implicitly withheld consent to search his personal belongings in the car. *Id.* at 492, 723 P.2d at 447. *See also State v. Mueller*, 63 Wash. App. 720, 723-24, 821 P.2d 1267, 1268-69 (1992) (search of vehicle, including trunk and gym bag, did not exceed scope of unlimited consent given by defendant). A consensual search is not invalidated if it results in the discovery of evidence that the consenting party did not expect to be discovered. *State v. Johnson*, 40 Wash. App. 371, 382-83, 699 P.2d 221, 229 (1985) (evidence of suspect's involvement in murder admissible after suspect signed a voluntary consent form permitting officers to search vehicle; record did not support suspect's claim that consent was limited to search for marijuana).

5.14 Consent by a Third Party

Under appropriate circumstances, warrantless searches may be based upon the consent of third parties, and evidence discovered during such searches may be used against a nonconsenting defendant. *State v. Mathe*, 102 Wash. 2d 537, 543, 688 P.2d 859, 862 (1994).

The validity of third-party consent is affected by both the relationship between the defendant and the third party and by other, more general considerations. The general considerations include: (1) the antagonism between the defendant and the third party (3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.3(b), at 720 (3d ed. 1996)); (2) the specific instructions that the defendant may have given to the third party (3 LAFAVE, SEARCH AND SEIZURE § 8.3(c), at 723); and (3) the objection by the defendant when he or she was present at the time the third party authorized the search (3 LAFAVE, SEARCH AND SEIZURE § 8.3(d), at 726).

Under the Fourth Amendment, third-party consent is analyzed under the "common authority" standard articulated in *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 993, 39 L. Ed. 2d. 242,

248-50 (1974). This standard has been adopted as the proper guide for analyzing questions of third party consent under article I, section 7. *Mathe*, 102 Wash. 2d at 543, 688 P.2d at 863. Under this standard, (1) the consenting party must be able to permit the search in his or her own right, and (2) it must be reasonable to find that the defendant had assumed the risk that a person with joint control might permit a search. *Id.* at 544, 688 P.2d at 863. *See also State v. Walker*, 86 Wash. App. 857, 860, 941 P.2d 1, 3 (1997); *Cranwell v. Mesec*, 77 Wash. App. 90, 103-04, 890 P.2d 491, 499-500 (1995).

For a discussion of the significance of a police officer's reasonable mistake that the third party had authority over the place searched, see *United States v. Yarborough*, 852 F.2d 1522 (9th Cir. 1988); *Schikora v. State*, 652 P.2d 473 (Alaska Ct. App. 1982); *see generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.3(g).

The following sections discuss the relationships between a defendant and a third party that may give rise to third-party consent.

5.14(a) Defendant's Spouse

Washington cases involving spousal consent are consistent with the "common authority" approach of *Mathe*, 102 Wash. 2d at 543, 688 P.2d at 863. Thus, the defendant's spouse, having equal use of an object or equal right to occupation of the premises, may consent to a search of the object or premises. *See, e.g., State v. Gillespie*, 18 Wash. App. 313, 317, 569 P.2d 1174, 1176 (1977) (wife gave valid consent to search of husband's army field jacket). However, for a valid consensual search of the home, consent must be obtained from both spouses if both are present and able to consent. *State v. Walker*, 86 Wash. App. 857, 860-61, 941 P.2d 1, 3 (1997). If only one spouse is present, consent will be valid against the absent spouse. *Id.*

When police request entry pursuant to "knock and announce" in conducting a search pursuant to a warrant, the admission of police by either spouse is valid. *State v. Hartnell*, 15 Wash. App. 410, 417, 550 P.2d 63, 69 (1976) (wife's invitation to police officer to enter defendant's house in response to officer's request was consensual entry requiring no notice of authority or purpose be given defendant, as ordinarily required under knock and announce statute or applicable constitutional provisions). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.4(a). *But see State v. Chichester*, 48 Wash. App. 257, 261, 738 P.2d 329, 332 (1987) (exigent circumstances needed to justify noncompliance with knock and announce rule). *See supra* § 3.7.

5.14(b) Defendant's Parents

A parent has authority over all rooms of a house and, consequently, can consent to a search of a dependent child's room whether or not the child is a minor. *State v. Summers*, 52 Wash. App. 767, 772, 764 P.2d 250, 253 (1988); *see also State v. Cotten*, 75 Wash. App. 669, 685, 879 P.2d 971, 981 (1994); *State v. Thompson*, 17 Wash. App. 639, 644, 564 P.2d 820, 823 (1977) (when defendant's mother, knowing that defendant was to be placed under arrest, consented without coercion to search of home in which she and defendant were living, consent was valid). However, when the child pays rent, and the status of the parent is similar to that of a landlord rather than a custodial parent, the parent has no authority to consent to a search of a child's room. *Summers*, 52 Wash. App. at 771-73, 764 P.2d at 253-54.

A parent's common authority extends to objects. A parent can consent to seizure of an object from a child's room that police otherwise could not lawfully remove. *Cotten*, 75 Wash. App. at 685, 879 P.2d at 980-81 (where plain view exception did not apply, defendant's mother could give valid consent to seizure of shotgun found in defendant's room).

5.14(c) Defendant's Child

The defendant's child, in appropriate circumstances, may consent to a search of the parent's home. *See, e.g., State v. Jones*, 22 Wash. App. 447, 451-52, 591 P.2d 796, 799 (1979) (thirteen-year-old's invitation to enter apartment in which child resided was legally sufficient consent, absent any evidence that opening of door and invitation were unusual, unexpected, or unauthorized acts, or that child was too young or immature to consent). For a general discussion of the scope and limitations of a child's consent to a search of the parent's house, see generally 3 LAFAVE, SEARCH AND SEIZURE § 8.4(c).

5.14(d) Co-tenant or Joint Occupant

A co-tenant or other joint occupant of the defendant's dwelling with "common authority over or other sufficient relationship to the premises or effects sought to be inspected" may give valid consent to a search of the premises or effects. *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 250 (1974). The theory behind allowing such a search is that the parties have equal control over the premises, and each assumes the risk that a cohabitant may permit a search of shared areas in the individual's absence. *Id.* at 170, 94 S. Ct. at 992-93, 39 L. Ed. 2d at 249; *State v. Mathe*, 102

Wash. 2d 537, 543, 688 P.2d 859, 863 (1984) (quoting *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 993 n.7, 89 L. Ed. 2d at 250 n.7); *State v. Jeffries*, 105 Wash. 2d 398, 414, 717 P.2d 722, 732 (1986) (common authority rule applicable to validate consent to search a "hobo" camp located outside the city of Wenatchee); *State v. Walker*, 86 Wash. App. 857, 860, 941 P.2d 1, 3 (1997). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.5(c).

Under the common authority rule, "when the police have obtained consent to search from an individual possessing equal control over the premises, the consent remains valid against a cohabitant, who also possesses equal control, *only while the cohabitant is absent.*" *Walker*, 86 Wash. App. at 860-61, 941 P.2d at 3 (emphasis added). Washington courts have held that if both cohabitants are present and able to object, the police must obtain consent from both in order for a search to be valid. *Id. See also State v. Leach*, 113 Wash. 2d 735, 744, 782 P.2d 1035, 1040 (1989) (search invalid where premises of business defendant shared with his girlfriend were searched; girlfriend consented, but police failed to ask for defendant's consent when they realized he was present).

In some jurisdictions, the defendant's contemporaneous objections do not invalidate the consent of a cohabitant. *See, e.g., People v. Sanders*, 904 P.2d 1311, 1314-15 (Colo. 1995); *People v. Cosme*, 397 N.E.2d 1319, 1323 (N.Y. 1979). The dual consent rule for cohabitants has not been extended to the common authority a driver and passenger share in an automobile. *State v. Cantrell*, 124 Wash. 2d 183, 190, 875 P.2d 1208, 1211-12 (1994) (passenger's consent to search automobile was sufficient to support warrantless search even though the defendant-driver did not consent to the search).

5.14(e) Landlord, Lessor, or Manager

The lessor or manager of an apartment building may consent to a search of an area that is not within the lessee's exclusive possession. *See, e.g., State v. Kreck*, 86 Wash. 2d 112, 123, 542 P.2d 782, 789 (1975) (search of rented half of garage upheld when police, with permission of rental manager, searched unrented half, pried off partition separating halves, and observed bottle of choloroform inside the partition); *State v. Talley*, 14 Wash. App. 484, 487, 543 P.2d 348, 351 (1975) (grounds outside apartment building were common areas not under exclusive control of defendant, and thus police could lawfully search grounds with consent of building manager).

A landlord, however, lacks authority to consent to a search when a tenant has the sole or undisputed possession of leased premises.

State v. Birdsong, 66 Wash. App. 534, 537-39, 832 P.2d 533, 535-36 (1992). This rule applies as well to limited rental arrangements such as those found in motels, boarding homes, and room rentals. *Mathe*, 102 Wash. 2d at 544, 688 P.2d at 863. *See also* Timothy E. Travers, Annotation, *Admissibility of Evidence Discovered in Warrantless Search of Rental Property Authorized by Lessor of Such Property—State Cases*, 2 A.L.R.4th 1173, 1208 (1980).

Upon expiration of the tenancy, a tenant abandons his or her interest in the property and, likewise, an expectation of privacy. *State v. Christian*, 95 Wash. 2d 655, 659, 628 P.2d 806, 809 (1981). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.5(a).

Tenants may consent to searches of common areas under the "common authority" rule, even over the objection of the landlord. *Cranwell v. Mesec*, 77 Wash. App. 90, 103-04, 890 P.2d 491, 499-500 (1995). For additional discussion of consent by a lessee, see generally 3 LAFAVE, SEARCH AND SEIZURE § 8.5(b).

5.14(f) Bailee

A bailee may consent to a search of the bailor's belongings when the bailee has a sufficient relationship to or degree of control over the chattel. *See State v. Smith*, 88 Wash. 2d 127, 139-40, 559 P.2d 970, 976 (1977) (when hospital had joint control over patient-defendant's clothing, hospital ward clerk could consent to police seizure of the clothing). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 8.6(a). For a discussion of consent by a bailor, see generally 3 LAFAVE, SEARCH AND SEIZURE § 8.6(b).

5.14(g) Employee and Employer

Under some circumstances, an employee may give consent to a search of employer's premises, and an employer may consent to a search of the place of employment even when the belongings of an employee would be affected. Thus, under the common authority rule analysis, *see supra*, § 5.14, an employer may validly consent to a search of that portion of the employer's premises used by an employee for personal purposes. *State v. Kendrick*, 47 Wash. App. 620, 632-33, 736 P.2d 1079, 1082 (1987) (defendant leased a "crash pad" on premises owned by his employer; employer controlled guard dogs on the premises, stored personal and business items there, had keys to the area, and allowed use of area by other employees). For a discussion of the rules governing consent within the employer-employee relationship, see generally 3 LAFAVE, SEARCH AND SEIZURE § 8.6(c)-(d).

5.14(h) Hotel Employee

A hotel or motel employee may not grant valid consent to a search of a guest's room because a motel guest generally has the same expectation of privacy during his or her tenancy as the renter of a private residence. *State v. Davis*, 86 Wash. App. 414, 419, 937 P.2d 1110, 1113 (1997). *See also Stoner v. California*, 376 U.S. 483, 486, 84 S. Ct. 889, 891, 11 L. Ed. 2d 856, 861 (1964); *State v. York*, 11 Wash. App. 137, 141, 521 P.2d 950, 952 (1974). Note that the hotel guest's expectation of privacy generally expires at check-out time. *See Davis*, 86 Wash. App. at 419, 937 P.2d at 1113 (motel guest loses expectation of privacy at the expiration of tenancy unless late payment has been accepted by the motel and/or the motel has tolerated previous overtime stays).

5.14(i) Host and Guest

A host has the authority to consent to a search of a guest's bedroom and any other room occupied by the guest. *See State v. Koepke*, 47 Wash. App. 897, 903-04, 738 P.2d 295, 298-99 (1987) (tenant of apartment gave valid consent to search of room in which defendant was residing as a guest; defendant paid no rent); *State v. Rodriguez*, 65 Wash. App. 409, 414-15, 828 P.2d 636, 639-40 (1992) (mother could give valid consent for police search of apartment where son was a temporary guest; consent extended to bathroom occupied by defendant). For additional discussion, see generally 3 LAFAVE, SEARCH AND SEIZURE § 8.5(e). *See* common authority rule, *supra*, § 5.14.

5.15 Statutory Implied Consent

A statute may establish that particular conduct constitutes implied consent to a search. For example, a person driving a motor vehicle in Washington gives implied consent to a blood test if he or she is arrested for vehicular homicide. *State v. Brokman*, 84 Wash. App. 848, 850-51, 930 P.2d 354, 355-56 (1997); WASH. REV. CODE § 46.20.308(1) (1996).

5.16 Exigent Circumstances: Introduction

The exigent circumstances exception to the warrant requirement applies when police have established probable cause but do not obtain a warrant because the need for an immediate search or seizure makes it impractical to obtain a warrant. *State v. Audley*, 77 Wash. App. 897, 905, 894 P.2d 1359, 1363 (1995); *State v. Muir*, 67 Wash. App.

149, 152, 835 P.2d 1049, 1051 (1992). The reasoning underlying the exception is that the delay involved in obtaining a warrant could result in the loss of evidence, in the escape of the suspect, or in harm to the public or the police. *See, e.g.*, *State v. Carter*, 127 Wash. 2d 836, 852-53, 904 P.2d 290, 297-98 (1995) (Alexander, J., dissenting) (exigent circumstances justified search of motel room when police were afraid that drugs inside room would be destroyed if room's occupants were alerted to police presence by noises in hallway); *State v. Pressley*, 64 Wash. App. 591, 598, 825 P.2d 749, 753 (1992) (police may seize evidence without a warrant if probable cause exists and actions of person detained give rise to reasonable suspicion that evidence is in danger of being lost or destroyed). *See also* State *v. Stroud*, 106 Wash. 2d 144, 147, 720 P.2d 436, 438 (1986); *State v. Terrovona*, 105 Wash. 2d 632, 644-45, 716 P.2d 295, 303-04 (1986); *Audley*, 77 Wash. App. at 907, 894 P.2d at 1364; *State v. Flowers*, 57 Wash. App. 636, 643-44, 789 P.2d 333, 338 (1990). *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1(b), at 402-03 (3d ed. 1996). Exigent circumstances, however, are not created merely whenever a serious offense has been committed. *Thompson v. Louisiana*, 469 U.S. 17, 21, 105 S. Ct. 409, 411, 83 L. Ed. 2d 246, 250-51 (1984); *State v. Stevenson*, 55 Wash. App. 725, 732, 780 P.2d 873, 877 (1989). *See also Mincey v. Arizona*, 437 U.S. 385, 394, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290, 301 (1978); *State v. Counts*, 99 Wash. 2d 54, 58, 659 P.2d 1087, 1089 (1983).

The exigent circumstances exception has been narrowly construed when the search requires intrusion into the human body, *Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908, 919 (1966), or entry into private premises, *Payton v. New York*, 445 U.S. 573, 587-89, 100 S. Ct. 1371, 1380-81, 63 L. Ed. 2d 639, 651-52 (1980) (absent exigent circumstances, police may not make a warrantless arrest following a nonconsensual entry into home); *State v. Solberg*, 122 Wash. 2d 688, 696-97, 861 P.2d 460, 465 (1993). At the same time, under the Fourth Amendment the exception broadly encompasses searches of vehicles; thus, police may make a warrantless search of a vehicle even though the vehicle and its owner are in police custody. *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419, 428-29 (1970).

Article I, section 7 of the Washington Constitution is not as broad in the context of automobile searches. The scope of the permissible search incident to arrest justified under the exigent circumstances exception is limited to the passenger compartment and any unlocked compartments or containers. Under this exception, the search is only

permissible if conducted during the arrest process and immediately subsequent to the suspect's arrest and placement in the patrol car. *See State v. Stroud*, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2(b), at 68 (3d ed. 1996).

The requirement that exigent circumstances precede a warrantless entry by police to make an arrest does not apply when the crime is committed in the officer's presence after being admitted into the residence. Thus, in *State v. Dalton*, 43 Wash. App. 279, 286, 716 P.2d 940, 944 (1986), an officer who had obtained entry into a student's college dormitory room under the pretense of buying drugs, but with the intent of affecting an arrest, could make a warrantless arrest under WASH. REV. CODE § 10.31.100 (1996), which provides for an arrest without a warrant where the police officer has reasonable cause to believe a felony has been or is being committed. *Dalton*, 43 Wash. App. at 286-87, 716 P.2d at 944.

5.17 Exigent Circumstances Justifying Warrantless Entry into the Home

5.17(a) Hot Pursuit

An arrest on the street does not create an exigent circumstance justifying a warrantless search of an arrestee's house. *See Vale v. Louisiana*, 399 U.S. 30, 35, 90 S. Ct. 1969, 1972, 26 L. Ed. 2d 409, 413-14 (1970). However, police may make a warrantless entry into a home when (1) they attempt to arrest the suspect in a public place; (2) the suspect retreats into the home; and (3) the police reasonably fear that delay will result in the suspect's escape, in injury to the officers or to the public, or in the destruction of evidence. *United States v. Weaklem*, 517 F.2d 70, 72 (9th Cir. 1975) (injury); *United States v. Bustamante-Gamez*, 488 F.2d 4, 8-9 (9th Cir. 1973) (escape; destruction of evidence); *Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970) (escape; destruction of evidence). *See also United States v. Santana*, 427 U.S. 38, 44, 96 S. Ct. 2406, 2410, 49 L. Ed. 2d 300, 306 (1976) (White, J., concurring); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298, 87 S. Ct. 1642, 1645-46, 18 L. Ed. 2d 782, 787 (1967); *State v. Griffith*, 61 Wash. App. 35, 44, 808 P.2d 1171, 1176 (1991); *State v. Gallo*, 20 Wash. App. 717, 722, 582 P.2d 558, 562 (1978). While the police are on the premises, the scope of the intrusion is limited to its purpose; if the purpose is to prevent escape or harm, for example, the search is limited to finding the suspect or

weapons that could be used against the police. *Hayden*, 387 U.S. at 299, 87 S. Ct. at 1646, 18 L. Ed. 2d at 787-88.

