Survey of Washington Search and Seizure Law: 2019 Update

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INTRODUCTION

We are pleased to be joined by Law Review members Joshua Harms, Natalie Reid, Edna Enriquez, Evanie Parr, Michael Parrott, and Gregory Swanson, and the rest of the *Seattle University Law Review*, who performed the research required to update this Survey. Many sections of this Survey were improved through editing and revisions, clarifying the discussions and analysis of cases. This marks the sixth publication of the Survey that was originally authored by Justice Robert F. Utter, Washington State Supreme Court (retired) in 1985, with updates published in 1988, 1998, 2005, and 2013.

This Survey is intended to serve as a resource which Washington lawyers, judges, law enforcement officers, and others can turn to as an authoritative starting point for researching Washington search and seizure law. In order to be useful as a research tool, this Survey requires periodic updates to address new cases interpreting the Washington constitution and the U.S. Constitution and to reflect the current state of the law. Many of these cases involve the Washington State Supreme Court's interpretation of the Washington constitution. Also, as the U.S. Supreme Court has continued to examine Fourth Amendment search and seizure jurisprudence, its decisions and reflections on Washington law are discussed.

Often the rules and approaches in interpreting the Washington constitution differ in certain areas from the analysis used by the U.S. Supreme Court in its Fourth Amendment jurisprudence. Where that occurs, this Survey has identified the independent approach adopted by the Washington State Supreme Court.

Article I, section 7 of the Washington constitution is a 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 historically applied the analytical framework outlined in *State v. Gunwall*, 106 Wn.2d 54, 61–62, 720 P.2d 808 (1986), in its case-by-case determination of the scope of protection afforded under article I, section 7, and in situations where greater individual protection exists under the Washington constitution than under the Fourth Amendment.

Gunwall adopted the following six neutral interpretive factors: (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) matters of particular state interest or local concern. *Id*.

This analytical framework adopted in *Gunwall* provides the structure and foundation from which Washington courts continue to define the scope of article I, section 7. Recognizing the structural approach to state constitutional interpretation, however, continues to provide a reasoned method for resolving issues of state constitutional law.

This Survey contains updated case comments and statutory references that are current through December 2018, and focuses primarily on search and seizure law in the criminal context; it omits discussion of many procedural issues, including those arising under court rules that implement constitutional protections. In addition, all references to Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, have been updated to the October 2018 update of the fifth edition.

CHAPTER 1

Triggering Article I, Section 7 and the Fourth Amendment: Defining Searches and Seizures

This chapter addresses three questions: (1) what is a search; (2) what is a seizure; and (3) who has standing to challenge a search or seizure? These questions represent the threshold inquiry in any search or seizure problem. Unless a search or seizure has occurred within the meaning of the federal or state constitution, constitutional protections are not triggered. This chapter first discusses when a search has occurred, from entries into the home to the taking of blood samples. The chapter then discusses when a seizure has occurred, be it an arrest, an investigatory stop, or the detainment of property. The chapter concludes with a discussion of who may raise claims concerning article I, section 7 or the Fourth Amendment.

1.0 DEFINING "SEARCH" PRE-*KATZ*: "CONSTITUTIONALLY PROTECTED AREAS"

Prior to 1967, the U.S. Supreme Court found Fourth Amendment protections in "constitutionally protected areas." *Berger v. New York*, 388 U.S. 41, 59, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967); *Lopez v. United States*, 373 U.S. 427, 438–39, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963). The Fourth Amendment's guarantees applied only to those searches that intruded 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* § 2.1, at 562–76 (5th ed. 2012).

This conception of the Fourth Amendment changed in 1967 when the U.S. Supreme Court decided *Katz v. United States*. 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In *Katz*, the Court found that the Fourth Amendment protects "people, not places." *Id.* at 350–52, 88 S.

Ct. 507. That is, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351, 88 S. Ct. 507. The Court thus defined a search as that which invades an individual's "reasonable expectation of privacy." *Id.* at 360, 88 S. Ct. 507 (Harlan, J., concurring). The following sections examine the application of this "reasonable expectation of privacy" analysis as well as the continued vitality of the "constitutionally protected area." *See* 1 LaFave, *supra*, § 2.1, at 562–96.

1.1 DEFINING "SEARCH" POST-*KATZ*: THE "REASONABLE EXPECTATION OF PRIVACY"

The concurring opinion in *Katz*, which has since been accepted as the *Katz* test, explained that the Fourth Amendment 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, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); *see* 1 Wayne R. LaFave, *Search and Seizure* § 2.1, at 562–96 (5th ed. 2012). A reasonable expectation of privacy is measured by a twofold analysis. *Katz*, 389 U.S. at 361, 88 S. Ct. 507 (Harlan, J., concurring). First, a person must have "exhibited an actual (subjective) expectation of privacy." *Id.* For example, a person has no expectation of privacy where illegal business is openly conducted. *State v. Clark*, 129 Wn.2d 211, 226, 916 P.2d 384 (1996); *State v. Hastings*, 119 Wn.2d 229, 232, 830 P.2d 658 (1992). Second, the individual's expectation must be "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361, 88 S. Ct. 507 (Harlan, J., concurring); *see also Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); *State v. Carter*, 151 Wn.2d 118, 127, 85 P.3d 887 (2004); *State v. Young*, 123 Wn.2d 173, 189, 867 P.2d 593 (1994). This "legitimate" expectation of privacy "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." *Rakas v. Illinois*, 439 U.S. 128, 143–44 n.12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

Similarly, article I, section 7 extends search and seizure protections to one's "private affairs" and home. Const. art I, § 7. 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." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). In the remainder of

this section, we discuss the protection of a person's "private affairs" under article I, section 7 and the reasonable expectation of privacy under the Fourth Amendment, as both have been applied to the use of sensory-enhancing devices and techniques such as canine sniffs, aerial surveillance, GPS trackers, and recording devices.

1.1(a) Article I, Section 7 Analysis of Sensory-Enhancing Devices and Techniques

In applying article I, section 7, courts engage in a case-by-case analysis concerning the use of sensory-enhancing techniques in the course of police investigations. For example, whether a canine sniff constitutes a search remains an unanswered question in Washington. *State v. Neth*, 165 Wn.2d 177, 181, 196 P.3d 658 (2008). Specifically, Washington courts have rejected a blanket rule that canine sniffs are not searches, focusing instead on the intrusiveness of the sniff and the individual's reasonable expectation of privacy. *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986); *see also State v. Hartzell*, 156 Wn. App. 918, 929–30, 237 P.3d 928 (2010) (dog sniff of exterior of car door is not a search); *State v. Stanphill*, 53 Wn. App. 623, 631, 769 P.2d 861 (1989) (dog sniff of package at post office is not a search).

Furthermore, under article I, section 7, "[a]erial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude." *State v. Wilson*, 97 Wn. App. 578, 581, 988 P.2d 463 (1999); *State v. Cord*, 103 Wn.2d 361, 365, 693 P.2d 81 (1985) (aerial surveillance of defendant's property at an altitude of 3,400 feet without the aid of visual enhancement devices does not constitute a search); *Myrick*, 102 Wn.2d at 514, 688 P.2d 151 (observation of defendant's marijuana plants at an altitude of 1,500 feet with the unaided eye is not a search); 1 Wayne R. LaFave, *Search and Seizure* § 2.3, at 724–803 (5th ed. 2012). Regarding GPS devices, a search occurs when the device is installed on an individual's vehicle. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003).

It is not a violation of article I, section 7 to record a conversation when a party consents. *Clark*, 129 Wn.2d at 221; *State v. Pulido*, 68 Wn. App. 59, 63, 841 P.2d 1251 (1992). However, it is unlawful to record any "[p]rivate communication transmitted by telephone, telegraph, radio, or other device between two or more individuals . . . without first obtaining the consent of *all* the participants in the communication." RCW 9.73.030(1)(a) (emphasis added). An individual has "consented" to the recording of electronic communications, however, if the individual has knowledge that the communications will be recorded. *State v. Townsend*, 147 Wn.2d 666, 676, 57 P.3d 255 (2002) (defendant was

deemed to have consented to the recording of the communications because he constructively knew that his attempts to arrange sexual encounters with a minor over an Internet instant messaging service were automatically recorded by the receiving computer); *see also State v. Smith*, 189 Wn.2d 655, 666, 405 P.3d 997 (2017) (defendant, as the user of his own cell phone and who is thereby considered generally familiar with its functions, is deemed to have consented to voice mail recordings that he inadvertently and unknowingly makes); *In re Marriage of Farr*, 87 Wn. App. 177, 184, 940 P.2d 679 (1997) (because an answering machine's only purpose is to record messages, a defendant who knowingly left messages on the answering machine has implicitly consented to the recording and has no reasonable expectation of privacy as to the recording). *But see State v. Hinton*, 179 Wn.2d 862, 876, 319 P.3d 9 (2014) (defendant retained a privacy interest in text messages sent to and received by a third party's phone when he was unaware that the recipient reading and responding to the messages was someone other than the intended recipient). Lastly, although an individual does not have a reasonable expectation of privacy in a conversation with a police officer recorded on a dashboard camera during a traffic stop, RCW 9.73.090 nevertheless requires that the officer inform the individual, on camera, that the conversation is being recorded. *Lewis v. State*, *Dep't of Licensing*, 157 Wn.2d 446, 473, 139 P.3d 1078 (2006).

1.1(b) Fourth Amendment Analysis of Sensory-Enhancing Devices and Techniques

Under the Fourth Amendment, a canine sniff does not normally constitute a "search" because "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'" *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (quoting *United States v. Jacobsen*, 466 U.S. 109, 123, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)); *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). For a discussion of the use of canine sniffs and probable cause, see *Florida v. Harris*, 568 U.S. 237, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013). *See also infra* § 2.4(b).

Also, under the Fourth Amendment, aerial surveillance is not precluded merely because precautions are taken against ground surveillance. *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986) (aerial surveillance of marijuana growing in a fenced backyard does not implicate Fourth Amendment because officer's observations were merely from a public vantage point); *see also Florida v. Riley*, 488 U.S. 445, 450, 109 S. Ct. 693, 102 L. Ed. 2d 835 (1989)

(surveillance of a residential backyard by a helicopter in a manner that does not interfere with the defendant's normal use of their property is not a search). However, if highly sophisticated equipment is used in conducting the aerial surveillance, the Fourth Amendment may be implicated. *Dow Chem. Co. v. United States*, 476 U.S. 227, 238, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986).

There is also no legitimate expectation of privacy under the Fourth Amendment when one party consents to the recording of a conversation. *United States v. Karo*, 468 U.S. 705, 726, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984); *see* 18 U.S.C. § 2511(2)(c) ("It shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or *one* of the parties to the communication has given prior consent to such interception.") (emphasis added). Therefore, 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 recorded message, and thus, no search occurred when the records were subsequently subpoenaed. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). Further, under the Fourth Amendment, individuals maintain a legitimate expectation of privacy in the records of their physical movements recorded and maintained through their cell phone's wireless carrier service. *Carpenter v. United States*, 138 S. Ct. 2206, 2217, 201 L. Ed. 2d 507 (2018).

In 2012, the U.S. Supreme Court clarified the rule in *Katz* as adding to, not substituting for, the common law trespassory test that predated *Katz*. *United States v. Jones*, 565 U.S. 400, 409, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). In *Jones*, the police attached a GPS device to the defendant's vehicle without a warrant and tracked his movements for twenty-eight days. *Id.* at 403, 132 S. Ct. 945. Without addressing the defendant's reasonable expectation of privacy, the Court found that an improper "search" occurred because, in attaching the GPS device to the vehicle, the police had committed a common law trespass. *Id.* at 410, 132 S. Ct. 945. This physical trespass, combined with an attempt to find something or obtain information, constituted a search. *Id.* at 407 n.5, 132 S. Ct. 945. Accordingly, behavior possibly constituting a search is analyzed under either the *Katz* "reasonable expectation of privacy" test or, when applicable, the common law trespass test resurrected in *Jones*.

1.2 DEFINING "SEARCH" POST-*KATZ*: "CONSTITUTIONALLY PROTECTED AREAS"

Although the concept of "constitutionally protected areas" does not "serve as a talismanic solution to every Fourth Amendment problem,"

Katz v. United States, 389 U.S. 347, 351 n.9, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the concept retains considerable clout. The U.S. Supreme Court has referred to "constitutionally protected areas" since *Katz* and has given special deference to the areas specifically enumerated within the Fourth Amendment. Because they are specifically enumerated in both article I, section 7 and the Fourth Amendment, houses and homes can be understood as such constitutionally protected areas.

1.3 SPECIFIC APPLICATIONS OF POST-*KATZ* ANALYSIS

1.3(a) Residential Premises

Article I, section 7 of the Washington Constitution states that no person shall have "his home invaded." Const. art. I, § 7. The Washington State Supreme Court has held that article I, section 7 is more protective of the home than is the Fourth Amendment. *State v. Groom*, 133 Wn.2d 679, 685, 947 P.2d 240 (1997).

Similarly, the Fourth Amendment provides that "[t]he right of the people to be secure in their . . . houses . . . shall not be violated." U.S. Const. amend. IV. The core of the Fourth Amendment is "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, 5 L. Ed. 2d 734 (1961); *see also Kyllo v. United States*, 533 U.S. 27, 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) ("[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.") (emphasis added). Accordingly, 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, 63 L. Ed. 2d 639 (1980). In terms that apply equally to seizures of property and seizures of persons, courts have drawn the Fourth Amendment line at the entrance to the house. *Silverman*, 365 U.S. at 511, 81 S. Ct. 679.

A search of a home can occur even when government officers do not personally enter the home. *State v. Young*, 123 Wn.2d 173, 186, 867 P.2d 593 (1994) ("The constitutional line of privacy that encircles the home is more than just a barrier to physical penetration."). Specifically, a search can occur when the "[g]overnment uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo*, 533 U.S. at 40, 121 S. Ct. 2038 (search occurred when thermal imaging device

monitored a home from a public street). Similarly, a search occurs when the government monitors an electronic device to determine whether a particular article or person is within an individual's home at a particular time. *United States v. Karo*, 468 U.S. 705, 714–15, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984); *see also Clinton v. Virginia*, 377 U.S. 158, 158, 84 S. Ct. 1186, 12 L. Ed. 2d 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).

In Washington, the use of infrared surveillance of a home constitutes a search under both article I, section 7 and the Fourth Amendment. *Young*, 123 Wn.2d at 186, 867 P.2d 593. In contrast, using a flashlight to look through a window at night is no more invasive than using natural eyesight to look through a window in daylight, and it is therefore not a search. *State v. Rose*, 128 Wn.2d 388, 400, 909 P.2d 280 (1996).

The privacy interest in a home is not confined to houses, but it extends to other types of residences. *See, e.g.*, *Stoner v. California*, 376 U.S. 483, 490, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964) (hotel rooms); *State v. Murray*, 84 Wn.2d 527, 534, 527 P.2d 1303 (1974) (apartments); *State v. Davis*, 86 Wn. App. 414, 419, 937 P.2d 1110 (1997) (motel rooms); *State v. Ramirez*, 49 Wn. App. 814, 818, 746 P.2d 344 (1987) (hotel rooms). However, 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, 85 L. Ed. 2d 406 (1985) (mobile motor home); *see infra* § 1.3(e). Additionally, there is a reduced privacy interest in those spaces where several persons or families occupy the premises in common, such as sharing common living quarters, where the defendant can demonstrate sole and exclusive control of the area searched. *State v. Alexander*, 41 Wn. App. 152, 155–56, 704 P.2d 618 (1985).

Despite the heightened protection of the home, objects and activities that are exposed to the "plain view" of outsiders are not protected because no intention to keep them private has been exhibited. *State v. Clark*, 129 Wn.2d 211, 229–30, 916 P.2d 384 (1996). Accordingly, a person may forfeit his or her privacy interest in an activity or object in the home by failing to protect the activity or object from observation by persons outside the home. *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127 (2002). For example, a privacy expectation in an individual's home is not reasonable when the individual positions himself in front of a window with the lights on and drapes open. *State v. Drumhiller*, 36 Wn. App. 592, 595, 675 P.2d 631

(1984). In contrast, drawing the curtains demonstrates a reasonable expectation of privacy, and the fact that an individual failed to completely shut the curtains does not diminish the reasonableness of that expectation. *State v. Jordan*, 29 Wn. App. 924, 927, 631 P.2d 989 (1981). Under this "open view" doctrine, no search has occurred when an officer is lawfully present at a vantage point and able to detect something by utilization of one or more of his or her senses. *State v. Ross*, 141 Wn.2d 304, 313, 4 P.3d 130 (2000).

A person may waive his or her right to privacy by willingly admitting a visitor; for example, waiver may occur where a person admits an undercover police officer into the premises to conduct an illegal transaction. *See State v. Carter*, 127 Wn.2d 836, 848, 904 P.2d 290 (1995) (defendant waived any right to privacy by willingly admitting plainclothes officer into a motel room to conduct a drug transaction); *see also State v. Dalton*, 43 Wn. App. 279, 284–85, 716 P.2d 940 (1986) (student invited officer into college dormitory to conduct an illegal drug transaction; warrantless entry upheld as nonintrusive because police were invited in and took nothing except what would have been taken by a willing purchaser). A person does not, however, relinquish the privacy interest in the home by opening the door in response to a police officer's knock. *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89 (1985). For a discussion of the distinction between the plain view doctrine and the open view doctrine, see *infra* § 5.5.

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, 1252–53 (3d Cir. 1992); 1 Wayne R. LaFave, *Search and Seizure* § 2.3(b), at 739–48 (5th ed. 2012). For example, even if a building is secure and not accessible to the public, some courts have found no reasonable expectation of privacy in the common hallways. *See, e.g.*, *United States v. Nohara*, 3 F.3d 1239, 1240, 1242 (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, *supra*, § 2.3(b), at 739–48. However, certain uses may grant residents a greater expectation of privacy in building common areas. *See State v. Houvener*, 145 Wn. App. 408, 419–22, 186 P.3d 370 (2008) (residents in university dormitory had a reasonable expectation of privacy in the common areas of their floor given their intimate academic and social experiences and "common interest" in the maintenance of their privacy). In addition, the Fourth Amendment is triggered when a housing inspector enters to conduct an administrative search. *See Camara v. Mun. Ct.*, 387 U.S. 523,

534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *City of Seattle v. McCready*, 124 Wn.2d 300, 309, 877 P.2d 686 (1994). Administrative searches are discussed *infra* § 2.9(a).

1.3(b) The Curtilage and Adjoining Lands

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). The curtilage has been considered "part of [the] home itself for Fourth Amendment purposes," and thus receives Fourth Amendment protections. *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

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

> the 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, 94 L. Ed. 2d 326 (1987). The *Dunn* Court expressly declined to adopt a "bright-line" rule that the curtilage extends "no farther than the nearest fence surrounding a fenced house." *Id.* at 301 n.4, 107 S. Ct. 1134. 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. 1134; *see, e.g.*, *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (small, enclosed yard adjacent to a home in a residential neighborhood is "clearly marked" area "to which the activity of home life extends," and therefore within the curtilage); *United States v. Davis*, 530 F.3d 1069, 1079–80 (9th Cir. 2008) (workshop not within the curtilage when nearly 200 feet from the house, not shielded from view, set apart from house by a fence, and from which no domestic activity was observed); *State v. Niedergang*, 43 Wn. App. 656, 662, 719 P.2d 576 (1986) (car parked in cul-de-sac where any member of the public could park is not within curtilage).

The curtilage also includes lands adjacent to a dwelling in which there is a reasonable expectation of privacy. *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968) (reasonable expectation of privacy

extends to backyard of lodge); *see also Oliver*, 466 U.S. at 178, 104 S. Ct. 1735, (individual may have legitimate expectation of privacy in "area immediately surrounding the home"); 1 Wayne R. LaFave, *Search and Seizure* § 2.3(f), at 780–92 (5th ed. 2012).

Under Washington law, there is no reasonable expectation of privacy in areas of a home's curtilage impliedly open to the public. *State v. Smith*, 118 Wn. App. 480, 484–85, 93 P.3d 877 (2003). An open curtilage is an area "apparently open to the public, such as the driveway, the walkway, or any access route leading to the residence." *State v. Dodson*, 110 Wn. App. 112, 123, 39 P.3d 324 (2002). A police officer with legitimate business, when acting in the same manner as a reasonably respectful citizen, may lawfully enter these open curtilage areas. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000); *see also State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996) (officer entitled to walk onto a porch, which was the usual access route to the house); *State v. Solberg*, 122 Wn.2d 688, 698–99, 861 P.2d 460 (1993) (unenclosed front porch held to be a public place, not a constitutionally protected area); *State v. Gave*, 77 Wn. App. 333, 337, 890 P.2d 1088 (1995) (driveway, walkway, or access routes leading to residence or to porch of residence are all areas of "curtilage" impliedly open to the public); *State v. Graffius*, 74 Wn. App. 23, 24, 871 P.2d 1115 (1994) (driveway commonly used for guests and members of the public not protected). Upon entering these areas in the same manner as a reasonably respectful citizen, *Ross*, 141 Wn.2d at 312, 4 P.3d 130, the officer is free to use his or her senses, *State v. Thompson*, 151 Wn.2d 793, 807, 92 P.3d 228 (2004).

When a police officer enters a property through an impliedly open curtilage area and discovers evidence, a court will consider a combination of factors to analyze the admissibility of evidence, including whether the officer (1) spied into the residence; (2) acted secretly; (3) acted after dark; (4) used the normal, most direct access route; (5) tried to contact the resident; (6) created an artificial vantage point; or (7) made the discovery accidentally. *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991) (citing *State v. Seagull*, 95 Wn.2d 898, 905, 632 P.2d 44 (1981)); *see Thompson*, 151 Wn.2d at 807, 92 P.3d 228 (quoting *Seagull*, 95 Wn.2d at 901, 632 P.2d 44 ("The mere observation of that which is there to be seen does not necessarily constitute a search.")); *Ross*, 141 Wn.2d at 312, 4 P.3d 130 (reasonably respectful citizen rule); *State v. Boethin*, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (evidence suppressed when, in traversing from the stairs to the garage and putting their noses close to the garage door, officers deviated substantially from what a reasonably respectful citizen would have

done); *State v. Jesson*, 142 Wn. App. 852, 859, 177 P.3d 139 (2008) ("While the 'No Trespassing' signs alone are not sufficient to remove implied consent to the access of the property via the driveway, the closed gate, the primitive road, the secluded location of the home in addition to the posted signs are sufficient."); *State v. Mierz*, 72 Wn. App. 783, 791, 866 P.2d 65 (1994), *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995) (warrantless intrusion into a backyard, which was enclosed by a six-foot fence and padlocked gate, violated the Fourth Amendment).

1.3(c) "Open Fields"

The expectation of privacy in structures located and viewed from outside the curtilage, but on private property, is the same as the expectation of privacy in those structures viewed from public places. *United States v. Dunn*, 480 U.S. 294, 304, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). Therefore, police officers standing in an open field could look into a barn even if the defendant had a reasonable expectation of privacy in the barn. *Id.*; *see also* 1 Wayne R. LaFave, *Search and Seizure* § 2.4(a)–(b), at 804–32 (5th ed. 2012). Under this "open fields" doctrine, an expectation of privacy in open fields is unreasonable. *Oliver v. United States*, 466 U.S. 170, 179, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) ("[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 182–83, 104 S. Ct. 1735 (issue was whether the "government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment"); *State v. Dodson*, 110 Wn. App. 112, 123, 39 P.3d 324 (2002) (presence of "no trespassing" signs is not dispositive of the homeowner's reasonable expectation of privacy). In addition, the fact that police commit a common law trespass while observing an object or activity in an open field does not render the intrusion a search under the federal constitution. *Oliver*, 466 U.S. at 183, 104 S. Ct. 1735. Thus, an intrusion may be onto the land itself as well as by aerial surveillance, and yet it may still not be considered a search. *See id.*

Under article I, section 7, the relevant inquiry 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, but rather whether "the State unreasonably intruded into the defendant's 'private affairs.'" *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151

(1984); *State v. Wilson*, 97 Wn. App. 578, 581, 988 P.2d 463 (1999). The nature of the property may 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 Wn.2d at 513, 688 P.2d 151.

1.3(d) Business and Commercial Premises

The Fourth Amendment privacy protections extend to most business and commercial premises. *Dow Chem. Co. v. United States*, 476 U.S. 227, 235, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (OSHA inspector's entry into the nonpublic working areas of electrical and plumbing business constituted a search). Some Washington courts have interpreted article I, section 7 to be coextensive with the Fourth Amendment in this context. *See Seymour v. Wash. State Dep't of Health, Dental Quality Assur. Comm'n*, 152 Wn. App. 156, 160, 216 P.3d 1039 (2009); *Centimark Corp. v. Dep't of Labor & Indus.*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005). The expectation of privacy in commercial properties, however, is less than in the home. *New York v. Burger*, 482 U.S. 691, 699, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); *Centimark Corp.*, 129 Wn. App. at 376, 119 P.3d 865 ("[A]n expectation of privacy in commercial premises is different, and less significant, than a 'similar expectation in an individual's home.'").

Similarly, 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, 413–14, 104 S. Ct. 769, 78 L. Ed. 2d 567 (1984) (an employer may not insist on a warrant as a condition precedent to a valid administrative subpoena unless government inspectors seek nonconsensual entry into "areas not open to the public").

Given the lesser expectation of privacy, unlike searches of private homes, warrantless administrative searches of commercial property may be authorized by the Legislature without violating the Fourth Amendment. *Burger*, 482 U.S. at 702, 107 S. Ct. 2636. The Fourth Amendment could be violated, however, if the Legislature, in authorizing these warrantless administrative searches, failed to make rules governing the inspection procedure. *Donovan v. Dewey*, 452 U.S. 594, 599, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981).

Courts often consider certain factors in determining whether warrantless administrative searches are allowed. One factor considered is whether a business, such as the liquor or firearms business, has historically been extensively regulated. *See, e.g.*, *Burger*, 482 U.S. at

707, 107 S. Ct. 2636 (automobile junkyards have historically been "closely regulated"). Due to such long histories of government oversight in these industries, these businesses do not enjoy a reasonable expectation of privacy. *Barlow's*, 436 U.S. at 313, 98 S. Ct. 1816 (distinguishing the liquor and firearms industries from ordinary businesses on the basis of "a long tradition of close government supervision").

Whether a place is a personal residence or a business may also affect whether it constitutes curtilage or an open field. *Dow Chem. Co.*, 476 U.S. at 239, 106 S. Ct. 1819 (aerial photographs from navigable airspace of open areas of an industrial plant complex with numerous structures spread over 2,000 acres not a search because area not "curtilage").

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 Wayne R. LaFave, *Search and Seizure* § 2.4(b), at 816–32 (5th ed. 2012). But the "'implied invitation for customers to come in' . . . extends only to those times when the premises are . . . '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 an individual enjoys a reasonable expectation of privacy in his or her 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, *supra*, § 2.4(b), at 816–32.

1.3(e) Automobiles and Other Motor Vehicles

Under article I, section 7, the protection against governmental intrusion into one's "private affairs" includes automobiles and their contents. *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). Passengers in a vehicle also have a constitutionally protected privacy interest that does not diminish merely by virtue of entering a vehicle. *Id.* at 496, 987 P.2d 73. This privacy interest is independent of the driver's privacy interest. *Id.* Thus, even when a driver is under arrest, "where officers do not have articulable suspicion that an individual is armed or dangerous and have nothing to *independently* connect such person to illegal activity," a search of a passenger in an automobile is invalid. *Id.* at 498, 987 P.2d 73.

Similarly, under the Fourth Amendment, automobiles constitute "effects." *United States v. Chadwick*, 433 U.S. 1, 12, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), *overruled on other grounds by California v.*

Acevedo, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991). As a result, constitutional protections against unreasonable searches apply to automobiles and other motor vehicles. *New York v. Class*, 475 U.S. 106, 112, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986) ("A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile."); *California v. Carney*, 471 U.S. 386, 390, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985). Passengers and drivers in automobiles, however, have a reduced expectation of privacy. *Wyoming v. Houghton*, 526 U.S. 295, 303, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999); *see also Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004).

Under both the Fourth Amendment and article I, section 7, this reduced expectation of privacy derives from both the pervasive schemes of regulation and the ready mobility unique to vehicles. *See Carney*, 471 U.S. at 392, 105 S. Ct. 2066. As a result, even when a vehicle is used as a residence, its owner has a lesser expectation of privacy when that vehicle is readily mobile and licensed to operate on public streets. *Id.* at 393, 105 S. Ct. 2066 (mobile home in public lot was treated as a vehicle); *cf. State v. Johnson*, 128 Wn.2d 431, 449, 909 P.2d 293 (1996) (lessened privacy interest for sleeper compartment of a tractor-trailer rig). Additionally, courts have held that there is no reasonable expectation of privacy in things that are located on a vehicle's exterior in plain view of passersby. *State v. McKinney*, 148 Wn.2d 20, 32, 60 P.3d 46 (2002) (computerized check of defendant's license plate and driving record did not constitute a search under article I, section 7); *see also United States v. Diaz-Castaneda*, 494 F.3d 1146, 1150 (9th Cir. 2007) (no search under Fourth Amendment). *But see Collins v. Virginia*, 138 S. Ct. 1663, 1671, 201 L. Ed. 2d 9 (2018) (automobile exception under the Fourth Amendment does not permit officers to remove a vehicle cover and search vehicle located within the home's curtilage).

1.3(f) Personal Characteristics

The Fourth Amendment provides no protection for what "a person knowingly exposes to the public." *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Personal characteristics such as facial features and voice tone are continually exposed to the public and therefore not protected under the Fourth Amendment. *United States v. Dionisio*, 410 U.S. 1, 14, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973) ("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."). Like speech, handwriting is also often exposed to the public. Accordingly, an individual has no more

privacy in his handwriting than in the sound of his voice. *United States v. Mara*, 410 U.S. 19, 21, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973). Article I, section 7 has been interpreted using this same analysis. *Bedford v. Sugarman*, 112 Wn.2d 500, 512, 772 P.2d 486 (1989) (no privacy with regard to one's personality, appearance, and behavior, which would normally be exposed in public).

In contrast to the lack of a general privacy interests in facial characteristics, voice exemplars, and handwriting, the taking of blood, urine, or DNA samples is considered a search within the meaning of both the Fourth Amendment and article I, section 7. *Ferguson v. Charleston*, 532 U.S. 67, 76, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (urine samples); *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (blood samples); *State v. Surge*, 122 Wn. App. 448, 454, 94 P.3d 345 (2004), *aff'd*, 160 Wn.2d 65, 156 P.3d 208 (2007) (DNA samples); *State v. Baldwin*, 109 Wn. App. 516, 523, 37 P.3d 1220 (2001) (breath and blood sample); *Robinson v. City of Seattle*, 102 Wn. App. 795, 818–19, 10 P.3d 452 (2000) (urine samples).

In Washington, mandatory blood testing, although considered a search, may still not violate article I, section 7 or the Fourth Amendment when testing an individual with a diminished privacy interest. *See Surge*, 160 Wn.2d at 74, 156 P.3d 208 (convicted felons); *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 93–94, 847 P.2d 455 (1993) (sexual offenders); *State v. Meacham*, 93 Wn.2d 735, 739, 612 P.2d 795 (1980) (putative fathers). These searches may be justified under the special needs doctrine. *See infra* § 6.1.

An individual may also unknowingly consent to a seizure of his or her bodily fluids. For example, under RCW 46.20.308, any person who operates a vehicle is deemed to have consented to a blood alcohol test. *See Baldwin*, 109 Wn. App. at 525 (upholding constitutionality of implied consent statute). Further, a person retains no privacy interest in his saliva when he licks an envelope and places it in the mail. *State v. Athan*, 160 Wn.2d 354, 367, 158 P.3d 27 (2007).

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 it is not explicitly stated, article I, section 7 protects personal effects in so far as they constitute "private affairs." Const. art. I, § 7. With regard to a person's banking and home telephone records, garbage, and motel registry information, article I, section 7's protection is broader than the protection provided by the Fourth Amendment.

Under the Washington Constitution, a person's banking records constitute "private affairs" that are protected from warrantless searches. *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007). However, there may be no expectation of privacy to an individual's bank records or business transactions when a person exposes evidence of those transactions to a third party, such as an insurance company. *State v. Farmer*, 80 Wn. App. 795, 801, 911 P.2d 1030 (1996). Under the Fourth Amendment, there is no reasonable expectation of privacy in a person's bank records, checks, deposit slips, and other records relating to bank accounts because, according to the Court, such records "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *United States v. Miller*, 425 U.S. 435, 442, 96 S. Ct. 1619, 48 L. Ed. 71 (1976).

Under the U.S. Constitution, individuals using their home telephones have no Fourth Amendment privacy interest in the phone numbers dialed. *Smith v. Maryland*, 442 U.S. 735, 745–46, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). In *State v. Gunwall*, however, the Washington Supreme Court declined to follow *Smith v. Maryland*, finding that article I, section 7 was violated when the police used a pen register—a device that records or decodes electronic impulses transmitted on a home telephone line, see RCW 9.73.260(1)(d)—without lawful authority to make a record of the local and long distance telephone numbers dialed on the customer's telephone. *State v. Gunwall*, 106 Wn.2d 54, 68–69, 720 P.2d 808 (1986).

Likewise, although the U.S. Constitution does not protect an expectation of privacy in one's trash after it has been left outside to be picked up, *California v. Greenwood*, 486 U.S. 35, 43, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988), the Washington Constitution does, *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990). This expectation of privacy, however, can be lost depending on the circumstances. For example, one court has found that there is no reasonable expectation of privacy in garbage bags left in front of a neighboring abandoned house. *State v. Hepton*, 113 Wn. App. 673, 679, 54 P.3d 233 (2002). Another court has found no reasonable expectation of privacy in stolen goods hidden in a community garbage receptacle. *State v. Rodriguez*, 65 Wn. App. 409, 418, 828 P.2d 636 (1992). Another court, however, has found that a person's privacy right in his or her garbage "must be evaluated in terms of the reasonableness of the expectation of privacy and the reasonableness of the governmental intrusion . . . this privacy right is not limited by the location of the garbage or the act of placing the garbage in the can." *State v. Sweeney*, 125 Wn. App. 881, 887, 107 P.3d 110 (2005).

Article I, section 7 protects information that may provide intimate details about a person's activities or associations contained in a motel registry, including information as to where an individual is located within the motel, as a "private affair" that the police may not search without an individualized suspicion. *State v. Jorden*, 160 Wn.2d 121, 130, 156 P.3d 893 (2007). Under the Fourth Amendment, however, courts have found that there is no reasonable expectation of privacy in motel guest registration records. *United States v. Cormier*, 220 F.3d 1103, 1108 (9th Cir. 2000).