Under both the Fourth Amendment and article I, section 7, a firm line has been drawn at the entrance of the house, and "that threshold may not reasonably be crossed without a warrant." *State v. Holeman*, 103 Wash. 2d 426, 429, 693 P.2d 89, 91 (1985) (quoting *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382, 63 L. Ed. 2d 639, 653 (1980)). Washington courts have deemed that the location of the arrestee, not the location of the arresting officer, is critical for purposes of determining whether an arrest takes place in a home. *Holeman*, 103 Wash. 2d at 429, 693 P.2d at 91. Thus, absent exigent circumstances such as hot pursuit, an officer may not arrest a suspect without a warrant—and, subsequently, conduct a warrantless search incident to arrest—if the suspect is standing in the doorway to his or her home, even when the officer is outside the home. *Id.* However, the unenclosed front porch of a home is a public place for purposes of arrest once probable cause has been established. *State v. Solberg*, 122 Wash. 2d 688, 699, 861 P.2d 460, 466 (1993). Therefore, a suspect who voluntarily exits his or her home onto the unenclosed porch may be arrested there, even in the absence of exigent circumstances. *Id.* at 700, 861 P.2d at 466. *See also State v. Bockman*, 37 Wash. App. 474, 481, 682 P.2d 925, 931 (1984).

In determining whether the warrantless entry into a home was justified by the hot pursuit exigent circumstance, courts examine not only the purpose of the entry, but also whether:

(1) the offense was serious or one of violence, *Dorman*, 435 F.2d at 392; *Welsh v. Wisconsin*, 466 U.S. 740, 752-53, 104 S. Ct. 2091, 2099, 80 L. Ed. 2d 732, 745 (1984) (warrantless arrest in defendant's bedroom for noncriminal traffic offense not justified to preserve evidence of individual's blood alcohol level because no imprisonment was possible, even assuming that underlying facts would have supported finding of that exigent circumstance). *But see Welsh*, 466 U.S. at 763-64, 104 S. Ct. at 2104-05, 80 L. Ed. 2d at 752 (White, J., dissenting) (because suspect could cast substantial doubt on validity of blood or breath test by consuming alcohol after arriving home, and in light of promptness with which officers reached suspect's home, the need to prevent imminent and ongoing destruction of evidence of *serious* violation of Wisconsin's traffic laws provided exigent circumstances justifying warrantless in-home arrest) (emphasis added);

(2) the suspect was armed, *Dorman*, 425 F.2d at 392;

(3) there was a clear and strong showing of probable cause to believe the suspect committed the crime, *id.* at 392-3;

(4) there were reasonable grounds to believe that the suspect was on the premises, *id.*;

(5) the police identified themselves and provided an opportunity for surrender prior to their entry, *id.*;

(6) the arrest decision was made in the course of an ongoing investigation or in the field, and the exigency of entry into the house was not foreseen at the time of the decision, *see United States v. Calhoun*, 542 F.2d 1094, 1102-03 (9th Cir. 1976) (entry into the defendant's home without warrant was not justified because entry was foreseeable consequence of planned investigation and prior police activities); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 464, 91 S. Ct. 2022, 2037, 29 L. Ed. 2d 564, 581-82 (1971); *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969);

(7) pursuit was substantially continuous and afforded police no reasonable opportunity to obtain a warrant, *People v. Escudero*, 592 P.2d 312, 318 (Cal. 1979); *see also Welsh*, 466 U.S. at 752-53, 104 S. Ct. at 2099, 80 L. Ed. 2d at 745 (warrantless search in home not justified by hot pursuit when police did not engage in immediate or continuous pursuit of defendant from scene of crime); *State v. Counts*, 99 Wash. 2d 54, 59, 659 P.2d 1087, 1089 (1983) (no hot pursuit when police stood outside defendant's home for one hour after defendant retreated therein).

The more intrusive the search, the greater the level of proof required for each element of the hot pursuit exception.

Washington cases involving hot pursuit include: *State v. Griffith*, 61 Wash. App. 35, 808 P.2d 1171 (1991) (escape; destruction of evidence); *State v. Hendricks*, 25 Wash. App. 775, 610 P.2d 940 (1980) (escape); *State v. Gallo*, 20 Wash. App. 717, 582 P.2d 558 (1978) (injury); *State v. Stringer*, 4 Wash. App. 485, 481 P.2d 910 (1971).

5.17(b) Imminent Arrest

Even when a suspect has not been arrested, police may make a warrantless entry into a home when they reasonably believe that the suspect has been alerted to his or her imminent arrest and is likely to destroy evidence or escape. *United States v. Flickinger*, 573 F.2d 1349, 1356 (9th Cir. 1978), *overruled on other grounds by United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984). The exception also applies when the police reasonably believe that the suspect is armed or the crime for which he or she is to be arrested is one of violence. *Hayden*, 387 U.S. at 298-300, 87 S. Ct. at 1645-46, 18 L. Ed. 2d at 787; *Flickinger*, 573 F.2d at 1355-56.

In addition, police may make a warrantless entry when they believe an accomplice has been alerted to the arrest of another accomplice and the crime was one of violence. *State v. Reid*, 38 Wash. App. 203, 209-10, 687 P.2d 861, 866 (1984). Police may not, however, make a warrantless entry when the likelihood of escape is slight, the offense is minor, and the police do not believe the suspect is armed. *State v. Dresker*, 39 Wash. App. 136, 139-40, 692 P.2d 846, 849 (1984).

Probable cause to believe a home contains contraband does not constitute an exigent circumstance justifying the absence of a warrant; police must have reason to believe the contraband will be destroyed before a warrant can be obtained. *See United States v. Rubin*, 474 F.2d 262, 268-69 (3d Cir. 1973); *cf. State v. Carter*, 127 Wash. 2d 836, 840, 904 P.2d 290, 292 (1995) (exigent circumstances justified warrantless entry of motel room where there was a risk of drugs being destroyed if persons in motel room were alerted to police presence by noises and scuffle in hallway); *State v. Jeter*, 30 Wash. App. 360, 362, 634 P.2d 312, 314 (1981) (presence of easily disposable contraband does not itself constitute exigent circumstances justifying noncompliance with "knock and announce" statute); *State v. Drumhiller*, 36 Wash. App. 592, 596-97, 675 P.2d 631, 633-34 (1984) (exigent circumstances when police observed occupants in process of inhaling what police reasonably believed to be cocaine).

5.18 Exigent Circumstances Justifying Warrantless Search and Seizure of the Person

Warrantless searches and seizures of persons may be justified by the exigent circumstances exception when police reasonably fear injury to themselves or others, flight, or the destruction of evidence. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 92-93, 100 S. Ct. 338, 343, 62 L. Ed. 2d 238, 246-47 (1979) (pat-down search unconstitutional absent reasonable belief); *Schmerber v. California*, 384 U.S. 757, 770-71, 86 S. Ct. 1826, 1835-36, 16 L. Ed. 2d 908, 919-20 (1966). *See generally State v. Audley*, 77 Wash. App. 897, 894 P.2d 1359 (1995). The issue generally does not arise with respect to an arrestee because the warrantless search of an arrestee may be justified as incident to arrest. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1, at 2 (3d ed. 1996). Exigent circumstances are used to justify two other kinds of warrantless searches of persons: searches that penetrate the body, such as blood tests and other invasive medical procedures, and searches of persons located on the premises being searched.

5.18(a) Warrantless Searches Involving Intrusion into the Body

For a medical procedure to be performed without a warrant and justified by exigent circumstances, the test selected to obtain evidence must be reasonable. *Schmerber*, 384 U.S. at 767-68, 86 S. Ct. at 1834, 16 L. Ed. 2d at 917-18. *See* 2 LAFAVE, SEARCH AND SEIZURE § 3.3(b), at 104. In addition, the State must show more than probable cause because of the severity of the search, and the method used to obtain the evidence must be reasonable. *Schmerber*, 384 U.S. at 770-72, 86 S. Ct. at 1835-36, 16 L. Ed. 2d at 919-20; *State v. Young*, 15 Wash. App. 581, 584-85, 550 P.2d 689, 691-92 (1976) (police may use reasonable force to constrict throat to prevent swallowing).

Where a serious crime involving intoxication is at issue, the natural dissipation of alcohol in the blood of a suspect is an exigent circumstance justifying the nonconsensual extraction of a blood sample to determine the suspect's blood alcohol level. *Schmerber*, 384 U.S. at 770-71, 86 S. Ct. at 1835-36, 16 L. Ed. 2d at 919-20. Blood tests without a warrant have been upheld as reasonable searches under both the Fourth Amendment and article I, section 7 as long as the test is performed in a reasonable manner by a trained paramedic. *State v. Curran*, 116 Wash. 2d 174, 185, 804 P.2d 558, 564 (1991), *abrogated on other grounds, State v. Berlin*, 133 Wash. 2d 541, 947 P.2d 700 (1997). In Washington, blood tests for alcohol intoxication are also justified by statutory implied consent under WASH. REV. CODE § 46.20.308(3) (1996). *Curran*, 116 Wash. 2d at 185, 804 P.2d at 564 (no violation of article I, section 7 when a blood sample is taken pursuant to WASH. REV. CODE § 46.20.308(3)). *But see State v. Wetherell*, 82 Wash. 2d 865, 870-71, 514 P.2d 1069, 1073 (1973) (lawful arrest of motorist is a prerequisite for operation of implied consent statute; express consent is required for blood test of motorist who is not under arrest).

Similarly, the exigent circumstance of dissipation of blood alcohol has also been used to justify a warrantless and nonconsensual entry into a residence to arrest a suspect and seize a blood sample. *State v. Komoto*, 40 Wash. App. 200, 211-13, 697 P.2d 1025, 1032-33 (1985) (officer used a passkey to enter apartment and arrest suspect following felony hit and run).

The fact that evidence is likely to be destroyed will not automatically justify an intrusive medical procedure even when a warrant is obtained; the evidence must be essential to a conviction. *See Winston v. Lee*, 470 U.S. 753, 765-66, 105 S. Ct. 1611, 1619-20, 84 L. Ed. 2d 662, 672-73 (1985) (no need to retrieve bullet from defendant's body

under circumstances where other substantial evidence was available to convict him).

5.18(b) Warrantless Searches and Seizures of Persons Located on Premises Being Searched

When a search warrant for premises is being executed, police may conduct a warrantless search of a person located on the premises if they have "reasonable cause" to believe that the person is concealing evidence sought and immediate seizure is necessary to prevent its destruction. *State v. Halverson*, 21 Wash. App. 35, 38, 584 P.2d 408, 410 (1978) (warrant authorizing search of home and its owner did not permit officers to search person found in home at time of search when magistrate had made no prior determination of probable cause to search that person and person did not act suspiciously). For a more complete discussion of when occupants may be searched during the execution of a search warrant for premises, see 2 LAFAVE, SEARCH AND SEIZURE § 4, at 394.

5.19 *Exigent Circumstances Justifying Entry into the Home or Search of the Person: Absence of Less Intrusive Alternatives*

Courts have held warrantless entries of homes illegal when police could have kept the residence under surveillance until a warrant was obtained. *State v. Werth*, 18 Wash. App. 530, 536-37, 571 P.2d 941, 944-45 (1977). *See also United States v. Pacheco-Ruiz*, 549 F.2d 1204 (9th Cir. 1976); *cf. State v. McKenzie*, 12 Wash. App. 88, 528 P.2d 269 (1974) (when police officers watched defendant's house while other officers applied for search warrant, and when defendant drove car out of garage, was approached by police, and then sounded his horn, the officers were permitted to immediately enter house in order to detain occupants, provided the officers refrained from searching the house until the search warrant was issued); *State v. Peele*, 10 Wash. App. 58, 516 P.2d 788 (1973) (search warrant necessary when the suspect was not fleeing, but might be expected to hide out on the premises until morning); *People v. Vogel*, 374 N.E.2d 1152 (Ill. App. Ct. 1978) (when threat of destruction of evidence in locker was minimal or nonexistent and could be thwarted by stationing officer at locker while warrant was obtained, warrantless search was not justified); *State v. Allen*, 508 P.2d 472 (Or. Ct. App. 1973) (when no one who could dispose of contraband remains on premises, police should secure premises by stationing guard while search warrant is obtained). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.5 (3d ed. 1996) (cordoning-off should be required

when it constitutes lesser intrusion than a warrantless search and does not jeopardize life).

Similarly, the police may be required to keep occupants under surveillance, instead of searching them, until a warrant is procured. *See, e.g., United States v. Grummel*, 542 F.2d 789 (9th Cir. 1976); *United States v. Rosselli*, 506 F.2d 627 (7th Cir. 1974) (police failure to apply for warrant was unlawful when police could have stationed officer with informant to prevent him from calling and warning defendant of imminent search); *State v. Lewis*, 19 Wash. App. 35, 40, 573 P.2d 1347, 1350 (1978). Police may use methods not involving any searching activity to secure premises in which they are legally present while awaiting the issuance of a search warrant. *State v. Terrovona*, 105 Wash. 2d 632, 645-46, 716 P.2d 295, 302 (1986) (prior warrantless entry and arrest of defendant in his residence was justified by exigent circumstances; nothing observed by the police contributed to the issuance of the search warrant, nor was anything in "plain view" used as evidence).

A suspect attempting to swallow evidence may create an exigent circumstance justifying efforts to prevent the swallowing, even when the evidence could be expected to pass through the digestive system and be recovered. *State v. Taplin*, 36 Wash. App. 664, 665-67, 676 P.2d 504, 506 (1984).

5.20 *Exigent Circumstances Justifying Warrantless Search and Seizure of Containers*

Generally, a container may be seized without a warrant when there is probable cause to believe it is evidence of a crime; the container's mobility is the exigent circumstance permitting the warrantless seizure. *See, e.g., United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977); *State v. Jackson*, 82 Wash. App. 594, 918 P.2d 945 (1996), *review denied*, 131 Wash. 2d 1006 (1997) (positive reaction by dog trained to discover drugs established probable cause justifying seizure of package). A warrantless search of its contents, however, is permissible only if delay would diminish the evidentiary value of the contents, prevent the apprehension of suspects, or endanger the public. *Chadwick*, 433 U.S. at 14-15, 97 S. Ct. at 2484, 53 L. Ed. 2d at 549; *State v. McAlpin*, 36 Wash. App. 707, 716, 677 P.2d 185, 190 (1984) (emergency of public safety protection justified search of briefcase in order to locate a missing gun). *See also State v. Smith*, 88 Wash. 2d 127, 137-38, 559 P.2d 970, 975 (1977); *State v. Wolfe*, 5 Wash. App. 153, 486 P.2d 1143 (1971). Once the container is in the officer's exclusive control, there is no danger of removal; thus exigent circum-

stances no longer justify a warrantless search of the contents. *See, e.g., United States v. Van Leeuwen*, 397 U.S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970); *State v. Johnston*, 31 Wash. App. 889, 645 P.2d 63 (1982) (seizure of purse valid, but subsequent search without a warrant was illegal); *State v. Moore*, 29 Wash. App. 354, 628 P.2d 522 (1981) (warrantless seizure of luggage proper, but warrantless search unlawful); *cf. State v. Kealey*, 80 Wash. App. 162, 170-71, 907 P.2d 319, 324 (1995), *review denied*, 129 Wash. 2d 1021 (1996) ("Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.").

When a container is found in an automobile, the rule requiring a warrant for the search of a container's contents does not apply if police have probable cause to search the vehicle, and police may open containers discovered during a search so long as the container is large enough to conceal the object of the search. *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). *See also United States v. Johns*, 469 U.S. 478, 105 S. Ct. 881, 83 L. Ed. 2d 890 (1985). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.5 (3d ed. 1996).

A warrantless inspection or testing of a container's contents is not always considered a "search." When the only fact that can be gleaned from an inspection or test is whether the contents are contraband, the Fourth Amendment is not implicated. *United States v. Jacobsen*, 466 U.S. 109, 123, 104 S. Ct. 1652, 1662, 80 L. Ed. 2d 85, 100 (1984) (chemical test that merely discloses whether a particular substance is cocaine does not compromise any legitimate interest in privacy). *Accord State v. Bishop*, 43 Wash. App. 17, 20, 714 P.2d 1199, 1200 (1986) (subjecting suspicious substance to chemical analysis to determine identity does not invade privacy interests). Thus, a canine sniff does not constitute a search under the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644-45, 77 L. Ed. 2d 110, 121 (1983) (trained narcotics dog sniffing exterior of luggage does not constitute a search). For a discussion of canine sniffs under article I, section 7, see *State v. Boyce*, 44 Wash. App. 724, 723 P.2d 28 (1986) (canine sniff of air outside suspect's bank safe deposit box; court suggests article I, section 7 requires a case-by-case examination of the circumstances in order to determine whether a canine sniff is a search). *See generally* 1 LAFAVE, SEARCH AND SEIZURE § 1.6. See *State v. Courcy*, 48 Wash. App. 326, 739 P.2d 98 (1987) for an application of the single purpose container rule in Washington. *See also* 3 LAFAVE, SEARCH AND SEIZURE §§ 5.2(b), at 68; 5.5, at 169.

5.21 *Warrantless Searches and Seizures of Motor Vehicles*

Automobiles and other motor vehicles are treated as a special category in search and seizure law for two reasons. First, the reasonable expectation of privacy in a vehicle is less than that in a home or on a person and, second, the mobility of a vehicle may make obtaining a warrant prior to a search or seizure impractical. *See California v. Carney*, 471 U.S. 386, 392-93, 105 S. Ct. 2066, 2069-70, 85 L. Ed. 2d. 406, 414 (1985) (privacy expectation in vehicles is less than in homes because of pervasive government regulation of driving and roads); *State v. Johnson*, 128 Wash. 2d 431, 449, 453-54, 909 P.2d 293, 303, 306 (1996); *see also Chambers v. Maroney*, 399 U.S. 42, 49, 90 S. Ct. 1975, 1980, 26 L. Ed. 2d 419, 427 (1970). Under both the Fourth Amendment and article I, section 7, the fact that it is possible to sleep in a vehicle does not give rise to the same privacy rights that attach to fixed dwellings. *Carney*, 471 U.S. at 393, 105 S. Ct. at 2070, 85 L. Ed. 2d at 414 (motor home is treated like a vehicle when it is mobile); *Johnson*, 128 Wash. 2d at 449, 909 P.2d at 303 (lessened privacy interest for sleeper compartment of a tractor-trailer rig); *State v. Cantrell*, 124 Wash. 2d 183, 190, 875 P.2d 1208, 1211-12 (1994) (There exists "less expectation of privacy in automobile than in either a home or an office. . . ."). The reasonable expectation of privacy in motor vehicles is discussed in 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3(e), at 66 (3d ed. 1996).

This section focuses on the warrantless search or seizure of a vehicle and its contents when police have probable cause to believe the vehicle contains evidence of a crime. Vehicles may also be the subject of a warrantless search when the circumstances of the search are consistent with other exceptions to the warrant requirement, such as the search incident to arrest or *Terry* stop and frisk exceptions. *See* 3 LAFAVE, SEARCH AND SEIZURE § 5.2(b), at 68; *see also* 2 LAFAVE, SEARCH AND SEIZURE §§ 4.7-4.9, at 583-652.

The search of a motor vehicle and its contents is treated differently under the Fourth Amendment than under article I, section 7 of the Washington Constitution. *Compare New York v. Belton*, 453 U.S. 454, 460-61, 101 S. Ct. 2860, 2864, 69 L. Ed. 2d 768, 774-76 (1981) (police may, as a contemporaneous incident of lawful custodial arrest of occupants in automobile, search passenger compartment and contents of any container in passenger compartment), *with State v. Stroud*, 106 Wash. 2d 144, 148-52, 720 P.2d 436, 438-40 (1986) (in warrantless search of automobile, actual exigent circumstances must be balanced

against whatever privacy interests individual has in articles in vehicle). The next section sets forth federal law governing search and seizure of automobiles and their contents, and then discusses state law. Finally, the general principles governing automobile impoundment and inventory searches are discussed.

5.22 *Searches and Seizures of Vehicles Under the Fourth Amendment*

5.22(a) Probable Cause to Search a Vehicle: The *Carroll* Rule

Under the Fourth Amendment, police may conduct a warrantless search of an automobile when there is probable cause to believe that the vehicle contains contraband or evidence. *Chambers v. Maroney*, 399 U.S. 42, 51-52, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419, 428 (1970); *Carroll v. United States*, 267 U.S. 132, 153-54, 45 S. Ct. 280, 285, 69 L. Ed. 543, 551 (1925); *State v. Huff*, 64 Wash. App. 641, 648-49, 826 P.2d 698, 702 (1992). A warrantless search is permissible under the *Carroll* rule because an automobile's mobility creates an exigency: the contraband or evidence could be transported out of the jurisdiction while officers are applying for a warrant. *Carroll*, 267 U.S. at 153, 45 S. Ct. at 285, 69 L. Ed. at 551.

The special treatment of automobiles has been extended to permit the warrantless search of a vehicle's trunk when the police reasonably believe that the trunk contains weapons and the vehicle is vulnerable to vandalism. *Cady v. Dombrowski*, 413 U.S. 433, 448, 93 S. Ct. 2523, 2531, 37 L. Ed. 2d 706, 718 (1973) (suspect's vehicle had been disabled in an accident and subsequently towed to a private garage). Similarly, police may make a warrantless search of a trunk when they reasonably believe a suspect may be hiding in it. *State v. Silvernail*, 25 Wash. App. 185, 191, 605 P.2d 1279, 1283 (1980).

5.22(b) Application of the *Carroll* Rule When Actual Exigency Removed

The *Carroll* rule permits a warrantless search even after a vehicle has been taken into police custody and is in no danger of removal or of disturbance of its contents. *Florida v. Meyers*, 466 U.S. 380, 382, 104 S. Ct. 1852, 1853, 80 L. Ed. 2d 381, 384 (1984); *Chambers*, 399 U.S. at 51-52, 90 S. Ct. at 1981, 26 L. Ed. 2d at 428-29 (actual exigent circumstances not necessary to justify warrantless probable cause search). The rationale is that the initial justification for the warrantless search does not disappear after impoundment. *United States v. Johns*, 469 U.S. 478, 484, 105 S. Ct. 881, 885, 83 L. Ed. 2d 890, 897 (1985). The vehicle, however, has to have been initially mobile or readily

mobile for the *Carroll* rule to apply. *Coolidge v. New Hampshire*, 403 U.S. 443, 460-62, 91 S. Ct. 2022, 2034-36, 29 L. Ed. 2d 564, 579-81 (1971) (warrant was required when defendant had already been arrested, his car was located in his driveway, no other individual was available to move the car, and police already had established probable cause to search the car). *See also California v. Carney*, 471 U.S. 386, 390-91, 105 S. Ct. 2066, 2068-69, 85 L. Ed. 2d 406, 412-13 (1985).

The constitutional limits on the number of warrantless searches and the length of time that may elapse before police are required to obtain a warrant has not been clarified. *See Johns*, 469 U.S. at 484-88, 105 S. Ct. at 886-87, 83 L. Ed. 2d at 897-99 (upholding the warrantless search of containers in a vehicle under the *Carroll* rule when the containers were stored in a government warehouse for three days prior to the search).

5.22(c) Permissible Scope of Search or Seizure Under *Carroll*: The Vehicle Itself and Containers Within the Vehicle

When police have probable cause to believe that a vehicle contains contraband, they may conduct a warrantless search "of the same scope as could be authorized by a magistrate." *Johns*, 469 U.S. at 483, 105 S. Ct. at 885, 83 L. Ed. 2d at 896 (citing *United States v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 2171-72, 72 L. Ed. 2d 572, 594 (1982)).

Thus, when the exact location of the contraband within the vehicle is not known, police may conduct a warrantless search not only of the vehicle itself, but also of any of its contents, including containers. *Ross*, 456 U.S. at 825, 102 S. Ct. at 2173, 72 L. Ed. 2d at 594. Formerly, police were required to obtain a warrant in order to search a container found in a motor vehicle if the probable cause to search was directed only at the container, and not the car itself. *Arkansas v. Sanders*, 442 U.S. 753, 765, 99 S. Ct. 2586, 2594, 61 L. Ed. 2d 235, 246 (1979); *United States v. Chadwick*, 433 U.S. 1, 13, 97 S. Ct. 2476, 2484-85, 53 L. Ed. 2d 538, 549-50 (1977). Currently, however, when police have probable cause to believe that the contraband is hidden within a particular container, and the container is placed inside a vehicle, probable cause automatically extends to the entire vehicle. *California v. Acevedo*, 500 U.S. 565, 580, 111 S. Ct. 1982, 1991, 114 L. Ed. 2d 619, 634 (1991). In other words, if the police have probable cause to believe contraband or evidence of a crime is present anywhere inside a vehicle, they may search the entire automobile and any containers within it. *Id.* The scope of the permissible search is limited to the size and shape of the items sought, and police may only search

where it is reasonable to believe the sought items may be hidden. *Id.* Note that *Acevedo* and *Ross* apply only in the context of the automobile exception, and a legitimate expectation of privacy in closed containers is retained outside of the context of motor vehicles.

5.23 *Searches and Seizures of Vehicles Under Article I, Section 7*

The Washington Constitution provides greater protection against the warrantless search of an automobile than the Fourth Amendment. *State v. Hendrickson*, 129 Wash. 2d 61, 69-70 n.1, 917 P.2d 563, 567 n.1 (1996). The Washington Constitution does not permit a blanket exception to the warrant requirement for automobiles. Under article I, section 7, warrantless vehicle searches incident to arrest must occur immediately following the arrest of the occupant of a vehicle. *State v. Stroud*, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986); *State v. Perea*, 85 Wash. App. 339, 343-44, 932 P.2d 1258, 1260 (1997). *See also State v. Cass*, 62 Wash. App. 793, 795-96, 816 P.2d 57, 58-59 (1991) (search of passenger compartment valid if immediately subsequent to arresting, handcuffing, and placing suspect in police car); *State v. Fore*, 56 Wash. App. 339, 347, 783 P.2d 626, 631 (1989) (for search to be valid, arrest must be sufficiently proximate, both temporally and physically, to lawful arrest).

Moreover, under the heightened privacy protection of article I, section 7, the warrantless search incident to arrest of locked containers located in the passenger compartment is prohibited. *Stroud*, 106 Wash. 2d at 152, 720 P.2d at 441. This is in contrast to the federal standard, which permits the warrantless search incident to arrest of both locked and unlocked containers. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2(b), at 68 (3d ed. 1996). "The rationale for this departure from the federal standard is that use of a lock demonstrates the individual's expectation of privacy and the presence of a lock minimizes the danger of an arrestee gaining access to the contents of the container." *State v. Johnson*, 77 Wash. App. 441, 446, 892 P.2d 106, 109 (1995), *aff'd*, 128 Wash. 2d 431, 909 P.2d 293 (1996) (discussing *Stroud*). Therefore, in Washington police must obtain a search warrant prior to searching any locked glove compartment or other locked container.

5.24 *Warrantless Vehicle Searches Based on Generalized Suspicion: Spot Checks of Motorists*

In the absence of a valid spot check program, police officers may stop a motor vehicle to check for valid registration or possible automobile violations only when they have a reasonable suspicion of

unlawful activity. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673 (1979) (random stopping of drivers to check registration violated the Fourth Amendment); *State v. Marchand*, 104 Wash. 2d 434, 441, 706 P.2d 225, 228 (1985) (safety spot check invalid under the Fourth Amendment). For police to institute general spot check procedures, the procedures must constitute "a sufficiently productive mechanism to justify the intrusion." *Marchand*, 104 Wash. 2d at 437-38, 706 P.2d at 226-27. In addition, the spot check procedures must be such that "the exercise of discretion by law enforcement officials [is] sufficiently constrained." *Id.* at 438, 706 P.2d at 227. *See also Seattle v. Mesiani*, 110 Wash. 2d 454, 459, 755 P.2d 775, 778 (1988) (Seattle's sobriety checkpoint program improperly "gave police officers unbridled discretion to conduct intrusive searches"). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.4(c) (3d ed. 1996). The validity of a road block program under the Fourth Amendment depends on the balancing of the effectiveness of the road block program against the degree of intrusion on the cumulative interests invaded, rather than merely with one individual's interest in freedom from intrusion. *Mesiani*, 110 Wash. 2d at 459-60, 755 P.2d at 778 (checkpoint program involved no statutory constraints and involved extensive invasion of privacy such as the smelling of suspect's breath, visual check of automobile for open containers, and physical tests designed to elicit evidence of dexterity). *Cf. Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (sobriety checkpoint where all vehicles were briefly detained did not violate the Fourth Amendment).

In *Mesiani*, the Washington Supreme Court held a sobriety checkpoint program unconstitutional under both article I, section 7 and the Fourth Amendment. *Mesiani*, 110 Wash. 2d at 458, 460, 755 P.2d at 777-78. Relying on article I, section 7's explicit recognition of the privacy rights of the state's citizens and requirements that all searches be conducted under "authority of law," the court dismissed the city's argument that the stops fell within an exception to the warrant requirement. *Id.* at 457-58, 755 P.2d at 777. In one of the cases relied upon by the city, *State v. Silvernail*, 25 Wash. App. 185, 605 P.2d 1279 (1980), the court permitted a warrantless search when there was information that a serious felony had been recently committed. *Id.* at 190, 605 P.2d at 1283. The *Mesiani* court distinguished *Silvernail*, stating that notice that a felony had recently been committed "is far different from an inference from statistics that there are inebriated drivers in the area." *Mesiani*, 110 Wash. 2d at 458 n.1, 755 P.2d at

777 n.1. *But see Ingersoll v. Palmer*, 743 P.2d 1299 (Cal. 1987). The California Supreme Court used the "administrative search" doctrine to decide that sobriety checkpoints pass constitutional muster so long as they are properly designed and operated. *Ingersoll*, 743 P.2d at 1303-04. Such checkpoints are intended primarily to deter intoxicated motorists from taking to the road, not to discover evidence of crimes, and, therefore, may be characterized as administrative searches that require no individualized suspicion of illegal conduct. *Id.* at 1306-08.

5.25 Warrantless Searches of Vehicles Suspected of Being Subject of Criminal Activity

A police officer may make a limited entry and investigation into a vehicle that he or she has probable cause to believe has been the subject of a burglary, tampering, or theft. *State v. Lynch*, 84 Wash. App. 467, 477-78, 929 P.2d 460, 465 (1996). An officer may search those areas he or she reasonably believes to have been affected, and those areas reasonably believed to contain some evidence of ownership. *Lynch*, 84 Wash. App. at 477-78, 929 P.2d at 465. *See also State v. Orcutt*, 22 Wash. App. 730, 734-35, 591 P.2d 872, 875 (1979) (valid warrantless entry into vehicle to look in places where registration papers might be kept if driver has fled vehicle and officer reasonably believed vehicle was stolen); *cf. Arizona v. Taras*, 504 P.2d 548, 552 (Ariz. Ct. App. 1972) (warrantless search for registration papers may be made when occupant is detained and refuses to identify owner of vehicle).

5.26 Forfeiture or Levy

Courts differ as to whether a vehicle that was used to transport contraband may be seized without a warrant. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.3(b), at 514-19 (3d ed. 1996). *See also General Motors Leasing Corp. v. United States*, 429 U.S. 338, 354, 97 S. Ct. 619, 629-30, 50 L. Ed. 2d 530, 545 (1977) (IRS may impound car parked on public street for levy or forfeiture purposes without obtaining warrant when no legitimate privacy is invaded; when car is on private property, a warrant may be required).

In Washington, courts have recognized that "searches and seizures of motor vehicles used in drug transactions are an everyday occurrence." *State v. McFadden*, 63 Wash. App. 441, 446, 820 P.2d 53, 55 (1991). In *Lowery v. Nelson*, 43 Wash. App. 747, 719 P.2d 594 (1986), the court held that, under the Fourth Amendment, the police are not required to obtain a search warrant before exercising the

authority granted by WASH. REV. CODE § 69.50.505(a)(4) (1985) (forfeiture statute, Uniform Controlled Substances Act) to seize a vehicle used to transport a controlled substance. *Lowery*, 43 Wash. App. at 750, 719 P.2d at 596. *See also Rozner v. Bellevue*, 116 Wash. 2d 342, 804 P.2d 24 (1991); *State v. Gwinner*, 59 Wash. App. 119, 796 P.2d 728 (1990) (upholding seizure under Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881(a)(4), (6) (1970)). Under both the Fourth Amendment and article I, section 7, police may conduct a warrantless search of a vehicle seized pursuant to the forfeiture statute on the theory that the search is a valid inventory search. *McFadden*, 63 Wash. App. at 449, 820 P.2d at 57 (1991). *See* 3 LAFAVE, SEARCH AND SEIZURE § 7.5(c), at 590.

5.27 Impoundment

"Impoundment is considered a seizure because it involves the taking of a vehicle into the exclusive custody of the government." *State v. Coss*, 87 Wash. App. 891, 898, 943 P.2d 1126, 1129 (1997), *review denied*, __ Wash. 2d __, 958 P.2d 318 (1998). The facts of each case determine the reasonableness of each particular impoundment. *Id.* A vehicle may be impounded without a warrant in several circumstances:

> (1) as evidence of a crime, if the officer has probable cause to believe that it was stolen or used in the commission of a felony; (2) as part of the police "community caretaking function," if the removal of the vehicle is necessary . . .; and (3) as part of the police function of enforcing traffic regulations, if the driver has committed one of the traffic offenses for which the legislature has specifically authorized impoundment.

Id. (citing *State v. Simpson*, 95 Wash. 2d 170, 189, 622 P.2d 1199, 1211 (1980)). *See also State v. Lynch*, 84 Wash. App. 467, 476, 929 P.2d 460, 465 (1996); *State v. Hill*, 68 Wash. App. 300, 842 P.2d 996 (1993); *State v. McFadden*, 63 Wash. App. 441, 820 P.2d 53 (1991).