With regard to information contained on personal computers, the Ninth Circuit has held that an individual has a legitimate expectation of privacy in a personal computer. *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007). This privacy interest diminishes, however, when a person installs and uses file-sharing software, thereby exposing his or her computer to other people. *United States v. Ganoe*, 538 F.3d 1117, 1127 (9th Cir. 2008). The Ninth Circuit has also found that the use of pen registers for computers—which identified the "to" and "from" addresses for e-mail messages, the IP addresses of websites visited, and the total data transmitted—did not implicate the Fourth Amendment. *United States v. Forrester*, 512 F.3d 500, 510, 511 (9th Cir. 2008). Analogizing to both physical mail and the telephone information obtained in *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, by means of a pen register, the court found dispositive the fact that the police only obtained addressing information and not the contents of the messages. *Forrester*, 512 F.3d at 510.

Under both the Fourth Amendment and article I, section 7, a search does not occur when the police search property that was voluntarily abandoned. *State v. Reynolds*, 144 Wn.2d 282, 287–88, 27 P.3d 200 (2001) (no expectation of privacy in the contents of a jacket that was abandoned during an arrest). Whether property has been abandoned depends on an individual's actions and intent, which can be inferred from the circumstances. *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001) (no abandonment when defendant asked police if he could take off his jacket because he felt hot and then placed the jacket on the hood of his car); *see also State v. Kealey*, 80 Wn. App. 162, 173, 907 P.2d 319 (1995) (lost or mislaid property is not considered abandoned). In Washington, abandonment does not occur when the property is located in an area that retains privacy protections, even if the individual denies ownership of the property. *State v. Evans*, 159 Wn.2d 402, 413, 150 P.3d 105 (2007) (briefcase found in defendant's car that defendant denied owning was not abandoned property when located in an area where defendant has a privacy interest).

Lastly, both the Fourth Amendment and article I, section 7 protect a reasonable expectation of privacy in the contents of first-class mail and sealed packages. *United States v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984); *State v. Hinton*, 179 Wn.2d 862, 873, 319 P.3d 9 (2014). However, senders of mail have no reasonable expectation of privacy prohibiting a canine sniff of the package or protecting their names and addresses on the exterior of a package. *State v. Stanphill*, 53 Wn. App. 623, 627, 769 P.2d 861 (1989) (release of information at request of police regarding arrival of package did not unreasonably intrude into private affairs).

1.4 DEFINING SEIZURES OF PERSONS

The definition of a seizure is comparatively the same under both article I, section 7 and the Fourth Amendment. 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, 64 L. Ed. 2d 497 (1980). More specifically, a seizure occurs when a police officer's behavior would communicate to a reasonable, innocent person that he or she is not free to ignore the officer's presence and walk away. *Kaupp v. Texas*, 538 U.S. 626, 629, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003); *United States v. Drayton*, 536 U.S. 194, 201, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002); *United States v. Guzman-Padilla*, 573 F.3d 865, 884 (9th Cir. 2009); *see also State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) ("Under article I, section 7, a person is seized only when, by means of physical force or a show of authority his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter.") (internal citations omitted).

If the individual's movement was already restricted by something independent from police behavior—for example, the individual was a passenger on a bus and wanted to remain on the bus, or the individual was at work and thus obligated to the employer—the appropriate test is whether the individual felt free to terminate the encounter and ignore the officer's questions. *Florida v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); *see also I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (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).

Whether a seizure occurs depends on both the police officer's conduct as well as the setting in which that conduct occurs. *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988). Under federal law, an individual is not seized until he or she submits to an officer's show of authority. *California v. Hodari D.*, 499 U.S. 621, 629, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). Rejecting *Hodari* and its subjective test, the Washington Supreme Court has held that the standard under article I, section 7 is a "purely objective" one. *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). Police behavior that could amount to a show of authority constituting a seizure includes "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 512, 957 P.2d 681 (quoting *Mendenhall*, 446 U.S. at 554–55, 100 S. Ct. 1870). Accordingly, a person cannot avoid seizure by failing to yield to an officer's show of authority. *State v. Patton*, 167 Wn.2d 379, 388, 219 P.3d 651 (2009) (citing *Young*, 135 Wn.2d 498, 957 P.2d 681).

An arrest occurs when a police officer "manifests an intent to take a person into custody and actually seizes or detains such person." *Id.* at 387, 219 P.3d 651. Not every seizure, however, is considered an arrest. Brief, investigative detentions, often called *Terry* stops, do not constitute arrests, see *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), because they are limited in scope and duration. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (citing *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984)). For an in-depth discussion of *Terry* stops, see *infra* § 4.5. 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).

When a person is detained in his or her own home both article I, section 7 and the Fourth Amendment may be triggered. *Michigan v. Summers*, 452 U.S. 692, 696, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981); *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89 (1985). Absent exigent circumstances, the police are prohibited from arresting individuals in their homes without authority of law, usually an arrest warrant. *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *State v. Hatchie*, 161 Wn.2d 390, 402, 166 P.3d 698 (2007); *Holeman*, 103 Wn.2d at 429, 693 P.2d 89; *see also supra* § 1.3(a). "After the police obtain a valid warrant they have lawful authority for a limited intrusion to enter a residence, execute the arrest, and then promptly leave." *Hatchie*, 161 Wn.2d at 402, 166 P.3d 698. In executing a valid search warrant at a home, it is also reasonable for an officer to

"briefly detain occupants of that residence, to insure officer safety and an orderly completion of the search." *State v. King*, 89 Wn. App. 612, 618–19, 949 P.2d 856 (1998). Further, because there is a lesser expectation of privacy, the police may arrest someone without a warrant when the person voluntarily exits the home to speak to officers on an unenclosed front porch. *State v. Solberg*, 122 Wn.2d 688, 696, 861 P.2d 460 (1993); *see also infra* § 4.2.

1.4(a) Consensual Encounters

Not every encounter with a police officer amounts to a seizure. *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 185–86, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004). A consensual encounter with an officer does not trigger the Fourth Amendment, even when the individual has been approached by an officer and is aware of the officer's identity as an officer. *United States v. Drayton*, 536 U.S. 194, 200–01, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (citing *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)); *see also State v. Belanger*, 36 Wn. App. 818, 820, 677 P.2d 781 (1984).

There is no clear definition of a consensual social contact; it lies somewhere between a cordial greeting and a detention for investigative purposes. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009). A common example of behavior constituting a consensual encounter rather than a seizure is when an officer asks for someone's identification. *See Hiibel*, 542 U.S. at 185–86, 124 S. Ct. 2451; *see also State v. O'Neill*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003); *State v. Hansen*, 99 Wn. App. 575, 578, 994 P.2d 855 (2000). A request for identification may constitute a seizure, however, when it follows a "considerable display of authority." *State v. Carney*, 142 Wn. App. 197, 202, 174 P.3d 142 (2007).

Under article I, section 7, a social contact can evolve into a seizure. *Harrington*, 167 Wn.2d at 665–66, 222 P.3d 92. For example, in *Harrington*, the Washington State Supreme Court found that although the interaction between the officer and defendant may have begun as a social contact on the street, it evolved into a seizure when another police officer arrived, and the first officer asked the defendant to remove his hands from his pockets and subsequently frisked him. *Id.* at 669, 222 P.3d 92. Although the officers' actions, when viewed individually, may not have amounted to a seizure, the actions did constitute a seizure when viewed cumulatively. *Id.* at 668, 222 P.3d 92; *see also United States v. Washington*, 490 F.3d 765, 772 (9th Cir. 2007) (initial consensual encounter escalated into a seizure when, late at night, uniformed officers

questioned defendant, without informing him of his right to leave, and directed defendant to move to a location where the officers were in between defendant and his car); *cf. State v. Smith*, 154 Wn. App. 695, 700–02, 226 P.3d 195 (2010) (defendant's interactions with the police did not evolve into a seizure when police requested, but did not order, defendant to exit hotel room, asked for identification, and asked for consent to search defendant's openly displayed wallet).

1.4(b) Seizures of Persons in Vehicles

A seizure of an automobile driver occurs as soon as an officer in a police car activates her emergency lights and addresses the driver. *State v. Gantt*, 163 Wn. App. 133, 141, 257 P.3d 682 (2011); *State v. DeArman*, 54 Wn. App. 621, 624, 774 P.2d 1247 (1989) (police seized the defendant when they pulled behind the vehicle and activated their emergency lights). A vehicle that voluntarily stops in response to emergency lights and police actions directed at a third party, however, is not seized. *United States v. Al Nasser*, 555 F.3d 722, 731 (9th Cir. 2009). The analysis differs somewhat with regard to individuals in parked vehicles because, once a vehicle is parked, its "occupants" (no longer "passenger" or "driver") are ostensibly pedestrians. *State v. O'Neill*, 148 Wn.2d 564, 579, 62 P.3d 489 (2003); *see also State v. Johnson* 156 Wn. App. 82, 92, 231 P.3d 225 (2010) (no seizure when officer parked behind parked car and asked for, but did not demand, defendant's identification). Such an encounter, however, can still ripen into a seizure when the police take additional actions. *See State v. Beito*, 147 Wn. App. 504, 510, 195 P.3d 1023 (2008) (seizure of passenger occurred when officer stood outside of passenger door, blocking passenger from exiting, told driver she was not allowed to leave, and repeatedly asked passenger for identification).

Under article I, section 7, absent a reasonable basis for the inquiry, a request for identification from a passenger of a vehicle for investigatory purposes constitutes a seizure. *State v. Rankin*, 151 Wn.2d 689, 697, 92 P.3d 202 (2004) (distinguishing the court's treatment of passengers versus pedestrians on the heightened privacy expectations in a vehicle). At least one Washington court, however, has narrowed this rule to only those circumstances in which a police officer has stopped a moving car with cause to detain and question the driver but not necessarily the passengers. *State v. Mote*, 129 Wn. App. 276, 291, 120 P.3d 596 (2005).

Under both article I, section 7 and the Fourth Amendment, a seizure also occurs when officers stop automobiles without suspicion pursuant to a systematic "spot check" or roadblock, though the courts' evaluation

of constitutionality of these seizures has varied. When examining the constitutionality of these seizures, the courts consider the government interest and nature of stop itself. *Indianapolis v. Edmond*, 531 U.S. 32, 41, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (holding drug checkpoints intended primarily to detect evidence of ordinary criminal wrongdoing unconstitutional); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449–50, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (holding drunk driving checkpoint constitutional given the "magnitude of the problem" and the State's interests); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555–56, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) (holding permanent checkpoint near the border to interdict illegal aliens constitutional); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457–60, 755 P.2d 775 (1988) (holding Seattle's holiday sobriety checkpoint program unconstitutional under both article I, section 7 and the Fourth Amendment). "Spot check" or "checkpoint" seizures are often justified under the "special needs" doctrine and examined under a reasonableness standard. *See infra* § 6.3.

1.5 Defining Seizures of Property

The Fourth Amendment protects both a person's possessory interest in his or her "effects" and his or her privacy interest. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (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, 80 L. Ed. 2d 85 (1984); *State v. Jackson*, 82 Wn. App. 594, 603, 918 P.2d 945 (1996). Put differently, an object is seized when government agents exercise "dominion and control" over the object. *Jacobsen*, 466 U.S. at 120, 104 S. Ct. 1652; *Jackson*, 82 Wn. App. at 603–04, 918 P.2d 945. Thus, impounding a room or securing a home constitutes a seizure under the Fourth Amendment. *State v. Ng*, 104 Wn.2d 763, 770, 713 P.2d 63 (1985) (citing *State v. Bean*, 89 Wn.2d 467, 472, 572 P.2d 1102 (1978)). At least one Washington court has found that transferring property within a home from one room to another could constitute a seizure. *State v. Cotten*, 75 Wn. App. 669, 682, 879 P.2d 971 (1994) (agents asserted dominion and control over a shotgun, even though that control was temporary, by taking shotgun from the bedroom, unloading it, and carrying it into another room).

In some circumstances, interference with an individual's possessory interests may also implicate an individual's liberty interests. For example, in *Place*, the seizure of luggage at an airport was determined to "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." 462 U.S. at 708, 103 S. Ct. 2637; *see also* 4 Wayne R. LaFave, *Search and Seizure* § 9.8(e), at 1006–27 (5th ed. 2012).

1.6 STANDING TO RAISE SEARCH AND SEIZURE CLAIMS

In Washington, standing to challenge police action under article I, section 7 may take one of two forms: automatic standing or asserting a violation of a person's reasonable expectation of privacy in the object or place searched or seized. *State v. Carter*, 127 Wn.2d 836, 841, 904 P.2d 290 (1995) (citing *United States v. Salvucci*, 448 U.S. 83, 86–87, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980)); *see also State v. Williams*, 142 Wn.2d 17, 23–24, 11 P.3d 714 (2000); *State v. Libero*, 168 Wn. App. 612, 277 P.3d 708 (2012); *State v. Kypreos*, 110 Wn. App. 612, 39 P.3d 371 (2002) (discussing history of automatic standing doctrine).

The first form of standing is automatic standing. Article I, section 7 of the Washington Constitution confers automatic standing upon anyone charged with a possessory crime regardless of whether the defendant had a legitimate expectation of privacy. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (citing *State v. Simpson*, 95 Wn.2d 170, 179, 622 P.2d 1199 (1980) (plurality opinion) (upholding the use of automatic standing based on the state constitution)). Put another way, "a defendant who has been charged with an offense that has possession as an element has automatic standing to challenge the search that led to the discovery of the substance the defendant is charged with possessing." *State v. Chelly*, 94 Wn. App. 254, 258, 970 P.2d 376 (1999); *State v. Johnston*, 38 Wn. App. 793, 801, 690 P.2d 591 (1984).

In order to claim automatic standing, the defendant must show that (1) possession is an "essential" element of the offense for which the defendant is charged and (2) the defendant was in possession of the seized property at the time of the contested search. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The "fruits of the search" must directly relate to the search the defendant is challenging. *State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000). *But see State v. Libero*, 168 Wn. App. 612, 619, 277 P.3d 708 (2012) ("Automatic standing does not permit a defendant to collaterally attack a search on the basis that it violated another's rights.").

The second form of standing analysis under article I, section 7 mirrors the standing analysis under the Fourth Amendment, see *State v. Carter*, 127 Wn.2d 836, 841, 904 P.2d 290 (1995) (citing *Salvucci*, 448 U.S. at 86–87, 100 S. Ct. 2547), and more often applies to persons charged with non-possessory crimes, *State v. Francisco*, 107 Wn. App. 247, 249, 26 P.3d 1008 (2001). Under the Fourth Amendment, the

concept of standing has been merged with the substantive law of the Fourth Amendment's privacy analysis. *Rakas v. Illinois*, 439 U.S. 128, 138–40, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). Accordingly,

> in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has "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.

Minnesota v. Carter, 525 U.S. 83, 87–88, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) (quoting *Rakas*, 439 U.S. at 143 n.12, 99 S. Ct. 421); *see also Williams*, 142 Wn.2d at 23, 11 P.3d 714; *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007); *Francisco*, 107 Wn. App. at 252, 26 P.3d 1008.

By merging the standing issue with the privacy analysis, the federal courts abandoned the concept of automatic standing. *Salvucci*, 448 U.S. at 92–93, 100 S. Ct. 2547. Hence, although the Fourth Amendment no longer applies to searches of stolen goods, it does apply to searches of legally possessed items discovered in the search of stolen goods, because an "illegal search only violates the rights of those who have 'a legitimate expectation of privacy in the invaded place.'" *Id.* (quoting *Rakas*, 439 U.S. at 143, 99 S. Ct. 421) (holding that 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 the apartment). A person who resides in an apartment with the permission of the lessee and who has a key to the apartment may therefore assert a privacy interest in the interior of the apartment. *Rakas*, 439 U.S. at 141–42, 99 S. Ct. 421 (citing *Jones v. United States*, 362 U.S. 257, 267, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)). In many instances, an individual may be able to show both forms of standing because, generally, an individual "who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his or her] right to exclude." *Id.* at 143 n.12, 99 S. Ct. 421. However, passengers in vehicles and houseguests have been found to have diminished privacy interests despite their immediate possession or control over the place searched. *See id.* at 148–50; *State v. Boot*, 81 Wn. App. 546, 551, 915 P.2d 592 (1996).

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. *Id.* at 148–50, 99 S. Ct. 421; *United States v. Pulliam*, 405 F.3d 782, 786 (9th Cir. 2005) (asserting a passenger's authorized

presence in the vehicle was not determinative of a legitimate expectation of privacy); *State v. Byrd*, 110 Wn. App. 259, 264, 39 P.3d 1010 (2002) ("[A] passenger in a vehicle stopped by police officers can contest the lawfulness of the stop."). An unauthorized driver, however, may have standing to challenge a search of the vehicle if she has received permission to use the car. *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006) (defendant has standing to challenge search of rental car when he can prove permission from the authorized renter).

With regard to a person's presence in someone else's home, an overnight guest has standing to challenge a search of the home. *Minnesota v. Olson*, 495 U.S. 91, 96–97, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). A defendant who was legitimately, but only casually, on the premises, however, does not necessarily demonstrate a legitimate expectation of privacy in the home. *State v. Boot*, 81 Wn. App. 546, 551, 915 P.2d 592 (1996). Four relevant but non-exhaustive factors for analyzing whether a social guest had standing are "(1) the defendant's relationship with the homeowner or tenant; (2) the context and duration of the visit during which the search took place; (3) the frequency and duration of the defendant's previous visits to the home; and (4) whether the defendant kept personal effects in the home." *State v. Link*, 136 Wn. App. 685, 693, 150 P.3d 610 (2007).

CHAPTER 2

Standards of Proof

2.0 THE NATURE OF PROBABLE CAUSE

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, while sections 2.3 through 2.8 discuss specific types of information considered in the probable cause determination. Finally, section 2.9 summarizes the types of searches and seizures for which probable cause is either not required or a lesser standard is applied.

The Fourth Amendment of the United States Constitution provides that "no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Under article I, section 7 of the Washington Constitution, "[n]o person shall be disturbed . . . without authority of law." Const. art I, § 7. As under the Fourth Amendment, this "authority of law" is fulfilled by a warrant issued upon probable cause that is established by sworn affidavit. *State v. Chenoweth*, 160 Wn.2d 454, 465, 158 P.3d 595 (2007); *see also State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). The probable cause analysis is thus substantively the same under article I, section 7 and the Fourth Amendment. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

The probable cause requirement is a fact-based determination representing a compromise between society's competing interests in enforcing the law and protecting the individual's right to privacy. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)). Probable cause requires reasonable grounds to believe that a defendant is guilty of a crime. *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.2 (5th ed. 2012) (discussing the general nature of probable cause). The police officer must be aware of reasonably trustworthy information that would cause a reasonable officer to believe that a crime has been

committed. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006); *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); *State v. Reeb*, 63 Wn. App. 678, 681–82, 821 P.2d 84 (1992) (information need only be reasonably trustworthy, not absolutely accurate). The belief must be specific to the person to be searched or seized. *Grande*, 164 Wn.2d at 144, 187 P.3d 248 (citing *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)).

Probable cause is required for most searches and seizures regardless of whether a search warrant is required, see *Wong Sun v. United States*, 371 U.S. 471, 479–80, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), or an arrest is made, *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). Where a valid search or seizure occurs without a warrant, police may initially determine whether probable cause exists, but the grounds for the search or seizure must be strong enough to obtain a warrant. *Wong Sun*, 371 U.S. at 480, 83 S. Ct. 407. A neutral and detached magistrate must make the probable cause determination for a warrant to issue. *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948). In addition, a suspect arrested without a warrant 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, 43 L. Ed. 2d 54 (1975). *See generally* 2 LaFave, *supra*, § 3.1.

When federal officers are working with and assisting state officials, they must comply with the Washington Constitution. *State v. Johnson*, 75 Wn. App. 692, 700, 879 P.2d 984 (1994). Conversely, when federal officers obtain evidence pursuant to federal law and independent of state officials, the evidence may be used in a state criminal proceeding even if the procedure involved would have violated the Washington Constitution. *State v. Brown*, 132 Wn.2d 529, 591, 940 P.2d 54, (1997); *In re Teddington*, 116 Wn.2d 761, 772–73, 808 P.2d 156 (1991). Courts have reasoned that the Washington Constitution cannot control the independent conduct of federal agents. *State v. Bradley*, 105 Wn.2d 898, 902–03, 719 P.2d 546 (1986). Accordingly, where a federal warrant is served, the federal standard for probable cause applies even though the evidence would be used in state courts. *See Johnson*, 75 Wn. App. at 699, 879 P.2d 984.

Though the probable cause requirement is a fact-based determination, it may be satisfied even when police officers make a reasonable mistake of fact. *Vickers*, 148 Wn.2d at 117, 59 P.3d 58 (incorrect date of informant's observations in affidavit did not affect the finding of probable cause); *In re Yim*, 139 Wn.2d 581, 597, 989 P.2d 512 (1999) (failure to assert in affidavit that defendant lacked a license to sell explosives was not critical when magistrate could reasonably infer that

defendant was probably engaged in the unlicensed manufacture and sale of explosives); *State v. Seagull*, 95 Wn.2d 898, 900, 908, 632 P.2d 44 (1981) (warrant valid even though officer misidentified tomato plant as marijuana). Likewise, negligent or innocent mistakes are insufficient to void a finding of probable cause. *State v. Gore*, 143 Wn.2d 288, 296, 21 P.3d 262 (2001), *overruled on other grounds by State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005); *Chenoweth*, 160 Wn.2d at 479, 158 P.3d 595; *In re Yim*, 139 Wn.2d at 597, 989 P.2d 512. Probable cause can exist even where an incongruity is legal rather than factual: probable cause may still exist at the time of arrest even if the statute under which an individual is being arrested is later declared unconstitutional. *State v. Afana*, 169 Wn.2d 169, 183, 233 P.3d 879 (2010); *State v. Potter*, 129 Wn. App. 494, 497, 119 P.3d 877 (2005).

The probable cause requirement may not, however, be satisfied when the police make an "inexcusable mistake of law" (in other words, they incorrectly believe that certain conduct is unlawful), *State v. Melrose*, 2 Wn. App. 824, 828, 470 P.2d 552 (1970), or when probable cause is based on a law "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). Additionally, if the defendant can show, by a preponderance of the evidence, that the affidavit on which probable cause was based contained "intentional material omissions or material omissions made with reckless disregard for the truth," then the omitted evidence must be considered in the probable cause finding. *Gore*, 143 Wn.2d at 297, 21 P.3d 262. The defendant, however, must make a substantial showing as to both materiality and intentionality for the omission. *State v. Garrison*, 118 Wn.2d 870, 872–73, 827 P.2d 1388 (1992) (per curiam) (mere showing of the omission of material that is critical to a finding of probable cause is not a sufficient preliminary showing that the omission was a reckless disregard for the truth). *See generally Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

2.1 PROBABLE CAUSE STANDARD: ARREST VERSUS SEARCH

Generally, probable cause requires the same sufficiency of evidence regardless of whether it concerns a search or an arrest. *State v. Grande*, 164 Wn.2d 135, 142, 187 P.3d 248 (2008) (citing 2 Wayne R. LaFave, *Search and Seizure* § 3.1(b) (4th ed. 2004)). In practice, however, the standards are not necessarily identical: probable cause for a search does not always constitute probable cause for an arrest, and probable cause for an arrest does not necessarily justify a search. *See State v. Dalton*, 73 Wn. App. 132, 140, 868 P.2d 873 (1994) ("[P]robable cause to believe a man

has committed a crime on the street does not necessarily give rise to probable cause to search his home.") (citing *Commonwealth v. Kline*, 234 Pa. Super. 12, 17, 335 A.2d 361 (1975)).

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. Thein*, 138 Wn.2d 133, 145–47, 151, 977 P.2d 582 (1999); *State v. McReynolds*, 104 Wn. App. 560, 570, 17 P.3d 608 (2000) (inscribed crow bar alone provided insufficient nexus between alleged crimes and the defendant's residence). Broad generalizations of criminal activity alone, by themselves, may not be sufficient. *Thein*, 138 Wn.2d at 147, 977 P.2d 582 (rejecting generalization that drug dealers keep drugs at home); *State v. Jackson*, 111 Wn. App. 660, 688, 46 P.3d 257 (2002) (rejecting generalization that criminals commonly return to the scene of their crime); *State v. Nordlund*, 113 Wn. App. 171, 182–84, 53 P.3d 520 (2002) (generalized statements about the computer habits of sex offenders insufficient to justify search of defendant's personal computer); *State v. McGovern*, 111 Wn. App. 495, 499–501, 45 P.3d 624 (2002) (magistrate could infer that evidence of drug dealing would be found in defendant's home based on generalization that drug dealers keep drugs at their home plus additional facts suggesting that "*this* drug dealer probably keeps drugs at *his* or *her* residence"); *see also United States v. Rodgers*, 656 F.3d 1023, 1030–31 (9th Cir. 2011) ("[A]n assumption that most sixteen-year-old passengers have identification does not lead to probable cause to search every car carrying a teenager absent some individualized suspicion . . . ."). The item sought need not be at the place to be searched at the time the warrant is issued, but the magistrate must have reasonable grounds to believe it will be there at the time of the search. *State v. Maddox*, 116 Wn. App. 796, 804, 67 P.3d 1135 (2003) (magistrate could reasonably infer that drugs or evidence of drug dealing were in the defendant's home based on evidence that the defendant was dealing drugs from his home); *State v. Perez*, 92 Wn. App. 1, 7–9, 963 P.2d 881 (1998) (sufficient facts supported inference of large-scale drug dealing to support search of alleged safe house).

For an arrest, probable cause exists when the arresting officer has information that would lead a reasonable person to conclude that the suspect has committed a crime. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996); *State v. Cerrillo*, 122 Wn. App. 341, 350–51, 93 P.3d 960 (2004). Probable cause to arrest is a nontechnical standard based on the facts and circumstances known to the officer at the time of arrest. *State v. Baxter*, 68 Wn.2d 416, 420, 413 P.2d 638 (1966); *State v. Lewellyn*, 78 Wn. App. 788, 797–98, 895 P.2d 418 (1995), *aff'd*, 130 Wn.2d 215, 922 P.2d 811

(1996) (officer's observations, defendant's driving, and field sobriety tests supported probable cause for DWI arrest); *State v. Garcia*, 63 Wn. App. 868, 870–75, 824 P.2d 1220 (1992) (hotel maid's observations of folded papers in a drawer, 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 Wn. App. 35, 39–40, 808 P.2d 1171 (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 Wn. App. 339, 343–44, 783 P.2d 626 (1989) (probable cause existed based on officer's observation of drug transactions in area with reported narcotics activity and performed in a manner similar to undercover buys made by the officer); *see also State v. Gregory*, 158 Wn.2d 759, 824–825, 147 P.3d 1201 (2006) (probable cause existed for blood draw of suspect to compare with DNA samples from hospital rape-kit performed on victim), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014); *State v. Mance*, 82 Wn. App. 539, 541–42, 918 P.2d 527 (1996) (information obtained after defendant was arrested could not be used to establish probable cause for the arrest). Facts that arise after a warrant is issued are immaterial unless they were reasonably inferable when the warrant was issued. *State v. Goble*, 88 Wn. App. 503, 508, 945 P.2d 263 (1997). Finally, where a seizure does not amount to an arrest, varied standards may apply. *See infra* § 2.9.

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, 13 L. Ed. 2d 142 (1964); *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). The officer's subjective belief is not determinative. *State v. Huff*, 64 Wn. App. 641, 645, 826 P.2d 698 (1992). Accordingly, an officer's good faith is not enough to justify a search absent probable cause, and likewise, an officer's belief that probable cause was not present is also not determinative. *Id.*; *see also State v. Gaddy*, 114 Wn. App. 702, 706, 60 P.3d 116 (2002) (officer's good faith reliance on an agency "hot sheet" would not validate an arrest if the "hot sheet" was not based upon probable cause), *aff'd on other grounds*, 152 Wn.2d 64, 93 P.3d 872; *State v. Rodriguez-Torres*, 77 Wn. App. 687, 693, 893 P.2d 650 (1995) (officer's subjective belief that probable cause did not exist was not dispositive);

Huff, 64 Wn. App. at 645–46, 826 P.2d 698 (officer's subjective belief that an offense has been committed does not cure a lack of probable cause).

Additionally, 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, 45 L. Ed. 2d 623 (1975) (border patrol officers are entitled to draw inferences in light of their prior experience with aliens and smugglers). As a result, an officer's particular training and expertise is highly important. *State v. Cole*, 128 Wn.2d 262, 289, 906 P.2d 925 (1995) (acknowledging officer's drug enforcement experience and ability to identify marijuana smell), *abrogated on other grounds by In re Det. of Petersen*, 145 Wn.2d 789, 42 P.3d 952 (2002); *Rodriguez-Torres*, 77 Wn. App. at 693–94, 893 P.2d 650 (probable cause existed when an officer with specialized training in narcotics enforcement observed exchange of money for hidden, cupped object in an area known for narcotics, and defendant fled upon notice of officer's presence). The officer's basis of knowledge, 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. Jacobs*, 121 Wn. App. 669, 678, 89 P.3d 232 (2004), *reversed on other grounds*, 154 Wn.2d 596, 115 P.3d 281 (2005) (noting that an affidavit's failure to indicate an officer's experience and education is not fatal to the resulting warrant's validity if other facts establish probable cause), *superseded by statute as stated in State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015); *State v. Johnson*, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995). Similarly, a dog's training and experience is important for establishing probable cause predicated on a canine sniff alert. *See Florida v. Harris*, 568 U.S. 237, 247, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013).

2.2(b) Quantum of Evidence Required

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, 93 L. Ed. 1879 (1949). Although a single fact in isolation may not be sufficient, probable cause may exist when that fact is read together with other facts stated in the affidavit. *State v. Vickers*, 148 Wn.2d 91, 110, 59 P.3d 58 (2002); *State v. Tarter*, 111 Wn. App. 336, 341, 44 P.3d 889 (2002).

Accordingly, to make an arrest, the officer need only have reasonable grounds for suspicion and evidence of circumstances sufficiently strong enough to justify a cautious and disinterested person in believing that the suspect is guilty. *State v. Scott*, 93 Wn.2d 7, 10–11, 604 P.2d 943 (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 who were driving a similar vehicle toward the address where the car's license number was traced). The exact quantum of evidence required is unclear and may depend in part on the nature of the intrusion and the seriousness of the offense. *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.2(e) (5th ed. 2012).

2.2(c) Individualized Suspicion

Probable cause to arrest an individual exists only if police have reasonable grounds to believe that the particular individual has committed the crime. *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *State v. Grande* 164 Wn.2d 135, 145, 187 P.3d 248 (2008). Accordingly, Washington courts have required individualized suspicion as to each occupant of a vehicle; the passenger cannot be arrested based solely on individualized suspicion as to the driver. *Grande*, 164 Wn.2d at 146–47, 187 P.3d 248. Under the Fourth Amendment, however, a police officer may reasonably infer a "common enterprise" among passengers in a vehicle. *Maryland v. Pringle*, 540 U.S. 366, 371–73, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003).

Individualized suspicion may also be described as a sufficient nexus between the suspects to be searched and the criminal activity. *State v. Carter*, 79 Wn. App. 154, 158, 901 P.2d 335 (1995). This was not the case in *Carter*, where a police informant observed residents and non-residents of a building buying, selling, and using illegal drugs, but the informant was unable to identify any of the individuals by name. *Id.* at 156, 901 P.2d 335. Based upon the informant's observations, the police obtained a warrant to search "all 'persons at the residence at the time the warrant i[s] being served as well as persons arriving at and leaving the residence at the time the warrant is being executed for controlled substances and papers of identification.'" *Id.* Upon execution of the warrant, the police found the defendant asleep on a mattress in the living room and discovered rock cocaine in his pants pocket. *Id.* at 157, 901 P.2d 335. The court held that the warrant did not justify a search of the defendant's person because the observations of the informant did not support the conclusion that only illegal conduct occurred within the apartment and that any person present was likely to be involved with criminal activity "in such a way as to have evidence of the criminal activity on his person." *Id.* at 161, 901 P.2d 335 (quoting *Stokes v. State*, 604 So.2d 836, 838 (Fla. Dist. Ct. App. 1992)). However, the court carefully noted that it was not deciding whether warrants with "all persons present" language would be valid under different circumstances. *Id.* Washington courts also require individualized suspicion before the police search motel registries for outstanding

warrants. *See State v. Jorden*, 160 Wn.2d 121, 130, 156 P.3d 893 (2007); *In re Nichols*, 171 Wn.2d 370, 377, 256 P.3d 1131 (2011).

Individualized suspicion may not be required when the police are conducting a valid vehicle roadblock or spot check. *See infra* § 5.18. Further, individualized suspicion may also not be required for some administrative searches. *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, 9 L. Ed. 2d 441 (1963); *State v. Murray*, 110 Wn.2d 706, 709–10, 757 P.2d 487 (1988). Probable cause must be based on facts and not on mere conclusions. *Aguilar v. Texas*, 378 U.S. 108, 113, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *State v. Thein*, 138 Wn.2d 133, 145–47, 977 P.2d 582 (1999). In addition, probable cause must exist at the actual time of arrest or search, and it cannot be stale. *See State v. Lyons*, 174 Wn.2d 354, 368, 275 P.3d 314 (2012) (no timely probable cause when affidavit failed to state when the informant observed a marijuana grow operation); *State v. Maddox*, 152 Wn.2d 499, 505–06, 98 P.3d 1199 (2004) (delay in executing a warrant "may render the magistrate's probable cause determination stale," while the test for staleness is based on the facts and circumstances identified in the affidavit).

Affidavits for search warrants must be evaluated in a commonsense, non-hypertechnical manner. *In re Yim*, 139 Wn.2d 581, 597, 989 P.2d 512 (1999); *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743 (1982); *see infra* § 3.3(c). "The support for issuance of a search warrant is 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 Wn.2d at 965, 639 P.2d 743 (quoting *State v. Clay*, 7 Wn. App. 631, 637, 501 P.2d 603 (1972)). Upon review, all doubts are resolved in favor of the warrant's validity. *Maddox*, 152 Wn.2d at 509, 98 P.3d 1199; *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994).

Information need not be admissible at trial in order to support probable cause. *Brinegar v. United States*, 338 U.S. 160, 172–74, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); *Bokor v. Dep't of Licensing*, 74 Wn. App. 523, 526, 874 P.2d 168 (1994). For example, marital privilege does not prevent a spouse's statements from being used to establish probable cause.

State v. Bonaparte, 34 Wn. App. 285, 289, 660 P.2d 334 (1983). *See generally infra* § 7.3.