A vehicle lawfully parked at one's home or even on a public street may not be impounded simply because its owner has been arrested. *United States v. Squires*, 456 F.2d 967, 969-70 (2d Cir. 1972). Similarly, impoundment is improper when the arrestee's release is imminent and the vehicle does not pose a safety hazard. *State v. Bales*, 15 Wash. App. 834, 836, 552 P.2d 688, 690 (1976). Note also that when police conduct warrantless impoundments and subsequent inventory searches (*see* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.5(e), at 590 (3d ed.

1996)) the searches may not be a pretext for a search that the police otherwise could not have made. *State v. White*, 83 Wash. App. 770, 774-75, 924 P.2d 55, 57 (1996), *rev'd on other grounds*, 135 Wash. 2d 761, 958 P.2d 982 (1998).

5.27(a) Evidence of Crime

"A car may be lawfully impounded as evidence of a crime if an officer has probable cause to believe that it was stolen or used in the commission of a felony." *State v. Terrovona*, 105 Wash. 2d 632, 647, 716 P.2d 295, 303 (1986). In *Terrovona*, the Washington Supreme Court held that the police properly impounded a vehicle that they had probable cause to believe was used in the commission of a felony, where the defendant had lured the victim to the murder site by telephoning him and asking him to bring gasoline to the defendant's empty vehicle. *Id.* at 647-48, 716 P.2d at 303. *Cf. State v. Huff*, 64 Wash. App. 641, 653, 826 P.2d 698, 705 (1992) (an officer who has probable cause to believe a vehicle contains contraband or evidence of a crime may seize and hold the car for the reasonable time needed to obtain a search warrant; the car may be towed to an impound yard during seizure).

5.27(b) Community Caretaking Function

The "community caretaking function" permits impoundment when the vehicle has been abandoned, impedes traffic, poses a threat to public safety and convenience, or is itself threatened by vandalism or theft of its contents. *South Dakota v. Opperman*, 428 U.S. 364, 368-69, 96 S. Ct. 3092, 3097, 49 L. Ed. 2d 1000, 1005 (1976); *Cady v. Dombrowki*, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706, 715 (1973); *State v. Sweet*, 44 Wash. App. 226, 236, 721 P.2d 560, 566 (1986). In *Sweet*, for example, impoundment was held to be proper under the community caretaking function when the arrestee was unconscious, items of value were visible inside the vehicle, and the vehicle was in a high crime area. *Sweet*, 44 Wash. App. at 236-37, 721 P.2d at 566.

Under the community caretaking function, the police need have no reasonable belief that the vehicle is connected with criminal activity. *See State v. Chisholm*, 39 Wash. App. 864, 866-67, 696 P.2d 41, 42-43 (1985). However, for a valid impoundment as part of the community caretaking function, police must first make an inquiry as to the availability of the owner or the owner's spouse or friends to move the vehicle. *State v. Williams*, 102 Wash. 2d 733, 743, 689 P.2d 1065, 1070-71 (1984). *See also State v. Houser*, 95 Wash. 2d 143, 153, 622

P.2d 1218, 1224-25 (1980); *State v. Simpson*, 95 Wash. 2d 170, 189, 622 P.2d 1199, 1211 (1980). Police must also consider the alternative of parking and locking the car. *Williams*, 102 Wash. 2d at 743, 689 P.2d at 1071.

5.27(c) Enforcement of Traffic Regulations

Officers are permitted to impound a vehicle as part of enforcing traffic regulations only when constitutionally reasonable and necessary to prevent a continuing violation of a traffic offense for which the legislature has specifically authorized impoundment. *Hill*, 68 Wash. App. at 305, 842 P.2d at 999. Impoundment is unreasonable and improper if a reasonable alternative to impoundment exists, such as when the owner of the vehicle, or a passenger in the vehicle, is available to transport it. *Id.* at 306, 842 P.2d at 999. Police officers are to use discretion when deciding to impound a vehicle and, while an officer need not exhaust all possibilities, the officer must at least consider alternatives to impoundment. *Coss*, 87 Wash. App. at 899-900, 943 P.2d at 1130 (impoundment improper where officer failed to consider alternatives to impoundment; a validly licensed passenger could have driven vehicle from scene of traffic stop). *See also State v. Reynoso*, 41 Wash. App. 113, 119-20, 702 P.2d 1222, 1225-26 (1985) (impoundment under WASH. REV. CODE § 46.20.435 (1987) for commission of certain offenses is not mandatory).

5.27(d) Warrantless Detention

Officers may make a warrantless detention of a vehicle by deflating its tires during the time when officers are in pursuit of a suspect. *State v. Burgess*, 43 Wash. App. 253, 259, 716 P.2d 948, 952 (1986). In *Burgess*, the court held that because the detention was unaccompanied by an exploratory search, the detention was reasonably restricted in time and place and was necessary to prevent the suspect's flight from the scene. *Id.*

5.28 Inventory Searches of Impounded Vehicles

Following the lawful impounding of a vehicle, the inventory exception to the warrant requirement permits an officer to conduct a warrantless search of the car. *See Colorado v. Bertine*, 479 U.S. 367, 371, 107 S. Ct. 738, 741, 93 L. Ed. 2d 739, 745 (1987) (inventory searches are a well-defined exception to the warrant requirement); *State v. White*, 135 Wash. 2d 761, 765-67, 958 P.2d 982, 984-85 (1998) (limiting scope of inventory search to those areas necessary to fulfill its purpose). Routine inventory searches are reasonable under the Fourth

Amendment when police follow standard practices and the search is not a pretext for obtaining evidence the police otherwise would not be able to obtain. *South Dakota v. Opperman*, 428 U.S. 364, 374-76, 96 S. Ct. 3092, 3100, 49 L. Ed. 2d 1000, 1008 (1976); *State v. White*, 83 Wash. App. 770, 774-75, 924 P.2d 55, 57 (1996), *rev'd on other grounds*, 135 Wash. 2d 761, 958 P.2d 982 (1998).

> Washington courts have long held that a noninvestigatory inventory search of an automobile is proper when conducted in good faith for the purposes of (1) finding, listing, and securing from loss during detention property belonging to a detained person; [and] (2) protecting police and temporary storage bailees from liability due to dishonest claims of theft.

State v. Houser, 95 Wash. 2d 143, 154, 622 P.2d 1218, 1225 (1980); *White*, 83 Wash. App. at 777-75, 924 P.2d at 58. *Cf. State v. Mireles*, 73 Wash. App. 605, 612, 871 P.2d 162, 166 (1994) (routine inventory search by Department of Social and Health Services did not violate owner's Fourth Amendment rights; truck was seized to enforce lien for owner's unpaid child support; search followed written standardized inventory procedures).

The scope of an inventory search is limited "to those areas necessary to fulfill its purpose," that is, "limited to protecting against substantial risks to property. . . ." *Houser*, 95 Wash. 2d at 155, 622 P.2d at 1226. For example, in Washington, police may not open and examine a locked trunk "absent a manifest necessity for conducting such a search." *Id.* at 156, 622 P.2d at 1226 (no great danger of theft to property left in trunk). Moreover, police may not open luggage located in an impounded vehicle absent consent or exigent circumstances. *Id.* at 158, 622 P.2d at 1227-28. Police conducting an inventory search of a validly impounded vehicle may not search a locked trunk despite the fact that the trunk could be opened by a switch located inside the passenger compartment. *White*, 135 Wash. 2d at 265-67, 958 P.2d at 984-86.

In *State v. Williams*, 102 Wash. 2d 733, 689 P.2d 1065 (1984), the court suggested that the owner's consent must be obtained before police may conduct an inventory search of an impounded vehicle pursuant to the community caretaking function. *Id.* at 743, 689 P.2d at 1071. However, an inventory search of a vehicle impounded pursuant to the community caretaking function without the owner's consent was held to be valid in *State v. Sweet*, 44 Wash. App. 226, 721 P.2d 560 (1986). In *Sweet*, the owner was unconscious and unable to either give or withhold his consent; there was also no evidence

suggesting that the search was conducted in bad faith or that it was a mere pretext for an investigatory search. *Id.* at 237, 721 P.2d at 566.

5.29 Warrantless Vehicle Searches: Medical Emergencies

Police may enter a vehicle to aid a person in distress or to seek information about a person in distress. *United States v. Haley*, 581 F.2d 723, 726 (8th Cir. 1978). *Cf.* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.5, at 169 (3d ed. 1996).

5.30 Warrantless Searches in Special Environments

Warrantless searches have been permitted in special environments when the danger to the public is severe and the degree of intrusion small. Thus, warrantless magnetometer (metal detector) searches are permitted at airports to prevent hijackings and bombings. *United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973). Similarly, brief stops are permitted at courthouses to prevent bombings. *Downing v. Kunzig*, 454 F.2d 1230, 1233 (6th Cir. 1972).

At the same time, the Washington Supreme Court has rejected as unconstitutional the warrantless pat-down of patrons at rock concerts. *Jacobsen v. Seattle*, 98 Wash. 2d 668, 673-74, 658 P.2d 653, 656 (1983). The searches are distinguishable from the airport and courthouse searches because the dangers posed by the violence at rock concerts are substantially less than those posed by bombings and hijackings and because pat-down searches constitute a higher degree of intrusion than magnetometer and typical courthouse searches. *Id.*

For a discussion of warrantless searches in other special environments, see 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 6.1 (schools), 6.2 (prisons and jails), 6.3 (borders) (3d ed. 1996).

5.31 Warrantless Searches and Seizures of Objects in the Public and Private Mails

First-class mail and packages transported by private carriers may be seized when law enforcement officers have probable cause to believe that the mail or packages contain contraband. *United States v. Van Leeuwen*, 397 U.S. 249, 251-52, 90 S. Ct. 1029, 1031-32, 25 L. Ed. 2d 282, 282 (1970). *See also United States v. Jacobsen*, 466 U.S. 109, 121-22, 104 S. Ct. 1652, 1660-61, 80 L. Ed. 2d 85, 99 (1984). The contents of such mail or packages may not be examined without a warrant, however, unless the reasonable expectation of privacy in the contents no longer exists or the examination consists of a test that will

only disclose the presence of the contraband. *Jacobsen*, 466 U.S. at 121-22, 104 S. Ct. at 1660-61, 80 L. Ed. 2d at 99; *State v. Wolohan*, 23 Wash. App. 813, 820, 598 P.2d 421, 425 (1979).

A canine sniff may be used to establish probable cause that a package lawfully held by police contains contraband. *State v. Jackson*, 82 Wash. App. 594, 606, 918 P.2d 945, 952 (1996), *review denied*, 131 Wash. 2d 1006 (1997). *See also State v. Boyce*, 44 Wash. App. 724, 729, 723 P.2d 28, 31 (1986) (declining to adopt the blanket federal rule that canine sniffs are never searches; suggesting article I, section 7 requires a case-by-case examination of the circumstances in order to determine whether a canine sniff is a search).

CHAPTER 6: SPECIAL ENVIRONMENTS

6.0 Special Environments and Purposes: Searches and Seizures at Schools, Prisons, and Borders; Administrative Searches and Seizures

This chapter discusses the differences in reasonable expectations of privacy, burdens of proof, and warrant requirements at three special environments: public schools, detention and correction facilities, and the international border. The section also discusses special considerations in administrative searches.

For a brief discussion of warrantless searches in airports, courthouses, and public concerts, see 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 10.6, 10.7 (3d ed. 1996).

6.1 Schools

Schools are considered a special environment in search and seizure law and the usual burdens of proof and warrant requirements are relaxed.

The reasonable suspicion standard and the balancing approach in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), have been used to justify the warrantless search of a student's purse by a school official. *New Jersey v. T.L.O.*, 469 U.S. 325, 329-30, 105 S. Ct. 733, 736, 83 L. Ed. 2d 720, 722 (1985). The special problem of school discipline and the special environment of the school permit a standard of proof less than probable cause. This is true even when the intrusion is more substantial than a frisk and the object of the intrusion is the discovery of evidence in violation of a school rule and not the prevention of physical harm. *Id.* at 341-42, 105 S. Ct. at 742-43, 83 L. Ed. 2d at 734-35.

The United States Supreme Court more recently has held that the Fourth Amendment does not require school officials to have an individualized suspicion before drug testing student athletes. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664, 115 S. Ct. 2386, 2396, 132 L. Ed. 2d 564, 582 (1995).

Washington has recognized the school as a special environment and, consequently, permits a search of a student's person based on less than probable cause. *State v. McKinnon*, 88 Wash. 2d 75, 81, 558 P.2d 781, 784 (1977). Using the *Terry* reasonable suspicion standard and the balancing test articulated in *Camara v. Municipal Court*, 387 U.S. 523, 535, 87 S. Ct. 1727, 1734, 18 L. Ed. 2d 930, 939 (1967), the *McKinnon* court set forth several factors for determining the reasonableness of a search: "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." *McKinnon*, 88 Wash. 2d at 81, 558 P.2d at 784 (citations omitted). However, because *McKinnon* was decided under federal constitutional law, the continuing extent of its protection is uncertain. It has clearly been overruled in the context of random, suspicionless drug testing of student athletes, a practice which has been upheld as constitutional under the Fourth Amendment. *Vernonia School Dist. 47J*, 515 U.S. at 664, 115 S. Ct. at 2396, 132 L. Ed. 2d at 582.

Although the reduced standard of proof of reasonable suspicion will justify the search of a student or his or her belongings, the school still must have particularized suspicion with respect to each individual searched. *Kuehn v. Renton School Dist. No. 403*, 103 Wash. 2d 594, 599, 694 P.2d 1078, 1081 (1985) (individualized suspicion required for search of band members' luggage). *But see Vernonia School Dist. 47J*, 515 U.S. at 664, 115 S. Ct. at 2396, 132 L. Ed. 2d at 582 (individualized suspicion not required for drug testing of student athletes); *T.L.O.*, 469 U.S. at 342 n.8, 105 S. Ct. at 743 n.8, 83 L. Ed. 2d at 735 n.8 (individualized suspicion may not be required). *See generally* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(b) (3d ed. 1996).

6.2 *Prisons, Custodial Detention, and post-Conviction Alternatives to Prison*

Incarceration affects all aspects of an individual's search and seizure protections: the reasonable expectation of privacy, the levels of proof required for intrusions, and the warrant requirements. This

section will provide a sampling of some of the ways incarceration or even conviction alone alters search and seizure protections.

6.2(a) Reasonable Expectation of Privacy

A prisoner has no reasonable expectation of privacy in his or her prison cell. *Hudson v. Palmer*, 468 U.S. 517, 525-26, 104 S. Ct. 3194, 3200-01, 82 L. Ed. 2d 393, 400-01 (1984). However, a convict released pending appeal does enjoy a limited expectation of privacy. *State v. Lucas*, 56 Wash. App. 236, 241, 783 P.2d 121, 125 (1989).

Pretrial detainees, on the other hand, appear to have a reasonable expectation of privacy, for the government must show legitimate reasons for instituting searches of their cells. *See Block v. Rutherford*, 468 U.S. 576, 590-91, 104 S. Ct. 3227, 3234-35, 82 L. Ed. 2d 438, 449-50 (1984); *Bell v. Wolfish*, 441 U.S. 520, 555-57, 99 S. Ct. 1861, 1882-84, 60 L. Ed. 2d 447, 479-80 (1979).

A convicted sex offender has only a minimal expectation of privacy in personal body fluids; thus, the State may remove blood for blood testing without the defendant's consent. *In re A, B, C, D, E*, 121 Wash. 2d 80, 88-89, 847 P.2d 455, 458 (1993) (upholding constitutionality of WASH. REV. CODE § 70.24.340 for both adult and juvenile offenders); WASH. REV. CODE § 70.24.340 (1996). Under WASH. REV. CODE § 43.43.754 (1996), the State may obtain blood samples and perform DNA tests without the defendant's consent following conviction. *State v. Olivas*, 122 Wash. 2d 73, 98, 856 P.2d 1076, 1089 (1993) (constitutionality upheld under Fourth Amendment).

6.2(b) Levels of Proof

Neither probable cause nor individualized suspicion is required for searches of prisoners, pretrial detainees, or prison cells. *See Bell*, 441 U.S. at 555-60, 99 S. Ct. at 1882-85, 60 L. Ed. 2d at 479-82 (pretrial detainees); *State v. Baker*, 28 Wash. App. 423, 424-25, 623 P.2d 1172, 1173 (1981) (prisoners).

A parolee does not have the same search and seizure protections as an ordinary citizen, and, thus, police may search a parolee's vehicle based only on a "well-founded" suspicion of criminal activity. *State v. Coahran*, 27 Wash. App. 664, 666, 620 P.2d 116, 118 (1980). Convicts released pending appeal are also subject to a warrantless search if the police have a "well-founded" suspicion of a violation of release conditions. *Lucas*, 56 Wash. App. at 241, 783 P.2d at 125.

6.2(c) Warrantless Searches and Seizures

Warrants are not required for searches of prisoners or pretrial detainees. *See Block*, 468 U.S. at 591, 104 S. Ct. at 3234-35, 82 L. Ed. 2d at 449-50; *Hudson*, 468 U.S. at 521, 104 S. Ct. at 3200-01, 82 L. Ed. 2d at 402-03.

Warrants also are not required for searches of parolees, probationers, work release inmates, and convicts released pending appeal, or for their homes and effects. *See Griffin v. Wisconsin*, 483 U.S. 868, 875-77, 107 S. Ct. 3164, 3169-70, 97 L. Ed. 2d 709, 718-19 (1987) (neither probable cause nor warrant required for search of probationer's home); *State v. Campbell*, 103 Wash. 2d 1, 22-23, 691 P.2d 929, 941-42 (1984); *see also Lucas*, 56 Wash. App. at 241, 783 P.2d at 125; *Coahran*, 27 Wash. App. at 666, 620 P.2d at 118; *State v. Simms*, 10 Wash. App. 75, 85, 516 P.2d 1088, 1094 (1973).