Even if a search may have occurred illegally, "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 Wn.2d 882, 887, 735 P.2d 64 (1987). In *Coates*, police obtained a search warrant based partially on facts in violation of the defendant's right to remain silent. *Id.* However, the court upheld the search warrant because other facts in the affidavit supported a finding of probable cause. *Id.* at 888–89, 735 P.2d 64.

2.3(a) Hearsay

Hearsay from an informant can establish probable cause for a warrant as long as there is evidence that provides reason to believe that the informant is reliable and has an adequate basis of knowledge. *Spinelli v. United States*, 393 U.S. 410, 416, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Aguilar v. Texas*, 378 U.S. 108, 113–14, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), *abrogated on other grounds by Gates*, 462 U.S. 213, 103 S. Ct. 2317; *State v. Jackson*, 102 Wn.2d 432, 437–38, 688 P.2d 136 (1984) ("If the informant's information is hearsay, the basis of knowledge prong can be satisfied if there is sufficient information so that the hearsay establishes a basis of knowledge."). 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 Wn. App. 380, 386, 711 P.2d 1078 (1985). The affidavit may also relate hearsay from informants as long as there is a basis for crediting it. *State v. Huft*, 106 Wn.2d 206, 209–10, 720 P.2d 838 (1986); *State v. Lund*, 70 Wn. App. 437, 449–50 n.9, 853 P.2d 1379 (1993); *see infra* § 2.5. Multiple levels of hearsay may also be considered if the requirements are met for each person in the chain of information. *See Huft*, 106 Wn.2d at 209–10, 720 P.2d 838 (concerned citizen information not sufficient without basis of informant's knowledge); *State v. Vanzant*, 14 Wn. App. 679, 683, 544 P.2d 786 (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* § 3.2(d) (5th ed. 2012).

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

A magistrate or police officer making a probable cause determination may consider prior convictions that have probative value to the specific

probable cause inquiry. *State v. Vickers*, 148 Wn.2d 91, 111 n.51, 59 P.3d 58 (2002); *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001) (defendant's prior conviction was "helpful in establishing probable cause" when the conviction was of the same general nature as the crime under investigation); *State v. Sterling*, 43 Wn. App. 846, 851, 719 P.2d 1357 (1986) (occupant's two prior convictions for narcotics can be a factor in determining probable cause). A prior criminal record—even of the same type of criminal conduct—does not alone justify a warrantless search. *State v. Hobart*, 94 Wn.2d 437, 446, 617 P.2d 429 (1980); *State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090 (1996); *see Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); 2 Wayne R. LaFave, *Search and Seizure* § 3.2(d) (5th ed. 2012). While prior acts may establish probable cause when the modus operandi is similar and distinctive, see 2 LaFave, *supra*, § 3.2(d), a general assertion of criminal reputation is insufficient, *Spinelli v. United States*, 393 U.S. 410, 416, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). However, the U.S. Supreme Court has noted that an officer's knowledge of a suspect's reputation is a "practical consideration of everyday life" upon which an officer (or a magistrate) may rely in determining the reliability of an informant. *United States v. Harris*, 403 U.S. 573, 583, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971) (plurality opinion). Specific facts leading to a conclusion that a suspect has a bad reputation may also be considered. *Id.*; *see* 2 LaFave, *supra*, § 3.2(d).

2.3(c) Increased Electrical Consumption

Standing alone, an increase in electrical use does not constitute sufficient probable cause to issue a search warrant. *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994); *State v. Sterling*, 43 Wn. App. 846, 851, 719 P.2d 1357 (1986); *State v. McPherson*, 40 Wn. App. 298, 301, 698 P.2d 563 (1985). Further, evidence of increased power consumption, absent other information, is an innocuous fact and cannot corroborate an anonymous tip of suspected criminal activity. *State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); *see also State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986) ("[T]here are too many plausible 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. *State v. Cole*, 128 Wn.2d 262, 291, 906 P.2d 925 (1995), *overruled on other grounds by In re Det. of Petersen*, 145 Wn.2d 789, 801, 42 P.3d 952 (2002) (increase in electrical consumption is a proper factor in determining probable cause when

combined with other suspicious factors); *Sterling*, 43 Wn. App. at 851–52, 719 P.2d 1357 (400 to 500 percent increase in power usage combined with suspicious facts supported probable cause for search warrant). For example, Washington courts have considered evidence of power usage three to four times greater than the previous occupant's, in combination with the absence of accumulated snow on the roof when neighboring buildings had 20 to 30 inches, in determining that probable cause was not established. *State v. Rakosky*, 79 Wn. App. 229, 239–40, 901 P.2d 364 (1995).

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. RCW 42.56.335 (formerly RCW 42.17.314, prohibiting the inspection or copying of a person's utility records by law enforcement unless the utility is provided a written statement that indicates the person is suspected of committing a crime and there is a reasonable belief that the records could determine or help determine whether the suspicion is true). *See generally Cole*, 128 Wn.2d at 290, 906 P.2d 925 (a search warrant satisfies the requirements of former RCW 42.17.314); *In re Maxfield*, 133 Wn.2d 332, 341–42, 945 P.2d 196 (1997) (no reasonable suspicion of criminal activity because electrical service was new and records showed high electrical consumption pottery kilns were to be used at location); *State v. Maxwell*, 114 Wn.2d 761, 767–69, 791 P.2d 223 (1990) (telephonic request for utility record not admissible because verbal request was in violation of former RCW 42.17.314); *In re Rosier*, 105 Wn.2d 606, 613–16, 717 P.2d 1353 (1986) (recognizing the need to balance the public's interest in disclosure of information leading to arrests and the individual and societal interest in preventing "fishing expeditions" by the government), *superseded by statute as stated in Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016).

2.3(d) Polygraph Results

The results of a polygraph test may be considered in a magistrate's probable cause determination, even though such results are inadmissible at trial unless stringent conditions are satisfied. *State v. Clark*, 143 Wn.2d 731, 749–50, 24 P.3d 1006 (2001). Although the qualifications of the FBI agent who administered the polygraph test in *Clark* were not set forth in the affidavit, the court noted that information from a reliable informant has corroborative value even if the informant's basis of knowledge is not specified. *Id.* at 750, 24 P.3d 1006 (citing *State v. Lair*, 95 Wn.2d 706, 712, 630 P.2d 427 (1981)). In *Clark*, the FBI agent's basis of knowledge

was "the administration of the polygraph test and his clinical and common sense observation of Clark's performance." *Id.*

2.3(e) Taking of Blood Samples

Probable cause exists to justify the seizure of a person's blood sample if the police believe that a person's blood sample will provide evidence of criminal activity and the facts and circumstances known to the officers justify their belief that the person is intoxicated and has committed a crime for which intoxication is an element. *State v. Curran*, 116 Wn.2d 174, 184, 804 P.2d 558 (1991), *abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *see also State v. Schulze*, 116 Wn.2d 154, 161, 804 P.2d 566 (1991) (no right to counsel prior to undergoing a mandatory blood draw); *State v. Komoto*, 40 Wn. App. 200, 208, 697 P.2d 1025 (1985) (police may enter the home of a suspected drunk driver if police "have probable cause to believe that the suspect was under the influence, that he has committed a felony of which being under the influence of alcohol is an element, and that he is presently at home").

2.4 LAW ENFORCEMENT OFFICERS' FIRST-HAND OBSERVATIONS

Because the existence of probable cause is dependent on a fact-based inquiry, it is impossible to define when an officer's observations are sufficient to constitute probable cause. However, the following common factual situations 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, 99, 103, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).

The alternative outcome occurred in a case where officers stopped a vehicle after learning that its owner had an outstanding warrant for a traffic violation. *State v. Glasper*, 84 Wn.2d 17, 18, 523 P.2d 937 (1974). The police then saw an unpadded, unsecured television in the open trunk. *Id.* A passenger in the car claimed ownership of the set but was unable to identify the brand. *Id.* The court held that the police had reasonable cause to believe that the television was stolen. *Id.* at 21, 523 P.2d 937. 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 Wn.2d 335, 337–38, 340, 823 P.2d 1068 (1992). However, in another case, the existence of an expensive briefcase in a car that had not been reported stolen was not sufficient to establish probable cause for a vehicle search. *State v. Ozuna*, 80 Wn. App. 684, 688–89, 911 P.2d 395 (1996). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.6(a) (5th ed. 2012).

2.4(b) Particular Crimes: Illegal Substances

The odor of an illegal substance may establish probable cause as long as the odor is detected by someone trained and experienced in detecting illegal substances. *State v. Jacobs*, 121 Wn. App. 669, 678, 89 P.3d 232 (2004), *rev'd on other grounds*, 154 Wn.2d 596, 115 P.3d 281 (2005); *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994) (trained officer's detection of marijuana odor); *State v. Vonhof*, 51 Wn. App. 33, 41–42, 751 P.2d 1221 (1988) (odor combined with experience in smelling the illegal substance constituted probable cause). The affidavit in support of a warrant must set forth the officer's training and experience in identifying the odor. *See State v. Graham*, 130 Wn.2d 711, 724–25, 927 P.2d 227 (1996); *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 282 (1992); *State v. Solberg*, 66 Wn. App. 66, 79, 831 P.2d 754 (1992), *rev'd on other grounds*, 122 Wn.2d 688, 861 P.2d 460 (1993) (officer had experience in identifying marijuana grow operations); *State v. Fore*, 56 Wn. App. 339, 343–44, 783 P.2d 626 (1989) (officer training relevant to surveillance of drug transactions in park). However, even if the officer's experience and education are not in the affidavit, the omission is not fatal to the search warrant's validity if other facts in the affidavit demonstrate probable cause. *Jacobs*, 121 Wn. App. at 678, 89 P.3d 232.

Absolute certainty as to the identity of a substance is not required. *Graham*, 130 Wn.2d at 725, 927 P.2d 227 (quoting *Fore*, 56 Wn. App. at 345, 783 P.2d 626). Moreover, odor may be used in concert with other suspicious activities to establish probable cause. *See State v. Huff*, 64 Wn. App. 641, 647–48, 826 P.2d 698 (1992) (odor of methamphetamine combined with furtive gestures and lying to police during car stop created probable cause). Documentation purporting to authorize a defendant's use of marijuana will not negate an officer's probable cause. *State v. Fry*, 168 Wn.2d 1, 6, 228 P.3d 1 (2010). The authorization creates only a potential affirmative defense that would excuse the criminal act. *Id.* at 7–8, 228 P.3d 1. However, the officer's experience with and training on the characteristics of those who cultivate illegal substances, without more, are not enough to establish probable cause. *Olson*, 73 Wn. App. at 357, 869 P.2d 110 (officer's experience that those who cultivate marijuana usually hide records and materials in a safe house under their control did not

satisfy probable cause for search warrant of the safe house premises); *State v. Perez*, 92 Wn. App. 1, 7–8, 963 P.2d 881 (1998) (sufficient facts supported inference of large-scale drug dealing to support search of alleged safe house); *see State v. Thein*, 138 Wn.2d 133, 150, 977 P.2d 582 (1999) (magistrate could not infer that evidence might be found in the defendant's home based solely on generalization that drug dealers likely keep drugs at their home); 2 Wayne R. LaFave, *Search and Seizure* § 3.6(b) (5th ed. 2012).

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 Wn. App. 594, 606–07, 918 P.2d 945 (1996) (alert by police dog after temporary seizure of Federal Express package constituted probable cause); *State v. Flores-Moreno*, 72 Wn. App. 733, 740–41, 866 P.2d 648 (1994) (probable cause established from observations of drug deal combined with positive canine sniff); *State v. Stanphill*, 53 Wn. App. 623, 632, 769 P.2d 861 (1989) (corroborating canine sniff overcame any deficiency in the reliability of an informant). The U.S. Supreme Court has found that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust [the dog's] alert[]" such that a court can initially presume that the alert provides probable cause to search. *Florida v. Harris*, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013). In *Harris*, however, the Court used the "totality of the circumstances" test established in *Illinois v. Gates* to determine that probable cause was not invalidated by the absence of records establishing the dog's track record in locating substances in the field. *Id.* at 1055, 185 L. Ed. 2d. 61. The Washington State Supreme Court, however, has declined to follow the test set out in *Illinois v. Gates*, and therefore the applicability of the totality of the circumstances test under article I, section 7 to probable cause based on a canine sniff alert remains unclear. *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984); *see Florida v. Jardines*, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

2.4(c) Association: Persons and Places

Because of the individualized suspicion requirement, mere association with a person 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, 92 L. Ed. 210 (1948) (search of a car passenger unjustified when the driver was arrested for possession of counterfeit ration coupons). Mere proximity to others suspected of criminal activity does not in itself establish probable cause for a search of the associate. *State v. Crane*, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001), *overruled*

on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003); *State v. Dorsey*, 40 Wn. App. 459, 466, 698 P.2d 1109 (1985) (probable cause based on association with others engaged in criminal activity requires an additional circumstance that reasonably implies knowledge of or participation in that activity). An officer must establish an individualized finding of probable cause to make a lawful arrest. *State v. Grande*, 164 Wn.2d 135, 140, 187 P.3d 248 (2008). In *Grande*, the court held that the officer did not have probable cause to arrest and search a car passenger based solely on the smell of marijuana emanating from the car. *Id.* at 146, 187 P.3d 248. Additionally, race or color alone, including "racial incongruity" ("a person of any race being allegedly 'out of place' in a particular geographic area") can never constitute probable cause of criminal activity. *State v. Barber*, 118 Wn.2d 335, 346, 823 P.2d 1068 (1992); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

Neither is an individual's presence in a high-crime area sufficient, by itself, to establish probable cause. *See Crane*, 105 Wn. App. at 312, 19 P.3d 1100; *see also Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). Suspicion of dangerousness must relate to the person searched, not to the area in which he is found. *State v. Smith*, 102 Wn.2d 449, 452–53, 688 P.2d 146 (1984) (general practice of frisking individuals in particularly dangerous area of the city is not justified by probable cause). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.6(g) (5th ed. 2012).

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. *State v. Graham*, 130 Wn.2d 711, 725–26, 927 P.2d 227 (1996) (finding probable cause when the defendant quickly concealed an object in his pants pockets, ignored the officers' request to stop, looked nervous, and sweated profusely on a cold night); *State v. Baxter*, 68 Wn.2d 416, 421–22, 413 P.2d 638 (1966) ("flight is an element of probable cause"); *State v. Huff*, 64 Wn. App. 641, 647, 826 P.2d 698 (1992) (furtive movements and lying to police about identity support probable cause); *State v. Hobart*, 24 Wn. App. 240, 243, 600 P.2d 660 (1979), *rev'd on other grounds*, 94 Wn.2d 437, 617 P.2d 429 (1980) (defendant grabbed his pocket and turned away from an officer after the officer asked if the defendant had cocaine in his pocket); *see also Sibron v. New York*, 392 U.S. 40, 66–67, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968) (probable cause existed when strangers tiptoed from apartment and fled from police officer); *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (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). Probable cause, however, is not negated merely because it is possible to imagine an innocent explanation for observed activities. *Graham*, 130 Wn.2d at 725, 927 P.2d 227 (quoting *State v. Fore*, 56 Wn. App. 339, 344, 783 P.2d 626 (1989)) (noting that absolute certainty as to the identity of a suspicious substance is not required).

2.4(e) Response to Questioning

A suspect's response to police questioning can establish probable cause when combined with other circumstances. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (officer's disbelief of defendant's statement that he lived at housing complex, combined with suspicious gestures, constituted probable cause for criminal trespass); *State v. Huff*, 64 Wn. App. 641, 647, 826 P.2d 698 (1992) (lying to police about identity coupled with furtive gestures and identification of illegal substance odor established probable cause); *see also United States v. Ortiz*, 422 U.S. 891, 897, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975) (border patrol may consider nature of responses to questioning to help establish probable cause).

A suspect's failure or refusal to answer an officer's questions, however, may not be taken into account. *State v. White*, 97 Wn.2d 92, 106, 640 P.2d 1061 (1982) *superseded by statute as stated in State v. Graham*, 130 Wn.2d 711, 927 P.2d 227 (1996); *see Brown v. Texas*, 443 U.S. 47, 53 n.3, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.6(f) (5th ed. 2012). 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, 49 L. Ed. 2d 91 (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, 92 L. Ed. 210 (1948) (officers could not infer probable cause from suspect's failure to protest arrest or to proclaim innocence).

Although the U.S. Supreme Court has held that the Fourth Amendment cannot compel a suspect to answer questions, a state may criminalize a suspect's refusal to identify herself if the request for identification is reasonably related to the circumstances that justified the investigative stop. *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty.*, 542 U.S. 177, 187–89, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004); *see State v. Turner*, 103 Wn. App. 515, 525–26, 13 P.3d 234 (2000) (holding the defendant's refusal to provide his name combined with the defendant's lunging at the officer were sufficient to support an arrest for obstruction of a law enforcement officer); *State v. Contreras*, 92 Wn. App.

307, 316, 966 P.2d 915 (1998) (recognizing the defendant's right to refuse to answer questions, but including the defendant's giving a false name as one reason that supported a charge for obstruction of justice). *See generally* RCW 9A.76.020(1) (Washington's obstruction of justice statute).

2.5 INFORMATION FROM AN INFORMANT: IN GENERAL

Different sets of rules govern information received from an informant depending on whether the informant is a criminal informant, a citizen informant, a police informant, or an anonymous informant. This section discusses general rules that apply to all informants; section 2.6 focuses on citizen informants; section 2.7 covers the rules for when the informant is a fellow police officer; and section 2.8 deals with anonymous informants.

Traditionally, under the Fourth Amendment, information from an informant could establish probable cause only when the information available to the police satisfied the two-prong *Aguilar-Spinelli* test, which requires 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, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *see* 2 Wayne R. LaFave, *Search and Seizure* § 3.3(a) (5th ed. 2012). While the Supreme Court has since rejected *Aguilar-Spinelli* in favor of a less stringent totality of the circumstances approach for determining when an informant's tip may establish probable cause, see *Illinois v. Gates*, 462 U.S. 213, 231–32, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the Washington State Supreme Court has held that article I, section 7 requires adherence to the *Aguilar-Spinelli* test. *State v. Vickers*, 148 Wn.2d 91, 111–12, 59 P.3d 58 (2002) (citing *State v. Jackson*, 102 Wn.2d 432, 440, 688 P.2d 136 (1984)).

A Washington trial court may not use the *Gates* "totality of the circumstances" test. *State v. Gaddy*, 152 Wn.2d 64, 71 n.2, 93 P.3d 872 (2004); *Jackson*, 102 Wn.2d at 443, 688 P.2d 136; *see* 2 LaFave, *supra*, § 3.3(a). As a result, under article I, section 7, a strong showing as to an informant's basis of knowledge cannot overcome a deficiency in the informant's credibility and vice versa. *Jackson*, 102 Wn.2d at 441, 688 P.2d 136. But probable cause may still be established despite such a deficiency if the police can support this missing prong by sufficiently corroborating the informant's tip. *Id.* at 445, 688 P.2d 136.

Under the "basis of knowledge" prong, the facts must enable the person making the probable cause determination, such as a magistrate, to decide whether the informant had a basis for the allegation of criminal

conduct. *Id.* at 444, 688 P.2d 136 (basis of knowledge not satisfied when informant could not establish how he knew the defendant was a drug dealer). Under the "veracity" prong, the facts must enable the magistrate to determine either the informant's inherent credibility or reliability on the particular occasion. *Spinelli*, 393 U.S. at 415–16, 89 S. Ct. 584. An informant's tip may provide police with grounds to stop a person only if there are some indicia of reliability. *State v. Smith*, 102 Wn.2d 449, 455, 688 P.2d 146 (1984) (officers' reliance on street kids to lead them to suspect is not permissible when the officers questioned the reliability of children). If either the basis of knowledge or veracity prong is deficient, the police may cure the deficiency by corroborating the informant's tip through an independent investigation. *Vickers*, 148 Wn.2d at 112, 59 P.3d 58.

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 v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002); *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984); *State v. Bauer*, 98 Wn. App. 870, 875, 991 P.2d 668 (2000). For example, an informant's statement that he had observed a marijuana grow operation in the defendant's residence will satisfy the basis of knowledge prong. *State v. Wolken*, 103 Wn.2d 823, 827, 700 P.2d 319 (1985). The affidavit need only show that the informant had personal knowledge of the facts asserted. *Vickers*, 148 Wn.2d at 113, 59 P.3d 58 (affidavit did not need to establish that informant had actually seen the weapons or ammunition used in a robbery, but did need to establish that the informant had personal knowledge of the facts asserted in the affidavit regarding the defendants' conversations about committing an armed robbery). Personal knowledge of only innocuous facts about the defendant, however, is insufficient. *State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593 (1994) (phone number, address, and abnormally high electrical consumption considered innocuous facts); *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986). Lastly, the basis of an informant's knowledge may be established by hearsay. *See Jackson*, 102 Wn.2d at 437, 688 P.2d 136; *State v. Casto*, 39 Wn. App. 229, 233, 692 P.2d 890 (1984).

Under article I, section 7, a deficiency in the basis of knowledge prong may be remedied by "independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements." *Jackson*, 102 Wn.2d at 438, 688 P.2d 136; *see also State v.*

Kennedy, 72 Wn. App. 244, 249–50, 864 P.2d 410 (1993); *State v. Adame*, 39 Wn. App. 574, 576–77, 694 P.2d 676 (1985). The corroborated information, like an informant's first-hand knowledge, must itself suggest criminal activity; "[m]erely verifying 'innocuous details,' commonly known facts or easily predictable events should not suffice to remedy [the] deficiency." *Jackson*, 102 Wn.2d at 438, 688 P.2d 136; *State v. Maddox*, 116 Wn. App. 796, 803, 67 P.3d 1135 (2003), *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004) (corroboration of alleged drug dealing sufficient when police searched informant before a controlled buy, observed his entrance and exit, and then re-searched the informant after the controlled buy); *State v. Maxwell*, 114 Wn.2d 761, 769–70, 791 P.2d 223 (1990) (frequent visitors, tin foil on windows, and suspicious conversation not sufficient evidence of illegal activity).

Lastly, even if a deficiency in the information renders it insufficient to establish probable cause, it may be used to corroborate other cognizable information. *State v. Lund*, 70 Wn. App. 437, 450 n.10, 853 P.2d 1379 (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 Wn.2d 706, 712, 630 P.2d 427 (1981) (statements by a reliable informant may establish probable cause when used to corroborate information provided by an informant whose reliability has not yet been established). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.3(f) (5th ed. 2012).

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

The veracity prong of the *Aguilar-Spinelli* test is a measure of an informant's truthfulness. *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007). This prong is met when the affidavit supporting the search warrant shows the informant's credibility or contains sufficient facts from which a magistrate can independently determine the veracity of the informant. *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002); *State v. Garcia*, 140 Wn. App. 609, 619, 166 P.3d 848 (2007) (quoting *State v. McCord*, 125 Wn. App. 888, 893, 106 P.3d 832 (2005)); *State v. Maddox*, 116 Wn. App. 796, 803, 67 P.3d 1135, *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004) (informant's "track record" of two successful controlled buys sufficient to support an inference of veracity).

An informant's reliability may be established if the informant has previously provided information that was proven to be reliable, thereby establishing a "track record" of reliability. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984); *State v. Shaver*, 116 Wn. App. 375, 380–81, 65 P.3d 688 (2003) (confidential informant had provided reliable

information to the officer in the past); *State v. Lopez*, 70 Wn. App. 259, 264, 856 P.2d 390 (1993) (informant's successful assistance in prior controlled buys established a track record of reliability); *see* 2 Wayne R. LaFave, *Search and Seizure* § 3.3(b) (5th ed. 2012). In the absence of circumstances demonstrating 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 Wn. App. 679, 681–82, 544 P.2d 786 (1975); *see infra* § 2.7(b). Further, similar to an informant's basis of knowledge, an informant's credibility may be verified by independent police investigation. *See State v. Emery*, 161 Wn. App. 172, 202, 253 P.3d 413 (2011) (informant's veracity confirmed by police investigation); *Shaver*, 116 Wn. App. at 380–81, 65 P.3d 688 (confidential informant's credibility corroborated by officer's ongoing investigation of drug activity at a residence for many years prior to informant's tip and officer's observations that residence was frequented by known drug users).

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

The veracity prong may also be established when the informant has a clear motive for being truthful, such as receiving a benefit in return for good information. *State v. Bean*, 89 Wn.2d 467, 469–71, 572 P.2d 1102 (1978) (offer of a favorable sentence recommendation gave informant a strong motive to provide accurate information); *State v. Estorga*, 60 Wn. App. 298, 305, 803 P.2d 813 (1991) (offer to drop charges in exchange for accurate information established strong motive to be truthful); *State v. Smith*, 39 Wn. App. 642, 647–48, 694 P.2d 660 (1984) (offer of reduction in charge from felony to misdemeanor gave informant strong motive to be truthful). An informant's statement against penal interest, or recitation of another person's statement against interest, particularly when supported by other indicia of reliability, may also demonstrate a motive for being truthful and thereby establish credibility. *State v. Chamberlin*, 161 Wn.2d 30, 42, 162 P.3d 389 (2007) (informant's confession of driving under the influence of narcotics, supported by his willingness to be a named informant, established reliability); *State v. Merkt*, 124 Wn. App. 607, 613−14, 102 P.3d 828 (2004); *State v. Shaver*, 116 Wn. App. 375, 380–81, 65 P.3d 688 (2003) (confidential informant relayed comments against penal interest made by suspected drug dealer).

2.6 CITIZEN INFORMANTS: VICTIM/WITNESS INFORMANTS IN GENERAL

The *Aguilar-Spinelli* test also applies to the use of information from a citizen informant. *State v. Wible*, 113 Wn. App. 18, 22, 51 P.3d 830 (2002); *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899 (2002)

(Aguilar-Spinelli test applied where informants were named citizens). Again, multiple levels of hearsay are acceptable as long as each instance in the chain meets the two-prong test. *See, e.g.*, *State v. Vanzant*, 14 Wn. App. 679, 683, 544 P.2d 786 (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* § 3.4 (5th ed. 2012). Lastly, a demonstration of reliability may not be required if a citizen provides noncriminal, nonaccusatory information that strongly suggests that the informant is relating personal observations. *State v. Nordlund*, 113 Wn. App. 171, 181, 53 P.3d 520 (2002); *State v. Stone*, 56 Wn. App. 153, 156, 782 P.2d 1093 (1989).

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

The basis for the citizen informant's knowledge must be established. *See State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986). The basis of the knowledge prong is satisfied by information showing that the informant has personally seen the facts asserted and is passing on firsthand information. *State v. Smith*, 110 Wn.2d 658, 663, 756 P.2d 722 (1988); *State v. Jackson*, 102 Wn.2d. 432, 437, 688 P.2d 136 (1984); *State v. Wible*, 113 Wn. App. 18, 23, 51 P.3d 830 (2002). However, the basis of the informant's knowledge must be demonstrated if the informant was not the eyewitness, or when the information requires some expertise, such as the identification of the odor of marijuana. *State v. Boyer*, 124 Wn. App. 593, 606, 102 P.3d 833 (2004) (affidavit failed to establish citizen informant's expertise in identifying cocaine); *see* 2 Wayne R. LaFave, *Search and Seizure* § 3.4(b) (5th ed. 2012).

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. Gaddy*, 152 Wn.2d 64, 72–73, 93 P.3d 872 (2004); *State v. Ibarra*, 61 Wn. App. 695, 698–99, 812 P.2d 114 (1991) (noting the different types of informants). Accordingly, the police must present the issuing magistrate with sufficient facts to determine the informant's inherent credibility or reliability unless the police corroborate the informant's tip. *State v. Bauer*, 98 Wn. App. 870, 876–77, 991 P.2d 668 (2000) (credibility established when informant was a concerned citizen, had been a Washington citizen for more than nine years, was a registered voter, and feared retaliation); *State v. Duncan*, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996); *State v. Huff*, 33 Wn. App. 304, 307–08, 654 P.2d 1211 (1982).

With an identified citizen informant, however, the burden for establishing credibility is generally lower, and the court will presume the citizen informant's reliability. *Gaddy*, 152 Wn.2d at 72–73, 93 P.3d 872; *State v. McReynolds*, 104 Wn. App. 560, 572–73, 17 P.3d 608 (2001) (citizen informant was readily identifiable from affidavit and provided information in "entirely unsuspicious circumstances"); *Ibarra*, 61 Wn. App. at 699, 812 P.2d 114; *State v. Franklin*, 49 Wn. App. 106, 109, 741 P.2d 83 (1987) (noting that the standard is relaxed but the information must support an inference of truthfulness and must establish a basis of knowledge). This is because a citizen informant is unlikely to have an established "track record" of providing information to the police, such that the citizen informant's veracity may be otherwise difficult to establish. *Ibarra*, 61 Wn. App. at 699, 812 P.2d 114. Naming an informant is not alone a sufficient ground on which to credit an informant, but it is considered in the determination of whether the informant is actually a citizen informant. *State v. McCord*, 125 Wn. App. 888, 893, 106 P.3d 832 (2005) (citing *Duncan*, 81 Wn. App. at 78, 912 P.2d 1090); *see also State v. Atchley*, 142 Wn. App. 147, 162, 173 P.3d 323 (2007) (credibility of citizen informant established when the informant provided his or her name and contact information, received no compensation for the tip, and a background check made no indication of untrustworthiness). The standard is generally not relaxed, however, when the citizen informant remains unidentified to the magistrate. *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986); *State v. Garcia*, 140 Wn. App. 609, 619, 166 P.3d 848 (2007); *Ibarra*, 61 Wn. App. at 699, 812 P.2d 114. Lastly, an informant is presumed reliable if the circumstances that establish personal knowledge are sufficiently detailed. *State v. Gaddy*, 114 Wn. App. 702, 707, 60 P.3d 116 (2002), *aff'd on other grounds*, 152 Wn.2d 64, 93 P.3d 872 (2004); *State v. Wible*, 113 Wn. App. 18, 24, 51 P.3d 830 (2002) (no independent corroboration required); *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899 (2002) (State's burden is "relaxed" with regard to the veracity of citizen informants).

2.6(c) Sufficiency of Information Supplied

Factors that have been considered in determining whether sufficient information has been provided by a victim informant or witness informant 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 or her vehicle has been involved in other similar criminal activity. *See* 2 Wayne R. LaFave, *Search and Seizure* § 3.4(c) (5th ed. 2012).

When a citizen can identify a suspect by photograph, the information is sufficient to establish probable cause. *See Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). Witness descriptions of the attire, vehicle, and physical build of the suspect may also provide probable cause when used in combination. *State v. Palmer*, 73 Wn.2d 462, 464–65, 438 P.2d 876 (1968) (probable cause for arrest was established when 45 minutes after robbery the victim identified an automobile by make, year, color, and dirty white top, and described suspect by hair color and attire); *State v. Kohler*, 70 Wn.2d 599, 605, 424 P.2d 656 (1967) (probable cause established when two witnesses provided descriptions of vehicle, clothing, and build of suspects, and when probability was slight that two similar cars would be traveling within the limited area of Seattle at 12:30 a.m.); *State v. Baker*, 68 Wn.2d 517, 520, 413 P.2d 965 (1966) (probable cause established when robbery victims identified make, color, and license plate number of suspect vehicle).

2.7 POLICE AS INFORMANTS

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

As with citizen informants' veracity 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, 13 L. Ed. 2d 684 (1965); *State v. Gaddy*, 152 Wn.2d 64, 71–73, 93 P.3d 872 (2004). Generally, there must be a showing that the officer had a basis for his or her knowledge. *Gaddy*, 152 Wn.2d at 72, 93 P.3d 872. Conclusory allegations will suffice in limited, complex situations, when explaining the grounds for the belief may be difficult. *Jaben v. United States*, 381 U.S. 214, 223–24, 85 S. Ct. 1365, 14 L. Ed. 2d 345 (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, 28 L. Ed. 2d 306 (1971) ("fellow officer rule"); *Gaddy*, 152 Wn.2d at 70–71, 93 P.3d 872 (officer may rely on information from a police bulletin or "hot sheet" if the issuing agency has probable cause). However, probable cause must actually exist for the arrest to be valid. *Whiteley*, 401 U.S. at 568–69, 91 S. Ct. 1031; *Gaddy*, 152 Wn.2d at 70–71, 93 P.3d 872; *see* 2 Wayne R. LaFave, *Search and Seizure* § 3.5(b) (5th ed. 2012). An arresting officer's good faith reliance is irrelevant. *State v. Gaddy*, 114 Wn. App. 702, 706, 60 P.3d 116 (2002), *aff'd*, 152 Wn.2d 64, 93 P.3d 872 (2004).

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 Wn. App. 309, 310, 529 P.2d 873 (1974). *See generally* 2 LaFave, *supra*, § 3.5(c). Whether the State must prove the reliability of the agency's records may depend on whether the court considers the agency to be a citizen informant. *See Gaddy*, 152 Wn.2d at 71–74, 93 P.3d 872 (treating Department of Licensing as a citizen informant and finding Department's information presumptively reliable regarding defendant's driving record); *State v. Sandholm*, 96 Wn. App. 846, 848, 980 P.2d 1292 (1999) (no evidence provided to show reliability of information from WACIC radio).

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 unless the tip is corroborated. *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). Even a named but unknown informant is not entitled to a presumption of reliability. *See State v. Sieler*, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980) (reliability of named but unknown telephone informant not significantly different from anonymous telephone informant). If the informant is a citizen informant and wishes to remain anonymous, "the affidavit must contain 'background facts to support a reasonable inference that the information is credible and without motive to falsify.'" *State v. Atchley*, 142 Wn. App. 147, 162, 173 P.3d 323 (2007) (quoting *State v. Cole*, 128 Wn.2d 262, 287–88, 906 P.2d 925 (1995)); *State v. Ibarra*, 61 Wn. App. 695, 700, 812 P.2d 114 (1991).

If, however, a police investigation corroborates the informant's information and constitutes more than mere public or innocuous facts, the *Aguilar-Spinelli* test will be satisfied. *Young*, 123 Wn.2d at 195, 867 P.2d 593; *State v. Jackson*, 102 Wn.2d 432, 438, 688 P.2d 136 (1984); *State v. Kennedy*, 72 Wn. App. 244, 249, 864 P.2d 410 (1993). The fact that the anonymous informant accurately describes a vehicle is insufficient. *State v. Lesnick*, 84 Wn.2d 940, 943–44, 530 P.2d 243 (1975) (citing *Whiteley v. Warden*, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971)).

2.9 SPECIAL SEARCHES AND SEIZURES REQUIRING LESSER OR GREATER LEVELS OF PROOF

Although a majority of searches will fall under the general rubric discussed above, three types of searches are either conducted on less than

probable cause or, in contrast, require additional constitutional safeguards. Administrative searches, discussed in section 2.9(a), and *Terry* investigatory stops, covered in section 2.9(b), are permissible under relaxed standards. Searches that intrude into an individual's body require a greater level of proof and are discussed in section 2.9(c).

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. Mun. Court*, 387 U.S. 523, 528–34, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *Rental Owners Ass'n v. Thurston Cnty.*, 85 Wn. App. 171, 183, 931 P.2d 208 (1997). Therefore, such searches must either be conducted pursuant to a warrant or fall within one of the narrowly drawn exceptions to the warrant requirement. *See Camara*, 387 U.S. at 534, 87 S. Ct. 1727. 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 v. Barlow's, Inc.*, 436 U.S. 307, 320–21, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (brackets in original) (citation omitted) (quoting *Camara*, 387 U.S. at 538, 87 S. Ct. 1727). Administrative searches excepted from the warrant requirement must be reasonable in light of the individual's expectation of privacy and the asserted government interest. *Murphy v. State*, 115 Wn. App. 297, 307–08, 62 P.3d 533 (2003). For a discussion of administrative searches in general, see *infra* § 6.4.

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. *City of Seattle v. Leach*, 29 Wn. App. 81, 85, 627 P.2d 159 (1981). Inventory searches are one type of search based on a general administrative program that can be justified without probable cause. *State v. White*, 135 Wn.2d 761, 766, 958 P.2d 982 (1998) (inventory searches pursuant to standard police procedures are "reasonable").

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, 20 L. Ed. 2d 889 (1968); *State v. Rankin*, 151 Wn.2d 689, 698–99, 92 P.3d 202 (2004) (police may request identification from a passenger for investigatory purposes with an articulable suspicion of criminal activity

by the passenger); *State v. Kennedy*, 107 Wn.2d 1, 8, 726 P.2d 445 (1986). However, the stop must not exceed the scope and purpose of a Terry stop—the stop must be reasonably limited in scope to "whatever reasonable suspicions legally justified the stop in the first place." *State v. Arreola*, 176 Wn.2d 284, 293–94, 290 P.3d 983 (2012) (citing *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)). If the officer has reasonable grounds to believe the person is armed and currently dangerous, he or she may perform a limited frisk of the suspect for weapons. *Terry*, 392 U.S. at 29, 88 S. Ct. 1868; *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). For a complete discussion of *Terry* stops and frisks, see generally *infra* Chapter 4.

2.9(c) Intrusions into the Body

Under article I, section 7 and the Fourth Amendment, taking a blood sample is a search and seizure that must be supported by probable cause. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). If probable cause exists, 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 Wn.2d 525, 534–36, 852 P.2d 1064 (1993). However, due to the invasive nature of intrusions into the body, the U.S. Supreme Court has iterated three additional requirements beyond the probable cause requirement. In order for the search to be lawful, there must be (1) a "clear indication" that the desired evidence will be found if the search is performed, (2) the method of searching must be reasonable, and (3) the search must be performed in a reasonable manner. *Schmerber v. California*, 384 U.S. 757, 769–70, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (finding that the "interests in human dignity and privacy which the Fourth Amendment protects" require a heightened standard). However, buccal swabs of arrestees for DNA identification is a reasonable search that can be considered part of a routine booking procedure under the Fourth Amendment. *Maryland v. King*, 569 U.S. 435, 465, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

More intrusive procedures may be permitted in special environments. For example, in prisons and jails, strip searches and cavity searches may be done without a warrant. *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (finding full body cavity searches of prison inmates following contact visits not categorically unreasonable); *State v. Harris*, 66 Wn. App. 636, 642, 833 P.2d 402 (1992) (finding exigent circumstances justified strip search of juvenile before placement in holding cell when police had prior experience with gang

members taping razor blades to their skin). For a full discussion of forced intrusions into the body, see *infra* § 3.12(b).

CHAPTER 3

Search Warrants

3.0 INTRODUCTION

Article I, section 7 of the Washington State Constitution states "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." As such, it requires that a search warrant be supported by probable cause to be valid. *State v. Neth*, 165 Wn.2d 177, 182–83, 196 P.3d 658 (2008); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). This is consistent with the Fourth Amendment which also 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.

These provisions were enacted as a response to the evils of general warrants and writs of assistance. *See Boyd v. United States*, 116 U.S. 616, 626–27, 6 S. Ct. 524, 29 L. Ed. 746 (1886). General warrants and writs had provided law enforcement officers virtually unlimited discretion to search whomever, wherever, and whenever they chose. With the Fourth Amendment, the Framers sought to curb the abuses of unconstrained searches. *See Chimel v. California*, 395 U.S. 752, 760–61, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). Despite these efforts, there are a number of situations in which searches and seizures may be made without warrants. *See infra* Chapter 5.

This chapter focuses on a valid search warrant and its execution under article I, section 7 of the Washington State Constitution. This chapter addresses general requirements for a valid warrant, the description of the place to be searched and the items to be seized, the scope and intensity of the search, the "knock and announce" requirement, detentions of persons on the premises, and challenges to an affidavit. The standards discussed below may also apply to arrest warrants 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

A warrant may be issued to search for and seize any evidence of a crime; contraband, the fruits of crime, or things otherwise criminally possessed; weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or a person for whose arrest there is probable cause, or who is unlawfully restrained. CrR 2.3(b); CrRLJ 2.3(b).

Warrants can be issued to recover evidence of a crime as long as probable cause exists to "establish a reasonable inference that the defendant is involved in criminal activity and that evidence the criminal activity can be found at the place to be searched." *State v. Fry*, 168 Wn.2d 1, 4–6, 228 P.3d 1 (2010) (procuring warrant to search a suspected marijuana grow operation) (citing *State v. Maddox* 152 Wn.2d 499, 505, 98 P.3d 1199 (2004)); *State v. Reep*, 161 Wn.2d 808, 811, 167 P.3d 1156 (2007) (issuing warrants to search for a possible methamphetamine lab and evidence of child pornography).

The State may seek a warrant to search and seize items that constitute "mere evidence" of a crime, i.e., items that have evidentiary value only. *See Warden v. Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642, L. Ed. 2d 782 (1967); *State v. Bullock*, 71 Wn.2d 886, 890–91, 431 P.2d 195 (1967) (adopting *Warden* and admitting a letter found with marijuana in an apartment search). To obtain a warrant for "mere evidence," the State must show probable cause to believe that the evidence will aid in apprehending or convicting a suspect. *See* CrR 2.3(b)–(c); *Bullock*, 71 Wn.2d at 890–91, 431 P.2d 195.

Lastly, a search warrant may be issued for evidence containing incriminating statements without violating the Fifth Amendment because the Fifth Amendment provides protection only where the act of producing evidence is, itself, testimonial. *In re Teddington*, 116 Wn.2d 761, 776, 808 P.2d 156 (1991) (citing *Andresen v. Maryland*, 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)) (finding that a letter written voluntarily by the defendant to his friend did not violate his Fifth Amendment rights).

3.2 WHO MAY ISSUE WARRANTS: REQUIREMENT OF A NEUTRAL AND DETACHED MAGISTRATE

Warrants provide protection against abuse because the determination of probable cause is made by a neutral and detached magistrate rather than by a police officer. *See State v. Hill*, 17 Wn. App. 678, 683, 564 P.2d 841 (1977). The requirement provides protection from "overzealous police officers" because "the judicial officer will more objectively balance the interests of privacy against the interests of criminal investigations than will the investigating police officer, who might distort the independent

judgment of probable cause required by the Fourth Amendment." *State v. Smith*, 16 Wn. App. 425, 427, 558 P.2d 265 (1976).

3.2(a) Qualifications of a "Magistrate"

Washington State has limited those empowered to issue warrants to judges in the state supreme court, court of appeals, superior court, and district court, as well as "all municipal officers authorized to exercise the powers and perform the duties of district judges." RCW 2.20.020. The magistrate need not 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." *State v. Porter*, 88 Wn.2d 512, 515, 563 P.2d 829 (1977). Case law has specifically included court commissioners. *State v. Gross*, 78 Wn. App. 58, 62, 895 P.2d 861 (1995) (citing *Porter*, 88 Wn.2d at 514, 563 P.2d 829). However, this power does not extend to court clerks. *State v. Walker*, 101 Wn. App. 1, 7–8, 999 P.2d 1296 (2000) (finding that a court clerk, acting alone, was not empowered to issue a bench warrant); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.2(c), at 620–24 (5th ed. 2012) ("Although the Court found that a layman-clerk could assess probable cause for rather simple ordinance violations, it does not inevitably follow that such a person is likewise capable of making the much more sophisticated judgments required for the issuance of search warrant . . . .").

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 act as a "rubber stamp for the police." *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012).

3.2(b) Neutrality

The magistrate issuing the warrant must be neutral. This requires that the warrant be issued by a judge who is divorced from law enforcement investigation and activities. *State v. Neslund*, 103 Wn.2d 79, 88, 690 P.2d 1153 (1984). If a magistrate cannot be neutral, then he or she is disqualified from issuing a warrant in that case. For instance, magistrates are per se disqualified from issuing a warrant in a case if they act as a prosecutor in that same case. *Coolidge v. New Hampshire*, 403 U.S. 443, 450, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *overruled on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). Similarly, the magistrate's involvement in the execution of a warrant may constitute a violation of the neutrality requirement. *Id.* at 450, 91 S. Ct. 2022. For example, an administrative "warrant" signed by the parole officer conducting the search is invalid. *Hocker v. Woody*, 95

Wn.2d 822, 825–26, 631 P.2d 372 (1981) (holding that a search of a third party's residence was unlawful because the warrant was not signed by a neutral and detached magistrate).

A pro-tempore judge that is also a part-time prosecutor is not automatically disqualified if he or she has not been involved in the prosecution of that particular case and there is no evidence of bias. *State v. Hill*, 17 Wn. App. 678, 683, 564 P.2d 841 (1977). Similarly, there is no per se disqualification for a judge who issued a search warrant in a case that was before him on special inquiry. *State v. Neslund*, 103 Wn.2d 88, 88, 690 P.2d 1153 (1984). In *Neslund*, the court did not per se disqualify the judge from issuing warrants because the warrants were not issued in subsequent court proceedings "arising" from the inquiry. *Id.* at 82–83, 690 P.2d 1153; *see* RCW 10.27.180. Search warrants have been upheld when the issuing judicial officer knew from an affidavit that he might be a witness against the defendant. *State v. Smith*, 16 Wn. App. 425, 427–28, 558 P.2d 265 (1976); 2 LaFave, *supra*, § 4.2(b), at 617–20.

Even when an individual is not per se disqualified from issuing a warrant, that individual's conduct under the facts of a particular case may cause him or her to lose their status as a neutral magistrate. *Neslund*, 103 Wn.2d at 88, 690 P.2d 1153. For instance, in *Lo-Ji Sales, Inc. v. New York*, a judge's conduct was found to have improperly merged with the police investigation when he accompanied police during the search of an adult bookstore owned by the defendant, reviewed material for obscenity, and added it to a previous signed search warrant. 442 U.S. 319, 326–27, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979).

Lastly, a magistrate is no longer neutral when he or she receives a fee for each search warrant issued. *Connally v. Georgia*, 429 U.S. 245, 250, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977) (having a pecuniary interest in issuing warrants compared with denying them renders a magistrate neither neutral nor detached); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.2(b), at 617–20 (5th ed. 2012).

3.2(c) Presentation of Evidence to a Second Magistrate

Washington courts have not yet squarely addressed the question of whether or under what circumstances a prosecuting authority may, in an attempt to obtain a search warrant, present the same evidence to a second magistrate after one denial. However, commentators appear to agree that a magistrate's initial probable cause determination is not a final order and that the principle of collateral estoppel does 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. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.2(e),

at 631–33 (5th ed. 2012); *see also United States v. Rettig*, 589 F.2d 418, 422 (9th Cir. 1978) (finding the second warrant valid but expressing disapproval that the second judge had not been informed of the prior attempt).

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. Czuprynski*, 8 F.3d 1113, 1115 (6th Cir. 1993), *on reh'g en banc*, 46 F.3d 560 (6th Cir. 1995), *supplemented*, 65 F.3d 169 (6th Cir. 1995) (condemning prosecutor who took the case to two district court judges before taking it to a magistrate who he knew had hard feelings for the defendant).

3.2(d) Burden of Proof

Unless a magistrate is disqualified under the per se rule of *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *overruled on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990), the defendant bears the burden of proving a magistrate's lack of neutrality. *See State v. Hill*, 17 Wn. App. 678, 683, 564 P.2d 841 (1977).

3.3 CONTENT OF THE WARRANT

As a search warrant is issued only if the court determines there is probable cause, the person seeking the warrant must present supporting evidence "in the form of affidavits, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant and may be provided to the court by any reliable means." CrR 2.3(c); *see also* CrRLJ 2.3(c).

3.3(a) A Supporting Affidavit

An affidavit must contain the underlying facts and circumstances upon which the court can determine whether probable cause exists. *See State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496 (1973). 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. Maddox*, 152 Wn.2d 499, 509, 98 P.3d. 1199 (2004); *In re Yim*, 139 Wn.2d 581, 594–95, 989 P.2d 512 (1999); *see also State v. Fry*, 168 Wn.2d 1, 6, 228 P.3d 1 (2010) (finding probable cause when the officer smelled marijuana wafting from the house, even when the defendant produced a marijuana permit).

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. *State v. Chenoweth*, 160 Wn.2d 454, 465, 158 P.3d 595 (2007); *see* CrR 2.3(c). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.5(b), at 335–51 (5th ed. 2012).

3.3(b) Oath or Affirmation Requirement; Pseudonym Affiants

The person presenting the supporting affidavit must swear to the information contained in the affidavit. U.S. Const. amend. IV; *see* CrR 2.3(c). Any sworn testimony must be recorded and shall be transcribed if it is ordered by the court, or if a party wishes to challenge the validity of a warrant. CrR 2.3(c); CrRLJ 2.3(c).

The Washington State Supreme Court has, however, upheld a warrant when the affidavit was not sworn but was signed in the presence of the magistrate. *State v. Douglas*, 71 Wn.2d 303, 309–10, 428 P.2d 535 (1967). A signed affidavit is not a constitutional requirement for the issuance of a search warrant. *State v. Mannhalt*, 33 Wn. App. 696, 699, 658 P.2d 15 (1983). If, however, the court finds there is probable cause, the person seeking the warrant shall obtain the court's signature and display it on the warrant identifying and describing the property or person to be searched. CrR 2.3(c); CrRLJ 2.3(c).

Washington courts have yet to rule on whether an incorrect name or pseudonym on the affidavit makes it defective. Likewise, the U.S. Supreme Court has not addressed this issue directly. 2 Wayne R. LaFave, *Search and Seizure* § 4.3(f), at 663–64 (5th ed. 2012). However, when a warrant has been challenged in federal courts on constitutional grounds, incorrect names were found to make a warrant defective. *Id.*; *see also, e.g.*, *United States ex rel. Pugh v. Pate*, 401 F.2d 6 (7th Cir. 1968); *King v. United State*s, 282 F.2d 398 (4th Cir. 1960).

Nonetheless, a handful of federal circuits have found a warrant still effective despite an incorrect name or pseudonym. *See generally* 2 LaFave, *supra*, § 4.3(f), at 663–65 & n.71. *See, e.g.*, *United States v. Causey*, 9 F.3d 1341 (7th Cir. 1993) (finding the affidavit effective when "the issuing judge has an opportunity to question the affiant, the judge is in fact not deceived, and there is sufficient probable cause notwithstanding the false information").

3.3(c) Insufficient Information, Omissions, and Staleness

A warrant is most commonly defective for one of three reasons: (1) there is insufficient information to establish probable cause; (2) material

information was omitted during the warrant process; or (3) the information in the affidavits is stale.

First, an affidavit is factually insufficient when it contains nothing more than a mere declaration of suspicion or personal belief that evidence of a crime will be found on the premises to be searched. *Maddox*, 152 Wn.2d at 505, 98 P.3d. 1199; *see State v. Neth*, 165 Wn.2d 177, 196 P.3d 658 (2008) (holding that empty baggies and prior criminal history are insufficient to support probable cause). For example, generalizations about the behavior of drug dealers concerning where they keep controlled substances are insufficient. *See State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999); *see also Albrecht v. United States*, 273 U.S. 1, 5, 47 S. Ct. 250, 71 L. Ed. 505 (1927). At the same time, affidavits for search warrants must be tested in a commonsense manner, not a hyper-technical one. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

The court must determine if the warrant is valid by "consider[ing] *only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested." *State v. Garcia-Salgado*, 170 Wn.2d 176, 187, 240 P.3d 153 (2010). Thus, if the warrant is invalid due to insufficient information, it cannot be made valid later by adding further information, even if that information was known at the time of issuance but not presented to the magistrate. *See Whiteley v. Warden*, 401 U.S. 560, 565 n.8, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971) (holding that 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").

Second, under article I, section 7, if there is an omission in the affidavit, the warrant is valid so long as the omission is neither intentional nor made with a reckless disregard for the truth and the warrant is facially valid, i.e., there is sufficient information to find probable cause. *See Chenoweth*, 160 Wn.2d at 478, 158 P.3d 595.

To invalidate a search warrant based on a misrepresentation in the supporting affidavit, the court must find not only that the allegedly improper statement was material to finding probable cause but also that statement was knowingly and intentionally made in disregard of the truth. *State v. Olson*, 74 Wn. App. 126, 872 P.2d 64 (1994). Thus, innocent or negligent mistakes do not satisfy the burden stated above. *Id.* The defense must allege intentional lies or intentional reckless disregard for the truth and make a substantial preliminary showing to be entitled to a hearing respecting alleged misrepresentations. *Id.* For instance, an incorrect date on an affidavit is immaterial. *State v. Vickers*, 148 Wn.2d 91, 109, 59 P.3d 58 (2002).

For example, in *In re Yim*, the court found the warrant valid even though the affidavit failed to expressly state that the defendant did not have an explosives license, a necessary element of the crime. 139 Wn.2d 581, 595–96, 989 P.2d 512 (1999). In *State v. Chenoweth*, the court found that the warrant was valid even though the prosecutor had failed to do a complete search of the informant's criminal history. 160 Wn.2d at 458–62, 158 P.3d 595. Had she run a search, she would have turned up a large criminal history, including crimes implicating veracity. *Id.* However, the court found that the prosecutor, "who prosecutes more than 200 cases a year, did not intentionally hide any information from the magistrate and did not act in bad faith in failing to gather relevant information," and she was therefore not reckless. *Id.* at 481, 158 P.3d 595.

Third, the information establishing probable cause must not be stale at the time it is presented to the judge. *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012) (finding the warrant stale when there was no date on the affidavit detailing when the informant had witnessed the grow operation). The information is not stale so long as "the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized." *Maddox*, 152 Wn.2d at 505–06, 98 P.3d. 1199 (holding that information discovered in the interim does not render the first probable cause determination stale so long as it does not negate probable cause).

In evaluating the staleness of facts underlying a warrant, courts examine the totality of the circumstances; the period of time between the issuance and execution of the warrant is only one factor to be considered. *Id.* Other relevant factors include the "nature of the criminal, the character of the evidence to be seized, and the nature of the place to be searched." *State v. Hosier*, 124 Wn. App. 696, 715, 103 P.3d 217 (2004). The facts and circumstances taken together must establish that "criminal activity is occurring at or about the time the warrant is issued." *State v. Perez*, 92 Wn. App. 1, 8–9, 963 P.2d 881 (1998); *see also State v. Ague-Masters*, 138 Wn. App. 86, 101, 156 P.3d 265 (2007) (information was not stale after two days when it appeared there could be continued manufacture of controlled substances). *But cf. State v. Higby*, 26 Wn. App. 457, 462–63, 613 P.2d 1192, 1195 (1980) (determining that observations weeks in the past were stale and insufficient to establish probable cause).

3.3(d) Oral Testimony

In Washington, a search warrant may be based on a single affidavit, on several affidavits, or on oral testimony. CrR 2.3(c). Oral testimony includes situations in which an affiant makes a sworn telephonic statement to a judge. *Id.*; *see also State v. Reep*, 161 Wn.2d 808, 818, 167 P.3d 1156

(2007); *State v. Ringer*, 100 Wn.2d 686, 701, 674 P.2d 1240 (1983) *overruled on other grounds by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) (finding that the availability of telephonic warrants increased the quality of police work). However, after the magistrate has taken a sworn telephonic statement, the magistrate must produce a record of the conversation. *State v. Myers*, 117 Wn.2d 332, 338, 815 P.2d 761 (1991); *State v. Ettenhofer*, 119 Wn. App. 300, 304–06, 79 P.3d 478 (2003). And the judge must record a summary of any additional evidence on which the warrant was based. *Ettenhofer*, 119 Wn. App. at 303 n.2, 79 P.3d 478 (quoting CrR 2.3(c)).

If the affiant's sworn testimony was not recorded during the telephonic process, the State is not allowed to reconstruct the affidavit without corroboration of the magistrate. *Myers*, 117 Wn.2d at 338, 815 P.2d 761 (finding the warrant invalid when the affiant made a summary of their own statement, but the magistrate did not summarize the statement and could not recall the conversation); *see also State v. Smith*, 87 Wn. App. 254, 257–59, 941 P.2d 691 (1997) (discussing the types of evidence that may be used to reconstruct a telephonic affidavit). In *State v. Garcia*, the court found the lack of a recording did not invalidate the warrant when the magistrate testified that the affidavit he was presented with matched his recollection of the conversation. 140 Wn. App. 609, 619–20, 166 P.3d 848 (2007). For a discussion of various objections to this procedure, see 2 Wayne R. LaFave, *Search and Seizure* § 4.3(c), at 650–54 (5th ed. 2012).

3.3(e) Administrative Warrants

Administrative warrants are subject to Fourth Amendment protection but may be issued on less than probable cause when authorized by a statute. *City of Seattle v. McCready* (*McCready III)*, 131 Wn.2d 266, 931 P.2d 156 (1997); *see Camara v. Mun. Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (holding that administrative searches to enforce local codes must be supported by "reasonable legislative or administrative standards"). An administrative warrant may be based on either (1) specific evidence of an existing violation, or (2) a general inspection program based on reasonable legislative or administrative standards derived from neutral sources. *City of Seattle v. Leach*, 29 Wn. App. 81, 84, 627 P.2d 159 (1981) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320–21, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978)).

Although a warrant may be issued on less than probable cause pursuant to an authorizing statute, if there is no authorizing statute, then the magistrate does not have authority to issue warrants for civil infractions, even with probable cause. *City of Seattle v. McCready (McCready II)*, 124 Wn.2d 300, 309, 877 P.2d 686 (1994). *See generally*

infra § 6.4 (administrative searches). Pursuant to article I, section 7, when a magistrate issues a warrant without authority, it is invalid. *Bosteder v. Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005), *superseded by statute on other grounds as recognized in Wright v. Terrell*, 162 Wn.2d 192, 170 P.3d 570 (2007); *see also State v. Lansden*, 144 Wn.2d 654, 663, 30 P.3d 483 (2001) (observing that courts of limited jurisdiction have no inherent authority to issue administrative search warrants). Notably, a statute giving a right of entry is not sufficient authorization to issue warrants. *McCready II*, 124 Wn.2d at 309, 877 P.2d 686. But if, under city ordinance, the willful or knowing violation of the city code is a misdemeanor, the court may issue a warrant for a civil violation. *Exendine v. Sammamish*, 127 Wn. App. 574, 582, 113 P.3d 494 (2005). If the administrative warrant was issued for *inspection* and not in connection to a crime, then that warrant cannot be used to assemble proof of a crime. *City of Seattle v. See*, 26 Wn. App. 891, 894, 614 P.2d 254 (1980).

3.4 Particular Description of Place to be Searched

Both article I, section 7 of the Washington State Constitution and the Fourth Amendment require a detailed description of the places to be searched and the items to be seized. This requirement prevents the execution of general searches, the seizure of objects that are not within the magistrate's authorization, and the issuance of warrants based on vague, loose, or doubtful facts. *See State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The requirement also limits discretion of the officers executing the warrant. *See id.*; *State v. Rivera*, 76 Wn. App. 519, 522, 888 P.2d 740 (1995); *see also Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927).

3.4(a) General Considerations

The description of the place to be searched must be sufficiently detailed such that "the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *State v. Fisher*, 96 Wn.2d 962, 967, 639 P.2d 743 (1982) (internal quotations omitted) (citing *State v. Rood*, 18 Wn. App. 740, 743–44, 573 P.2d 1325 (1977)). This need not be a brick and mortar location. *See, e.g.*, *State v. Jackson*, 150 Wn.2d 251, 268, 76 P.3d 217 (2003) (determining that the "place" to be searched in attaching a GPS to a car was the travel pattern of the vehicle). However, if there is a possibility that a mistaken search could occur, the warrant is not sufficiently particular. *Fisher*, 96 Wn.2d at 967, 639 P.2d 743; *see also State v. Bohan*, 72 Wn. App. 335, 339–40, 864 P.2d 26 (1993) (explaining the test of whether a mistaken search could occur is one of practical application given the facts of the case).

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. *Fisher*, 96 Wn.2d at 967, 639 P.2d 743; *see also State v. Smith*, 39 Wn. App. 642, 649, 694 P.2d 660 (1984) (upholding search where incorrect town was identified in warrant because defendant made no showing that a similar address existed that could have been mistakenly searched). 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. *Bohan*, 72 Wn. App. at 339, 864 P.2d 26. Clerical or ministerial errors will invalidate a warrant only if prejudice is shown. *State v. Wible*, 113 Wn. App. 18, 25, 51 P.3d 830 (2002); *see State v. Busig*, 119 Wn. App. 381, 388, 81 P.3d 143 (2003) (finding a warrant that did not match the pleading paper for the affidavit to be valid).

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 Wn. App. 519, 522–23, 557 P.2d 368 (1976) (finding sufficient a warrant describing premises as two-story, white-frame house located directly behind particular address); *see also State v. Chisholm*, 7 Wn. App. 279, 283, 499 P.2d 81 (1972) (holding that a 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 identified by a legal description of the property. *See State v. Cockrell*, 102 Wn.2d 561, 570, 689 P.2d 32 (1984).

In the execution of the search, carelessness on the part of the officers executing the warrant will not render the warrant insufficient regarding the place to be searched; however, it is required that the executing officers could have confined their search to the areas delineated in the warrant with a "reasonable effort." *See id.* (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 Fisher*, 96 Wn.2d at 967, 639 P.2d 743 (finding that with a "reasonable effort" the officers could have confined themselves to the place listed in the warrant). When there is no other information that would allow the officer to identify the premises to be searched, then the search warrant lacks the particularity required by the Washington State Constitution. *See State v. Rood*, 18 Wn.App. 740, 745–46, 573 P.2d 1325 (1977).

3.4(b) Inadequacy and Severability

If a warrant fails to sufficiently describe the place to be searched, the warrant is invalid even if the magistrate made a probable cause

determination. In absence of such description, there are three sources of information from which courts can determine whether the premises to be searched were sufficiently identified. First, other physical descriptions of the premises contained in the warrant or affidavit. *Fisher*, 96 Wn.2d at 967, 639 P.2d 743. Second, an officer's personal knowledge of the location of the premises or its occupants. *State v. Rood*, 18 Wn. App at 744, 573 P.2d 1325. And third, an officer's personal observations at the time the warrant was executed. *Id.* at 744–45. *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.5(a)–(e) (5th ed. 2012). The initial determination of whether a description is adequate is made with reference only to the warrant itself, including any attached documents. *See State v. Stenson*, 132 Wn.2d 668, 691–93, 696, 940 P.2d 1239 (1997). A description may appear adequate on its face, but upon execution be found to be ambiguous or erroneous. *Id*.

If a warrant is inadequate with respect to one location, the adequate portion may still be valid if the inadequacy can be severed from the warrant. For example, if a warrant separately and distinctly describes two targets and it is determined afterward that probable cause existed for issuance of the warrant for only one target, the warrant may be treated as severable and upheld as to the one target. *State v. Cockrell*, 102 Wn.2d 561, 571, 689 P.2d 32 (1984) (finding portions of the warrant that identified outbuildings severable from the rest of the warrant that was for the residence); *see also* 2 LaFave, *supra*, § 4.5(c), at 743–48.

3.4(c) Particular Searches and Exceptions

Generally, to be valid a search warrant for a multiple-occupancy building must describe with sufficient definiteness the particular subunit to be searched. *State v. Alexander*, 41 Wn. App. 152, 704 P.2d 618 (1985). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.5(b), at 731 (5th ed. 2012). However, the warrant is not defective for failing to specify a subunit 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. *State v. Chisholm*, 7 Wn. App. 279, 282, 499 P.2d 81 (1972). The Ninth Circuit has recognized that a warrant may authorize the search of an entire premise containing multiple units while reciting probable cause to a portion of the premise if the defendant was in control of the whole premises or they were occupied in common, if the entire premises were suspect, or if the multiunit character of the premises was not known to the officers. *United States v. Gillman*, 684 F.2d 616, 618 (9th Cir. 1982); *see also* 2 LaFave, *supra*, § 4.5(b), at 734–43. Additionally, 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. *Alexander*, 41 Wn. App. at 156, 704 P.2d 618 (adopting the community living unit rule in Washington).

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 Wn. App. 448, 453, 836 P.2d 239 (1992) (concluding that because the storage locker did not constitute 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). In *State v. Boyer*, the court upheld a search of a storage room belonging to a different apartment because "the fact that the outside door was labeled apartment B implied to the casual visitor that the hallway and its doorways were all part of apartment B." 124 Wn. App. 593, 604, 102 P.3d 833 (2004).

However, this exception does not extend to outbuildings. In *State v. Kelley*, 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. 52 Wn. App. 581, 586, 762 P.2d 20 (1988). Further, 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 Wn. App. 11, 16–17, 939 P.2d 706 (1997).

A warrant issued to search a defendant's premises may include the defendant's automobile if it is located on the premises. *State v. Claflin*, 38 Wn. App. 847, 853, 690 P.2d 1186 (1984) (a search warrant authorizing search of defendant's house and premises includes search of his car located on the premises). 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 Wn. App. 44, 51–52, 896 P.2d 704 (1995). For a more detailed description, see *infra* § 3.9.

3.4(d) 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. CrR 2.3(c); *State v. Rollie M.*, 41 Wn. App. 55, 58–59, 701 P.2d 1123 (1985). When a search warrant is issued for a person, the general rule requiring particularity still applies. *State v. Martinez*, 51 Wn. App. 397, 399–400, 753 P.2d 1011 (1988) (holding that a warrant is sufficient if it provides a detailed description of the person to be searched, including the person's place of residence); *Rollie M.*, 41 Wn. App. at 58–59, 701 P.2d 1123 (finding insufficient a warrant that authorized

search of a person found in general vicinity of a specified place); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.5(e), at 755–63 (5th ed. 2012).

For a discussion of when a premises search warrant authorizes the search of persons not named in the warrant, see *infra* § 3.8(b). 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 State v. Rivera*, 76 Wn. App. 519, 524, 888 P.2d 740 (1995); *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979). Nonetheless, a warrant authorizing the search of "all persons present" at a location to be searched might be upheld in Washington if the warrant establishes a nexus between all persons present, the place, and the criminal activity. *State v. Carter*, 79 Wn. App. 154, 161, 901 P.2d 335 (1995) (assuming without deciding that such warrants may pass muster).

3.5 Particular Description of Things to be Seized

As with the location to be searched, article I, section 7 requires that the courts "never authorize general, exploratory searches." *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 315, 178 P.3d 995 (2008). Instead, article I, section 7 requires that "warrants describe with particularity the things to be seized." *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). The requirement "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *State v. Reep*, 161 Wn.2d 808, 814, 167 P.3d 1156 (2007) (citing *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992)). Courts look to the purposes of the "particular description" requirement to determine whether the description is valid. These purposes include (1) preventing general exploratory searches; (2) protecting against "seizure of objects on the mistaken assumption that they fall within" the warrant; and (3) ensuring that probable cause is present. *Perrone*, 119 Wn.2d at 545, 834 P.2d 611; *see also Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927).

In the Ninth Circuit, three factors are relevant to the existence of sufficient particularity: (1) whether probable cause exists for all classes of items in the warrant; (2) whether the warrant sets out objective standards that allow the executing officer to decide what may be seized and what may not; and (3) whether the government was able to describe the things to be seized with any greater particularity. *United States v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004). For a discussion of searches requiring heightened protection, see *infra* § 3.13.

Because the facts in each case differ greatly, the fact patterns of prior cases generally are not referenced when determining whether a warrant is

sufficiently particular. *See State v. Thein*, 138 Wn.2d 133, 149, 97 P.2d 582 (1999) (citing *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)). Instead, the degree of specificity required depends on the circumstances and the type of items involved. *State v. Jackson*, 150 Wn.2d 251, 268, 76 P.3d 217 (2003). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.6(a)–(f) (5th ed. 2012).

Pursuant to a warrant, officers may also seize objects that establish the defendant's dominion and control over the premises. *State v. Weaver*, 38 Wn. App. 17, 22, 683 P.2d 1136 (1984); *see Ewing v. Stockton*, 588 F.3d 1218, 1229 (9th Cir. 2009) (warrant for articles establishing identity of persons in control of premises not overbroad). In *State v. Weaver*, the court held that although a cardboard box bearing defendant's name would not generally be considered "paper," police could seize the box because the obvious purpose of the warrant was seizure not only of controlled substances, but also of evidence enabling the state to demonstrate defendant's dominion and control over the premises. 38 Wn. App. at 22, 683 P.2d 1136.

3.5(a) General Rules

While there is no bright-line rule, a few general principles can be gleaned from case law that indicate when a warrant is sufficiently definite to allow the executing officer to identify the property with reasonable certainty.

First, more ambiguity is tolerated when the police have acquired the most complete description that could reasonably be expected. *See State v. Clark*, 143 Wn.2d 731, 754, 24 P.3d 1006 (2001) (finding warrant for "trace evidence" valid when it would be impossible to know what type of trace evidence could be present beforehand). Thus, a description need not be detailed if it is "as specific as the circumstances and the nature of the activity, or crime, under investigation permits." *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). However, a warrant is overbroad if the affidavit is much more specific yet the warrant fails to reflect the affidavit's specificity. *State v. Higgins*, 136 Wn. App. 87, 92, 147 P.3d 649 (2006) (finding warrant overbroad when it allowed search for "Assault 2nd DV" when the affidavit listed Glock pistol, spent casings, and entry and exit points).