6.2(d) Strip and Body Cavity Searches Following Custodial Arrest for Minor Offenses

In Washington, routine strip searches are governed in part by statute and administrative regulation. *See* WASH. REV. CODE §§ 10.79.060-.110 (1996); WASH. ADMIN. CODE §§ 289-02-020; 289-16-100; 289-16-200 (1997). A defendant's state protections from a strip search under article I, section 7 are coextensive with the defendant's Fourth Amendment rights. *State v. Audley*, 77 Wash. App. 897, 904, 894 P.2d 1359, 1363 (1995) (holding that WASH. REV. CODE § 10.79.130(1)(a) is constitutional under article I, section 7 and the Fourth Amendment, and that such searches are permissible where they are supported by reasonable suspicion that an arrestee is concealing contraband that poses a threat to jail security). Probable cause and a warrant are required for strip and body cavity searches conducted prior to a detainee's first court appearance unless one of the following occurs: (1) the detainee is charged with a violent offense; (2) the detainee is charged with an offense involving escape, burglary, use of a deadly weapon, or contraband; or (3) police possess a reasonable suspicion that the detainee is concealing on his or her person contraband, weapons, or fruits or instrumentalities of crime. WASH. ADMIN. CODE §§ 289-16-100; 289-16-200 (1997). *Cf. State v. Brown*, 33 Wash. App. 843, 848, 658 P.2d 44, 47-48 (1983) (strip search of prisoner permitted after prisoner had contact with visitor); *State v. Hartzog*, 96 Wash. 2d 383, 396-97, 635 P.2d 694, 701-02 (1981) (holding visual and body cavity searches of prisoners leaving penal institution for court appearance are permissible, and where the record

fails to disclose that an inmate-defendant has undergone a body cavity probe search immediately before leaving the penitentiary, a second search at courthouse may also be imposed without a hearing to determine its necessity).

6.3 Borders

Searches and seizures of travelers at or near the international border fall within the scope of the Fourth Amendment, but such intrusions generally do not have to meet the strict levels of proof and warrant requirements of ordinary searches and seizures. This section will describe briefly some of the situations in which traditional proof and warrant requirements have been relaxed.

6.3(a) Permanent Checkpoints: Illegal Aliens

Law enforcement officers may conduct routine brief questioning of travelers at permanent checkpoints to identify illegal aliens provided the intrusion does not exceed the scope of a *Terry* stop. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-67, 96 S. Ct. 3074, 3087, 49 L. Ed. 2d 1116, 1133 (1976). No warrant is required for such stops. *See id.*

6.3(b) Roving Patrols: Illegal Aliens

Officers conducting roving patrols near borders must have a reasonable suspicion, based on "specific articulable facts," that a vehicle contains illegal aliens in order to stop the vehicle. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S. Ct. 2574, 2582, 45 L. Ed. 2d 607, 618 (1975).

For a roving patrol to search a vehicle, reasonable suspicion that the vehicle contains illegal aliens is insufficient; the officers must have probable cause. *Almeida-Sanchez v. United States*, 413 U.S. 266, 269-70, 93 S. Ct. 2535, 2537-38, 37 L. Ed. 2d 596, 600-01 (1973).

6.3(c) Smuggling

The scope of a *Terry* stop at the border may be relatively intrusive when smuggling of narcotics is suspected. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 544, 105 S. Ct. 3304, 3312, 87 L. Ed. 2d 381, 393 (1985) (individual fitting courier profile of alimentary canal smuggler may be detained for sixteen hours pending bowel movement); *cf. Florida v. Royer*, 460 U.S. 491, 502-03, 103 S. Ct. 1319, 1326-27, 75 L. Ed. 2d 229, 239-40 (1983) (officers who had only reasonable suspicion that airport traveler was smuggling narcotics could not detain traveler in a special room and seize his tickets and

luggage); *United States v. Place*, 462 U.S. 696, 709-10, 103 S. Ct. 2637, 2645-46, 77 L. Ed. 2d 110, 122 (1983) (ninety-minute detention of luggage at international airport unreasonable when law enforcement officers had only reasonable suspicion of smuggling). *But see United States v. Sharpe*, 470 U.S. 675, 687-88, 105 S. Ct. 1568, 1576, 84 L. Ed. 2d 605, 616-17 (1985) (twenty-minute detention of suspect based only on reasonable suspicion is permissible; *Terry* stop unconstitutional in duration only when police do not act with due diligence, not at expiration of any time period). However, a Washington case has held that absent some independent legal justification, customs officers may not conduct warrantless searches based on less than probable cause at locations other than an actual border. *See State v. Quick*, 59 Wash. App. 228, 232, 796 P.2d 764, 766 (1990).

6.4 Administrative Searches

Searches conducted for administrative purposes, whether or not criminal prosecution is anticipated, are governed by the Fourth Amendment. *See, e.g., Michigan v. Clifford*, 464 U.S. 287, 291-93, 104 S. Ct. 641, 646-47, 78 L. Ed. 2d 477, 483-84 (1984) (Fourth Amendment applies to inspection of home that was partially damaged by fire, even when purpose of inspection is to determine fire's origin and no criminal conduct is suspected).

6.4(a) Reasonable Expectation of Privacy

The fact that a search is part of an administrative or regulatory program or has a purpose other than criminal prosecution does not affect an individual's reasonable expectation of privacy in the premises being searched. *See Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S. Ct. 1727, 1730-31, 18 L. Ed. 2d 930, 935 (1967) (search of home for housing code violations); *See v. Seattle*, 387 U.S. 541, 545-46, 87 S. Ct. 1737, 1740-41, 18 L. Ed. 2d 943, 947-48 (1967) (search of commercial premises for fire code violations). Although a few pervasively regulated industries are not permitted reasonable expectations of privacy, the general rule is that the Fourth Amendment protections apply to civil as well as criminal searches and to commercial as well as residential premises. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S. Ct. 1816, 1820-21, 56 L. Ed. 2d 305, 311-12 (1978) (except for particular industries, such as those involving liquor and firearms where no reasonable expectation of privacy exists, the Fourth Amendment protects against unreasonable administrative searches of commercial premises); *see also Clifford*, 464 U.S. at 291,

104 S. Ct. at 646, 78 L. Ed. 2d at 483; *Michigan v. Tyler*, 436 U.S. 499, 506, 98 S. Ct. 1942, 1948, 56 L. Ed. 2d 486, 496 (1978).

6.4(b) Warrant Requirements

Warrants generally are required for administrative searches of both private and commercial premises. *See Camara*, 387 U.S. at 532-33, 545-46, 87 S. Ct. at 1732-33, 740-41, 18 L. Ed. 2d at 937-38, 947-98. When the traditional exceptions to the warrant requirement apply, however, a warrant is unnecessary. *See Clifford*, 464 U.S. at 297-98, 104 S. Ct. at 646-47, 78 L. Ed. 2d at 483-84 (warrant not required for entry onto premises when consent given or exigent circumstances present: "[E]vidence of criminal activity . . . discovered during the course of a valid administrative search . . . may be seized under the 'plain view' doctrine.") (citation omitted).

Warrants are not required in certain limited situations when searches are made pursuant to comprehensive and predictable legislative schemes. *See Donovan v. Dewey*, 452 U.S. 594, 598, 101 S. Ct. 2534, 2537-38, 69 L. Ed. 2d 262, 268-69 (1981). Such situations are characterized by a substantial federal interest in inspection, as in the case of hazardous industries, and by the necessity of a warrantless inspection to enforce the legislative purpose. *See id.* at 598-99, 101 S. Ct. at 2538-39, 69 L. Ed. 2d at 269 (Congressional scheme authorizing warrantless inspections of mines found constitutional). In addition, the scheme must prove to be an adequate substitute for a warrant by imposing certainty and regularity in the inspections and by accommodating special privacy concerns. *Id.* at 600-01, 101 S. Ct. at 2539, 69 L. Ed. 2d at 270.

Warrants are not always required for license, registration, and equipment spot checks of vehicles. *Compare Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673-74 (1979) (warrant required for random spot check of vehicles), *with Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 2488, 110 L. Ed. 2d 412, 423 (1990) (holding that a highway sobriety checkpoint program, under which all vehicles passing through the checkpoint were stopped and examined for signs of intoxication, did not violate the Fourth Amendment), *and State v. Marchand*, 104 Wash. 2d 434, 441, 706 P.2d 225, 228 (1985) (holding unconstitutional a statute empowering state patrol officers to require the driver of any motor vehicle being operated on any Washington highway to stop and display his or her driver's license and/or to submit the vehicle to an inspection to ascertain whether it complied with the minimum equipment requirements).

6.4(c) Level of Proof Requirements

To obtain an administrative warrant to search commercial or residential premises, law enforcement officers must either offer specific proof of a violation, or show that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Marshall*, 436 U.S. at 320-21, 98 S. Ct. at 1824, 56 L. Ed. 2d at 316 (brackets in original) (citation omitted) (quoting *Camara*, 387 U.S. at 538, 87 S. Ct. at 1736, 18 L. Ed. 2d at 941).

When officers seek a warrant based on a general administrative program, they must set forth sufficient details of the program to enable the magistrate to determine whether the program is reasonable. *Seattle v. Leach*, 29 Wash. App. 81, 85, 627 P.2d 159, 162 (1981). Conclusory statements are inadequate. *Id.*

When an administrative warrant is sought to determine the recent cause of a fire, "fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victims' privacy, and that the search will be executed at a reasonable and convenient time." *Clifford*, 464 U.S. at 294, 104 S. Ct. at 647, 78 L. Ed. 2d at 484.

The constitutionality of vehicle spot checks depends in part upon two factors: whether the purpose is satisfied by the procedure—that is, whether spot checks are "a sufficiently productive mechanism to justify the intrusion," and whether the checks do not involve the "unconstrained exercise of discretion" by officers conducting the stops. *Prouse*, 440 U.S. at 663, 99 S. Ct. at 1401, 59 L. Ed. 2d at 673-74; *see also Marchand*, 104 Wash. 2d at 439, 706 P.2d at 227. Where the officers do not have unconstrained discretion, there is no constitutional violation. *See, e.g., Sitz*, 496 U.S. at 451-52, 110 S. Ct. at 2486, 110 L. Ed. 2d at 420-21 (holding that a highway sobriety checkpoint program, under which all vehicles passing through the checkpoint were stopped and examined for signs of intoxication, did not violate the Fourth Amendment).

Since the *Sitz* case, the validity of Washington case law on the issue of vehicle checkpoints prior to that decision has been imperiled. *Compare Seattle v. Yeager*, 67 Wash. App. 41, 47, 834 P.2d 73, 76 (1992) (upholding constitutionality of statute authorizing stops of vehicles with license plates marked to indicate that the driver had previously been cited for driving without a license; no particularized suspicion required), *with Seattle v. Mesiani*, 110 Wash. 2d 454, 460,

755 P.2d 775, 778 (1988) (sobriety checkpoint program established during holiday season that involved the warrantless stopping of all oncoming motorists at checkpoints violated state and federal constitutional guarantees against seizure without authority of law), *and Marchand*, 104 Wash. 2d at 441, 706 P.2d at 228. *Mesiani*, in particular, appears to be contradicted by the United States Supreme Court's holding in *Sitz*.

As with the "area" warrants that authorize housing and fire code inspections, *see Camara*, 387 U.S. at 537-38, 87 S. Ct. at 1734-35, 18 L. Ed. 2d at 940-41; *See*, 387 U.S. at 545, 87 S. Ct. at 1740, 18 L. Ed. 2d at 947, individualized suspicion is not necessarily required for spot checks. *See Sitz*, 496 U.S. at 451-52, 110 S. Ct. at 2486, 110 L. Ed. 2d at 421; *see also Prouse*, 440 U.S. at 663, 99 S. Ct. at 1401, 59 L. Ed. 2d at 673-74. Furthermore, it is clear that under certain circumstances and with certain procedures the Washington Constitution allows vehicle spot checks. *Compare Marchand*, 104 Wash. 2d at 441, 706 P.2d at 228 (procedures insufficient), *with Yeager*, 67 Wash. App. at 48, 834 P.2d at 77 (no unconstrained discretion).

CHAPTER 7: ADMINISTRATION OF THE EXCLUSIONARY RULE

7.0 Introduction

The exclusionary rule has traditionally provided that if a search or seizure violates a person's Fourth Amendment rights, any evidence found as a result of the search or seizure must be suppressed in the criminal trial of that defendant. *State v. Chaplin*, 75 Wash. App. 460, 464-65, 879 P.2d 300, 303 (1994). When physical evidence must be suppressed, testimony regarding that physical evidence must also be suppressed if such testimony is the fruit of the unlawful search or seizure. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.6, at 358 (3d ed. 1996); *see, e.g., State v. Salinas*, 121 Wash. 2d 689, 697, 853 P.2d 439, 442-43 (1993). To invoke the exclusionary rule, a defendant must make a timely objection and have standing to object. *See State v. Michaels*, 60 Wash. 2d 638, 640-41, 374 P.2d 989, 990 (1962). The rule applies both to federal and state violations of the Fourth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 660, 81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081, 1093 (1961).

Historically, the exclusionary rule has had several purposes: (1) to deter unreasonable searches and seizures, *id.* at 656, 81 S. Ct. at 1692, 6 L. Ed. 2d at 1090-91; (2) to preserve judicial integrity by preventing courts from becoming accomplices to willful disobedience

of the Constitution, *id.* at 659, 81 S. Ct. at 1694, 6 L. Ed. 2d at 1092; and (3) to sustain the public's belief that the government will not profit from lawless behavior, *United States v. Calandra*, 414 U.S. 338, 357, 94 S. Ct. 613, 624, 38 L. Ed. 2d 561, 576-77 (1974) (Brennan, J., dissenting). In 1984, the United States Supreme Court identified deterrence of police misconduct as the principal justification for the exclusionary rule. *United States v. Leon*, 468 U.S. 897, 916, 104 S. Ct. 3405, 3417, 82 L. Ed. 2d 677, 696 (1984). In fact, the Court declined to employ the rule to demonstrate judicial integrity or to deter magistrates from improper probable cause determinations. *Id.* at 917, 104 S. Ct. at 3417-18, 82 L. Ed. 2d at 695.

Although most of the discussion in this section centers upon the exclusion of evidence when compelled by the federal Constitution, state law can compel the exclusion of evidence from state courts that federal law would hold admissible in federal courts. *See, e.g., State v. Williams*, 94 Wash. 2d 531, 541, 617 P.2d 1012, 1018 (1980) (recordings made in violation of Washington privacy statute, although permitted under federal wiretap statute, are inadmissible in state court proceedings); *see* 3 LAFAVE, SEARCH AND SEIZURE § 7.4(f) (State may compel exclusion of illegally seized evidence from civil proceedings even when federal Constitution does not require such exclusion).

The variations between the federal exclusionary rule and the state rule are largely based on the difference in wording and intent between the Fourth Amendment and article I, section 7 of the Washington Constitution. *See, e.g., State v. Crawley*, 61 Wash. App. 29, 34, 808 P.2d 773, 776 (1991) (asserting State's emphasis on protecting individual rights and assuring judicial integrity, not merely as remedial measure for unconstitutional governmental action); *State v. White*, 97 Wash. 2d 92, 110-12, 640 P.2d 1061, 1071-72 (1982). Washington has even recognized deterrence of legislative misconduct as a legitimate purpose for excluding illegally obtained evidence. *White*, 97 Wash. 2d at 112, 640 P.2d at 1072. Under the Fourth Amendment, the application of the rule will depend largely on whether the exclusion of evidence will deter future police misconduct; but, under article I, section 7, the application of the rule focuses on protecting individual rights and may even be automatic. *Compare Crawley*, 61 Wash. App. at 35, 808 P.2d at 776, *and White*, 97 Wash. 2d at 109-12, 640 P.2d at 1071-72, *with Leon*, 468 U.S. at 918, 104 S. Ct. at 3418, 82 L. Ed. 2d at 695.

7.1 Criticism of the Rule

A number of judges and legal scholars have opposed a broad-reaching exclusionary rule. *See Stone v. Powell*, 428 U.S. 465, 484 n.21, 96 S. Ct. 3037, 3047-48 n.21, 49 L. Ed. 2d 1067, 1082 n.21 (1976); *see generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2(a)-(f) (3d ed. 1996). The arguments for a broader rule and their counterarguments include:

(1) Argument: The rule handcuffs the police, handicapping the detection and prosecution of crime. 1 LAFAVE, SEARCH AND SEIZURE § 1.2(a). Counterargument: The Fourth Amendment itself, not the rule, has that effect. *Id.* When the amendment was adopted, that very argument was rejected. *See id.* at 24. For citations to studies on the effects of the exclusionary rule on felony prosecutions, see *United States v. Leon*, 468 U.S. 897, 907-08 n.6, 104 S. Ct. 3405, 3413 n.6, 82 L. Ed. 2d 677, 688 n.6 (1984).

(2) Argument: The rule aids only the guilty. 1 LAFAVE, SEARCH AND SEIZURE § 1.2(a), at 24-29. Counterargument: Because of the rule's deterrent effect, innocent persons are spared unreasonable searches and seizures. *Id.*

(3) Argument: The rule does not deter. *Id.* § 1.2(b). Counter-argument: After the rule's creation, there was a dramatic increase in the number of warrant applications and the number of police academy classes offering instruction on obtaining evidence in a manner that does not violate the Fourth Amendment. *Stone*, 428 U.S. at 492, 96 S. Ct. at 3051, 49 L. Ed. 2d at 1086-87.