The use of a generic term or general description in a warrant is not a per se violation if a more specific description is impossible and if probable cause is shown. *See State v. Perrone*, 119 Wn.2d 538, 547, 834 P.2d 611 (1992). "When the nature of the underlying offense precludes a descriptive itemization, generic classifications such as lists are acceptable." *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993); *see also Stenson*, 132

Wn.2d at 692, 940 P.2d 1239. However, in such instances, "the search warrant must [also] be circumscribed by reference to the crime under investigation." *Riley*, 121 Wn.2d at 29, 846 P.2d 1365. In *State v. Reid*, 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 guidelines for the officers conducting the search." 38 Wn. App. 203, 212, 687 P.2d 861 (1984). The warrant must also be definite enough to allow the searching officer to identify the objects sought with reasonable certainty. *State v. Nordlund*, 113 Wn. App. 171, 180, 53 P.3d 520 (2002) (citing *Stenson*, 132 Wn.2d at 691–92, 940 P.2d 1239).

Second, greater care and particularity are required when the property sought is inherently innocuous as opposed to property that is inherently illegal. *State v. Wible*, 113 Wn. App. 18, 28, 51 P.3d 830 (2002) (citing *State v. Chambers*, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997)). Thus, a less precise description is adequate for controlled substances. *See Chambers*, 88 Wn. App. at 647–48, 945 P.2d 1172 (finding that a search for "any and all controlled substances" is sufficient in a search for marijuana under the circumstances); *State v. Olson*, 32 Wn. App. 555, 557–58, 648 P.2d 476 (1982).

Third, 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 Chambers*, 88 Wn. App at 647–48, 945 P.2d 1172 (holding that a warrant authorizing search for "all controlled substances" when the affidavit recited probable cause for a marijuana grow operation did not fail to be particular). In *State v. Christiansen*, the court held that "[t]he fact the warrant could have been more precise in terms of identifying marijuana as the focus of the search does not affect its validity, since reasonable particularity is all that is required." 40 Wn. App. 249, 254, 698 P.2d 1059 (1985).

Finally, an error is not fatal if the officer is able to determine the items to be seized from the other facts provided in the warrant. *State v. Dodson*, 110 Wn. App. 112, 121, 39 P.3d 324 (2002) (holding that police officer merely corrected a clerical error in changing a warrant to specify a search for methamphetamine instead of marijuana where court had determined probable cause to search for methamphetamine); *see also Wible*, 113 Wn. App. at 25–26, 51 P.3d 830 (warrant only invalid for clerical errors upon a showing of prejudice).

3.5(b) Severability

As with the place to be searched, discussed in section 3.4(b) above, when one part of the warrant is insufficiently particular regarding the items

to be seized, the portion sometimes may be severed. However, the severability doctrine must not be applied when doing so would render the particularity standards meaningless. *State v. Perrone*, 119 Wn.2d 538, 556–57, 834 P.2d 611 (1992) (holding that a warrant authorizing a general search of materials protected by the First Amendment was impermissibly broad and invalid in its entirety).

Washington courts may examine five factors when determining whether invalid portions of a warrant may be severed from valid portions: (1) whether the warrant lawfully authorized entry into the premises; (2) whether the warrant includes at least one particularly described item for which there is probable cause; (3) whether the portion of the warrant that is valid is significant when compared to the warrant as a whole; (4) whether the searching officers found and seized any disputed items while executing the valid part of the warrant; and (5) whether the officers conducted a general search in flagrant disregard of the warrant's scope. *State v. Maddox*, 116 Wn. App. 796, 807–09, 67 P.3d 1135 (2003), *aff'd*, 152 Wn.2d 499 (2004).

3.6 "KNOCK AND ANNOUNCE" REQUIREMENT

Absent exigent circumstances, officers executing a valid warrant must identify themselves as police officers and announce their purpose prior to entering private premises. *See* RCW 10.31.040; *Ker v. California*, 374 U.S. 23, 37–40, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963) (announcing the rule but leaving the states to administer the standard of reasonableness). The State has the burden of proving that these requirements were met. *State v. Talley*, 14 Wn. App. 484, 490, 543 P.2d 348 (1975). An appropriate remedy for an unexcused violation of the "knock and announce rule" is the suppression of the evidence obtained as a result of the violation. *See, e.g.*, *State v. Johnson*, 11 Wn. App. 311, 522 P.2d 1179 (1974). *But see Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct.. 2159, 165 L. Ed. 2d 56 (2006) (holding that suppression of evidence is not required in all cases).

The "knock and announce rule" applies only where an officer attempts to enter a building by "breaking open" a door or window. "Breaking open" means simply entering without permission. *State v. Miller*, 7 Wn. App. 414, 419, 499 P.2d 241(1972). Therefore, the rule does not apply when officers enter the premises with the consent of an occupant as it does not constitute "breaking open." *State v. Hartnell*, 15 Wn. App. 410, 418, 550 P.2d 63 (1976). Importantly, this rule applies to both outer *and* inner doors. RCW 10.31.040. It also applies to the execution of both arrest and search warrants. *State v. Richard*, 87 Wn. App. 285, 289, 941

P.2d 710 (1997); *State v. Shelly*, 58 Wn. App. 908, 910, 795 P.2d 187 (1990).

The knock and announce rule is designed to reduce the potential for violence, to prevent the physical destruction of property, and to protect an occupant's privacy. *State v. Cardenas*, 146 Wn.2d 400, 411, 47 P.3d 127 (2002). Strict compliance with this rule is required unless exigent circumstances exist or police officers have a reasonable belief compliance would be dangerous or futile. *Id.* at 411–12, 47 P.3d 127; *State v. Richards*, 136 Wn.2d 361, 374, 962 P.2d 118 (1998). In some situations, when there is substantial compliance with the statute, the entry is valid. *State v. Reid*, 38 Wn. App. 203, 210, 687 P.2d 861 (1984) (finding substantial compliance when the police loudly announced themselves after opening a door that they thought was an outer hallway).

The U.S. Supreme Court, like the Washington State Supreme Court, has held that a "no-knock" entry is permissible where the police have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or would inhibit the effective investigation of the crime by allowing the destruction of evidence. *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997).

3.6(a) Types of Entry Requiring Notice

The phrase "break open" in Washington's knock and announce statute refers to all nonconsensual entries, not simply to those involving forcible breaking. *See State v. Richards*, 136 Wn.2d 361, 370–73, 962 P.2d 118 (1998). As a consensual entry is not "breaking open," officers have no duty to announce themselves in that situation. *See State v. Williamson*, 42 Wn. App. 208, 211, 710 P.2d 205 (1985). However, the circumstances must reasonably indicate that the occupant has actually consented to the officer's entry. *See State v. Sturgeon*, 46 Wn. App. 181, 183, 730 P.2d 93 (1986) (holding that the knock and announce statute was violated when the police knocked, the defendant shouted "yeah," and the police entered the apartment). If officers are attempting to gain entry to the residence through a "knock and talk" procedure and gain consent for a search, then the officer must announce he or she is an officer and inform the suspect that he or she has the right to refuse entry. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998); *see also State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011).

Even if the police are able to freely enter the residence, they must still announce themselves. For instance, when officers attempt to gain entry through an unlocked or open door. *See, e.g.*, *State v. Miller*, 7 Wn. App. 414, 416, 499 P.2d 241 (1972) (holding an entry unlawful when the

officer entered through an open door and did not announce his presence); *see also Coyle*, 95 Wn.2d at 6, 621 P.2d 1265 (holding that officer entering dwelling must give notice of his office and purpose even though door to apartment was partially open). Notice is also required for entry by use of a pass key. *See Ker*, 374 U.S. at 38–41, 83 S. Ct. 1623.

An officer's failure to knock and announce himself before entering a fenced backyard through an unlocked gate, however, does not violate RCW 10.31.040 when the officer can observe that the backyard is unoccupied. *State v. Schimpf*, 82 Wn. App. 61, 65, 914 P.2d 1206 (1996). The court in *Schimpf* determined that "a knock and announcement at the gate in these circumstances would serve none of the purposes of the rule and statute." *Id.* No one was present in the backyard, so there was little risk of violence; the unlocked gate allowed the deputy to enter without any property damage; and the low fence meant that the deputy could already see into the backyard, suggesting there were no significant privacy interests involved. *Id.*

3.6(b) Entry Obtained by Deception

The Washington State Supreme Court has held that consent obtained by deception may still be effective consent under certain circumstances. *State v. Myers*, 102 Wn.2d 548, 552, 689 P.2d 38 (1984), *modified on other grounds by State v. Lively*, 130 Wn.2d 1, 19–21, 921 P.2d 1035 (1996). If the ruse is unsuccessful, then the "knock and wait" requirement must be observed. *State v. Ellis*, 21 Wn. App. 123, 129, 584 P.2d 428 (1978).

For instance, in *State v. Myers*, the police obtained a search warrant. 102 Wn.2d at 549, 689 P.2d 38 (1984). They were aware it would be difficult to execute the warrant given that the doors and windows to the defendant's house were covered by iron bars and that the defendant kept a handgun. *Id*. Officers prepared a fictitious warrant for the defendant's arrest for a traffic offense. *Id.* at 550, 689 P.2d 38. Upon being permitted to enter his house, the police executed the search warrant. *Id.* The court held that even though the officers failed to announce their purpose to search, the occupant of the house had granted "valid permission" for them to enter. *Id.* at 554, 689 P.2d 38; *see also State v. Coyle*, 95 Wn.2d 1, 5, 621 P.2d 1265 (1980).

The *Myers* court determined this ruling was consistent with the interests underlying the knock and announce requirement. *See Myers*, 102 Wn.2d at 555, 689 P.2d 38. An occupant's right to privacy is protected because the occupant may not deny entry to police who possess a valid search warrant, there is no damage to property as the entry was consensual, and the possibility for violence is lower with consent. *State v. Richards*, 136 Wn.2d 361, 373, 962 P.2d 118 (1998). Thus, an officer need not

announce he is an officer or state his purpose because—as the suspect has given consent—no "breaking" occurs within the terms of the statute. *State v. Williamson*, 42 Wn. App. 208, 211, 710 P.2d 205 (1985).

Similarly, in *State v. Huckaby*, the court found the knock and announce statute inapplicable when undercover officers entered the suspect's home with the suspect's consent and for the apparent purpose of conducting a drug transaction. 15 Wn. App. 280, 290, 549 P.2d 35 (1976). *See generally* William D. Bremer, Annotation, *What Constitutes Compliance with Knock-and-Announce Rule in Search of Private Premises—State Cases*, 85 A.L.R. 5th 1 (2001).

3.6(c) Identification and Waiting Period

The police must wait only a reasonable period of time after they announce their presence before entering the residence if no one answers their knock. *State v. Cardenas*, 146 Wn.2d 400, 411, 47 P.3d 127 (2002); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.8(c), at 853–62 (5th ed. 2012). 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." *State v. Alldredge*, 73 Wn. App. 171, 177, 868 P.2d 183 (1994). 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 Wn. App. 532, 537 n.3, 596 P.2d 1090 (1979).

Whether the officer waited a reasonable amount of time is a question of law and is determined with regard to the particular circumstances of the case. *State v. Richards*, 136 Wn.2d 361, 374, 962 P.2d 118 (1998); *State v. Johnson*, 94 Wn. App. 882, 890, 974 P.2d 855 (1999). If it is clear that the inhabitants are aware of the police presence, the police may enter immediately. *See Richards*, 136 Wn.2d at 374, 962 P.2d 118 (holding that officers did not violate the knock and wait rule when they entered the apartment immediately after announcing their identity because they were visible through sliding screen door); *State v. Woodall*, 32 Wn. App. 407, 411, 647 P.2d 1051 (1982) *reversed on other grounds by State v. Woodall*, 100 Wn.2d 74, 666 P.2d 364 (1983) (holding three to four second wait reasonable when someone inside the clubhouse had seen the officers long before they reached the door and announced their presence).

So long as the police wait a reasonable amount of time after announcing their presence, they need not wait for an affirmative denial. *See United States v. Bustamante–Gamez*, 488 F.2d 4, 10–11 (9th Cir. 1973); *Richards*, 136 Wn.2d at 374, 962 P.2d 118. Denial of admittance may be implied from the occupant's lack of response. *See State v. Schmidt*, 48 Wn. App. 639, 644–45, 740 P.2d 351 (1987).

Because the length of a "reasonable" wait depends on the situation, courts have held that short waiting periods are appropriate if the suspect may be armed or the evidence is easily disposable. In *State v. Berlin*, the court held that the defendant's possession of weapons and his history of violence did "bear upon the reasonableness of the length of time that the police waited after announcing themselves." 46 Wn. App. 587, 593–94, 731 P.2d 548 (1987). In *State v. Schmidt*, the court found that a three-second wait was reasonable when there was the possibility that the occupants had been alerted to police presence by barking dogs, the suspect had a history of gun possession, and the place to be searched was a very small shed, meaning the knock could have been quickly answered. 48 Wn. App. at 646, 740 P.2d 351 (1987).

When an officer has satisfied the knock and announce requirements, but is met with a refusal, the officer may then use reasonable force to execute the warrant. *See* RCW 10.31.040; *State v. Young*, 76 Wn.2d 212, 216, 455 P.2d 595 (1969). The reasonableness of the force used by law enforcement is determined by the totality of the circumstances. *See State v. Coyle*, 95 Wn.2d 1, 9–11, 621 P.2d 1256 (1980).

3.6(d) Exceptions: Useless Gesture and Exigent Circumstances

Police are excused from compliance with the knock and announce rule when it would be a useless gesture or when the police face exigent circumstances. The State has the burden of demonstrating that exigent circumstances exist. *Ellis*, 21 Wn. App. at 125, 584 P.3d 428. Although Washington courts have not addressed this situation, at the federal level, law enforcement officers may be excused from the knock and announce requirement when covert entry of the premises is the only way to effectively execute the warrant. *See Dalia v. United States*, 441 U.S. 238, 247–48, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979).

Under the "useless gesture" exception, compliance with the knock and announce rule is excused if the officers are "virtually certain" that the occupants are aware of their presence and purpose on the premises. *Coyle*, 95 Wn.2d at 11, 621 P.2d 1265; *State v. Shelly*, 58 Wn. App. 908, 911, 795 P.2d 187 (1990). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.8(f), at 879–81 (5th ed. 2012). Once the defendant has opened the door and the police officers have identified themselves and their purpose, waiting for a grant or denial of entrance by the defendant is a useless gesture. *See Shelly*, 58 Wn. App. at 911, 795 P.2d 187. The useless gesture exception has also been applied 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 Wn. App. 713, 717, 519 P.2d 1328 (1974).

Officers may enter immediately and with force when exigent circumstances are present. *See Ker v. California*, 374 U.S. 23, 37–41, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); *State v. Cardenas*, 146 Wn.2d 400, 412, 47 P.3d 127 (2002); *State v. Young*, 76 Wn.2d 212, 216, 455 P.2d 595 (1969). Exigent circumstances exist, for example, when the evidence may be easily disposed, the defendant may escape, or the defendant poses a threat to public safety.

Washington has rejected the blanket rule, favored by some courts, that permits an unannounced entry when the warrant is for easily disposable items, such as drugs. *State v. Jeter*, 30 Wn. App. 360, 362, 634 P.2d 312 (1981). In Washington, the police must possess specific information indicating that the items are in imminent danger of destruction or removal. *See Young*, 76 Wn.2d at 215–16, 455 P.2d 595 (holding that belief of exigent circumstances cannot be based on suspicion or ambiguous acts); *State v. Dugger*, 12 Wn. App. 74, 81, 528 P.2d 274 (1974) (holding that destruction of evidence exigency was not established because prior to their entry police had heard nothing to suggest such destruction was in progress). *See generally* 2 LaFave, *supra*, § 4.8(d).

In Washington, the courts look to six factors to determine if exigent circumstances exist: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) whether there is strong reason to believe that the suspect is on the premises; (5) the likelihood that the suspect will escape if not swiftly apprehended; and (6) whether the entry is made peaceably. *Cardenas*, 146 Wn.2d at 406, 47 P.3d 127.

A police officer's reasonable belief that announcing his or her office and purpose would jeopardize police or public safety is another type of exigent circumstance. *See id.* at 410–12, 47 P.3d 127; *State v. Reid*, 38 Wn. App. 203, 209–10, 687 P.2d 861 (1984). A mere good faith concern for safety, however, is not sufficient. *Jeter*, 30 Wn. App. at 363, 634 P.2d 312 (finding no exigent circumstances existed when officer had prior knowledge of defendant's possession of gun but not of any propensity for defendant to use it to resist arrest). Police must know from prior information or from direct observation that the suspect both keeps weapons and has a propensity to use them. *State v. Allyn*, 40 Wn. App. 27, 31, 696 P.2d 45 (1985).

Finally, law enforcement may rely on the exigent circumstances exception when they obtained specific prior information that would lead them to believe that a suspect has made preparations to escape. *See State*

v. Gallo, 20 Wn. App. 717, 723–24, 582 P.2d 558 (1978) (holding that police had probable cause to believe the armed suspect was in his apartment; knocked and announced repeatedly without a response; and heard a sound of something being dragged across the floor, indicating either that "an escape was being attempted or that some fortification was being effected so as to resist arrest").

3.7 SEARCH AND DETENTION OF PERSONS ON THE PREMISES BEING SEARCHED

3.7(a) Detention of Persons on Premises Being Searched

A valid search warrant carries with it the authority to detain the occupants of the premises while the search is being conducted. *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981); *State v. Flores-Moreno*, 72 Wn. App. 733, 739, 866 P.2d 648 (1994). However, this authority is narrower than either a detention supported by probable cause or a *Terry* stop. *State v. King*, 89 Wn. App. 612, 618–19, 949 P.2d 856 (1998) (stating that a "narrower application is that even without probable cause or reasonable suspicion of criminal activity, it is reasonable for an officer executing a search warrant at a residence to briefly detain occupants of that residence, to insure officer safety and an orderly completion of the search"). To detain a person not listed in a search warrant, the police must have a reasonable, articulable suspicion that the person has committed or is about to commit a crime or that she is a threat to safety. *See State v. Parker*, 139 Wn.2d 486, 498, 987 P.2d 73 (1999).

In executing a search warrant, 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. *State v. Galloway*, 14 Wn. App. 200, 202, 540 P.2d 444 (1975), *abrogated on other grounds by State v. Russell*, 125 Wn.2d 24, 60, 882 P.2d 747 (1983). 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 Wn. App. 589, 592, 618 P.2d 1324 (1980).

3.7(b) 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 Wn.2d 641, 643, 870 P.2d 313 (1994). Officers have only the power to detain other persons who are present, but they may not conduct personal searches of the persons other than the occupant. *See State v. Worth*, 37 Wn. App. 889, 892, 683 P.2d 622 (1984); *State v. Galbert*, 70 Wn. App. 721, 727, 855 P.2d 310 (1993)

(rejecting "mere presence" of contraband as a justification to search persons who are merely located at the search scene). This protection extends to "readily recognizable personal effects . . . which an individual has under his control and seeks to preserve as private." *State v. Lohr*, 164 Wn. App. 414, 423, 263 P.3d 1287 (2011) (internal quotations omitted) (citing *Worth*, 37 Wn. App. at 893, 683 P.2d 622); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.9(b)–(c), at 894–902 (5th ed. 2012). Thus, if the police can identify the item as belonging to a person other than the occupant, they may not search it. *See Worth*, 37 Wn. App. at 893, 683 P.2d 622; *see also State v. Jackson*, 107 Wn. App. 646, 649, 27 P.3d 689 (2001) (holding that police properly searched a jacket where there was confusion over whether it was owned by the lawfully arrested driver or the non-arrested passenger).

This protection also extends to personal effects that are worn or held and those effects nearby the person at the time of the search: "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 Wn. App. at 893, 683 P.2d 622. The Washington State Supreme Court has held, however, that one has no privacy interest in items left at another's house. *See State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001) (holding that the defendant voluntarily abandoned her coat and, consequently, had no constitutionally protected privacy interest in coat's contents).

There are limited instances in which the police may conduct a search of a person on the premises but not named in the warrant. *State v. Broadnax*, 98 Wn.2d 289, 301, 654 P.2d 96 (1982). For searches conducted incident to arrest, see *infra* § 5.1. If the search is not incident to a lawful arrest, then police may only detain or search an individual other than the occupant if there is "presence plus." *Broadnax*, 98 Wn.2d at 301, 654 P.2d 96. "Presence plus" is detailed below.

Suspicious behavior. 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 Wn. App. 35, 38, 584 P.2d 408 (1978) (citations omitted). "Reasonable cause" requires that the person engage in some type of suspicious activity. *Broadnax*, 98 Wn.2d at 301, 654 P.2d 96. For instance, in the execution of a search warrant for narcotics, police were justified in searching a person's fists when, at the time of the officer's entry, the person was observed kneeling in front of a weighing scale and then rising with his fists clenched. *Halverson*, 21 Wn.

App. at 36–37, 584 P.2d 408. In contrast, police are not justified in searching a purse, however, when the owner of the purse gave no evidence of suspicious behavior. *Lohr*, 164 Wn. App. at 423, 263 P.3d 1287.

Search for weapons. Second, police may conduct a limited search for weapons to protect themselves during the execution of the warrant. *Ybarra v. Illinois*, 444 U.S. 85, 93, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *Broadnax*, 98 Wn.2d at 301, 654 P.2d 96; *State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980). The police must, however, have a reasonable suspicion that the person searched is armed. *State v. Lennon*, 94 Wn. App. 573, 580–81, 976 P.2d 121 (1999) (A "[g]eneralized suspicion" that people present during narcotic searches are often armed is insufficient to justify a search.). The search must also be limited to ascertaining whether the individual is armed. *See Allen*, 93 Wn.2d at 172, 606 P.2d 1235 (holding that an officer conducting a pat-down may not examine the contents of a wallet found on the individual "after satisfying himself that the 'bulge' [wallet] was not a weapon"). For a more detailed discussion, see *infra* § 4.5.

3.8 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. The nature of the items to be seized governs the permissible degree of intensity for the search. *State v. Lair*, 95 Wn.2d 706, 717, 630 P.2d 427 (1981) (holding that a search for marijuana has a high degree of intensity). "Any express or implied limitations or qualifications may reduce the scope of consent in duration, area, or intensity." *State v. Reichenbach*, 153 Wn.2d 126, 133, 101 P.3d 80 (2004). Once the purpose of the warrant has been carried out, the authority to search ends. *See State v. Legas*, 20 Wn. App. 535, 541, 581 P.2d 172 (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).

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 Wn. App. 889, 892, 683 P.2d 622 (1984) (citing *State v. White*, 13 Wn. App. 949, 538 P.2d 860 (1975)); *see also State v. Anderson*, 41 Wn. App. 85, 96, 702 P.2d 481 (1985) (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).

In a search for documents, courts have recognized that officers must, out of necessity, examine documents not specifically listed in the warrant.

See Andresen v. Maryland, 427 U.S. 463, 478, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976); *State v. Stenson*, 132 Wn.2d 668, 692–95, 940 P.2d 1239 (1997). 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." *Stenson*, 132 Wn.2d at 695, 940 P.2d 1239.

3.8(a) Area

Police "must execute a search warrant strictly within the bounds set by the warrant." *State v. Cheatam*, 112 Wn. App. 778, 783, 51 P.3d 138 (2002), *aff'd*, 150 Wn.2d 626 (2003) (citing *State v. Kelley*, 52 Wn. App. 581, 585, 762 P.2d 20 (1988)). But a search of the premises and outbuildings extends to the curtilage of the house as well. *See State v. Rivera*, 76 Wn. App. 519, 525, 888 P.2d 740 (1995) (citing *State v. Claflin*, 38 Wn. App. 847, 853, 690 P.2d 1186 (1984)). 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, 248, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (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 knowledge of police presence at the premises provoked that action. *See State v. Dearinger*, 73 Wn.2d 563, 567, 439 P.2d 971 (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).

As discussed further in section 3.4(c), above, a warrant that authorizes the search of a house with no mention of outbuildings does not include a search of outbuildings not under defendant's control. *State v. Kelley*, 52 Wn. App. 581, 586, 762 P.2d 20 (1988) (suppressing evidence located in a barn and garage that were not specified in the warrant); *see also State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997) (holding that warrant application describing drug buy at a mobile home did not give rise to probable cause to search travel trailer located on same property but not under suspect's control). Generally, where it is reasonable for an officer to believe that a storage area is appurtenant to the area covered by a valid search warrant, the officers may search the storage area. *See State v. Boyer*, 124 Wn. App. 593, 602, 102 P.3d 833 (2004).

It has been suggested that police may also enter adjacent areas if they reasonably fear for their safety, i.e., conduct a protective sweep. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.10(a), at 942–45 (5th ed. 2012). However, in Washington, the protective sweep incident to arrest has not

been extended to search warrants because no court has yet considered this question. *Boyer*, 124 Wn. App. at 602, 102 P.3d 833.

3.8(b) Personal Effects

See supra § 3.7(b). 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 Wn. App. 111, 114–15, 809 P.2d 228 (1991). In *Colin*, the court utilized RCW 10.79.080 and RCW 10.79.100 by analogy in determining standards of reasonableness. *Id.* In *State v. Hampton*, the court held that the strip search pursuant to a search warrant was reasonable because it was conducted in a reasonably private place, a police van with tinted windows, without unnecessary touching, and by persons of the defendant's gender. 114 Wn. App. 486, 494–95, 60 P.3d 95 (2002).

3.8(c) Vehicles

Officers with authority to search a residence for illegal drugs also have authority to search vehicles that are under the control of the defendant and located on the premises to be searched. *State v. Claflin*, 38 Wn. App. 847, 853, 690 P.2d 1186 (1984). But a trailer that is used as a residence is treated as a residential outbuilding rather than as a vehicle. *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997) (holding that because the trial court found that the defendant treated the trailer as his residence, the reviewing court treated it like a residential outbuilding). And police have no authority to search vehicles that are not within the curtilage of the home. *See, e.g.*, *State v. Graham*, 78 Wn. App. 44, 51–52, 896 P.2d 704 (1995) (holding that a truck parked next to, and slightly in, a public street is not within the curtilage of the house where there was no fence or other barrier between the occupant's yard and the street).

In *State v. Pourtes*, the court held that the street and the shoulder of the roadway were not within the curtilage of a residence. 49 Wn. App. 579, 581, 744 P.2d 644 (1987). Likewise, in *State v. Niedergang*, the court held that a 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. 43 Wn. App. 656, 662, 719 P.2d 576 (1986).

3.9 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 Wn.2d 61, 70, 917 P.2d 563 (1996) (search incident to arrest). *See generally infra* Chapter 5. For example, officers

may often see an incriminating object that was not listed in the warrant during a search and use the plain view and open view exceptions to seize that object. *See State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996) (explaining the "open view" doctrine); *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761 (1991) (explaining the "plain view" doctrine). Items may also be seized in order to show dominion and control of the premises. *State v. Weaver*, 38 Wn. App. 17, 22, 683 P.2d 1136 (1984).

3.10 DELIVERING WARRANT AND INVENTORY: REQUIREMENTS FOR EXECUTION OF WARRANTS

Washington statutes or court rules impose requirements on the execution of warrants beyond those mandated by the U.S. Constitution. For instance, in Washington, an officer shall give a copy of the warrant to the person who controls the premises being searched. CrR 2.3(d). If no one is present, the officer must post a copy of the warrant. *Id.* An inventory of articles taken must be made in the presence of at least one person other than the searching officer. *Id*.

Washington follows the majority rule which holds that defects relating to the delivery of a search warrant are ministerial and do not compel invalidation of the warrant absent a showing of prejudice. *State v. Temple*, 170 Wn. App. 156, 161 n.8, 285 P.3d 149 (2012). In *State v. Aase*, the court held that suppression was not required under either the federal or the state constitution when an officer conducted a search and took several minutes to provide the defendant with copy of warrant. 121 Wn. App. 558, 567, 89 P.3d 721 (2004). "Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits." *State v. Parker*, 28 Wn. App. 425, 426, 626 P.2d 508 (1981).

3.11 CHALLENGING THE CONTENT OF AN AFFIDAVIT

A defendant is generally entitled to examine an affidavit in order to challenge whether there was probable cause to issue the warrant. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *State v. Haywood*, 38 Wn. App. 117, 120, 684 P.2d 1337 (1984). Relevant issues relating to a challenge to an affidavit's contents include the disclosure of an informant's identity and misrepresentations or omissions in the affidavit.

3.11(a) Informant's Identity

The court may excise portions of an affidavit that identify a confidential or unnamed informant to protect the State's interest in

maintaining the confidentiality of such informants. *See State v. Moen*, 150 Wn.2d 221, 230, 76 P.3d 721 (2003); *see* CrR 4.7(f)(2) ("Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant.").

When the informant is undisclosed, however, the defendant lacks access to the very information he or she needs to challenge the veracity of an affidavit. *State v. Casal*, 103 Wn.2d 812, 818, 699 P.2d 1234 (1985). Courts have held that when the "informant provided information relating to probable cause only, rather than the defendant's guilt or innocence, disclosure of the identity of an informant is not required." *State v. Atchley*, 142 Wn. App. 147, 156, 173 P.3d 323 (2007); *see also Casal*, 103 Wn.2d at 815–16, 699 P.2d 1234.

There are instances, however, where fundamental fairness may require the disclosure of an informant's identity to assess the affiant's credibility or accuracy. *See State v. White*, 50 Wn. App. 858, 865, 751 P.2d 1202 (1988). In such cases, the court must balance the risks of disclosure against the risk that nondisclosure may conceal police perjury. *Id.*; *State v. Wolken*, 103 Wn.2d 823, 829, 700 P.2d 319 (1985). The discretionary nature of the rule recognizes that search warrant affidavits may contain some false allegations. *White*, 50 Wn. App. at 865, 751 P.2d 1202.

A defendant may be entitled to an *in camera* hearing on whether to disclose the informant's identity if the defendant "casts a reasonable doubt on the veracity of material representations made by the affiant." *White*, 50 Wn. App. at 865, 751 P.2d 1202 (quoting *Casal*, 103 Wn.2d at 820, 699 P.2d 1234). This hearing is available on only a "minimal showing of inconsistency." *Id.* Even so, "a *Casal* hearing is required only whe[n] a search warrant affidavit contains no other independent basis for establishing probable cause." *Id.* at 865 n.4, 751 P.2d 1202. 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, 751 P.2d 1202. But if the judge finds a substantial showing of falsehood, an open evidentiary hearing is required. *Id.*

3.11(b) Misrepresentations and Omissions in an Affidavit

A defendant may challenge the validity of a warrant based on a misrepresentation of fact in the supporting affidavit. *Franks*, 438 U.S. at 155–56, 98 S. Ct. 2674; *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007). The *Franks* test also applies to allegations of material omissions. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Under article I, section 7 of the Washington Constitution, the defendant must first make a substantial showing that a false statement in

the affidavit (1) was made either knowingly and intentionally or in reckless disregard for the truth, and (2) was necessary or material to the finding of probable cause. *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992); *see also Chenoweth*, 160 Wn.2d at 478–79, 158 P.3d 595. An omission or misrepresentation that was made in a negligent or grossly negligent manner will not give rise to a *Franks* hearing; the omission or misrepresentation must be made recklessly. *Chenoweth*, 160 Wn.2d at 478–79, 158 P.3d 595; *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). The showing must be based on specific facts and offers of proof rather than on conclusory assertions. *Garrison*, 118 Wn.2d at 872, 827 P.2d 1388.

If the defendant fails to meet these preconditions, the inquiry ends. *Chenoweth*, 160 Wn.2d at 479–81, 158 P.3d 595; *State v. Jackson*, 111 Wn. App. 660, 677, 46 P.3d 257 (2002). If the defendant is successful in proving the truth of his allegations, the affidavit must be examined with the false statements deleted and the omissions inserted. *State v. Atchley*, 142 Wn. App. 147, 158, 173 P.3d 323 (2007). 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. 2674; *Garrison*, 118 Wn.2d at 873, 827 P.2d 1388. Close cases should be assessed in favor of the defendant when the misstatements are removed from the affidavit. *United States v. Kelley*, 482 F.3d 1047 (9th Cir. 2007).

3.12 SPECIAL SITUATIONS

The search and seizures of materials protected by the First Amendment, intrusions into the body, and warrants directed at non-suspects require additional limitations.

3.12(a) First Amendment Materials

When a warrant authorizes the search of materials protected by the First Amendment it must "follow the Fourth Amendment's particularity requirement with 'scrupulous exactitude.'" *State v. Reep*, 161 Wn.2d 808, 815, 167 P.3d 1156 (2007) (internal citations omitted). Nothing should be "left to the discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). This includes warrants for books, pictures, films, or recordings. *State v. Perrone*, 119 Wn.2d 538, 547, 834 P.2d 611 (1992); *see Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

If the objects to be seized are books or films, and are being seized because of their content, the requirement of particularity is especially important." *Perrone*, 119 Wn.2d at 548, 834 P.2d 611; *see also* 2 Wayne

R. LaFave, *Search and Seizure* § 4.6(e) (5th ed. 2012). Oftentimes, the seizure of protected materials happens to be allegedly obscene material. 2 LaFave, *supra*, § 4.6(e), at 812 ("a description of these materials by title or similar identifying characteristic, or by a specific statement as to the type of contents which would render the materials presumptively obscene" is required). For instance, in *State v. Perrone*, the court held that a warrant for "child pornography" was insufficiently particular because pornography implicates "obscenity," a term that is presumptively protected by the First Amendment. 119 Wn.2d 538, 547, 834 P.2d 611 (1992).

Likewise, in *State v. Reep*, the court held that "the fictitious crime of 'child sex' is even broader and more ambiguous than the term 'child . . . pornography.'" 161 Wn.2d 808, 815, 167 P.3d 1156 (2007). In contrast, in the Ninth Circuit, a warrant for "computers, compact disks, floppy disks, hard drives, memory cards, printers, and other portable digital devices, DVDs, and video tapes" was not too broad, as the computer-related equipment was described in the narrowest terms reasonably likely to contain the images. *States v. Brobst*, 558 F.3d 982 (9th Cir. 2009).

The scrupulous exactitude standard has not been extended to all searches and seizures involving the First Amendment. *State v. Walter*, 66 Wn. App. 862, 869, 833 P.2d 440 (1992) (citing *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986)) (determining that greater scrutiny was not required merely because photographs were involved). For instance, computers themselves are not subject to heightened protection just because they frequently store material protected by the First Amendment. *United States v. Giberson*, 527 F.3d 882 (9th Cir. 2008).

Lastly, in some cases, a search warrant has been found to satisfy the particularity requirement despite having a catchall phrase. In *Andresen v. Maryland*, the U.S. Supreme Court upheld a search warrant that listed specific documents pertaining to a particular crime, but then added the catchall phrase "together with other fruits, instrumentalities, and evidence of crime." 427 U.S. 463, 479–82, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). The *Anderson* ruling was in sharp contrast to *United States v. Heredia*. In *Heredia*, the Ninth Circuit found a warrant for "any and all" records related to a certain organization too broad because the organization had not been shown to be pervasively criminal. 483 F.3d 913 (9th Cir. 2007).

3.12(b) Intrusions into the Body

Under both the Fourth Amendment and article I, section 7 of the Washington State Constitution, a forced intrusion into the body is a search.

Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). This includes, among other things, DNA sampling, tests of a defendant's blood for alcohol content, breathalyzer tests, cavity searches, and strip searches.

If the defendant voluntarily discards bodily fluids, no warrant is necessary. *State v. Athan*, 160 Wn.2d 354, 367, 158 P.3d 27 (2007) (finding no privacy interest in saliva on envelope mailed to the defendant by a police officer posing as an attorney). A trial court may also order samples to be taken from the defendant's body; however, the court's power to do so is subject to constitutional limitations. CrR 4.7(b)(2)(vi); *see Garcia-Salgado*, 170 Wn.2d at 185–86, 240 P.3d 153 (2010). Thus, intrusion into the body is covered by the warrant requirement.

For an intrusion into the body, the regular requirements under article I, section 7 and the Fourth Amendment apply. *State v. Kalakosky*, 121 Wn.2d 525, 532, 852 P.2d 1064 (1993) (holding that valid search warrant based on probable cause is constitutionally sufficient to obtain blood sample from suspect). However, three more requirements must be met: (1) there must be a "clear indication" that the desired evidence will be found if the search is performed, (2) the method of searching must be reasonable, and (3) the search must be performed in a reasonable manner. *Schmerber v. California*, 384 U.S. 757, 770–72, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *Garcia-Salgado*, 170 Wn.2d at 184–85, 240 P.3d 153.

When alcohol content of the defendant's blood is an element of the crime, however, the police may take a blood sample without a warrant if the test used to measure blood alcohol content is reasonable and performed in a reasonable manner. *State v. Curran*, 116 Wn.2d 174, 185, 804 P.2d 558 (1991), *abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). For example, taking a blood sample from a defendant charged with negligent homicide was valid when the police have probable cause to believe that evidence of intoxication will be found and the test used to measure blood alcohol content is reasonable and performed in a reasonable manner. *State v. Judge*, 100 Wn.2d 706, 712, 675 P.2d 219 (1984).

Washington has also upheld mandatory blood testing in certain cases; for instance, in the case of putative fathers. *See State v. Meacham*, 93 Wn.2d 735, 739, 612 P.2d 795 (1980). Washington mandatory HIV and DNA testing of convicted sexual offenders is permissible. *Kalakosky*, 121 Wn.2d at 536, 852 P.2d 1064 (1993) (upholding mandatory HIV testing of sexual offenders as it presents a minimal Fourth Amendment intrusion for which the State's reasons are compelling); *State v. Olivas*, 122 Wn.2d 73, 93, 856 P.2d 1076 (1993) (upholding mandatory DNA testing of convicted

sexual offenders in order to establish DNA databank). It is also permissible to take DNA samples from convicted felons. *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007) (upholding mandatory DNA testing of felons without a warrant). Once the police have the DNA sample in their possession, they may compare it to unrelated cases without a warrant. *State v. Gregory*, 158 Wn.2d 759, 826–27, 147 P.3d 120 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

More intrusive procedures may be permitted in special environments. In prisons and jails, strip searches and cavity searches may be done without a warrant. *State v. Harris*, 66 Wn. App. 636, 642, 833 P.2d 402 (1992) (finding exigent circumstances justified strip search of juvenile before placement in holding cell when police had prior experience with gang members taping razor blades to their skin); *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (finding full body cavity searches of prison inmates following contact visits not unreasonable). Similar intrusive procedures may be allowed at the country's borders. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) (holding that suspect fitting the profile for a 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. The U.S. Supreme Court also upheld the use of DNA sampling for persons arrested for, but not convicted of, a crime. *See Maryland v. King*, 569 U.S. 435, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

3.12(c) Warrants Directed at Non-suspects

The Fourth Amendment also applies to non-suspects. *Zurcher v. Stanford Daily*, 436 U.S. 547, 559–60, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978). 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* Peter A. Pastore, *The Reasonableness of Warranted Searches of Nonsuspect Third Parties*, 44 Alb. L. Rev. 212, 232–35 (1979). In response to *Zurcher*, Congress enacted the Privacy Protection Act of 1980 (PPA), which 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. §§ 2000aa to 2000aa-12.

These protections have not been extended outside the media, and Washington has not yet addressed the issue. *See generally* 2 Wayne R.

LaFave, *Search and Seizure* §§ 4.2(c), 4.1(f)–(i) (5th ed. 2012). Disputes often occur over the search of non-suspect attorneys' offices. *See, e.g.*, *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).

CHAPTER 4

Seizure of the Person: Arrests and Stop-and-Frisks

This chapter covers principles that are unique to seizure of a person. This chapter will discuss the following: (1) the basics of arrests, both with and without warrants, for felony charges and misdemeanor charges; (2) the specifics of arrests, such as force, custodial arrests for minor offenses, judicial review, and booking charges; and (3) *Terry* stops, including the reasonable suspicion standard, frisks, investigative questioning, and the dimensions of a reasonable stop.

4.0 SEIZURE

Article I, section 7, provides greater protections for individual privacy interests than the Fourth Amendment. *State v. Winterstein*, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009). In Washington, a seizure occurs when a reasonable person under the totality of the circumstances would not feel free either to leave or to decline an officer's requests due to the officer's use of force or display of authority. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003).

Unlike the Fourth Amendment, Washington's standard is a purely objective one. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009); *see also California v. Hodari D.*, 499 U.S. 621, 626–29, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). To determine whether a reasonable person would feel free to leave, courts consider the officer's conduct. *See O'Neill*, 148 Wn.2d at 574, 62 P.3d 489; *see also Harrington*, 167 Wn.2d at 663, 222 P.3d 92. Thus, the relevant question is whether, under the circumstances, the officer's conduct would have communicated to a reasonable person that he or she was not free to leave. *O'Neill*, 148 Wn.2d at 574, 62 P.3d 489; *State v. Avila-Avina*, 99 Wn. App. 9, 14, 991 P.2d 720 (2000), *abrogated on other grounds by Winterstein*, 167 Wn.2d 620, 220 P.3d 1226. The defendant has the burden of proving that a seizure occurred

in violation of article I, section 7. *See O'Neill*, 99 Wn. App. at 574, 62 P.3d 489.

Coercive conduct that constitutes a seizure is established by a series of acts, rather than a single act. *See State v. Soto-Garcia*, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992), *abrogated on other grounds by State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996). The Washington State Supreme Court has embraced a nonexclusive list of factors that likely result in a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554–55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

If the officers merely ask the defendant a few questions or ask for identification, however, they have initiated a social contact, not a seizure. *See Harrington*, 167 Wn.2d at 664–65, 222 P.3d 92 (finding a social contact when only one officer was present, the defendant had use of the sidewalk, and the police officer was on foot); *State v. Hansen*, 99 Wn. App. 575, 576, 994 P.2d 855 (2000) (holding that handing defendant's identification from one officer to another for the purpose of identification does not amount to a seizure); *see supra* Chapter 1.

When an individual consents to the police–civilian contact, that interaction may or may not constitute a seizure. *See, e.g.*, *Morales v. New York*, 396 U.S. 102, 90 S. Ct. 291, 24 L. Ed. 2d 299 (1969*)* (remanded to determine whether defendant's "confrontation with the police was voluntarily undertaken by him"). Federal courts have considered the question of whether a defendant's consent was really "voluntary." *See, e.g.*, *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003); *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). In such cases, courts have considered the totality of circumstances including the following factors:

> [T]he time, place and purpose of the encounter; the words used by the officer, his tone of voice and general demeanor in requesting the defendant to accompany him to the police station; the officer's statements to others who were present during the encounter; the manner in which the defendant was escorted out of the house and transported to the stationhouse; the officer's response to any questions by the defendant or his parents regarding the defendant's right to refuse to go to the stationhouse; and the defendant's verbal or non-verbal responses to any directions given to him by the officer.

3 Wayne R. LaFave, *Search and Seizure* § 5.1(a), at 5–6 (5th ed. 2012). Similarly, in Washington, a seizure was found when the defendant

voluntarily entered a police car that could not be opened from inside. *Avila-Avina*, 99 Wn. App. at 14, 991 P.2d 720. In situations where there is more than one police officer or the officers use a threatening tone, the court has found seizures as well. *See Harrington*, 167 Wn.2d at 660, 222 P.3d 92 (arrival of second police officer and request to pat down instigated a seizure); *State v. Gleason*, 70 Wn. App. 13, 17, 851 P.2d 731 (1993) (seizure found when two officers were present, and one officer yelled "[c]an I talk to you a minute?" to the suspect, approached him, and requested identification).

4.1 ARREST

A defendant is placed under arrest when "a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person." *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651 (2009). The moment of arrest occurs when the officer manifests this intent, not when the officer actually restrains the defendant. *Id.* (holding that a defendant was under arrest at the point when officer told him he was under arrest even though the defendant ran).

To determine whether a person has been arrested the court asks "whether a reasonable person in the suspect's position at the time would have thought so." *State v. Rivard*, 131 Wn.2d 63, 75, 929 P.2d 413 (1997). The subjective intent of the arresting officer is irrelevant. *State v. Radka*, 120 Wn. App. 43, 50, 83 P.3d 1038 (2004). For instance, in *State v. Rivard*, the court found that no arrest occurred because the defendant was not physically apprehended, restrained, handcuffed, or placed in a police vehicle. 131 Wn.2d at 75, 929 P.2d 413. Similarly, in *State v. Radka*, the court found no arrest even though the defendant was told he was under arrest and placed in a patrol car because he was neither frisked nor handcuffed, and he was allowed to make calls on his cell phone. 120 Wn. App. at 50, 83 P.3d 1038.

Although a seizure restrains an individual's freedom of movement, not all seizures amount to arrests. *See State v. Lyons*, 85 Wn. App. 267, 270, 932 P.2d 188 (1997) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (finding investigative detention was not transformed into an arrest when the investigating officer physically restrained a suspect and stated that he was under arrest)). For instance, a seizure, but not necessarily an arrest, has taken place when a police officer asks an individual to step out of his or her car during a stop. *See State v. O'Neill*, 148 Wn.2d 564, 581–82, 62 P.3d 489 (2003).

It is not a defense in a criminal prosecution that a defendant was illegally arrested. *Ker v. Illinois*, 119 U.S. 436, 444, 7 S. Ct. 225, 30 L. Ed. 421 (1886); *State v. Waters*, 93 Wn. App. 969, 976, 971 P.2d 538 (1999).

The legality of the arrest, however, affects the legality of any search or confession that takes place after the arrest, as well as the admissibility of evidence derived from the arrest. *See generally infra* Chapter 7.

4.2 ARRESTS WITHOUT WARRANTS

Arrests are not subject to the same strict warrant requirements as searches, giving officers more freedom to arrest without a warrant. This section summarizes general rules for warrantless arrests in public places and in the home. This section also examines the standards for warrantless arrests for felony offenses and for misdemeanors.

4.2(a) Public Arrests

An officer may make a warrantless felony arrest in a public place even though the officer had time to obtain a warrant. *State v. Solberg*, 122 Wn.2d 688, 696, 861 P.2d 460 (1993) (citing *United States v. Watson*, 423 U.S. 411, 422–24, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)). Such arrests must be supported by probable cause. *Id.*; 3 Wayne R. LaFave, *Search and Seizure* § 5.1(b), at 22–23 (5th ed. 2012). "Probable cause exists when the arresting officer is aware of facts or circumstances . . . sufficient to cause a reasonable officer to believe a crime has been committed." *State v. Moore*, 161 Wn.2d 880, 887, 169 P.3d 469 (2007) (emphasis removed) (citing *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004)); *see Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003).

Probable cause must be specific to the individual arrested; thus, if an officer smells marijuana emanating from a vehicle and two individuals are present, the officer may not arrest both if he cannot discern where the odor is coming from. *State v. Grande*, 164 Wn.2d 135, 146, 187 P.3d 248 (2008). Probable cause, however, is not subject to calculation by formula or by mathematical certainty. *See State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731 (1995); *see also supra* Chapter 2.

A defendant is entitled to a prompt judicial determination of probable cause following a warrantless arrest. *Westerman v. Cary*, 125 Wn.2d 277, 295, 892 P.2d 1067 (1994); *see Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) ("Once the suspect is in custody . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate."); *see also infra* § 4.4(c).

4.2(b) Home Arrests

Although officers may make a warrantless arrest in a public area, they may not make a warrantless arrest after a nonconsensual entry into a

suspect's home. *State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d 172 (2011) (citing *Payton v. New York*, 445 U.S. 573, 589–90, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)). If the officers have a warrant, they may enter the home if they reasonably believe the defendant resides therein. *State v. Hatchie*, 161 Wn.2d 390, 395–96, 166 P.3d 698 (2007); *see infra* § 4.3(c) (discussing *Hatchie*). The defendant's home includes trailers even when the "trailer home [is] so small that [the defendant] could open the front door while lying in his bed." *United States v. Quaempts*, 411 F.3d 1046, 1047 (9th Cir. 2005). Washington courts have not extended the protections provided by *Payton* beyond the home. *See State v. White*, 129 Wn.2d 105, 109, 915 P.2d 1099 (1996).

In Washington, 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 Wn.2d 688, 697, 861 P.2d 460 (1993) (citing *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89 (1985)). The location of the suspect, not the location of the officer, is material to the issue of whether an arrest occurs in the home. *Holeman*, 103 Wn.2d at 429, 693 P.2d 89; *see Solberg*, 122 Wn.2d at 697, 861 P.2d 460. And if the officers force the suspect out of his home, the arrest is considered as taking place inside the home. *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985). Notably, an arrest of a suspect who is on a front porch, as opposed to in the doorway, is considered a public arrest. *See Solberg*, 122 Wn.2d at 700, 861 P.2d 460 ("[T]he protections afforded in *Payton* clearly do not apply outside the physical boundaries of the home as the theoretical basis of the *Payton* decision is that an arrest within a home violates the sanctity of the home whereas outside the boundaries of the home, no such violation is present.").

Washington courts have not adopted the bright-line rule applied under the Fourth Amendment that an officer may, in all circumstances, accompany an arrestee into the arrestee's home after the arrest. *See State v. Chrisman*, 100 Wn.2d 814, 820–21, 676 P.2d 419 (1984); *see also State v. Kull*, 155 Wn.2d 80, 86, 118 P.3d 307 (2005). 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, evidence might be destroyed, or escape is a strong possibility. *Kull*, 155 Wn.2d at 88–89, 118 P.3d 307 (finding that the officer could not follow the defendant into her house because he did not fear for his safety and had no other justification). If the officer knows of specific, articulable facts that indicate a threat to the officer's safety, the officer may follow the defendant inside. *State v. Wood*, 45 Wn. App. 299, 308–09, 725 P.2d 435 (1986) (finding that sufficient reason existed to accompany the arrestee

into residence for security purposes when the officer was executing an arrest warrant for a felony parole violation). An officer may also enter a home without a warrant under exigent circumstances or in response to a medical emergency. *Eserjose*, 171 Wn.2d at 912, 259 P.3d 172; *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000); *see infra* §§ 5.12–5.14 (exigent circumstances).

A warrantless search based on the emergency exception is valid only if

> (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.

Kinzy, 141 Wn.2d at 386, 5 P.3d 668; *State v. Gibson*, 104 Wn. App. 792, 796–97, 17 P.3d 635 (2001) (upholding arrest of defendant under emergency exception when officers entered house to secure the safety of the children before arresting defendant).

4.2(c) Felony Arrest

Under the common law standard and the Fourth Amendment, the authority to arrest without a warrant applies to felonies. *United States v. Watson*, 423 U.S. 411, 422–23, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976); *Kellogg v. State*, 94 Wn.2d 851, 854, 621 P.2d 133 (1980).

An officer may arrest for a felony committed outside of his presence if "he has reasonable grounds to believe that (1) the offense committed is a felony, and (2) the person apprehended committed the felony." RCW 10.31.100; *see also Watson*, 423 U.S. at 422–23, 96 S. Ct. 820. In deciding whether an officer had a reasonable belief that a felony was committed, the court must consider all of the information known to the officer at the time of the arrest, as well as the officer's expertise. *State v. Rose*, 175 Wn.2d 10, 22, 282 P.3d 1087 (2012) (holding that plain view of pipe with residue, coupled with the detective's training, provided cause to make a warrantless arrest).

An officer may also make an arrest without a warrant for the purpose of preventing the commission of a felony. *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966) (holding that there was probable cause to arrest without a warrant when the officers first saw the defendant at 4 a.m., he appeared to have come from behind or out of some business houses in an area containing just a few such businesses, he was wearing one hat and was carrying two others, the police automobile drove past him, stopped and backed up, and he took flight.); *State v. Cottrell*, 86 Wn.2d 130, 542

P.2d 771 (1975) (holding that there was probable cause to arrest when the officer had recently seen the defendant in possession of controlled substances and had additional reliable information suggesting the same).

4.2(d) Misdemeanor Arrest

To make a warrantless misdemeanor arrest, an officer must have probable cause to believe that a misdemeanor is being committed in his presence. RCW 10.31.100; *State v. Green*, 150 Wn.2d 740, 742, 82 P.3d 239 (2004) (per curiam). Under common law, an officer has the authority to make a warrantless arrest of a person who breaches the peace, but the authority is not limited to such offenses. *See Kalmas v. Wagner*, 133 Wn.2d 210, 218, 943 P.2d 1369 (1997); 3 Wayne R. LaFave, *Search and Seizure* § 5.1(b), at 15–17 (5th ed. 2012). *But see Atwater v. Lago Vista*, 532 U.S. 318, 327, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001). If a misdemeanor is committed in the presence of the officer, the officer may arrest without a warrant. *Green*, 150 Wn.2d at 742, 82 P.3d 239. The common law presence rule is not constitutionally mandated; consequently, Washington's rule is broader, allowing an officer to make a warrantless misdemeanor arrest even when the offense is not committed in the officer's presence. RCW 10.31.100; *see United States v. Watson*, 423 U.S. 411, 418–21, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).

In Washington, an officer may make a warrantless misdemeanor arrest if the offense (1) involves criminal trespass, physical harm, or the threat of physical harm to persons or property; (2) is for possession of marijuana, or possession or consumption of alcohol by a minor; (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. RCW 10.31.100. 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 Wn. App. 482, 485, 735 P.2d 1353 (1987).

The "in the presence" requirement of RCW 10.31.100 is satisfied whenever the officer directly perceives facts permitting a reasonable inference that a misdemeanor is being committed. *See Tacoma v. Harris*, 73 Wn.2d 123, 126, 436 P.2d 770 (1968). *See generally* 3 LaFave, *supra*, § 5.1(c) (discussing what constitutes "in the presence"). Common issues include whether the officer must view all the elements of a crime and what types of information may be used to fill in "gaps." *See Tacoma*, 73 Wn.2d at 126, 436 P.2d 770. The arresting officer need not, however, observe the events. Under Washington law, an officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor when the

offense is committed in the presence of any officer, not limited to the presence of only the arresting office. RCW 10.31.100.

4.3 ARRESTS WITH WARRANTS

4.3(a) Issuance of Arrest Warrants

In Washington, the issuance of arrest warrants in all state criminal proceedings is authorized by court rules. Specifically, the authority to issue a warrant and the formal requirements for arrest warrants are governed by CrR 2.2 and CrRLJ 2.02.

For superior court proceedings, CrR 2.2(a) requires that an arrest warrant be based upon an indictment or information filed by the prosecuting attorney pursuant to CrR 2.1. If there is an indictment or information filed, the court may issue an arrest warrant for a defendant. A warrant of arrest must be supported by an affidavit or sworn testimony establishing the grounds for issuing the warrant, and the court must determine that there is probable cause for its issuance. *See* CrR 2.2(b) ("A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged."). Similarly, in district court, CrRLJ 2.2(a) provides that the filing of a criminal complaint may support the issuance of an arrest warrant.

The requirements of an arrest warrant are set forth by CrR 2.2(c) and CrRLJ 2.2(c). For supervisory court proceedings, "a warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify the name of the defendant, or if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty." *State v. Rollie M.*, 41 Wn. App. 55, 701 P.2d 1123 (1985) ("John Doe" warrant; a warrant authorizing the search of unnamed and undescribed persons is too unspecific to be valid). The warrant must also designate the offense charged in statutory terms. CrR 2.2(c) ("The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged . . . .").

A defendant who is in custody pursuant to a warrant or summons will not be released due to an irregularity in the warrant or summons. CrR(f)(2); CrR(f)(2). Instead, the warrant or summons may be amended so as to remedy any irregularity. *Id*.

4.3(b) Return of Arrest Warrants

In Washington, "[a]t the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled." CrR 2.2(e); CrRLJ 2.2(e). When a person is delivered a summons, he or she shall, on or before the return date, file a return with the court. *Id*. The court may also order the warrant returned to it upon reasonable cause. *Id*.

4.3(c) Execution of Arrest Warrants

An officer with a valid warrant may enter a home without permission to make an arrest. *See State v. Hatchie*, 161 Wn.2d 390, 395–97, 166 P.3d 698 (2007) (holding that a misdemeanor warrant allowed the officers to enter the residence). However, Washington courts recognize "that the presence of an officer, which is initially lawful, can be rendered unlawful by his movement." *State v. Chrisman*, 100 Wn.2d 814, 820, 676 P.2d 419 (1984). A valid arrest warrant gives police "only the limited ability to enter the residence, find the suspect, arrest him, and leave." *Hatchie*, 161 Wn.2d at 400, 166 P.3d 698.

The principles governing the procurement and execution of search warrants generally apply to arrest warrants. *See supra* Chapter 3. Thus, an invalid warrant will not support an arrest. *State v. Nall*, 117 Wn. App. 647, 651, 72 P.3d 200 (2003) (holding that an invalid Oregon warrant will not support arrest in Washington); *see Whiteley v. Warden*, 401 U.S. 560, 568–69, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971); 3 Wayne R. LaFave, *Search and Seizure* § 5.1(h), at 86–88 (5th ed. 2012). Even if the arrest is based on a mistaken "hot sheet" and is made in goodwill, the arrest is unlawful. *State v. Mance*, 82 Wn. App. 539, 542, 918 P.2d 527 (1996).

With a valid warrant, an arrest is lawful if the officer has reasonably articulable grounds to believe that the suspect is the intended arrestee named in the warrant. *State v. Smith*, 102 Wn.2d 449, 453–54, 688 P.2d 146 (1984). If doubt arises as to identity, the officer is expected to immediately take reasonable steps to confirm or deny that the warrant applies to the person being held. *Id*. at 454, 688 P.2d 146. 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 id*. (applying *Sanders v. United States*, 339 A.2d 373, 379 (D.C. Cir. 1975), and finding the seizure unlawful because the defendant only fit a general description and the officer failed to take steps to verify the specific information).

A person arrested under the authority of a warrant must first be read the warrant. *See* RCW 10.31.030. The rules surrounding the execution of an arrest warrant are ministerial, and substantial compliance with RCW 10.31.030 is all that is required for a valid arrest. *State v. Simmons*, 35 Wn. App. 421, 423, 667 P.2d 133 (1983). After arrest, if the person wishes to

deposit bail, he or she must be taken without delay before a judge. RCW 10.31.030; *State v. Caldera*, 84 Wn. App. 527, 528, 929 P.2d 482 (1997) (per curiam) (finding illegal a search of two defendants when the search occurred prior to them being read the warrant or being taken before a judge to deposit bail). However, the plain language of RCW 10.31.030 does not require the officer to take the defendant to the nearest detention station. *State v. Ross*, 106 Wn. App. 876, 881, 26 P.3d 298 (2001).

4.4 ARRESTS: MISCELLANEOUS REQUIREMENTS

Even with a warrant, an officer may not make an arrest in any manner that he or she chooses. There are further limitations on the use of deadly force, booking charges, judicial review, and custodial arrest for minor offenses. This section introduces these various rules in more detail.

4.4(a) Use of Force

An officer is permitted to use reasonable force to make an arrest, and an officer can use deadly force if such force reasonably appears 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, 85 L. Ed. 2d 1 (1985). If the defendant does not pose a threat to the officer, the officer is restricted in the force he can use. *Bryan v. MacPherson*, 630 F.3d 805, 826–31 (9th Cir. 2010) (taser following stop for failure to wear seat belt was excessive when arrestee did not pose immediate threat to officer and officer did not warn arrestee taser would be used). Deadly force is restricted even further and is appropriate only when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3, 105 S. Ct. 1694 (holding that police were not permitted to shoot an unarmed, fleeing burglary suspect).

In Washington, the amount of force an officer may use is governed by statute to the extent consistent with the *Garner* ruling. *See* RCW 10.31.050 ("If after notice of the intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest."); RCW 9A.16.040 (listing specific situations in which an officer is justified in using deadly force). The legislature specifically limited the use of deadly force under RCW 9A.16.040(1)(c) to 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." RCW 9A.16.040(2). The use of deadly force by a public officer can be justified "to overcome actual resistance to the execution of the legal process . . . or in the discharge of a legal duty." RCW 9A.16.040(1)(b).

In 2018, Washington voters approved Initiative 940 which imposed both an objective and subjective good faith standard on the use of deadly force by law enforcement officers. The objective good faith test is met if a reasonable officer, in light of all the facts and circumstances known to the officer at the time, would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual. The subjective good faith test is met if the officer intended to use deadly force for a lawful purpose and sincerely and in good faith believed that the use of deadly force was warranted in the circumstance. RCW 9A.16.040.

4.4(b) Significance of Booking and Crime Charged

Courts differ about whether a suspect being booked for one offense may be formally charged with another offense. On the one hand, if the booking and formal charges do not need to 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* § 5.1(e) (5th ed. 2012).

In Washington, the formal charge may differ from the booking charge. *See State v. Teuber*, 19 Wn. App. 651, 655–56, 577 P.2d 147 (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 Wn.2d 598, 606–07, 364 P.2d 527 (1961).

4.4(c) Judicial Review

A person arrested without a warrant is entitled to a post-arrest probable cause determination. *Westerman v. Cary*, 125 Wn.2d 277, 295, 892 P.2d 1067 (1994); *see Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) ("Once the suspect is in custody . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate."). A neutral and detached magistrate must make the probable cause determination, but the hearing may be ex parte. *See Gerstein*, 420 U.S. at 119–23, 95 S. Ct. 854. Courts have not resolved the issue of whether a violation of the *Gerstein* rule requires suppression of evidence seized after the arrest. *See* 3 Wayne R. LaFave, *Search and Seizure* § 5.1(g), at 70–76 (5th ed. 2012).

4.4(d) Custodial Arrests for Minor Offenses

"If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. Lago Vista*, 532 U.S. 318, 354–55, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) (upholding the arrest of an individual for failing to secure herself and her children with safety belts). Washington's additional protection for privacy rights, however, requires the court to draw the line differently than the U.S. Supreme Court. *State v. Pulfrey*, 120 Wn. App. 270, 283, 86 P.3d 790 (2004), *aff'd*, 154 Wn.2d 517, 528, 111 P.3d 1162 (2005) (affirming but not deciding the constitutional issue).

Under RCW 46.64.015, 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. RCW 46.64.015; *see State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004); *see also State v. Reding*, 119 Wn.2d 685, 689, 835 P.2d 1019 (1992). "[A]s 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 Wn.2d 45, 47, 578 P.2d 527 (1978); *see also* 3 Wayne R. LaFave, *Search and Seizure* § 5.2(g), at 162–164 & n.149 (5th ed. 2012). In *Hehman*, the Supreme Court of Washington 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." 90 Wn.2d at 50, 578 P.2d 527.

Custodial arrests are permissible, however, for non-minor traffic offenses such as reckless driving and driving with a suspended license. *Pulfrey*, 154 Wn.2d at 528, 111 P.3d 1162; *State v. Carner*, 28 Wn. App. 439, 444, 624 P.2d 204 (1981) (finding arrest proper when minor tried to evade police on his motorcycle). Also, the officer may make a custodial arrest when the circumstances surrounding the arrest dictate transferring the violator to another location for completion of the arrest process. *See State v. LaTourette*, 49 Wn. App. 119, 125, 741 P.2d 1033 (1987) (finding that the officers' decision to move arrestee to another location to complete arrest for reckless driving was proper when a hostile crowd gathered in parking lot).

When civil proceedings are involved, custodial arrests may be improper. The Supreme Court of Washington has held a statute unconstitutional that authorized the custodial arrest of any person against whom a paternity complaint is filed. *See State v. Klinker*, 85 Wn.2d 509, 524, 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*.

4.5 INTRODUCTION TO *TERRY* STOPS

In some situations, police may make investigatory stops that fall short of arrests and are based on proof less than probable cause. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Snapp*, 174 Wn.2d 177, 197–98, 275 P.3d 289 (2012). Although these brief detentions, known as "*Terry* stops," fall within the scope of the Fourth Amendment, the public interests in crime detection and the relative non-intrusiveness of the stop permit a lower standard of proof. *See Terry*, 392 U.S. at 20–27, 88 S. Ct. 1868. Thus, the investigatory stop is tested against the Fourth Amendment's general proscription of unreasonable searches and seizures rather than the probable cause requirement. *See id*. at 21, 88 S. Ct. 1868.

For a seizure to be permissible, an officer must have a reasonable suspicion that the person stopped is engaged in criminal conduct. *State v. Doughty*, 170 Wn.2d 57, 62–63, 239 P.3d 573 (2010). The question is "whether the officer had 'specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" *State v. Kennedy*, 107 Wn.2d 1, 5, 726 P.2d 445 (1986) (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. (1868)); *see also Doughty*, 170 Wn.2d at 62–63, 239 P.3d 573. Under article I, section 7 of the Washington Constitution, reasonable suspicion requires consideration of the totality of the circumstances, including the officer's subjective belief. *See State v. Ladson*, 138 Wn.2d 343, 358–59, 979 P.2d 833 (1999). *See generally supra* § 2.9(b). For a discussion of the use of the reasonable suspicion standard in special environments, see *infra* §§ 6.1 (schools), 6.3 (borders). *See also* 4 Wayne R. LaFave, *Search and Seizure* §§ 9.3(b) (routine traffic stops), 9.7 (roadblocks), 9.8 (other brief detentions) (5th ed. 2012).

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, 60 L. Ed. 2d 824 (1979). The stop must be limited in scope to "whatever reasonable suspicions legally justified the stop in the first place." *See State v. Arreola*, 176 Wn.2d 284, 293–94, 290 P.3d 983 (2012) (citing *Ladson*, 138 Wn.2d at 350, 979 P.2d 833). Article I, section 7, provides more protection than the Fourth Amendment in that the investigative stop may not be a pretext for a search in any situation. *Ladson*, 138 Wn.2d at 358–59, 979 P.2d 833. *See generally Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

During a *Terry* stop, the officer may ask a moderate number of questions regarding identity and the purpose of the stop without rendering the suspect "in custody" for the purposes of *Miranda*. *State v. Heritage*, 152 Wn.2d 210, 219, 95 P.3d 345 (2004). Once an intrusion is substantial enough to constitute an arrest, probable cause is necessary. *See State v. Rose*, 175 Wn.2d 10, 18–19, 282 P.3d 1087 (2012); *see also infra* § 6.3. However, reasonable suspicion justifying an investigatory stop may ripen into probable cause for arrest. *State v. McIntosh*, 42 Wn. App. 579, 583–84, 712 P.2d 323 (1986) (holding that a suspect's 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). If the "suspect's freedom of action is curtailed to a 'degree associated with formal arrest,'" then a *Miranda* warning must be given. *State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004); *State v. Harris*, 106 Wn.2d 784, 789–90, 725 P.2d 975 (1986) (adopting *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

4.6 NATURE OF THE OFFENSE

"It is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions." *State v. Kennedy*, 107 Wn.2d 1, 5–6, 726 P.2d 445 (1986). Thus, *Terry* stops have been upheld for offenses ranging from aggravated robbery to possession of narcotics. *See United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985); *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). In Washington, a non-traffic, civil infraction is insufficient to justify a *Terry* stop. *State v. Duncan*, 146 Wn.2d 166, 175, 43 P.3d 513 (2002) (declining to extend *Terry* to general, non-traffic civil infractions); *see also State v. Day*, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007) (declining to extend *Terry* to parking infractions). Normal traffic infractions, however, are sufficient to support a *Terry* stop. *State v. Snapp*, 174 Wn.2d 177, 198, 275 P.3d 289 (2012) (failure to illuminate headlights).

For arguments that *Terry* stops should be limited to investigations of serious offenses, see *Adams*, 407 U.S. at 151–53, 92 S. Ct. 1921 (Brennan, J., dissenting). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 9.2(c) (5th ed. 2012).

4.7 SATISFYING THE REASONABLE SUSPICION STANDARD

To satisfy the reasonable suspicion standard, the officer's belief must be based on objective facts. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003); *State v. Seitz*, 86 Wn. App. 865, 869–70, 941 P.2d 5 (1997).

The facts must be specific and articulable; thus, an "inarticulate hunch[]" is insufficient. *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010) (citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Courts consider the experience of the officer when determining if there was reasonable suspicion. *See Acrey*, 148 Wn.2d at 747, 64 P.3d 594. Consequently, an experienced officer may be able to detect something suspicious where a layperson would not. *See State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (concluding that officers' familiarity with the neighborhood allowed them to lawfully detain man they did not recognize who claimed to live in an apartment). Generally, the level of suspicion required for an investigative stop of a pedestrian is the same as that required for a vehicle. *See State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

This section will examine the reasonable suspicion standard in greater depth. Issues include individualized suspicion, information from informants as the basis for the reasonable suspicion, and the standard as it is applied to different offenses. For a discussion of stops not requiring individualized suspicion, see *infra* §§ 6.3 (stops at or near borders), 5.18 (vehicle spot checks).

4.7(a) Individualized Suspicion

An officer must have an individualized suspicion that the *particular* defendant is engaging in unlawful conduct to make a *Terry* stop. *State v. Kennedy*, 38 Wn. App. 41, 45–46, 684 P.2d 1326 (1984); *see State v. Penfield*, 106 Wn. App. 157, 162–63, 22 P.3d 293 (2001) (finding that (1) the officer stopped vehicle without any articulable suspicion of criminal activity and (2) the officer could not lawfully ask male driver to identify himself when basis for the stop was the license suspension of the female registered owner).

When an officer does not have individual suspicion of unlawful conduct, the search becomes a general search. *See York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 315, 178 P.3d 995 (2008). Washington, however, does not authorize general, exploratory searches. *Id.* For instance, under article I, section 7, sobriety checkpoints are deemed unconstitutional if lacking individualized suspicion. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 460, 755 P.2d 775 (1988).