Suggested alternatives to the exclusionary rule include providing civil damages as the sole remedy, limiting the rule to knowing of substantial violations, or limiting the rule to minor crimes. *See generally* 1 LAFAVE, SEARCH AND SEIZURE § 1.2(a)-(f). *See also* Stephen E. Gottlieb, *Feedback from the Fourth Amendment: Is the Exclusionary Rule an Albatross Around the Judicial Neck?*, 67 KY. L.J. 1007 (1979) (suggesting remedy solely in tort, with damages paid either through insurance or governmental reimbursement).

7.2 Limitations in the Application of the Rule

There are two general categories of exceptions to the exclusionary rule: those based on the good faith of the police, and those based on the nonsubstantive use of the illegally obtained evidence. Subsequent sections will discuss additional limitations on the application of the rule which pertain to: (1) the type of judicial proceeding, *see* 3 WAYNE R.

LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 7.3, 7.4, at 508, 533 (3d ed. 1996); (2) the public or private status of the party conducting the unlawful search and seizure, *see id. at* §§ 7.5, 7.6; (3) the nexus between the unlawful search or seizure and the evidence sought to be suppressed, *see id. at* §§ 7.7, 7.8; and (4) the procedural requirements, *see id. at* §§ 7.9, 7.10.

7.2(a) Unlawful Searches and Seizures Conducted in Good Faith

The exclusionary rule does not apply in federal courts when evidence is seized in reasonable, good faith reliance on a search warrant that is later found to be unsupported by probable cause. *See United States v. Leon*, 468 U.S. 897, 919-21, 104 S. Ct. 3405, 3419, 82 L. Ed. 2d 677, 696-97 (1984). "[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922, 104 S. Ct. at 3420, 82 L. Ed. 2d at 698. Yet, Washington courts have repeatedly refused to adopt the *Leon* good faith exception to search warrants violating the state constitution. *See State v. Crawley*, 61 Wash. App. 29, 35, 808 P.2d 773, 776 (1991) (recognizing that Washington has not adopted a "good faith" exception allowing admission of evidence obtained using invalid search warrant); *State v. Huft*, 106 Wash. 2d 206, 212, 720 P.2d 838, 844 (1986) (declining to adopt "good faith" exception due to the substantial basis required for probable cause); *State v. Kelley*, 52 Wash. App. 581, 587 n.2, 762 P.2d 20, 24 n.2 (1988).

Similarly, in federal courts evidence seized under the authority of a technically invalid warrant may be admitted when the police reasonably believed that the search they conducted was authorized by a valid warrant. *Massachusetts v. Sheppard*, 468 U.S. 981, 987-88, 104 S. Ct. 3424, 3427-28, 82 L. Ed. 2d 737, 743 (1984). "Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve." *Id.* at 990-91, 104 S. Ct. at 3429, 82 L. Ed. 2d at 745.

Federal courts may also admit evidence obtained during a search incident to an unlawful arrest when the arrest is made in good faith reliance on an ordinance subsequently declared unconstitutional. *Michigan v. DeFillippo*, 443 U.S. 31, 40, 99 S. Ct. 2627, 2633, 61 L. Ed. 2d 343, 351 (1979). This good faith exception has its own exception: the evidence is inadmissible when the ordinance at issue is so similar to an ordinance or statute that previously was declared

unconstitutional and as a consequence is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38, 99 S. Ct. at 2632, 61 L. Ed. 2d at 350.

Even if the unlawful arrest was based partly on a provision of a statute that had not yet been construed to make it presumptively valid at the time of the arrest, evidence obtained is inadmissible if the valid section of the statute could not be enforced without incorporating the grossly and "flagrantly unconstitutional" section. *State v. White*, 97 Wash. 2d 92, 104, 640 P.2d 1061, 1068 (1982).

However, the *DeFillippo* good faith exception to the exclusionary rule is inapplicable to claims brought under article I, section 7 of the Washington Constitution. *White*, 97 Wash. 2d at 109-12, 640 P.2d at 1070-72. Thus, when an arrest is made pursuant to an unlawful statute, the good faith of police and the presumptive validity of the statute at the time of arrest will not render the fruits of the arrest admissible. *Id.* at 112, 640 P.2d at 1072 (recognizing that the automatic application of the exclusionary rule "will add stability to the rights of individual citizens, discourage the legislature from passing provisions akin to [the unlawful statute], and will make law enforcement more predictable").

7.2(b) Nonsubstantive Use of Illegally Seized Evidence

Illegally obtained evidence may be used to impeach a defendant's direct testimony at trial even when the evidence is inadmissible in the government's case-in-chief. *Walder v. United States*, 347 U.S. 62, 65, 74 S. Ct. 354, 356, 98 L. Ed. 503, 507 (1954). A defendant's statements made in response to proper cross-examination are also subject to impeachment by illegally obtained evidence that is inadmissible as substantive evidence of guilt. *United States v. Havens*, 446 U.S. 620, 627-28, 100 S. Ct. 1912, 1916-17, 64 L. Ed. 2d 559, 566 (1980); *State v. Simpson*, 95 Wash. 2d 170, 179-80, 622 P.2d 1199, 1206 (1980).

7.3 Applications of the Exclusionary Rule in Criminal Proceedings Other Than Trials

7.3(a) Grand Jury Testimony

A person testifying before a grand jury may not refuse to answer questions on the ground that the questions are based on evidence derived from an illegal search. *United States v. Calandra*, 414 U.S. 338, 349-50, 94 S. Ct. 613, 620-21, 38 L. Ed. 2d 561, 572 (1974).

The exclusionary rule is not applied to grand jury proceedings because its application would have only a marginal deterrent effect. In determining whether to employ the rule, the court weighs the deterrent value of applying the rule against the costs of excluding the type of evidence in question. *Id.* at 349, 94 S. Ct. at 620, 38 L. Ed. 2d at 573.

7.3(b) Indictment

The rule does not apply to indictments based on illegally obtained evidence. *Lawn v. United States*, 355 U.S. 339, 350, 78 S. Ct. 311, 318, 2 L. Ed. 2d 321, 329-30 (1958). Again, excluding the evidence, even if it means dismissing an indictment, would have only marginal deterrent value. *Id.; see also Calandra*, 414 U.S. at 351, 94 S. Ct. at 621, 38 L. Ed. 2d at 573.

7.3(c) Probable Cause Hearing

Illegally seized evidence may be considered in determining whether there is probable cause to believe that the accused committed the crime charged. *Giordenello v. United States*, 357 U.S. 480, 488, 78 S. Ct. 1245, 1251, 2 L. Ed. 2d 1503, 1511 (1958); *State v. O'Neill*, 103 Wash. 2d 853, 867-72, 700 P.2d 711, 719-21 (1985) (recordings by federal agents made in a manner inconsistent with state law and, thus, inadmissible at trial nevertheless may be used to furnish probable cause for court-ordered search).

7.3(d) Bail Hearing

Several cases in other jurisdictions suggest that illegally seized evidence may be suppressed at bail hearings. *See Steigler v. Superior Court*, 252 A.2d 300, 305 (Del. 1969); *State v. Tucker*, 244 A.2d 353, 355 (N.J. Super. Ct. 1968). This question has not been presented to the Washington Supreme Court.

7.3(e) Sentencing

Before the establishment of the Sentencing Reform Act of 1984, the exclusionary rule had only been applied in sentencing hearings when the illegal search was conducted for the express purpose of enhancing the sentence or improperly influencing the sentencing judge. *United States v. Larios*, 640 F.2d 938, 941-42 (9th Cir. 1981) (remanding case for resentencing because judge abused his discretion by excluding evidence given that the illegality of the search was based on a technical error, not by an overextensive or inappropriate search); *United States v. Vandemark*, 522 F.2d 1019, 1022 (9th Cir. 1975) (limiting exclusion of evidence when customs agent was not aware that

defendant was a probationer or that evidence could be used for any other purpose than the possession conviction); *Verdugo v. United States*, 402 F.2d 599, 613 (9th Cir. 1968) (excluding evidence from sentencing consideration when search conducted without a warrant was "blatantly illegal," and the police need to be deterred). *See also United States v. Graves*, 785 F.2d 870 (10th Cir. 1986); *United States v. Butler*, 680 F.2d 1055 (5th Cir. 1982); *United States v. Lee*, 540 F.2d 1205 (4th Cir. 1976); *United States v. Schipani*, 435 F.2d 26, 28 (2d Cir. 1970). *See generally* Michael K. Forde, *The Exclusionary Rule at Sentencing: New Life Under the Federal Sentencing Guidelines*, 33 AM. CRIM. L. REV. 379 (1996).

Since the promulgation of the Sentencing Guidelines, the majority of jurisdictions have maintained that the exclusionary rule does not apply in sentencing hearings. *See United States v. Kim*, 25 F.3d 1426 (9th Cir. 1994); *United States v. Montoya-Ortiz*, 7 F.3d 1171 (5th Cir. 1993); *United States v. Jenkins*, 4 F.3d 1338 (6th Cir. 1993); *United States v. Tejada*, 956 F.2d 1256 (2d Cir. 1992); *United States v. Lynch*, 934 F.2d 1226 (11th Cir. 1991); *United States v. Torres*, 926 F.2d 321 (3d Cir. 1991); *United States v. McCrory*, 930 F.2d 63 (D.C. Cir. 1991). In fact, the Ninth Circuit has suggested that the sentencing Guidelines and Title 18, Section 3661 of the United States Code may preclude the application of the *Verdugo* exception and may require that all evidence be considered during sentencing. *Kim*, 25 F.3d at 1435-36; *see also* Forde, 33 AM. CRIM. L. REV. at 388-92.

A small minority of jurisdictions have argued that the exclusionary rule should apply at sentencing given the certainty of increased punishment if illegally-seized evidence is considered under the Sentencing Guidelines. *See United States v. Jewel*, 947 F.2d 224, 238-40 (7th Cir. 1991) (Easterbrook, J., concurring); *United States v. Gilmer*, 811 F. Supp. 578, 579 (D. Colo. 1993); *United States v. Rullo*, 748 F. Supp. 36, 43-45 (D. Mass. 1990); *see also* Forde, 33 AM. CRIM. L. REV. at 392-401. Failure to invoke the exclusionary rule during the expansive sentencing process would create a greater incentive for police officers to illegally search for additional evidence in order to enhance sentencing such that the "constitutional ban on unreasonable searches and seizures will become a parchment barrier." *Jewel*, 947 F.2d at 240 (Easterbrook, J., concurring); *see also* Forde, 33 AM. CRIM. L. REV. at 408-09.

Washington's Sentencing Reform Act of 1981, which became effective July 1, 1984, structured, but did not eliminate, discretionary decisions affecting sentencing. WASH. REV. CODE § 9.94A.010 (1996). Because the sentencing process is limited to the present

conviction and the defendant's prior convictions, Washington does not have the problems that exist under the federal guidelines.

7.3(f) Revocation of Conditional Release

There continues to be a split of authority on whether the exclusionary rule extends to parole or probation revocation hearings. *Compare Vandemark*, 522 F.2d at 1022 (9th Cir. 1975) (exclusionary rule does not apply to probation revocation proceedings when officers conducting search did not know and had no reason to believe suspect was probationer), *and Richardson v. State*, 841 P.2d 603, 605-06 (Okla. Crim. App. 1992) (rule does not apply to revocation hearings, but may be applied in cases of particularly egregious misconduct), *with United States v. Workman*, 585 F.2d 1205, 1209 (4th Cir. 1978) (rule applies to probation revocation).

Some courts have suggested that the exclusionary rule should apply when the arresting officer knows that the victim is on conditional release; otherwise, a zealous officer would have less incentive to obey the Constitution knowing that illegally seizing the evidence could send the parolee back to prison. *See Vandemark*, 522 F.2d 1019. *See generally Workman*, 585 F.2d 1205.

Washington courts are also divided on whether article I, section 7 of the Washington Constitution requires the application of the exclusionary rule to probation revocation hearings. *State v. Murray*, 110 Wash. 2d 706, 709, 757 P.2d 487, 488 (1988) (recognizing the division and the uncertainty that exists around article I, section 7's exclusionary rule in revocation hearings, but not resolving the uncertainty). *Compare State v. Kuhn*, 7 Wash. App. 190, 194, 499 P.2d 49, 51 (1972), *aff'd on other grounds*, 81 Wash. 2d 648, 503 P.2d 1061 (1972) (evidence obtained in illegal search not applicable to probation revocation proceedings), *and State v. Proctor*, 16 Wash. App. 865, 867, 559 P.2d 1363, 1364 (1977) (rule against illegal search only applies in probation revocation proceedings if police, aware suspect is on probation, act in bad faith in conducting search), *with State v. Lampman*, 45 Wash. App. 228, 232, 724 P.2d 1092, 1095 (1986) (requiring application without exception to probation revocation proceedings).

However, under article I, section 7 a parolee does have a diminished right to privacy and a warrantless search of the parolee may be made by a law enforcement officer with a well-founded suspicion that a probation violation has occurred. *Lampman*, 45 Wash. App. at 235, 724 P.2d at 1096 (fact of parolee's flight, in light of officer's knowledge, created a well-founded suspicion that a parole violation had

occurred). *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.2(a), at 282 (3d ed. 1996).

7.3(g) Federal Habeas Corpus Proceeding

The exclusionary rule does not require habeas corpus relief when the State granted the defendant a full and fair opportunity to litigate all Fourth Amendment claims. *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 3048, 49 L. Ed. 2d 1067, 1067-68 (1976).

7.3(h) Perjury

Illegally seized evidence may be used to support a perjury conviction. *See United States v. Raftery*, 534 F.2d 854, 857 (9th Cir. 1976); *United States v. Turk*, 526 F.2d 654 (5th Cir. 1976) (cautioning against *per se* admissibility; suggesting that exclusion may sometimes have deterrent effect).

7.4 Application of the Rule in Quasi-Criminal, Civil, and Administrative Proceedings

The exclusionary rule has been applied in forfeiture proceedings, requiring the suppression of any illegally seized evidence used to prove the criminal violation justifying the forfeiture. *See, e.g., One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965); *People v. Zimmerman*, 358 N.E.2d 715 (Ill. App. Ct. 1976). Yet, the further removed the proceeding is from a criminal trial, the greater the disagreement in the applicability of the rule.

7.4(a) Juvenile Delinquency Proceedings

The exclusionary rule has generally been applied in juvenile delinquency proceedings. *See, e.g., Application of Gault*, 387 U.S. 1, 30-31, 87 S. Ct. 1428, 1445, 18 L. Ed. 2d 527, 548 (1967); *In re Marsh*, 237 N.E.2d 529, 531 (Ill. 1968); *In re Robert T.*, 8 Cal. App. 3d 990, 993, 88 Cal. Rptr. 37, 38 (1970). However, some courts have recognized the inapplicability of the rule to juvenile dependency proceedings based on the potential of harm to a child remaining in an unhealthy environment. *See, e.g., In re Christopher B.*, 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (1978).

7.4(b) Narcotics Addict Commitment Proceedings

The exclusionary rule has been applied in narcotics addict commitment proceedings. *See People v. Moore*, 446 P.2d 800, 805

(Cal. 1968), *overruled on other grounds by People v. Thomas*, 566 P.2d 228 (Cal. 1977); *but see Conservatorship of Susan T.*, 884 P.2d 988, 996-97 (Cal. 1994) (rule not applicable to conservatorship proceedings because of concern for individual's well-being and society's safety).

7.4(c) Civil Tax Proceedings

The exclusionary rule is not applied in civil tax proceedings when state officials turn over illegally seized tax records to the IRS. *United States v. Janis*, 428 U.S. 433, 457-60, 96 S. Ct. 3021, 3033-35, 49 L. Ed. 2d 1046, 1062-64 (1976). *But see Pizzarello v. United States*, 408 F.2d 579, 586 (2d Cir. 1969) (tax assessment invalid if based substantially on illegally obtained evidence). *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.5(a)-(g) (3d ed. 1996).

Nor does the exclusionary rule apply when IRS agents violate internal regulations as long as no constitutional or statutory rights are infringed upon. *United States v. Snowadzki*, 723 F.2d 1427, 1430-31 (9th Cir. 1984) (involving seizure of documents by defendant's coworker who was not acting as a government agent).

7.4(d) Administrative Proceedings

Most courts apply the exclusionary rule in administrative hearings when the disposition is relatively significant and when application of the rule is likely to deter unlawful searches and seizures. *See Thanhauser v. Milprint, Inc.*, 192 N.Y.S.2d 911 (N.Y. App. Div. 1959) (claimant's statement, taken while claimant under sedation and in severe pain, admissible in worker's compensation hearing); *see also New Brunswick v. Speights*, 384 A.2d 225, 231 (N.J. Super. Ct. 1978) (policy of deterring unlawful governmental conduct may be significant when subsequent disciplinary hearing directed at police officer charged with criminal violations was foreseeable at time of search or seizure); *Governing Bd. of Mountain View Sch. Dist. v. Metcalf*, 111 Cal. Rptr. 724, 727-28 (1974) (recognizing rule may be applied in administrative hearings, but holding that rule is not applicable in teacher dismissal proceeding based on immoral conduct because primary purpose of proceeding is to protect school children).