There are several exceptions to this general rule. For example, a school official may detain and search a student with only reasonable suspicion and not individualized suspicion. *York*, 163 Wn.2d at 308–09, 178 P.3d 995. Stops at border checkpoints may only require reasonable suspicion. *See infra* § 6.3. In such circumstances, however, an officer's discretion must be limited. *State v. Marchand*, 104 Wn.2d 434, 441, 706

P.2d 225 (1985) (finding spot checks of licenses unconstitutional because the discretion of the officers was not checked in any way); *see also State v. Thorp*, 71 Wn. App. 175, 181–82, 856 P.2d 1123 (1993) (holding that officers who lack probable cause or a reasonable suspicion may not randomly stop moving vehicles for questioning).

4.7(b) Information from Informants

When *Terry* stops are based on information provided by informants, the information does not have to meet the same criteria required for probable cause. *State v. Lee*, 147 Wn. App. 912, 916–17, 199 P.3d 445 (2008) (citing *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)). *See generally supra* § 2.5. However, "[a]n informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient 'indicia of reliability.'" *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (quoting *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). To determine whether the informant possesses the requisite "indicia of reliability," the court will consider (1) whether the informant is reliable; (2) whether the information was obtained in a reliable fashion; and (3) whether the officers can corroborate any details of the informant's tip. *State v. Kennedy*, 107 Wn.2d 1, 7, 726 P.2d 445 (1986); *Sieler*, 95 Wn.2d at 47, 621 P.2d 1272; *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975).

Citizen-informants that witnessed the crime firsthand are generally reliable. *See State v. Vandover*, 63 Wn. App. 754, 759, 822 P.2d 784 (1992). Indeed, citizen-informants are given greater credence than professional informants because they act with only an intent to aid the police. *Lee*, 147 Wn. App. at 918–19, 199 P.3d 445 (tip from eyewitness citizen-informant sufficient when corroborated by officer's observations); *see State v. Garcia*, 125 Wn.2d 239, 242, 883 P.2d 1369 (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); 2 Wayne R. LaFave, *Search and Seizure* § 3.4(a), at 265–70 (5th ed. 2012).

Surrounding circumstances may decrease the level of reliability required to conduct a *Terry* stop. For example, the Supreme Court of Washington has suggested that when the tip involves a serious crime or potential danger, less reliability is required for a stop than is required in other circumstances. *Sieler*, 95 Wn.2d at 50, 621 P.2d 1272; *Lesnick*, 84 Wn.2d at 944–45, 530 P.2d 243; *see* 4 LaFave, *supra*, § 9.5(i), at 806–11. However, the informant must still be reliable either by the circumstances

of the tip or by police corroboration. *Vandover*, 63 Wn. App. at 760, 822 P.2d 784.

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

In any case, the length and intrusiveness of the detention may not exceed that which would have been accomplished by the police agency providing the information. *State v. Dorsey*, 40 Wn. App. 459, 470, 698 P.2d 1109 (1985) (citing *Hensley*, 469 U.S. at 233, 105 S. Ct. 675).

4.7(c) Situations that Satisfy or Fail to Satisfy the Reasonable Suspicion Standard

The mere fact that a suspect is in a high-crime area will not justify a *Terry* stop. *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *State v. Seitz*, 86 Wn. App. 865, 867–70, 941 P.2d 5 (1997) (holding that officers lacked reasonable suspicion to stop when they saw occupants of a car speaking to a man on the sidewalk but did not observe drugs, money, or anything else change hands); *State v. Soto-Garcia*, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992) (stating that merely walking in the street in a known drug area late at night does not suggest that someone has committed a crime), *abrogated*, *State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996). 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 Wn.2d 838, 841, 613 P.2d 525 (1980). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.9(d) (5th ed. 2012); *see also supra* § 4.7(b).

A person who simply acts suspiciously is not the proper subject of a stop in the absence of other circumstances implicating a crime. *State v. Walker*, 66 Wn. App. 622, 629, 834 P.2d 41 (1992) (finding that an officer investigating a report of suspicious behavior in a neighborhood inappropriately stopped a man who appeared startled when he saw the officer and turned onto another street to avoid him), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (nervousness is not sufficient for a *Terry* stop.). In addition, being "out of place" in a particular location because of race is not suspicious. *State v. Barber*, 118

Wn.2d 335, 346, 823 P.2d 1068 (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).

Taken together, the suspect's actions, whether they are furtive gestures or flight, may satisfy the reasonable suspicion standard. *State v. Graham*, 130 Wn.2d 711, 725–26, 927 P.2d 227 (1996); *State v. Little*, 116 Wn.2d 488, 496, 806 P.2d 749 (1991) (flight from the police may be considered.). Crouching down or dropping an object upon seeing the officer may also give rise to reasonable suspicion. *State v. Jones*, 117 Wn. App. 721, 728, 72 P.3d 1110 (2003) (holding that suspect in an area known for narcotics crouching down with item consistent with the appearance of crack cocaine was reasonably suspicious when the suspect quickly began to leave the area upon noticing the presence of the officer). However, it is not sufficient if the officer does not see what the suspect is hiding. *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008).

An officer's familiarity with the location or with the narcotics involved, when combined with another circumstance, is considered when determining whether there was reasonable suspicion. *State v. Garcia*, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994) (per curiam). In *Garcia*, the Court determined that information given to police, combined with an officer's experience in narcotics and knowledge of location as a high-crime area, justified investigative restraint. *Id.* Similarly, in *State v. Little*, the court found sufficient suspicion to conduct a *Terry* stop where officers were generally familiar with residents of a complex and did not recognize the suspects, and the defendant subsequently fled from the officers. 116 Wn.2d at 497–98, 806 P.2d 749.

4.8 DIMENSIONS OF A PERMISSIBLE STOP

A valid *Terry* stop "must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop," and "the investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *State v. Williams*, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984) (discussing *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)); *see also State v. Smith*, 115 Wn.2d 775, 784–85, 801 P.2d 975 (1990). To determine whether the stop was valid, the court examines (1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect's liberty; and (3) the length of time the suspect is detained. *State v. Wheeler*, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987). This section examines duration, investigative techniques, transporting the suspect, and seizure of persons in proximity to the suspect.

4.8(a) Duration

The U.S. 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 by asking "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, 84 L. Ed. 2d 605 (1985); *see also Liberal v. Estrada*, 632 F.3d 1064, 1080–82 (9th Cir. 2011) (45-minute detention permissible). If the "investigation should have taken no more than a few minutes," and the officers unnecessarily delayed it, the stop is unlawful. *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dept.*, 533 F.3d 780, 795 (9th Cir. 2008) (the fact that officers needed a supervisor to clarify the law for them was not a sufficient basis to extend the stop.).

"'[A]n officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information.'" *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (quoting *State v. Miller*, 91 Wn. App. 181, 184, 955 P.2d 810 (1998)). In Washington, the court has found a 45-minute wait permissible when it was caused by the defendant's refusal to provide identification. *State v. Cunningham*, 116 Wn. App. 219, 228–29, 65 P.3d 325 (2003). Similarly, officers may temporarily detain a suspect pending results of a police radio check. *State v. Perea*, 85 Wn. App. 339, 342, 932 P.2d 1258 (1997). This also includes detaining a suspect in a room for approximately 20 minutes while the robbery victim was brought to the room for identification. *State v. Moon*, 45 Wn. App. 692, 695, 726 P.2d 1263 (1986), *abrogated on other grounds by State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003).

4.8(b) Investigative Techniques

During a *Terry* stop, the police may request both identification from the suspect and a description of the suspect's purpose in the area. *State v. Little*, 116 Wn.2d 488, 495, 806 P.2d 749 (1991) (citing *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982)); *see also Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). "An officer making a *Terry* stop may ask a moderate number of questions to determine the identity of the suspect and to confirm or dispel the officer's suspicions . . . ." *State v. Heritage*, 152 Wn.2d 210, 219, 95 P.3d 345 (2004). However, the officers must use the least intrusive means reasonably available. *United States v. Sharpe*, 470 U.S. 675, 687, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985); *State v. Johnston*, 38 Wn. App. 793, 798–99, 690 P.2d 591 (1984) (ordering three juveniles out of the house at

gunpoint was not the least intrusive means possible to confirm suspicion of burglary). The officer may expand the stop and use greater force such as frisking, secluding, gun drawing, or cuffing if the officer perceives a reasonable threat to his or her safety. *State v. Mitchell*, 80 Wn. App. 143, 145–46, 906 P.2d 1013 (1995); *see infra* § 4.10.

Police may not subject the suspect to custodial interrogation during a *Terry* stop. *See Dunaway v. New York*, 442 U.S. 200, 211, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *Heritage*, 152 Wn.2d at 219, 95 P.3d 345. The police also may not transport the suspect to the police station for the purposes of interrogation or fingerprinting, although it may be permissible to fingerprint the suspect in the field. *Hayes v. Florida*, 470 U.S. 811, 816–18, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985).

4.8(c) Transporting the Suspect

Transporting a suspect to the police station "is usually impermissible because it is not reasonably related to the investigation." *State v. Gardner*, 28 Wn. App. 721, 727–28, 626 P.2d 56 (1981); *see also Dunaway v. New York*, 442 U.S. 200, 212–13, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). Thus, if there is no probable cause to arrest, such transportation is illegal. *State v. Gonzales*, 46 Wn. App. 388, 396, 731 P.2d 1101 (1986) (handcuffing and transporting a suspect to a police station before probable cause to arrest arises constitutes an illegal arrest under the Fourth Amendment and article I, section 7).

However, if the transportation is reasonably related to the investigative purpose of the initial detention, it may be permissible. *Gardener*, 28 Wn. App. at 728, 626 P.2d 56 (1981) (finding it lawful to transport the suspect a short distance to the crime scene); *see also State v. Wheeler*, 108 Wn.2d 230, 237, 737 P.2d 1005 (1987) (transporting the suspect a short distance for identification purposes). An unrelated emergency occurring nearby or other exceptional circumstances may also warrant transportation. *See State v. Sweet*, 44 Wn. App. 226, 232–33, 721 P.2d 560 (1986) (stating a transport was permissible when police received radio call summoning officers to an apparently unrelated crime scene a block away and the suspect told them he was a lookout).

4.8(d) Detention of Persons in Proximity to Suspect

The mere fact that an individual is close in proximity to someone who is suspected of criminal activity is insufficient to justify a *Terry* stop. *State v. Horrace*, 144 Wn.2d 386, 398, 28 P.3d 753 (2001) (citing *State v. Broadnax*, 98 Wn.2d 289, 295, 654 P.2d 96 (1982), *abrogated on other grounds by Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124

L. Ed. 2d 334 (1993). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 9.2(b) (5th ed. 2012).

For example, a passenger must give some indication of suspicious activity before the police can ask the passenger for identification. *See State v. Rankin*, 151 Wn.2d 689, 697, 92 P.3d 202 (2004) (citing *State v. Larson*, 93 Wn.2d 638, 642, 611 P.2d 771 (1980)); *Horrace*, 144 Wn.2d at 394, 28 P.3d 753 (holding reasonable suspicion existed to frisk passenger because the driver was making furtive gestures as if handing the passenger something even though the passenger did not move). In *State v. Chelly*, the court found that the fact the passenger was not wearing a safety belt provided the officer with the authority to detain him for a reasonable period of time in order to identify him. 94 Wn. App. 254, 260, 970 P.2d 376 (1999).

4.8(e) Pretextual Traffic Stops

Pretextual traffic stops are impermissible under article I, section 7 when their purpose is to conduct a warrantless investigation of crime unrelated to a traffic infraction. *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999). In this respect, the Washington Constitution provides greater protection because pretextual traffic stops have been found permissible under the Fourth Amendment. *Compare Gustafson v. Florida*, 414 U.S. 260, 266, 94 S. Ct. 488, 38 L. Ed. 2d 456 (1973) (holding search incident to arrest valid even though it followed an admittedly pretextual traffic stop); *with State v. Hehman*, 90 Wn.2d 45, 50, 578 P.2d 527 (1978) (declining to limit protection to that provided under federal law). For further discussion of the Fourth Amendment requirements concerning pretextual stops and a critique of U.S. Supreme Court jurisprudence on the matter, see generally Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 36 Seattle U. L. Rev. 1413 (2013).

Under article I, section 7, "the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the [search] warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation." *State v. Myers*, 117 Wn. App. 93, 98, 69 P.3d 367 (2003) (citing *Ladson*, 138 Wn.2d at 349, 979 P.2d 833). "A stop for a traffic infraction can be extended only when an officer has articulable facts from which the officer could reasonably suspect criminal activity." *State v. Lemus*, 103 Wn. App. 94, 101, 11 P.3d 326 (2000) (internal quotations omitted). If the initial traffic stop is unlawful, "the subsequent search and fruits of that search are inadmissible." *State v. Gatewood*, 163 Wn.2d 534, 542, 182 P.3d 426 (2008) (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). *See generally infra* Chapter 7 (exclusionary rule).

When determining if a traffic stop is pretextual, courts consider the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of the officer's behavior. *State v. Snapp*, 174 Wn.2d 177, 199, 275 P.3d 289 (2012); *State v. Hoang*, 101 Wn. App. 732, 742–43, 6 P.3d 602 (2000). In *State v. Snapp*, the court found a stop was not pretextual because the officer could not see how many occupants were inside the vehicle, the officer testified that he routinely pulled people over who did not have their headlights illuminated, and the car began moving in the opposite direction when his police car came into view. 174 Wn.2d at 199–201, 275 P.3d 289.

In contrast, in *State v. Ladson*, the court held that the stop was pretextual because the officer admitted the reason for the stop was rumored drug use by one of the occupants. *See* 138 Wn.2d at 359–60, 979 P.2d 833 (1999). Likewise, in *State v. DeSantiago*, the court found a stop pretextual because the officer believed the suspect had just bought or sold drugs and he deliberately followed the suspect for ten blocks looking for a reason to pull him over. 97 Wn. App. 446, 448, 983 P.2d 1173 (1999).

4.8(f) Mixed-Motive Traffic Stops

In *State v. Arreola*, the Washington Supreme Court distinguished between the impermissible pretextual traffic stops in *Ladson* and the permissible "mixed-motive" traffic stops. 176 Wn.2d at 297–300, 290 P.3d 983. A traffic stop falls under the latter category when it is based on both legitimate and illegitimate grounds—i.e., partially grounded on pretext. *Id.* The court held that a "mixed-motive" stop was constitutional under article I, section 7:

> a traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction (or multiple infractions), for which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop. In other words, despite other motivations or reasons for the stop, a traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.

Id. at 298, 290 P.3d 983. The ruling did not overrule *Ladson*, however. *See id.* According to the court, the stop in *Ladson* continues to be unconstitutional because the police officer's reasons for stopping the car were *entirely* pretextual. *See id.* at 298. The police officer in that case recognized that reason for stopping the defendant's vehicle was based on an unsubstantiated street rumor, and only then did the officer notice the

license plates were expired and think of pulling over the car. *Id.* The traffic infraction was not an independent cause for the traffic stop. *Id.*

4.9 CONSTITUTIONAL LIMITATIONS ON COMPELLED RESPONSES TO INVESTIGATORY QUESTIONS

Even when a police officer possesses a reasonable suspicion and makes a valid *Terry* stop, the officer may not compel the suspect to answer. *Davis v. Mississippi*, 394 U.S. 721, 727 n.6, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969); *State v. White*, 97 Wn.2d 92, 105–06, 640 P.2d 1061 (1982). A suspect's refusal to answer an investigating officer's questions cannot provide the basis for an arrest. *White*, 97 Wn.2d at 106, 640 P.2d 1061.

To remedy this limitation, Washington has enacted a stop-and-identify statute to facilitate police investigations of ongoing or imminent crimes. RCW 9A.76.020; *State v. Lalonde*, 35 Wn. App. 54, 57, 665 P.2d 421 (1983), *review denied*, 100 Wn.2d 1014 (1983) (finding the statute constitutional as amended). The amended RCW 9A.76.020 provides, "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." However, refusing to identify oneself, when viewed in isolation, is still insufficient to support a charge of obstructing a law enforcement officer." *State v. Steen*, 164 Wn. App. 789, 265 P.3d 901 (2011), *review denied as amended*, 173 Wn.2d 1024 (2012).

4.10 GROUNDS FOR INITIATING A FRISK DURING A *TERRY* STOP

An officer conducting a valid *Terry* stop may conduct a limited search for weapons to protect himself or herself or persons nearby from physical harm. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (citing *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007)). After the officer has made a valid stop supported by reasonable suspicion of criminal activity, a frisk may then be undertaken if the officer reasonably believes that the "suspect is armed and 'presently' dangerous." *State v. Xiong*, 164 Wn.2d 506, 513–14, 191 P.3d 1278 (2008) (officers did not have right to frisk the defendant because he cooperated with police, made no attempt to flee, and could not reach his pockets). "Reasonable belief that the suspect is armed and presently dangerous means . . . [that there is] some basis from which the court can determine that the detention was not arbitrary or harassing." *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008) (emphasis removed) (internal quotation marks omitted) (finding no reasonable belief when the suspect was under the influence, lied about his name, and was nervous and fidgety). Once the officer dispels

his belief that the suspect is armed, the frisk must end. *Garvin*, 166 Wn.2d at 254–55, 207 P.3d 1266 (officer exceeded the scope of the search when he continued to squeeze the defendant's pocket after concluding there was no weapon).

Washington requires the following for a valid frisk: (1) the initial stop is legitimate; (2) there is a reasonable safety concern justifying a protective frisk for weapons; and (3) the scope of the frisk is limited to protective purposes. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). The fact that a detention occurs in a high-crime area is not in itself sufficient to justify a search. *See State v. Smith*, 102 Wn.2d 449, 452–53, 688 P.2d 146 (1984) (holding that the inquiry must focus on the defendant and his actions, not the area where he was found). Thus, police may not frisk 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 Wn.2d 733, 740–41, 689 P.2d 1065 (1984). The most common situation is where the suspect makes a furtive gesture or appears to be concealing something. *State v. Chang*, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008) (holding the search of the passenger compartment of the car was valid when the suspect appeared to be concealing something when police approached).

For certain crimes in which the offender is likely to be armed, the right to conduct a protective search is much more accepted, but for other crimes, such as possession of marijuana, additional circumstances must be present. *See United States v. Flatter*, 456 F.3d 1154, 1158–59 (9th Cir. 2006) (absent other circumstances, a frisk was not proper for a postal employee suspected of mail theft because it "is not a crime that is frequently associated with weapons"); 4 Wayne R. LaFave, *Search and Seizure* § 9.6(a), at 852–62 (5th ed. 2012). Consequently, in *State v. Guzman-Cuellar*, an officer was justified in initiating a frisk where the suspect matched the description of a murder suspect. 47 Wn. App. 326, 332, 734 P.2d 966 (1987). Likewise, in *State v. Harvey*, a frisk was justified when the crime under investigation was burglary because it is well known that burglars often carry weapons. 41 Wn. App. 870, 875, 707 P.2d 146 (1985).

The time of day can also contribute to the reasonableness of a protective search. *State v. Horrace*, 144 Wn.2d 386, 398–99, 28 P.3d 753 (2001) (considering "early morning darkness" as a factor justifying a protective search). Not only does "[t]he darkness ma[k]e it more difficult for [the officer] to get a clear view into the car," but "an individual who has been stopped may be more willing to commit violence against a police officer at a time when few people are likely to be present to witness it." *State v. Collins*, 121 Wn.2d 168, 174–75, 847 P.2d 919 (1993).

Under certain circumstances, officers may seize evidence 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 a crime is in danger of being destroyed. *State v. Pressley*, 64 Wn. App. 591, 598, 825 P.2d 749 (1992) (holding that officer asking the suspect to remove her hand from her pocket after seeing a bag in the suspect's palm was proper given his experience with disposal of narcotics and her furtive gesture); *see also State v. Dorsey*, 40 Wn. App. 459, 472, 698 P.2d 1109 (1985). However, some courts have expressly rejected this rationale for a search. *State v. Rodriguez–Torres*, 77 Wn. App. 687, 693, 893 P.2d 650 (1995) (rejecting *Pressley* and stating that a *Terry* frisk may be conducted only based on protective purposes).

4.10(a) Scope of a Permissible Frisk

A frisk must be justified in its inception and scope. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). The scope of a valid frisk is strictly limited to protective purposes. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); *see also State v. Alcantara*, 79 Wn. App. 362, 366, 901 P.2d 1087 (1995) (holding that a search exceeded the scope of a *Terry* stop because the officer gave no indication that the search was based on concerns for the officer's safety). Thus, the officer may only conduct a search of the suspect's outer clothing for weapons that might be used to harm the officer or others nearby. *Terry v. Ohio*, 392 U.S. 1, 29–30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Hudson*, 124 Wn.2d at 112, 874 P.2d 160. However, a frisk need not conform to the conventional pat down. *Hudson*, 124 Wn.2d at 112, 874 P.2d 160 (if pat down is inconclusive, the officer may reach into the clothing); *see also Adams v. Williams*, 407 U.S. 143, 147–49, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972) (finding an officer was justified in reaching through a window and removing a revolver from the suspect's waistband when officer knew that the suspect carried a gun in his waistband and he refused to step out of the car). *See generally* 4 Wayne R. LaFave, *Search and Seizure* §§ 9.5(b)–9.6(b) (5th ed. 2012).

When in the course of a frisk an officer feels what may be a weapon, the officer may only take such action as is necessary to examine the object. *Hudson*, 124 Wn.2d at 113, 874 P.2d 160 (citing *Terry*, 392 U.S. at 30, 88 S. Ct. 1868). *See generally* 4 LaFave, *supra*, § 9.6(c). Once police ascertain that no weapon is involved, their authority to conduct even a limited search ends. *Garvin*, 166 Wn.2d at 254, 207 P.3d 1266 (continuing squeeze of pocket after the officer determined no weapon was present was not permissible under the "plain feel" doctrine); *Hudson*, 124 Wn.2d at 113, 874 P.2d 160.

4.10(b) Frisks of Persons in Proximity to Suspect

Police may not frisk persons merely because they are present on the premises of a place being lawfully searched. *See Ybarra v. Illinois*, 444 U.S. 85, 94, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *see also supra* § 3.8(a). Thus, a passenger frisk is justified "only [when] the officer is able to point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger [may] be armed and dangerous." *State v. Horrace*, 144 Wn.2d 386, 399–400, 28 P.3d 753 (2001); *State v. Parker*, 139 Wn.2d 486, 489, 987 P.2d 73 (1999) (officers may not search purse of passenger); *see also State v. Larson*, 93 Wn.2d 638, 641–42, 611 P.2d 771 (1980). In other words, whether an officer has a reasonable apprehension of danger, depending 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 Wayne R. LaFave, *Search and Seizure* § 9.6(a), at 871–73 (5th ed. 2012).

4.10(c) Protective Measures Other Than 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 serious. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (noting that intrusion is de minimis while risks confronting an officer are substantial); *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). The Supreme Court of Washington, however, has declined to extend *Mimms* to passengers of the vehicle under article I, section 7, unless the officer has an objective reason based on safety concerns. *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722 (1999) (declining to follow *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997)), *abrogated in part on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007); *see* 4 Wayne R. LaFave, *Search and Seizure* § 9.6(a), at 885 n.192 (5th ed. 2012).

If the officer is merely controlling the scene and not detaining the passenger for investigatory reasons, he must meet the standard set out in *Mendez*. Namely, he must be "able to articulate an objective rationale predicated specifically on safety concerns . . . for ordering a passenger to stay in the vehicle or to exit the vehicle." *Mendez*, 137 Wn.2d at 220, 970 P.2d 722. However, if the purpose of the officer's interaction with the passenger is investigatory, then the interaction must meet the standard set out in *Terry*, and the officer must have a reasonable suspicion of criminal activity. *State v. Horrace*, 144 Wn.2d 386, 393, 28 P.3d 753 (2001).

4.10(d) Search of Area: Measures Beyond Frisks

Officers may extend a *Terry* search for weapons to the passenger compartment of a detained person's vehicle "'if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle.'" *State v. Glossbrener*, 146 Wn.2d 670, 680–81, 49 P.3d 128 (2002) (quoting *State v. Terrazas*, 71 Wn. App. 873, 879, 863 P.2d 75 (1993)) (officer did not have concern for safety when he allowed suspect to sit in the car while he checked for warrants and search was an afterthought); *see also Michigan v. Long*, 463 U.S. 1032, 1049–50, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). The search must be confined to the area within the suspect's immediate control. *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). However, that includes immediate control once the suspect has returned to the vehicle. Thus, the officer may still search the compartment if both occupants of the vehicle are outside the car and do not have access to the passenger compartment so long as the officer intends to return them to the car following the stop. *State v. Chang*, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008).

In *State v. Kennedy*, the court upheld a search where the officer observed the suspect leaning forward as if to place something under his seat while the officer was stopping the suspect's vehicle for investigation of a possible drug buy. 107 Wn.2d at 12, 726 P.2d 445. Likewise, in *State v. McIntosh*, the search of the passenger compartment was lawful when the driver of a vehicle was armed with a knife and a weapon-like object was visibly protruding from under the passenger seat. 42 Wn. App. 579, 582–84, 712 P.2d 323 (1986).

A police officer may also search a container carried by a suspect who is detained for questioning if the officer reasonably believes that the suspect possesses a weapon. *State v. Miller*, 91 Wn. App. 181, 185–86, 955 P.2d 810 (1998) (officer could search a tin found with defendant that was capable of holding a gun after officer found knife on the defendant); *State v. Franklin*, 41 Wn. App. 409, 415, 704 P.2d 666 (1985) (finding search of backpack proper when the defendant told the officer it contained a firearm). For a discussion of whether an officer may search items carried by a suspect, see generally 4 Wayne R. LaFave, *Search and Seizure* § 9.5(f) (5th ed. 2012).

CHAPTER 5

Warrantless Searches and Seizures: Exceptions to the Warrant Requirement

5.0 INTRODUCTION

Warrantless searches are per se unreasonable unless justified by a limited set of carefully drawn exceptions. *State v. Snapp*, 174 Wn.2d 177, 187–88, 275 P.3d 289 (2012); *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Article I, section 7 of the Washington State Constitution not only "prohibits unreasonable searches, but also provides no quarter for ones that, in the context of the Fourth Amendment, would be deemed reasonable [warrantless] searches and thus constitutional." *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). "This creates 'an almost absolute bar to warrantless arrests, searches, and seizures.'" *Id.* (quoting *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)).

The State bears the burden of proving that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003). Even when a search or seizure falls within one of the exceptions to the warrant requirement, the search or seizure may be invalid if it infringes upon other rights. *See generally State v. Reep*, 161 Wn.2d 808, 167 P.3d 1156 (2007) (holding that search warrants for documents protected under the First Amendment must have a higher standard of particularity).

The following sections examine the various exceptions to the warrant requirement, including searches incident to a lawful arrest, the plain view and open view doctrines, consent, exigent circumstances, *Terry* stops, and inventory searches.

5.1 SEARCH INCIDENT TO ARREST

Generally, police may conduct a warrantless search incident to a lawful arrest. *Chimel v. California*, 395 U.S. 752, 762–63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). Under article I, section 7, a custodial arrest provides the necessary "authority of law" to search, so long as the arrest is

lawful. *State v. Grande*, 164 Wn.2d 135, 139, 187 P.3d 248 (2008); *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). The rationale behind this rule is to ensure officer safety and to prevent the concealment or destruction of evidence. *State v. MacDicken*, 171 Wn. App. 169, 174–75, 286 P.3d 413 (2012). The search, however, may only extend to the area within the arrestee's "immediate control"—the area in which an arrestee may be able to obtain a weapon or destroy evidence. *Chimel*, 395 U.S. at 762–63, 89 S. Ct. 2034. Thus, "searching any room other than that in which an arrest occurs" or "searching through all the desk drawers or other closed or concealed areas in that room itself" is not justified absent a search warrant. *Id.* at 763, 89 S. Ct. 2034.

This exception to the warrant requirement applies, however, only when (1) there was a lawful 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 being "a wide-ranging exploratory, rummaging, ransacking" search. *State v. Smith*, 88 Wn.2d 127, 135, 559 P.2d 970 (1977). For a discussion of automobile searches incident to arrest, see *infra* § 5.1(c).

As the following sections demonstrate, while Washington's search incident to arrest exception to the warrant requirement is similar to the federal exception, it is subject to a different analysis under the Washington Constitution.

5.1(a) Lawful Arrest

Chapter 4 discusses the criteria for a lawful arrest. If the arrest is invalid, then the search incident to the arrest is invalid as well. *State v. Moore*, 161 Wn.2d 880, 885–86, 169 P.3d 469 (2007); *State v. Hehman*, 90 Wn.2d 45, 50, 578 P.2d 527 (1978); *State v. Terrazas*, 71 Wn. App. 873, 878, 863 P.2d 75 (1993). If an arrest is lawful, then a search incident to that arrest may be permissible. *State v. Pulfrey*, 154 Wn.2d 517, 522–23, 111 P.3d 1162 (2005).

In Washington, however, even when an arrest is valid, a search is not properly "incident" to the arrest if the arrest is merely a pretext for conducting a search to obtain evidence of a different offense. *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999) (declining to interpret article I, section 7 according to federal law, under which pretextual traffic stops did not violate the Fourth Amendment, because the Washington State constitution "requires we look beyond the formal justification for the stop to the actual one"). Furthermore, additional searches of the same individual made in retaliation for the defendant's previous criminal behavior are unreasonable. *State v. Carner*, 28 Wn. App. 439, 445–46, 624 P.2d 204 (1981). For discussion of the need for the search to be contemporaneous with the arrest, see *infra* § 5.3.

The search incident to arrest exception requires a custodial arrest. *See State v. O'Neill*, 148 Wn.2d 564, 587, 62 P.3d 489 (2003); *State v. Radka*, 120 Wn. App. 43, 50, 83 P.3d 1038 (2004) (search of vehicle not valid as incidental to arrest because driver's detention at a traffic stop was noncustodial); *see also State v. McKenna*, 91 Wn. App. 554, 564, 958 P.2d 1017 (1998) (search unreasonable because noncustodial arrest had ended). Under article I, section 7, a custodial arrest provides the "authority of law" for the search. *O'Neill*, 148 Wn.2d at 585, 62 P.3d 489. In Washington, a custodial arrest for minor traffic violations is generally not permitted. *See* RCW 46.64.015; *State v. Reding*, 119 Wn.2d 685, 689–90, 835 P.2d 1019 (1992). Rather, 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* RCW 46.64.015; *Reding*, 119 Wn.2d at 689–90, 835 P.2d 1019. Moreover, officers explicitly lack authority to arrest after witnessing only a minor traffic infraction. RCW 46.63.020. Thus, a search is generally unlawful if it is incident to a stop for a minor traffic violation. *See Terrazas*, 71 Wn. App. at 876–78, 863 P.2d 75.

Police officers are authorized to make a custodial arrest for a traffic violation if (1) the violation is one of the "nonminor" traffic violations specifically designated in RCW 10.31.100, or (2) the motorist is a nonresident. *See* RCW 46.64.015(1)–(2). Absent either of these conditions, 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 Reding*, 119 Wn.2d at 691–92, 835 P.2d 1019 (upholding custodial arrest for the nonminor offense of reckless driving); *Terrazas*, 71 Wn. App. at 875–78, 863 P.2d 75 (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).

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. Cormier*, 100 Wn. App. 457, 463, 997 P.2d 950 (2000) (evidence from a search of the defendant was admissible after the defendant's lawful arrest for assaulting an officer, even though the defendant assaulted the officer after being illegally stopped). In *State v. Smith*, after police lawfully arrested the defendant for consuming liquor in public, the court held that the drug paraphernalia found in the defendant's fanny pack was admissible. *State v. Smith*, 119 Wn.2d 675, 684, 835 P.2d 1025 (1992); *see also State v. Gammon*, 61 Wn. App. 858, 863, 812 P.2d 885 (1991); *State v. LaTourette*, 49 Wn. App. 119, 127–29, 741 P.2d 1033 (1987); *State v. White*, 44 Wn. App. 276, 278, 722 P.2d 118 (1986).

5.1(b) "Immediate Control"

There is no hard and fast rule for determining whether the area searched or the object seized was within the "immediate control" of the defendant under the Fourth Amendment. The court has considered various factors, including (1) whether the arrestee was physically restrained; (2) the position of the officer in relation to the defendant and the place searched; (3) the difficulty of gaining access into the container or enclosure searched; and (4) the number of officers present as compared with the number of arrestees or other persons. *See* 3 Wayne R. LaFave, *Search and Seizure* § 6.3(c), at 462–75 (5th ed. 2012); *see also id.* § 7.1(b), at 676–79. For the purposes of a search incident to an arrest, an object or container is considered within the control of an arrestee if the object was within the arrestee's reach immediately prior to arrest or at the moment of arrest. *State v. Smith*, 119 Wn.2d 675, 681, 835 P.2d 1025 (1992) (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 were within immediate control of arrestee who was on the bed when he was arrested); *United States v. Andersson*, 813 F.2d 1450, 1455–56 (9th Cir. 1987) (closed suitcase on the bed next to arrestee was searchable incident to arrest "as long as the search of the suitcase occurred at about the same time of the arrest").

Article I, section 7 places greater restraints on a search incident to arrest in someone's home, compared to the Fourth Amendment. Entry into rooms beyond the immediate control of the suspect requires that police have a reasonable fear for their safety or a reasonable belief that the arrestee is about to destroy evidence or escape. *State v. Chrisman*, 100 Wn.2d 814, 815, 821, 676 P.2d 419 (1984); *see also State v. Boyer*, 124 Wn. App. 593, 602, 102 P.3d 833 (2004) (warrantless protective sweep of basement rooms that belonged to an upstairs apartment not justified when search was done incident to execution of a search warrant for a basement apartment); 3 LaFave, *supra* §§ 6.3(c), at 468, 6.4(a)–(c), at 476–510, 7.1(b), at 693.

Conversely, 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 id.* § 6.4(a), at 477–80. Federal courts have also permitted police to search premises to determine whether accomplices who could aid the arrestee are present, see *id.* § 6.4(b), at 484, and to

conduct a protective sweep of the premises when the officers fear that third parties may offer resistance, *id.* § 6.4(c), at 488–90. *See also Maryland v. Buie*, 494 U.S. 325, 333–36, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990).

Under the Fourth Amendment, an officer may search an arrestee in 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, 38 L. Ed. 2d 427 (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, 38 L. Ed. 2d 456 (1973). 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. 467; *see State v. Reding*, 119 Wn.2d 685, 691–92, 835 P.2d 1019 (1992). However, if a police officer merely cites a driver for speeding without making an arrest, a search is impermissible. *Knowles v. Iowa*, 525 U.S. 113, 118–19, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998).