7.4(e) Legislative Hearings

Whether the exclusionary rule applies in a legislative hearing depends on whether the evidence was seized with the intent to use it at the hearing; if it was, then application of the rule will have some significant deterrent value. *United States v. McSurely*, 473 F.2d 1178,

1194 (D.C. Cir. 1972) (when defendant is prosecuted for contempt of Congress, court must exclude evidence derived from unlawful search and seizure by congressional committee investigator); *see also Watkins v. United States*, 354 U.S. 178, 205, 77 S. Ct. 1173, 1188, 1 L. Ed. 2d 1273, 1294 (1957) ("Protected freedoms should not be placed in danger in absence of clear determination by House or Senate that particular inquiry is justified by specific legislative need.").

7.4(f) Private Litigation

The exclusionary rule is not applied in suits between private parties. *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 348 (7th Cir. 1975) (Fourth and Fourteenth Amendments do not require exclusion of evidence obtained illegally by state police when private parties seek to introduce evidence in civil proceeding); *Sackler v. Sackler*, 203 N.E.2d 481, 482 (N.Y. 1964) (evidence of wife's adultery obtained by illegal entry into wife's home by husband and private investigators admissible in divorce action). Even evidence illegally seized by the government may be introduced into a private proceeding, as exclusion would have little deterrent value because the State is not a party to the proceeding and would have nothing to gain from a Fourth Amendment violation. *Honeycutt*, 510 F.2d at 348.

States, however, may rely on their own laws to bar the use of illegally seized evidence in private litigation, and, thereby, promote the following policies: (1) depriving transgressors of the fruits of their wrongs; (2) deterring lawless behavior; and (3) discouraging violence. *See Kassner v. Frement Mut. Ins. Co.*, 209 N.W.2d 490, 492 (Mich. Ct. App. 1973) (unlawful search of premises destroyed by fire represents significant invasion of privacy; thus, evidence seized as result of search not admissible in civil case); Hans W. Bade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch*, 51 TEX. L. REV. 1325, 1353 (1973). The issue has not been reviewed under the Washington State Constitution.

7.5 Application of the Rule to Searches by Private Individuals: General Principle

Because the Fourth Amendment is a limitation on the government only, federal courts do not exclude the fruits of a private search. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 576, 65 L. Ed. 1048, 1051 (1921) (papers obtained through theft by private individual and delivered to federal prosecutors admissible against defendant); *see United States v. Jacobsen*, 466 U.S. 109, 117, 104 S. Ct. 1652, 1658, 80 L. Ed. 2d 85, 96 (1984) (a private freight carrier notified government

agents that damaged package contained white powdery substance; information held admissible, for "when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs[,] the Fourth Amendment does not prohibit governmental use of that information.").

Washington Constitution article I, section 7 does not apply to searches by private citizens acting on their own initiative. *State v. Clark*, 48 Wash. App. 850, 855, 743 P.2d 822, 826 (1987). The protection from private searches afforded by article I, section 7 is, thus, coextensive with the protection afforded by the Fourth Amendment. *State v. Dold*, 44 Wash. App. 519, 524-25, 722 P.2d 1353, 1357 (1986). The fact that the person conducting the search may be a public employee does not lend an element of state action to the search if the search is not related to the employee's official duties and is undertaken solely in his capacity as private citizen. *State v. Ludvik*, 40 Wash. App. 257, 263, 698 P.2d 1064, 1068 (1985) (state game warden, residing across the street from defendant, observed suspected drug transactions and informed police). *But see State v. Faford*, 128 Wash. 2d 476, 910 P.2d 447 (1996).

When a private party acting independently of the government conducts a search and delivers the material to the police, neither the Fourth Amendment, nor article I, section 7 require the police to obtain a search warrant before examining the material so long as the government search does not exceed the scope of that previously conducted by the private party. *In re Teddington*, 116 Wash. 2d 761, 766, 808 P.2d 156, 158 (1991) (no violation when sergeant inventoried defendant's locker after soldier was arrested for murder and turned over incriminating letter to police); *State v. Walter*, 66 Wash. App. 862, 866, 833 P.2d 440, 443 (1992) (no violation when photo lab turns pictures over to police); *State v. Bishop*, 43 Wash. App. 17, 20, 714 P.2d 1199, 1200 (1986) (no violation when police re-opened packets and tested substance which was found by private security guard in the telephone mouthpiece of defendant's hospital room); *Dold*, 44 Wash. App. at 522, 722 P.2d at 1355 (police investigation of defendant based on receipt of a letter addressed to defendant, but delivered to a private party who forwarded it to police). *Cf. Kuehn v. Renton School Dist. No. 403*, 103 Wash. 2d 594, 600, 694 P.2d 1078, 1081 (1985) (when private person acts under authority of state, Fourth Amendment applies; thus, lawfulness of school search of students' luggage is not dependent upon whether person conducting search is band director, principal, or parent); *State v. Slattery*, 56 Wash. App. 820, 826, 787

P.2d 932, 935, (1990) (recognizing "school search exception" for teachers and when reasonably justified based on circumstances).

7.6 Searches by Private Individuals: Particular Applications

A private search becomes a state search if the private party acts as an agent for the government or the two are engaged in a joint endeavor. *See State v. Clark*, 48 Wash. App. 850, 743 P.2d 822 (1987). A private search may also be considered a state search when the party conducting the search acts on behalf of the public or with the purpose of aiding the government. *See, e.g., In re Robert T.*, 8 Cal. App. 3d 990, 88 Cal. Rptr. 37 (1970) (entry by deceit considered government action when landlord introduced plainclothes officer as companion in order to gain access to apartment to search for stolen goods). A criminal defendant has the burden of proving that a private citizen search was conducted as an agent or instrumentality of the state. *Clark*, 48 Wash. App. at 856, 743 P.2d at 826. No agency relationship exists unless the State actively encourages or instigates the citizen's actions. *See id.* at 856-57, 743 P.2d at 826-27. Factors to be considered include the State's knowledge of and acquiescence in the search and whether the citizen's intent was to assist law enforcement efforts or to further his or her own ends. *State v. Clark*, 48 Wash. App. 850, 856, 743 P.2d 822, 826 (1987) (friend of defendant who had entered into an immunity agreement in return for testimony was not acting as agent of State when he turned over incriminating evidence belonging to defendant to police).

A minority of jurisdictions hold that any illegally obtained evidence is inadmissible, regardless of who performed the unlawful act. *See Sackler v. Sackler*, 203 N.E.2d 481, 484-86 (N.Y. 1964) (Van Voorhis, J., dissenting; Bergan J., dissenting). For a discussion of the admissibility of evidence illegally obtained by a private person, see Paul G. Reiter, J.D., Annotation, *Admissibility, in Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 575-84 (1971).

7.6(a) Agency Theory

Under agency theory, a search is not private if ordered or requested by a government officer. Thus, evidence is admissible when obtained as a consequence of postal authorities' opening of a package to see if the proper postage rate was paid, but is inadmissible when the postal authorities open the package upon the request of a police officer seeking evidence. *United States v. Valen*, 479 F.2d 467 (3d Cir. 1973); *Commonwealth v. Dembo*, 301 A.2d 689 (Pa. 1973); *State v. Blackshear*,

511 P.2d 1272 (Or. Ct. App. 1973) (DEA agent's removal of plastic bags from rubber tubing inside damaged package and agent's visual inspection of contents enabled him to learn nothing more than had been learned from private search conducted earlier by private courier employees who called DEA after observing white powdery substance); *Thacker v. Commonwealth*, 221 S.W.2d 682 (Ky. 1949). *See New Jersey v. T.L.O.*, 469 U.S. 325, 336, 105 S. Ct. 733, 740, 83 L. Ed. 2d 720, 731 (1985) (school officials act as representatives of the State, not as surrogates for parents, and they cannot claim the parents' immunity from Fourth Amendment strictures); *see also United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

7.6(b) Joint Endeavor Theory

Under a joint endeavor theory, when the police accompany a citizen on a search it becomes a government search. *State v. Scrotsky*, 189 A.2d 23, 25-26 (N.J. 1963). "It is immaterial whether the official originates the idea, or simply joins the search while it is in progress." *Lustig v. United States*, 338 U.S. 74, 79, 69 S. Ct. 1372, 1374, 93 L. Ed. 1819, 1823 (1949). Tacit governmental approval of a private entry may also convert a private search into state action. *State v. Becich*, 509 P.2d 1232, 1234 (Or. Ct. App. 1973).

A search is private, however, if it is undertaken in direct contravention to police instructions. *United States v. Maxwell*, 484 F.2d 1350, 1352 (5th Cir. 1973). And even if the police are summoned before the search begins and are present as it occurs, the search may still be considered private if a private purpose is served. *United States v. Lamar*, 545 F.2d 488, 490 (5th Cir. 1977) (heroin discovered by airline agent who opened unclaimed bag to determine its owner is admissible even when officer was present during search); *see also United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (allegedly obscene books discovered by shipping manager and delivered to FBI admissible); *Berger v. State*, 257 S.E.2d 8, 10 (Ga. Ct. App. 1979) (contraband discovered in briefcase by hotel manager and security personnel admissible because purpose of search was to determine owner of lost or misplaced property admissible); *cf. Corngold v. United States*, 367 F.2d 1, 5-6 (9th Cir. 1966) (contraband discovered by airline agents inadmissible when government agents actively joined in search).

7.6(c) Public Function Theory

Evidence obtained by store detectives, security officers, and insurance investigators is generally admissible. *See United States v. Lima*, 424 A.2d 113, 121 (D.C. 1980); Reiter, Annotation, 36

A.L.R.3d at 567-71. Searches by off-duty police officers are considered private if the officers acted as private citizens and if the search or seizure was unconnected with their duties as police officers. *People v. Wachter*, 58 Cal. App. 3d 911, 920-21, 130 Cal. Rptr. 279, 285 (1976) (deputy sheriff acted as private citizen when he notified law enforcement officials of defendant's marijuana plants).

But when a private party acts as a police officer, has a strong interest in obtaining convictions, and is familiar with search and seizure law, the purposes of the exclusionary rule are served by suppression and the rule will apply. *See Commonwealth v. Eshelman*, 383 A.2d 838, 842 (Pa. 1978) (off-duty police officer considered acting as government agent when he trespassed, seized suspicious-looking package from car, and handed package over to police); *Stapleton v. Super. Ct.*, 447 P.2d 967, 970 (Cal. 1968) (police participation in planning car search that was conducted by credit card agent marked subsequent actions of agent with imprimatur of state action).

For examples of private action constituting state action in contexts other than search and seizure cases, see *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L. Ed. 265 (1946).

7.6(d) Ratified Intent and Judicial Action Theory

A majority of jurisdictions have decided that when evidence is seized to aid the government and when the government had prior knowledge that the seizure would occur, the taint of the illegal action is transferred to the government. *See United States v. Mekjian*, 505 F.2d 1320, 1327-28 (5th Cir. 1975) (copies of fraudulent claims allowed into evidence because defendant failed to prove that federal investigators knew nurse had illegally copied records for government use).

7.7 Fruit of the Poisonous Tree: General Rule

The extent to which evidence related to an illegal search or seizure may be suppressed depends on the extent to which the evidence derives from exploitation of the illegality. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319, 321 (1920) (when police unlawfully seized documents, made copies of the documents, and returned the originals, the copies were inadmissible); *State v. Byers*, 88 Wash. 2d 1, 10, 559 P.2d 1334, 1338 (1977), *overruled on other grounds, State v. Williams*, 102 Wash. 2d 733, 741 n.5, 689 P.2d 1065, 1070 n.5 (1984). The

following sections discuss three tests that have been used to determine whether a given piece of evidence constitutes "fruit of the poisonous tree" that should be suppressed. *See generally* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4 (3d ed. 1996).

7.7(a) Attenuation Test

The attenuation test suggests that at some point the taint of evidence becomes so dissipated as to preclude suppression. That point arises when the detrimental consequences of the illegal police action becomes so attenuated that the deterrent effect on the exclusionary rule no longer justifies its cost. *Brown v. Illinois*, 422 U.S. 590, 608-09, 95 S. Ct. 2254, 2264-65, 45 L. Ed. 2d 416, 430-31 (1975) (Powell, J., concurring); *State v. Reid*, 38 Wash. App. 203, 213, 687 P.2d 861, 868 (1984). For example, in *Reid*, the police arrested the defendant shortly after the defendant emerged from his apartment building and got into a car. When the defendant refused to identify from which apartment unit he had exited, police seized the defendant's keys from the car, entered the building, and used the keys to unlock the door to one of the apartments. The police then entered the apartment, observed evidence in plain view, and later returned and seized the evidence pursuant to a warrant. *Reid*, 38 Wash. App. at 205-09, 687 P.2d at 864-66. The court reasoned that even if the initial seizure of the keys was unlawful, the evidence taken from the apartment would be admissible because the seizure of the evidence "was so attenuated that the taint of the seizure of the keys had dissipated." *Id.* at 208-09, 687 P.2d at 865-66 ("[B]ystanders had identified the door through which the defendant had often entered and exited. [Thus,] [t]he keys were not utilized in the manner of a divining rod to locate [the defendant's] apartment but rather to facilitate access to [the] residence and to confirm from which door the defendant had exited.").

One commentator has suggested the following criteria for establishing whether the fruit of the unlawful search or seizure is too attenuated to be suppressible.

(1)

> [T]he chain between the challenged evidence and the primary illegality is long or the linkage can be shown only by "sophisticated argument". . . . In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus [the discovery of the evidence would] not have been a motivating force behind [the search].

Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1148-49 (1967). Consequently, the threat of exclusion would not operate as a deterrent.

(2) When the evidence "is used for some relatively insignificant or highly unusual purpose. Under these circumstances, it is not likely, that, at the time the primary illegality was contemplated, the police foresaw or were motivated by the potential use of the evidence and the threat of exclusion would, therefore, effect no deterrence." *Id.* at 1149.

(3) When the unlawful police conduct is minimally offensive. Because "the purpose of the exclusionary rule is to deter undesirable police conduct, where that conduct is particularly offensive the deterrence ought to be greater and . . . the scope of exclusion broader." *Id.* at 1150-51.

7.7(b) Independent Source Test

When evidence has been obtained lawfully, the fact that police also came by the evidence unlawfully does not make it suppressible. *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377, 387-88 (1984); *State v. O'Bremski*, 70 Wash. 2d 425, 429-30, 423 P.2d 530, 533 (1967) (when missing child found during unlawful search of apartment, child's testimony admissible because she was not discovered solely as result of unlawful search; witness had informed police he knew where child was).

The case for admitting the evidence is stronger when the independent source is known prior to the police illegality. *United States v. Barrow*, 363 F.2d 62, 66 (3d Cir. 1966) (testimony of witness found on premises of gambling casino during illegal search admissible when witness' identity as casino patron was previously learned from observation by federal agents); *see also United States v. Giglio*, 263 F.2d 410, 413 (2d Cir. 1959).

Finally, when the unlawful search or seizure results in the police only "focusing" their investigation on a particular individual, subsequently obtained evidence is not suppressible even if police would not have been able to focus the investigation but for the illegality. *United States v. Friedland*, 441 F.2d 855, 859 (2d Cir. 1971); *see also United States v. Bacall*, 443 F.2d 1050, 1056-57 (9th Cir. 1971) (even when evidence can be traced to leads resulting from illegal search, evidence is admissible if government in fact learned of evidence from independent source).

7.7(c) Inevitable Discovery Test

Evidence obtained as a result of unlawful police action is admissible when the police inevitably would have obtained the evidence lawfully. *Nix*, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d at 387-88; *see also Somer v. United States*, 138 F.2d 790, 792 (2d Cir. 1943); *State v. Warner*, 125 Wash. 2d 876, 888, 889 P.2d 479, 484 (1995) (relying on federal precedent); *State v. Richman*, 85 Wash. App. 568, 570, 933 P.2d 1088, 1090 (1997) (applying inevitable discovery rule after providing detailed state constitutional analysis under *Gunwall* factors); *Reid*, 38 Wash. App. at 209 n.6, 687 P.2d at 866 n.6.

The State bears the burden of proving by a preponderance of the evidence that the evidence would have been inevitably discovered through lawful means. *Nix*, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d at 387; *Warner*, 125 Wash. 2d at 888, 889 P.2d at 484. Washington has recognized that "[a]bsolute inevitability of discovery is not required[,] but simply a reasonable probability" that the evidence would have been discovered from an untainted source. *Warner*, 125 Wash. 2d at 888, 889 P.2d at 484 (recognizing lengthy statute of limitations for child rape increased likelihood of eventual discovery).

The inevitable discovery test applies even when the State cannot show that the police acted in good faith in accelerating the discovery of the evidence. *Nix*, 467 U.S. at 445, 104 S. Ct. at 2510, 81 L. Ed. 2d at 388 (under inevitable or ultimate discovery exception to exclusionary rule, prosecution is not required to prove absence of bad faith). *But see Richman*, 85 Wash. App. at 570, 933 P.2d at 1090 (recognizing need to demonstrate that police did not act unreasonably or attempt to accelerate discovery in addition to its inevitability). *See generally* Robert F. Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L. & CRIMINOLOGY 307, 315 (1964).

7.8 Particular Applications of the Fruit of the Poisonous Tree Doctrine

7.8(a) Confession as Fruit of Illegal Arrest

Generally, a court may admit a defendant's confession into evidence consistent with the Fifth Amendment when the defendant confessed voluntarily. However, when a confession is the fruit of an illegal search or seizure, the court must also ensure that the distinct policies of the Fourth Amendment are satisfied. *Brown v. Illinois*, 422

U.S. 590, 600-03, 95 S. Ct. 2254, 2260-61, 45 L. Ed. 2d 416, 425-27 (1975). For example, a confession made immediately upon an illegal entry and arrest is excludable, but when a suspect is released after an illegal arrest and later returns to the police station to make a confession, the confession is admissible because its taint has dissipated. *Wong Sun v. United States*, 371 U.S. 471, 491, 83 S. Ct. 407, 419, 9 L. Ed. 2d 441, 454 (1963).

The factors dissipating the taint of a confession are the following:

(1) the giving of *Miranda* warnings, although the warnings taken alone do not constitute a per se break in the causality between the illegality and the confession;
(2) the temporal proximity of the arrest and the confession;
(3) the presence of intervening circumstances; and
(4) the purpose and egregiousness of the official misconduct.

Brown, 422 U.S. at 603-05, 95 S. Ct. at 2262, 45 L. Ed. 2d at 428; *accord State v. Byers*, 88 Wash. 2d 1, 8, 559 P.2d 1334, 1338 (1977), *overruled on other grounds by State v. Williams*, 102 Wash. 2d 733, 689 P.2d 1065 (1984); *see also Rawlings v. Kentucky*, 448 U.S. 98, 110, 100 S. Ct. 2556, 2564, 65 L. Ed. 2d 633, 645 (1980); *State v. Johnston*, 38 Wash. App. 793, 800-01, 690 P.2d 591, 595 (1984).

When a person is detained, but not formally arrested, and the detention is unlawful because probable cause is lacking, his or her confession, if causally connected to the detention, is not admissible, even though the person was first given *Miranda* warnings. *Dunaway v. New York*, 442 U.S. 200, 217-18, 99 S. Ct. 2248, 2259, 60 L. Ed. 2d 824, 839-40 (1979).

7.8(b) Confession as Fruit of Illegal Search

Dissipation of the taint and the *Brown* factors do not apply to a confession following an unlawful search as opposed to one following an unlawful arrest because a suspect is more likely to confess as a result of a search. *People v. Robbins*, 369 N.E.2d 577, 581 (Ill. App. Ct. 1977). Thus, a confession is suppressible if it would not have been made but for the illegal search. *See State v. White*, 97 Wash. 2d 92, 102-04, 640 P.2d 1061, 1067-68 (1982). *But cf. United States v. Green*, 523 F.2d 968, 972 (9th Cir. 1975) (defendant's admission allowed into evidence when admission followed government agents' confronting defendant with both legally and illegally seized products of search); *United States v. Trevino*, 62 F.R.D. 74, 77 (S.D. Tex. 1974) (defendant's admissions allowed into evidence even though they were result of an illegal search; defendant testified at pretrial hearing that he "probably would have" made admissions even in absence of search).

7.8(c) Search as Fruit of Illegal Arrest or Detention

When a search is incident to an illegal arrest, the fruits of the search are suppressible unless intervening factors, such as a valid arrest, occur between the illegal arrest and the search. *United States v. Walker*, 535 F.2d 896, 898 (5th Cir. 1976).

A search following an illegal arrest may be purged of the taint by voluntary consent to the search; the voluntariness of the consent may be determined by reference to the *Brown* factors, as outlined above in § 7.81(a). 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(d), at 277 (3d ed. 1996). *See State v. Fortier*, 553 P.2d 1206, 1209 (Ariz. 1976); *see also State v. Shoemaker*, 85 Wash. 2d 207, 212, 533 P.2d 123, 125 (1975); *cf.* 3 LAFAVE, SEARCH AND SEIZURE § 8.1, at 596.

Some courts have held that when the execution of a search warrant has been preceded by an illegal arrest of the person who lives at the place searched, the evidence derived from the illegal arrest is automatically excluded. *See, e.g., People v. Shuey*, 533 P.2d 211, 222 (Cal. 1975). *But see State v. Fenin*, 381 A.2d 364, 368 (N.J. Super. Ct. 1977) (evidence of possession and of possession with intent to distribute a controlled substance is admissible although preceded by illegal search because evidence was obtained pursuant to valid warrant and not as the result of illegal search).

7.8(d) Search as Fruit of Illegal Search

When the issuance of a search warrant is based upon untainted evidence, the fact that an illegal search took place prior to securing the warrant will not invalidate the execution of the warrant and evidence seized during the execution will be admissible. *Segura v. United States*, 468 U.S. 796, 814, 104 S. Ct. 3380, 3391, 82 L. Ed. 2d 599, 614-15 (1984) (second search of home is not tainted by prior illegal entry).

Generally, warrants are considered valid if they could have been issued based upon the untainted information in the affidavit. *See United States v. Marchand*, 564 F.2d 983, 1001-02 (2d Cir. 1977) (when lawfully obtained evidence is sufficient to justify issuance of warrant, the fact that officer might not have sought warrant but for receipt of illegally obtained evidence does not require suppression of fruits of search made pursuant to warrant); *United States v. DiMuro*, 540 F.2d 503, 515 (1st Cir. 1976); *United States v. Nelson*, 459 F.2d 884, 889 (6th Cir. 1972).

7.8(e) Arrest as Fruit of Illegal Search

If an arrest is based solely on information derived from an illegal search, the arrest is tainted and void. *Marchand*, 564 F.2d at 1002; *see Sheff v. Florida*, 329 So. 2d 270, 272 (Fla. 1976).

7.8(f) Identification of Suspect as Fruit of Illegal Arrest

Courts differ as to whether to exclude suspect identifications made as a result of an illegal arrest exemplified by the following.

(1) *Line-up identification.* Courts have reached conflicting conclusions on the suppression of line-up identifications resulting from illegal arrests. *Compare Commonwealth v. Garvin*, 293 A.2d 33, 37-38 (Pa. 1972) (permissible to introduce line-up evidence obtained as result of illegal arrest), *with Garner v. Delaware*, 314 A.2d 908, 912 (Del. Super. Ct. 1973) (line-up evidence derived from illegal arrest suppressible).

Some courts have used the *Brown* factors in determining whether such identifications are admissible. *See Johnson v. Louisiana*, 406 U.S. 356, 365, 92 S. Ct. 1620, 1626, 32 L. Ed. 2d 152, 161 (1972) (defendant may consent to line-up and, hence, break taint); *State v. McMahon*, 568 P.2d 1027, 1031 (Ariz. 1977) (post-arrest discovery of information connecting defendant with another crime dissipates taint of illegal line-up if new information comes to light before line-up occurs and illegal arrest is not made with intent to obtain line-up evidence). Courts have also examined the purpose and flagrancy of the official misconduct. *See generally* 5 LAFAVE, SEARCH AND SEIZURE § 11.4(a)-(j).

(2) *At-trial identification.* When both the police officer's knowledge of the accused's identity and the victim's independent recollection of the accused antedate the unlawful arrest, an in-court identification of the accused by the victim is untainted by either the arrest or the pretrial identification arising therefrom. *United States v. Crews*, 445 U.S. 463, 474, 100 S. Ct. 1244, 1251, 63 L. Ed. 2d 537, 547-48 (1980); *State v. Mathe*, 102 Wash. 2d 537, 546-47, 688 P.2d 859, 864 (1984). Other factors to be considered in determining whether the at-trial identification is admissible include:

(a) the witness' prior opportunity to observe the alleged criminal act;
(b) the existence of any discrepancy between any pre-line-up description and the defendant's actual description;
(c) any identification of another person as the perpetrator prior to the line-up;

(d) the identification of the defendant by picture prior to the line-up;
(e) the failure to identify the defendant on a prior occasion; and
(f) the length of time between the alleged act and the line-up identification.

United States v. Wade, 388 U.S. 218, 241, 87 S. Ct. 1926, 1940, 18 L. Ed. 2d 1149, 1165 (1967). *Compare Payne v. United States*, 294 F.2d 723, 725 (D.C. Cir. 1961) (no taint), *with Garner*, 314 A.2d at 912 (Del. Super. Ct. 1973) (in-court identification inadmissible when based solely upon line-up identification that was result of illegal arrest), *and In re Woods*, 314 N.E.2d 606, 611 (Ill. App. Ct. 1974) (six-month lapse between identification that was result of illegal arrest and in-court identification insufficient to purge the primary taint).

When police have made flagrantly illegal arrests for the purpose of securing identifications that otherwise could not have been obtained, the identifications are inadmissible. *United States v. Edmons*, 432 F.2d 577, 584 (2d Cir. 1970).

(3) *Photo identification.* A photo identification produced by an unlawful arrest is not admissible. *Crews*, 445 U.S. at 474, 100 S. Ct. at 1251, 63 L. Ed. 2d at 547-48. *But see Johnson v. State*, 496 S.W.2d 72, 74 (Tex. Crim. App. 1973) (photo identification not fruit of illegal arrest when discovery of outstanding warrant was intervening circumstance).

Courts have allowed photos taken during illegal arrests to be used on subsequent occasions to connect suspects with additional, unrelated crimes when the suspects were not originally arrested for the sole purpose of acquiring the photo. *See People v. McInnis*, 494 P.2d 690, 693 (Cal. 1972) (use of photo identification permitted when illegal arrest by law enforcement agency when (1) the arrest was made in good faith, (2) the ultimate charge was wholly unrelated to the charge in the illegal arrest, (3) a different agency pressed charges, and (4) there is no evidence of exploitation of the original arrest); *cf. People v. Pettis*, 298 N.E.2d 372, 376 (Ill. App. Ct. 1973) (testimony identifying defendant as perpetrator of offense admissible, even though photo was taken after illegal arrest for unrelated offense).

(4) *Fingerprints.* Fingerprints must be suppressed when the unlawful arrest was for the purpose of obtaining and using the fingerprints for prosecuting the suspect for the crime that he or she was arrested for. *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S. Ct. 1394, 1397-98, 22 L. Ed. 2d 676, 681 (1969). *See also Paulson v. Florida*, 257 So. 2d 303, 305 (Fla. Dist. Ct. App. 1972) (because police did not arrest defendant for sole purpose of obtaining fingerprints,

fingerprints obtained from arrest for public drunkenness not suppressible at trial for grand larceny).

7.8(g) Identification of Property as Fruit of Illegal Search

Testimony concerning an object seized during an illegal search is inadmissible when the identification of the object is established by use of the illegally seized object. *People v. Dowdy*, 50 Cal. App. 3d 180, 187, 123 Cal. Rptr. 155, 159 (1975).

7.8(h) Testimony of Witness as Fruit of Illegal Search

Testimony and physical evidence are treated differently for purposes of the exclusionary rule. *United States v. Ceccolini*, 435 U.S. 268, 277-79, 98 S. Ct. 1054, 1061-62, 55 L. Ed. 2d 268, 278-79 (1978). Verbal testimony carries with it an exercise of free-will, and the costs of excluding the evidence are great. Consequently, the ability to suppress a derivative witness's testimony depends on several of the following factors:

(1) whether the witness testified freely, *see United States v. Karathanos*, 531 F.2d 26, 35 (2d Cir. 1976) (testimony by illegal aliens obtained as result of illegal search inadmissible because testimony was prompted by government statements concerning future prosecution);

(2) whether the physical fruits of the illegal search were used in questioning the witness, *see Ohio v. Rogers*, 198 N.E.2d 796, 806 (Ohio Ct. of Common Pleas 1963) (testimony about gun suppressed because witness would not have been questioned about gun but for unlawful search);

(3) whether the search and testimony were close in time, *see Ceccolini*, 435 U.S. at 277-78, 98 S. Ct. at 1061, 55 L. Ed. 2d at 277-78;

(4) whether the witness' identity and location were known before the search, *see State v. O'Bremski*, 70 Wash. 2d 425, 429-30, 423 P.2d 530, 533 (1967) (when parents had sought help from police, police questioned boy, and boy stated girl was in apartment; girl's testimony admissible although girl was found in apartment during illegal search); and

(5) whether the search was made with the intent to find witnesses, *see People v. Martin*, 46 N.E.2d 997, 1002 (Ill. 1942) (testimony of witnesses suppressed when witness' names obtained from papers found during illegal search of defendant's premises); *see generally Ceccolini*, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268.

7.8(i) Crime Committed in Response to Illegal Arrest or Search

Generally, evidence that the defendant attempted to bribe or attack an officer is admissible even if the arrest was illegal. *United States v. Perdiz*, 256 F. Supp. 805, 806 (S.D.N.Y. 1966); *State v. Aydelotte*, 35 Wash. App. 125, 132, 665 P.2d 443, 447 (1983). Thus, evidence of a suspect speeding away from an unlawful traffic stop has been considered sufficiently distinguishable from the intrusion to be admissible at trial. *State v. Owens*, 39 Wash. App. 130, 135, 692 P.2d 850, 853 (1984).

The rationale for admitting the evidence is that acts of free will purge the taint; thus, the application of the exclusionary rule would only marginally further deterrence. In addition, exclusion would permit persons unlawfully arrested to assault officers without risk of criminal liability. *Aydelotte*, 35 Wash. App. at 132-33, 665 P.2d at 447-48. Yet, the evidence would be inadmissible if it were the product of questionable police action. *See People v. Cantor*, 324 N.E.2d 872 (N.Y. 1975) (without identifying themselves, three officers encircled defendant; evidence of defendant pulling gun inadmissible).

7.9 Waiver or Forfeiture of Objection

A defendant may waive or forfeit his or her constitutional objection and, thus, render the objectionable evidence admissible. A waiver can be made in several ways, including: (1) failure to make a timely objection, *see* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, at 598 (3d ed. 1996); (2) defendant's testimony at trial about the evidence, *see id.* at § 7.9(b); and, (3) entry of a guilty plea, *see id.* at § 7.9(c).

7.9(a) Failure to Make Timely Objection

Jurisdictions have their own rules for what constitutes a timely objection. Washington court rules provide that a defendant's failure to object at the omnibus hearing may constitute a waiver of the error if the party had knowledge of the illegality of the search or seizure prior to the hearing. *See* WASH. CR.R. 4.5(d). The defendant's failure to object at trial will constitute a waiver unless the illegality "is of such a flagrant or prejudicial nature that any curative measure would have been futile." *State v. Van Auken*, 77 Wash. 2d 136, 143, 460 P.2d 277, 282 (1969).

7.9(b) Testimony by Defendant Concerning Suppressed Evidence

A defendant may not raise a Fourth Amendment claim on appeal challenging the admission of evidence, notwithstanding a timely objection, if the defendant gave testimony at trial admitting to the possession of that evidence. *See State v. Peele*, 10 Wash. App. 58, 67, 516 P.2d 788, 793 (1973); *Jones v. Texas*, 484 S.W.2d 745, 747 (Tex. Crim. App. 1972). A claim may be raised, however, if the defendant's testimony was induced by the erroneous admission of the evidence. *See Harrison v. United States*, 392 U.S. 219, 224-25, 88 S. Ct. 2008, 2011, 20 L. Ed. 2d 1047, 1052-53 (1968); *Peele*, 10 Wash. App. at 67-68, 516 P.2d at 794. The rationale for the general rule is that the testimony may make the admission of the illegal evidence harmless error. *See Peele*, 10 Wash. App. at 66, 516 P.2d at 793; *see also LaRue v. State*, 224 S.E.2d 837 (Ga. Ct. App. 1976); 3 LAFAVE, SEARCH AND SEIZURE § 7.10.

7.9(c) Guilty Plea

A defendant who has knowingly and voluntarily entered a guilty plea may not thereafter obtain post-conviction relief on Fourth Amendment grounds even though he or she made a timely motion to suppress in advance of the plea. *Sanders v. Craven*, 488 F.2d 478, 479 (9th Cir. 1973); *see Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973). Because the conviction is based on the plea, the defendant cannot directly challenge the evidence. *See Sanders*, 488 F.2d at 479. But if the plea itself can be characterized as the fruit of illegally obtained evidence and, consequently, should have been suppressed upon the defendant's timely motion, then the plea was not entered voluntarily or knowingly. The defendant in such a case is permitted to go to trial and, if convicted, to appeal the admission of the evidence. *See* L.A. Bradshaw, Annotation, *Plea of Guilty as Waiver of Claim of Unlawful Search and Seizure*, 20 A.L.R.3d 724, 732-35 (1968).

7.10 Harmless Error

Even when illegally seized evidence has been improperly admitted at trial, a conviction will not be reversed if the defendant would have been convicted without its admission. *See State v. Smith*, 93 Wash. 2d 329, 352-53, 610 P.2d 869, 883 (1980); *State v. Flicks*, 91 Wash. 2d 391, 396, 588 P.2d 1328, 1332 (1979).

CONCLUSION

Since this Survey was first published by Justice Robert F. Utter in 1985, search and seizure law in Washington State has undergone both minor modifications and major revisions. The Washington Supreme Court's action in *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986), set forth the minimum matters that must be considered in making arguments under article I, section 7 of the Washington Constitution. The court's refusal to consider arguments that do not address the *Gunwall* factors, as discussed in *State v. Wethered*, 110 Wash. 2d 466, 755 P.2d 797 (1988), stresses the court's continuing insistence on quality legal thought, briefing, and argument by the lawyers appearing before the court.

Particulars of search and seizure law may change based upon the circumstances of each case, but the types of issues raised and considered are likely to remain much the same. An attempt has been made to expand upon basic issues by referencing additional and more recent Washington search and seizure cases. While this Survey is not comprehensive and will require continuous updating, it will hopefully continue to be a useful tool for practitioners and judges who must assess the scope of protection that the Washington Constitution and the United States Constitution afford against unlawful searches and seizures.

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