Under article I, section 7, an arrestee's diminished expectation of privacy permits an officer to search an arrestee's clothing, including small containers found on the arrestee. *See, e.g.*, *Smith*, 119 Wn.2d at 681–82, 835 P.2d 1025 (upholding search of fanny pack following lawful arrest); *State v. Gammon*, 61 Wn. App. 858, 864, 812 P.2d 885 (1991) (upholding search of prescription pill bottle found on defendant following lawful arrest); *State v. White*, 44 Wn. App. 276, 278–79, 722 P.2d 118 (1986) (upholding police examination of cosmetic case found in arrestee's coat pocket). 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 Wn.2d at 681, 835 P.2d 1025. Further, 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 id.* (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 Wn. App. at 863, 812 P.2d 885; *State v. LaTourette*, 49 Wn. App. 119, 127–28, 741 P.2d 1033 (1987); *White*, 44 Wn. App. at 278, 722 P.2d 118. A greater expectation of privacy is extended, however, to possessions that are not closely related to the person's clothing, such as "purses, briefcases or luggage," and some additional reason must be present to justify the search of those items. *White*, 44 Wn. App. at 279, 722 P.2d 118; *see also State v. Kealey*, 80 Wn. App. 162, 170, 907 P.2d 319 (1995) (stating that "a purse is inevitably associated with an

expectation of privacy"). For a discussion of the search of purses in conjunction with automobile searches, see *infra* § 5.3(b).

An intrusion into a suspect's body, such as a draw of blood samples, is a search and seizure under both article I, section 7 and the Fourth Amendment. *State v. Dunivin*, 65 Wn. App. 501, 507, 828 P.2d 1150 (1992). It may be justified under the exigent circumstances exception rather than the search incident to arrest exception. *Schmerber v. California*, 384 U.S. 757, 770–71, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *see* 3 LaFave, *supra* § 5.3(c), at 215. *See generally infra* § 5.13(b) and *supra* § 3.13(b). For example, in Washington, bodily intrusions are authorized by statute in order to allow police to take blood samples of motorists arrested for certain serious traffic violations. *See* RCW 46.20.308(4). If the suspect is attempting to swallow apparent contraband, less intrusive physical measures, such as a choke-hold, are permissible. *See State v. Taplin*, 36 Wn. App. 664, 666–67, 676 P.2d 504 (1984); *State v. Williams*, 16 Wn. App. 868, 871–72, 560 P.2d 1160 (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 nose shut. *Williams*, 16 Wn. App. at 872, 560 P.2d 1160. For a brief discussion of post-detention body searches, see *infra* § 6.2(c).

5.1(c) Vehicles and Containers

Under both article I, section 7 and the Fourth Amendment, police may not search the passenger compartment of an automobile as a search incident to the arrest of the occupant except in certain circumstances. *Arizona v. Gant*, 556 U.S. 332, 351, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012). However, Washington's application of the search incident to arrest exception in the context of vehicles is much narrower than the Fourth Amendment application. *Snapp*, 174 Wn.2d at 192, 275 P.3d 289 (declining to adopt federal interpretation of the Fourth Amendment for article I, section 7). In Washington, an officer may search the vehicle only when there are (1) concerns for officer safety, or (2) concerns for destruction of the evidence. *Id. passim*; *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009); *State v. Patton*, 167 Wn.2d 379, 395, 219 P.3d 651 (2009). Once the defendant is in custody, fears for officer safety or destruction of the evidence evaporate. *Patton*, 167 Wn.2d at 395, 219 P.3d 651. Thus, once a defendant is handcuffed, removed from the vehicle, or placed in a police vehicle, there can be no vehicle search. *Id*. In contrast, under the more expansive exception to the Fourth Amendment, an officer may search if the officer believes that evidence relevant to the crime of

arrest will be found in the vehicle. *Gant*, 556 U.S. at 355, 129 S. Ct. 1710. For a more detailed explanation of vehicle searches, see *infra* § 5.15.

5.2 PRE-ARREST SEARCH

If a warrantless search is closely related in time and place to a lawful arrest, the search may be considered incidental to the arrest and valid as long as probable cause to arrest exists at the time of the search, even if the search occurs before the arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); *State v. Harrel*, 83 Wn. App. 393, 400, 923 P.2d 698 (1996). If probable cause does not exist at the time of the search, a search that provides probable cause is not considered a valid search incidental to the arrest. *Smith v. Ohio*, 494 U.S. 541, 543, 110 S. Ct. 1288, 108 L. Ed. 2d 464 (1990) (warrantless search of the defendant's paper bag could not be justified as a search incidental 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* § 5.5(a) (5th ed. 2012).

Under limited circumstances, pre-arrest searches are permitted even when the arrest does not closely follow the search. *See generally* 3 LaFave, *supra* § 5.4(b). A search may be considered incidental to the arrest of a suspect in the following circumstances: (1) the police have probable cause; (2) the police believe the suspect is in the process of destroying highly evanescent evidence; and (3) the evidence can be preserved by a limited search. *Cupp v. Murphy*, 412 U.S. 291, 296, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973). *See generally* 3 LaFave, *supra* § 5.4(b). Pre-arrest searches are *Terry* searches, see *supra* § 2.9(b), and should be subject to the same standard applied and discussed in sections 4.5 through 4.9.

5.3 POST-DETENTION SEARCHES: SEARCHES INCIDENT TO ARREST AND INVENTORY SEARCHES

5.3(a) Post-Detention Searches Incident to Arrest

The search incident to arrest exception can apply to a search at both the place of detention as well as the place of arrest. *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 5.3(a) (5th ed. 2012). However, a significant delay between the arrest and the search may render the search unreasonable if the search is no longer contemporaneous with the arrest. *State v. Smith*, 119 Wn.2d 675, 683, 835 P.2d 1025 (1992) (delay of 17 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 under the search incident to arrest exception depends on the facts of the individual case. *Id.* at 683 n.4, 835 P.2d 1025; *see State v.*

Boursaw, 94 Wn. App. 629, 635, 976 P.2d 130 (1999) (a 10-minute delay between arrest and arrival of dog to complete search by sniffing behind vehicle's ashtray was reasonable). Likewise, any post-arrest search is unlawful if probable cause to arrest dissipates by the time the suspect is taken into custody. *State v. Lemus*, 103 Wn. App. 94, 105, 11 P.3d 326 (2000) (search of vehicle was invalid because no probable cause existed to arrest driver prior to police performing a positive field test for cocaine powder found from vehicle search).

Under article I, section 7, when an arrestee is searched upon booking, officers may later conduct a warrantless "second look" into the arrestee's belongings. *State v. Cheatam*, 150 Wn.2d 626, 642, 81 P.3d 830 (2003); *see also United States v. Edwards*, 415 U.S. 800, 805, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974) (a search of the defendant's clothing long after the defendant had been searched and placed in a jail cell was a permissible search incident to an arrest). An arrestee no longer has a reasonable expectation of privacy in his personal items once state officials have viewed them during a valid inventory search. *Cheatam*, 150 Wn.2d at 642, 81 P.3d 830. The same is true for a pretrial detainee transferred to a hospital for a competency evaluation. *State v. Puapuaga*, 164 Wn.2d 515, 523, 192 P.3d 360 (2008). Additionally, the police do not need a warrant when comparing an individual's DNA profile already in the State's possession with evidence from a new crime scene. *State v. Gregory*, 158 Wn.2d 759, 828, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 760, 336 P.3d 1134 (2014).

A difficult question arises when police detain a suspect only because the police have failed to comply with laws allowing release. *See generally* 3 LaFave, *supra* § 5.3(d). 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 Wn. App. 439, 445, 624 P.2d 204 (1981). Similarly, a search based on consent from someone who was illegally detained is invalid. *State v. Avila–Avina*, 99 Wn. App. 9, 14–15, 991 P.2d 720 (2000), *abrogated*, *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009); *State v. O'Day*, 91 Wn. App. 244, 253, 955 P.2d 860 (1998) (search was invalid where "the illegality and the consent were contemporaneous").

5.3(b) Post-Detention Inventory Search

Under article I, section 7 and the Fourth Amendment, police officers may search containers or packages as part of an inventory of the arrestee's possessions prior to storing the items for safekeeping. *Illinois v. Lafayette*, 462 U.S. 640, 643–48, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994). However, an inventory search that is "a ruse for a general rummaging in order to discover

incriminating evidence" is unreasonable. *Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990); *State v. Mireles*, 73 Wn. App. 605, 871 P.2d 162 (1994).

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 Wn. App. at 16, 882 P.2d 190 (quoting *State v. Gluck*, 83 Wn.2d 424, 428, 518 P.2d 703 (1974)). Thus, it is reasonable for police, as part of routine procedure before incarcerating an arrestee, to search any container or article in the arrestee's possession according to inventory procedures. *Id.* (upholding the search of defendant's purse upon arrival to jail). *But see State v. Smith*, 56 Wn. App. 145, 150–52, 783 P.2d 95 (1989) (holding that a booking search of an arrestee's purse was unlawful because she was not given timely opportunity to post bail, and police were not concerned that she was carrying weapons). Officers may also conduct an inventory search of a validly impounded automobile and its containers. *See Colorado v. Bertine*, 479 U.S. 367, 374–75, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); *State v. McFadden*, 63 Wn. App. 441, 448, 820 P.2d 53 (1991), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 640, 965 P.2d 1072 (1998); *see also infra* § 5.19.

Inventory searches, however, are not unlimited in scope, and "must be restricted to effectuating the purposes that justify their exception to the Fourth Amendment." *State v. Dugas*, 109 Wn. App. 592, 597–98, 36 P.3d 577 (2001) (holding that while police could inventory arrestee's jacket, they could not search the closed container within the jacket when there was no indication of dangerous contents or illegal drugs). *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 5.5(b) (5th ed. 2012).

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

The police also do not need a warrant to assist persons who are seriously injured or threatened with such injury. *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006); *State v. Guevara*, 172 Wn. App. 184, 288 P.3d 1167 (2012). This "community caretaking" exception is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), and is distinct from the "exigent circumstances"

exception to the warrant requirement. *State v. Leupp*, 96 Wn. App. 324, 330, 980 P.2d 765 (1999). Both exceptions involve instances "in which the police must act immediately, but for distinctly different purposes." *State v. Kinzy*, 141 Wn.2d 373, 387 n.39, 5 P.3d 668 (2000). Unlike the exigent circumstances exception, "community caretaking" arises from a police officer's responsibility to come to the aid of persons in danger. *Id*. Additionally, if officers undertake a search as part of their "community caretaking" function, any evidence discovered may be admissible. *See State v. Thompson*, 151 Wn.2d 793, 802–03, 92 P.3d 228 (2004) (community caretaking function does not include simply retrieving a guest's jacket from defendant's home).

Whether a search or seizure made for such "noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform this 'community caretaking function.'" *Kalmas v. Wagner*, 133 Wn.2d 210, 216–17, 943 P.2d 1369 (1997). Thus, even when police lack probable cause to believe a crime has been committed, they may conduct a warrantless search of the premises when the premises contains any of the following: (1) persons in imminent danger of death or harm; (2) objects likely to burn, explode, or otherwise cause harm; or (3) information that will disclose the location of a threatened victim or the existence of such a threat. *State v. Downey*, 53 Wn. App. 543, 545, 768 P.2d 502 (1989); *see also State v. Menz*, 75 Wn. App. 351, 353–56, 880 P.2d 48 (1994) (police entry was justified in response to a domestic violence call).

The "community caretaking" exception, however, must be motivated by a need to render assistance, and cannot be used as simply a "pretext for conducting an evidentiary search." *State v. Schlieker*, 115 Wn. App. 264, 270, 62 P.3d 520 (2003) (held search invalid when officers failed to inquire about the defendants' safety and proceeded to search for drugs). *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 5.5(d) (5th ed. 2012). Consequently, the officer must be able to articulate specific facts and reasonable inferences drawn therefrom that justify the warrantless entry. *State v. Davis*, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997) (entry was proper when, after check-out time, the motel occupant did not respond to repeated telephone calls and knocks at the door). Finally, however, no court has yet fully articulated the precise contours of this exception, including whether and to what extent it applies to a search of a home. *See Feis v. King County Sheriff's Dep't.*, 165 Wn. App. 525, 545−47, 267 P.3d 1022 (2011).

5.4(a) Minors

The community caretaking exception may apply when officers are attempting to protect children. *State v. Acrey*, 148 Wn.2d 738, 64 P.3d 594 (2003). When determining whether police have exceeded their scope of authority in trying to protect children under community caretaking, courts consider various circumstances, including whether a minor is found late at night, unaccompanied by a parent. *See State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000). In *Kinzy*, police physically detained a 16-year-old girl after seeing her walking in downtown Seattle at 10 p.m. on a weeknight with an adult male known to be involved with narcotics. *Id.* at 378, 5 P.3d 668. The court held that under the community caretaking exception, police could approach Kinzy and ask if she needed help, but without articulable suspicion that she had committed a criminal offense, police could not physically detain her. *Id.* at 395, 5 P.3d 668. In contrast, in *Acrey*, the court upheld the detention of a 12-year-old, whom the officers found while responding to a 911 call on a weeknight, after midnight, in an isolated area, and with no adult supervision. *Acrey*, 148 Wn.2d at 742–43, 64 P.3d 594. Police contacted the mother, who asked police to give the boy a ride home. *Id.* at 743, 64 P.3d 594. Before transporting the boy in the police car, police conducted a pat-down frisk for safety purposes and found drugs. *Id.* The court held that the police acted reasonably in this instance because there was a heightened concern that Acrey may be engaging in conduct that could bring harm to himself or others. *Id.* at 751, 64 P.3d 594. The court found persuasive the young age of the defendant, the late hour, and his presence in an isolated area without adults. *Id*. at 752, 64 P.3d 594. Most importantly, the officers had initially made a *Terry* stop of the defendant to investigate a possible crime. *Id.*

5.4(b) Rendering Aid to Victims

Courts of appeal have recognized that police may make a warrantless entry into a residence in response to a report of ongoing domestic violence. *State v. Menz*, 75 Wn. App. 351, 353–56, 880 P.2d 48 (1994). "Police officers responding to a domestic violence report have a duty to ensure the present and continued safety and wellbeing of the occupants" of a residence. *State v. Raines*, 55 Wn. App. 459, 465, 778 P.2d 538 (1989). In deciding whether police entry was lawful, the court can consider the specific instance and likelihood of domestic violence as it relates to the requirements of the emergency-aid exception. *State v. Schultz*, 170 Wn.2d 746, 750, 248 P.3d 484 (2011) (a report of a couple yelling, the presence of "loud voices," and an agitated woman answering the door was not enough to uphold a warrantless entry).

When the medical emergency is a homicide, officers may enter to aid the victim and make a quick check to see if the perpetrator or other victims are present. *See Flippo v. West Virginia*, 528 U.S. 11, 14, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999) (noting that, while officers may enter a murder scene to aid victims or to see if the perpetrator is present, there is no general "murder scene" warrant exception). Thus, the police may seize any evidence observed in plain view during the course of legitimate police emergency activities. *State v. Stevenson*, 55 Wn. App. 725, 729–30, 780 P.2d 873 (1989); *see infra* § 5.5. Any such search must be brief; a general exploratory search lasting several hours is not permissible. *Thompson v. Louisiana*, 469 U.S. 17, 21, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984).

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 Wn.2d 562, 568, 647 P.2d 489 (1982) (the search of the defendant's tote bag for identification was improper when the defendant regained consciousness prior to the search). The scope of the search must remain limited to whatever is reasonable to conduct the community caretaking function, and the necessity must exist at the time of the search. *Id.* at 568, 647 P.2d 489; *State v. Schroeder*, 109 Wn. App. 30, 45, 32 P.3d 1022 (2001) (searching coat pocket for identification of suicide victim was beyond scope of community caretaking function because the deceased no longer needed emergency medical attention, and the object of the search was not in plain view); *State v. Dempsey*, 88 Wn. App. 918, 922, 947 P.2d 265 (1997), *abrogated on other grounds by State v. Neeley*, 113 Wn. App. 100, 52 P.3d 539 (2002).

5.4(c) Property Damage

Similarly, police may make a warrantless entry to protect property, and in doing so, may seize evidence in plain view. *State v. Bakke*, 44 Wn. App. 830, 839–41, 723 P.2d 534 (1986). 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. Tyler*, 436 U.S. 499, 510, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978). Once a fire has been extinguished, however, a warrant is required for arson investigators to search the premises to investigate a possible criminal cause of the fire. *Michigan v. Clifford*, 464 U.S. 287, 294–95, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984); *Tyler*, 436 U.S. at 511, 98 S. Ct. 1942.

5.4(d) Second Entry

Police officers may enter a private residence without a warrant when officials of another government agency have validly entered the residence and discovered contraband. *State v. Bell*, 108 Wn.2d 193, 201, 737 P.2d

254 (1987) (marijuana-growing operation discovered in plain view by firefighters justified a warrantless entry and seizure by police), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). However, the entry of the initial party must be valid. *State v. Browning*, 67 Wn. App. 93, 97, 834 P.2d 84 (1992) (contraband sighted during building inspector's entry could not be used as the basis for later police entry under warrant because inspector's initial entry was unlawful).

5.5 THE "OPEN VIEW" AND "PLAIN VIEW" DOCTRINES DISTINGUISHED

Courts have used the "plain view" and "open view" doctrines interchangeably to describe a variety of situations, but the two doctrines are distinct. *See State v. Seagull*, 95 Wn.2d 898, 901–02, 632 P.2d 44 (1981); *State v. Barnes*, 158 Wn. App. 602, 612, 243 P.3d 165 (2010). "Open view" often describes one of two situations: (1) a search in which an officer observes an item that is exposed to public view in a public place or in a location that is not constitutionally protected; or (2) a search in which an officer, standing in an unprotected area, observes an object that is located inside a constitutionally protected area. *Barnes*, 158 Wn. App. at 612, 243 P.3d 165; *State v. Perez*, 41 Wn. App. 481, 483, 704 P.2d 625 (1985); *see also State v. O'Herron*, 153 N.J. Super. 570, 579, 380 A.2d 728 (1977) (discussing the "chameleon-like quality of the phrase 'plain view'") (quoting *Brown v. State*, 15 Md. App. 584, 606, 292 A.2d 762 (1972)); 1 Wayne R. LaFave, *Search and Seizure* § 2.2(a), at 596–97 (5th ed. 2012). The "open view" doctrine is characterized by the defendant's lower expectation of privacy because in both cases the officer views the contraband from an unprotected place. *See supra* § 1.3. The plain view doctrine, as opposed to the open view doctrine, may justify the seizure of objects without a warrant. *See generally* LaFave, *supra* § 2.2(a). This doctrine usually applies to the discovery and seizure of an object after entry into a constitutionally protected area. *See generally id.*

5.6 "OPEN VIEW"

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 because the defendant has no reasonable expectation of privacy in objects exposed to public view. *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996). Thus, this situation is referred to as "open view" and not "plain view." *State v. Dykstra*, 84 Wn. App. 186, 191 n.4, 926 P.2d 929 (1996); *see supra* § 1.3.

Likewise, in the second instance, an officer viewing contraband in a protected area while standing in an unprotected place also constitutes an

"open view" situation. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). This is because a search does not occur when an object located in a protected area is merely observed from a location in an unprotected area. *See id.* at 312–13, 4 P.3d 130. However, even if observations from an unprotected vantage point do not constitute a search, privacy rights are implicated when police enter a constitutionally protected area to seize an object. *See State v. Dyreson*, 104 Wn. App. 703, 713–14, 17 P.3d 668 (2001). In other words, "[w]herever 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); *see also Dykstra*, 84 Wn. App. at 192–93, 926 P.2d 929.

Therefore, although the "open view" doctrine may justify observing an object located in a constitutionally protected area, it will not justify seizing the object but may serve as the basis for a search warrant. *See Dykstra*, 84 Wn. App. at 191, 926 P.2d 929; *State v. Mierz*, 72 Wn. App. 783, 791, 866 P.2d 65 (1994), *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995) (view of prohibited coyote pups from legal vantage point outside of the defendant's fence did not justify an officer's warrantless entry onto property); *State v. Ferro*, 64 Wn. App. 181, 182, 824 P.2d 500 (1992).

In limited instances, seizure of an object may be permissible under the "open view" doctrine if an officer is reasonably certain that a container holds contraband based on the container's appearance. *State v. Courcy*, 48 Wn. App. 326, 330, 739 P.2d 98 (1987) (a paper "bindle" containing cocaine was observed by an officer during a lawful investigative stop). This is because "'some containers . . . by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.'" *Id*. (quoting *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). Consequently, the suspect does not have a reasonable expectation of privacy that would prevent opening the container or field-testing its contents. *Courcy*, 48 Wn. App. at 330, 739 P.2d 98.

5.7 CRITERIA FOR FALLING WITHIN THE "PLAIN VIEW" EXCEPTION

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

In contrast to "open view," "plain view" often involves an officer lawfully entering a constitutionally protected area and unexpectedly discovering incriminating evidence. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971);

State v. Rodriguez, 65 Wn. App. 409, 416, 828 P.2d 636 (1992). For a warrantless seizure to fall within this "plain view" exception, the following two requirements must be met: (1) the police must have a prior justification for the intrusion into the constitutionally protected area; and (2) the police must immediately realize that the object they observe is evidence—the incriminating character of the evidence must be immediately apparent. *State v. Hatchie*, 161 Wn.2d 390, 395, 166 P.3d 698 (2007); *see also State v. Cotten*, 75 Wn. App. 669, 683, 879 P.2d 971 (1994) (shotgun 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). Previously, courts imposed a third requirement: the discovery of the incriminating evidence must be inadvertent. *See Cotten*, 75 Wn. App. at 683, 879 P.2d 971. However, neither article I, section 7, nor the Fourth Amendment still require inadvertent discovery to justify a seizure under the plain view exception. *See Horton v. California*, 496 U.S. 128, 130, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *State v. Hudson*, 124 Wn.2d 107, 114 n.1, 874 P.2d 160 (1994) (noting the *Horton* revision to the plain view test).

5.7(a)(1) Prior Justification for Intrusion

The plain view doctrine applies only when police are lawfully occupying the position from which they observe the illegal object or activity. *State v. McKague*, 143 Wn. App. 531, 539, 178 P.3d 1035 (2008). 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. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005). 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 Wn.2d 940, 942–43, 530 P.2d 243 (1975); *see also Washington v. Chrisman*, 455 U.S. 1, 9, 102 S. Ct. 812, 70 L. Ed. 2d 778 (1982), *on remand*, 100 Wn.2d 814, 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 the underlying lawfulness. For example, when the arresting officer follows the arrestee into his or her home, 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 9, 102 S. Ct. 812 (determining that Fourth Amendment permits officer to accompany arrestee wherever arrestee goes), *on remand*, 100 Wn.2d at 822 (concluding that article I, section 7 prohibits an officer from entering

misdemeanor arrestee's home unless the officer can demonstrate threat to own safety, possibility of destruction of evidence of misdemeanor charged, or strong likelihood of escape). Essentially, any application of the plain view exception in confluence with article I, section 7 requires "a close examination of the facts and not a bright line rule" for determining when officers exceed their lawful presence. *Id.* at 820, 102 S. Ct. 812; *see State v. Link*, 136 Wn. App. 685, 697, 150 P.3d 610 (2007).

5.7(a)(2) Immediate Knowledge: Incriminating Character Immediately Apparent

The plain view exception applies only when the police immediately recognize the incriminating nature of the object seized. *State v. Cotten*, 75 Wn. App. 669, 683, 879 P.2d 971 (1994) (seizure of shotgun not valid under the plain view doctrine because it was not immediately apparent to the FBI officers that it was evidence of a crime). Although the officer need not have absolute knowledge that the object is related to a crime, the officer cannot tamper with the evidence in order to come to this belief, and the object must have a nexus to the crime under investigation or lead to an arrest. *Id*.

It is sufficient that an officer has probable cause to believe that the object is evidence of a crime. *State v. Sistrunk*, 57 Wn. App. 210, 214, 787 P.2d 937 (1990). For example, in *State v. Gonzales*, a clear vial of capsules and pills, "viewed in context" of other items of drug paraphernalia, was properly seized. *State v. Gonzales*, 46 Wn. App. 388, 400–01, 731 P.2d 1101 (1986). On the other hand, a closed paper bag containing marijuana was improperly seized because the marijuana was clearly not visible. *Id.* at 400, 731 P.2d 1101; *see also Sistrunk*, 57 Wn. App. at 214, 787 P.2d 937 (no probable cause to seize empty beer cans when the condition of cans was consistent with driver's explanation that they had been picked up for recycling).

If an object is moved or tampered with in any way to determine whether it is evidence of a crime, the "immediately apparent" prong of the plain view test will fail. *State v. King*, 89 Wn. App. 612, 622 n.31, 949 P.3d 856 (1998) (citing *State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974)). Police officers must connect items to a crime based solely on what is exposed to their view; they cannot move the object even a few inches. *Murray*, 84 Wn.2d at 527, 527 P.2d 1303 (holding that the police may not move a television to view the serial number).

Officers may seize objects only if the objects are connected with the crime under investigation or will lead to an arrest. *State v. Terrovona*, 105 Wn.2d 632, 648, 716 P.2d 295 (1986) (officers may only seize evidence that is not 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"). This nexus may include documents providing the motive for a crime or evidence of the crime itself. *See State v. Stenson*, 132 Wn.2d 668, 695, 940 P.2d 1239 (1997) (insurance documents were "related to the crime" because they could provide a motive for the murder), *post-conviction relief granted*, *In re Stenson*, 174 Wn.2d 474, 476, 276 P.3d 286 (2012)).

An officer's knowledge and experience are also relevant to determining whether an object is legally seized under the plain view doctrine. *State v. Kennedy*, 107 Wn.2d 1, 13, 726 P.2d 445 (1986) (the police officer "could immediately conclude, based on his own prior experience investigating narcotics and the information he had about the Smith household and about Kennedy, that the bag contained contraband"). Baggies may be considered evidence of a crime if other factors are present, such as the baggies' appearance of having contained illicit substances or presence in an area of high drug crime. *State v. Neth*, 165 Wn.2d 177, 185 n.3, 196 P.3d 658 (2008).

Article I, section 7 provides the same protection as the Fourth Amendment in this respect. *State v. O'Neill*, 148 Wn.2d 564, 582, 62 P.3d 489 (2003). Under the Fourth Amendment, officers must also immediately recognize the illicit nature of the object. *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.11(d) (5th ed. 2012). But they may not move the object to uncover its illicit nature. *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *Arizona v. Hicks*, 480 U.S. 321, 328, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) (the scope of plain view was exceeded when police lifted stereo components to read serial numbers). Officers may also, however, be informed in their determination by their expertise. *Andresen v. Maryland*, 427 U.S. 463, 483, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (use of specially trained investigators supported the seizure of business records).

5.8 EXTENSIONS OF THE PLAIN VIEW DOCTRINE

5.8(a) Plain Hearing

Some circuit courts have recognized a "plain hearing" analog to the plain view doctrine based on the premise that defendants have no reasonable expectation of privacy in conversations that are overheard with unaided ears. *See United States v. Jackson*, 588 F.2d 1046, 1051–52 (5th Cir. 1979); *see also United States v. Baranek*, 903 F.2d 1068, 1071 (6th Cir. 1990) (inadvertently intercepted nontelephonic conversations were authorized under "plain view" exception to the warrant requirement). Use of hearing enhancement devices may "raise very different and far more

serious questions" from visual enhancement devices when determining the reasonable expectation of the privacy of defendants and, consequently, when determining whether a warrant is required. *Dow Chem. Co. v. United States*, 476 U.S. 227, 238–39, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (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. RCW ch. 9.73. Tape recordings made by federal agents pursuant to the federal wiretap statute are inadmissible in state court when the recordings are made in violation of the Washington statute. *State v. Williams*, 94 Wn.2d 531, 541, 617 P.2d 1012 (1980). Police testimony about such recorded conversation is also inadmissible. *See infra* § 7.3(a) (discussing the use of illegally obtained evidence at probable cause hearings); *see also* Tara McGraw Swaminatha, *The Fourth Amendment Unplugged: Electronic Evidence Issues & Wireless Defenses*, 7 Yale J.L. & Tech. 51 (2005).

5.8(b) Plain Smell

Courts have generally accepted the "plain smell" exception as a branch of the plain view doctrine. *See generally* 1 Wayne R. LaFave, *Search and Seizure* § 2.2(a), at 596–97 (5th ed. 2012). Thus, police officers have used odor to justify warrantless entries and seizures so long as the officer was lawfully in the location where the odor was detected. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (warrantless search of car trunk valid when dog sniff of exterior of car detected drugs inside trunk and when police lawfully pulled car over for traffic stop). *But see Florida v. Jardines*, 569 U.S. 1, 12–13, 133 S. Ct. 1409, 1418, 185 L. Ed. 2d 495 (2013) (Kagan, J., concurring) (Drug-detection dogs are "super-sensitive instrument[s], . . . deployed to detect things inside that [police] could not perceive unassisted. . . . They are to the poodle down the street as high-powered binoculars are to a piece of plain glass. Like the binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell).") (majority opinion found search unconstitutional as an intrusion into the home, grounded in property law).

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 Wn.2d 332, 345, 815 P.2d 761 (1991) (odor of marijuana was in "open view"); *State v. Huckaby*, 15 Wn. App. 280, 290–91, 549 P.2d 35 (1976). Odor can also support a warrantless entry and can serve as probable cause for a search warrant. *See State v. Gave*, 77 Wn. App. 333, 336, 890 P.2d 1088 (1995) (odor of

marijuana supported warrant probable cause requirement); *State v. Gocken*, 71 Wn. App. 267, 278, 857 P.2d 1074 (1993) (odor of decaying flesh justified warrantless entry at homicide scene).

5.8(c) Plain Feel

The court has recognized the "plain feel" or "plain touch" doctrine as a corollary of the plain view doctrine. Under the plain touch exception to the warrant requirement, police may seize nonthreatening contraband detected through the officer's sense of touch during a legitimate pat down search. *Minnesota v. Dickerson*, 508 U.S. 366, 375–76, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); *State v. Garvin*, 166 Wn.2d 242, 251, 207 P.3d 1266 (2009). The object will be admissible only if its "contour or mass makes its identity immediately apparent." *Dickerson*, 508 U.S. at 365–76, 113 S. Ct. 2130; *State v. Hudson*, 124 Wn.2d 107, 115, 874 P.2d 160 (1994). Any "squeezing, sliding or [otherwise] manipulating" the object extends the search beyond the scope of *Terry*, thus rendering the search constitutionally invalid. *Garvin*, 166 Wn.2d at 248–50, 207 P.3d 1266 (excluding evidence when officer continued to squeeze defendant's pocket after feeling no weapon); *Bond v. United States*, 529 U.S. 334, 337–39, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000) (border patrol agent's exploratory manipulation of bus passenger's opaque bag violated the Fourth Amendment).

5.9 Introduction to Consensual Searches

A warrantless search is constitutional when valid consent is granted. *Washington v. Chrisman*, 455 U.S. 1, 9–10, 102 S. Ct. 812, 70 L. Ed. 2d 778 (1982), *on remand*, 100 Wn.2d 814, 676 P.2d 419 (1984); *State v. Cantrell*, 124 Wn.2d 183, 187, 875 P.2d 1208 (1994). A valid consensual 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 Wn.2d 229, 234, 830 P.2d 658 (1992). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.1 (5th ed. 2012). Furthermore, while the Fourth Amendment does not require targets of searches to be told they have the right to refuse the search, article I, section 7 provides heightened protection against unreasonable searches. *United States v. Drayton*, 536 U.S. 194, 207, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002). Thus, "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 Wn.2d 103, 116, 960 P.2d 927 (1998) (quoting *State v. Johnson*, 68 N.J. 349, 353–54, 346 A.2d 66 (1975)).

The State has the burden of proving that consent to a search was voluntary. *Ferrier*, 136 Wn.2d at 116, 960 P.2d 927 (citing *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990)). The level of proof required is "clear and convincing evidence." *Smith*, 115 Wn.2d at 789, 801 P.2d 975. For a discussion of the distinctions between voluntary consent and waiver of constitutional rights, see generally 4 LaFave, *supra* § 8.1(a), at 10–17.

5.9(a) Factors Considered in Determining Voluntariness

The court analyzes the validity or voluntariness of consent to a search in a similar manner as the voluntariness of a confession. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). However, consent to search is distinguishable from testimonial admissions since the former is consistent with innocence. *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988). 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 Wn.2d 103, 114, 960 P.2d 927 (1998) (quoting *Washington v. Chrisman*, 100 Wn.2d 814, 822, 676 P.2d 419 (1984)).

In Washington, if the police officers conduct a "knock and talk" for the purpose of gaining consent, they must "inform the person[s] from whom consent is sought that [they] 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." *Ferrier*, 136 Wn.2d at 118–19, 960 P.2d 927; *see supra* § 3.7. Failure to do so vitiates any consent given afterwards. *Ferrier*, 136 Wn.2d at 118–19, 960 P.2d 927. The Washington Supreme Court has declined to extend the *Ferrier* rule to situations where police seek entry to (1) question a resident in the course of investigating a crime, *State v. Khounvichai*, 149 Wn.2d 557, 559, 69 P.3d 862 (2003); (2) execute arrest warrants, *State v. Thang*, 145 Wn.2d 630, 636–37, 41 P.3d 1159 (2002); and (3) identify residents of the home, *State v. Williams*, 142 Wn.2d 17, 27, 11 P.3d 714 (2000). In other words, police need not give a *Ferrier* warning when the purpose of the visit is something other than searching for contraband or evidence of a crime. Thus, in *State v. Tagas*, the court concluded that under article I, section 7, the validity of defendant's consent to the search of her purse did not depend on the officer advising her of her right to refuse consent to search. 121 Wn. App. 872, 878, 90 P.3d 1088 (2004).

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. *See State v. Raines*, 55 Wn. App. 459, 462, 778 P.2d 538

(1989). A prior refusal to consent to a search will suggest that a subsequent consent was not voluntary. *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(f) (5th ed. 2012).

A suspect's behavior may also indicate consent even when verbal consent is withheld. *See Raines*, 55 Wn. App. at 462, 778 P.2d 538 (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 Wn. App. 929, 938, 561 P.2d 212 (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).

5.9(b) 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, 20 L. Ed. 2d 797 (1968); *State v. Browning*, 67 Wn. App. 93, 97–98, 834 P.2d 84 (1992) (acquiescence to a claim of authority is not equivalent to free and voluntary consent to a search). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(a) (5th ed. 2012).

A threat to seek a warrant if the person refuses to allow a search does not, however, automatically invalidate consent. *See State v. Smith*, 115 Wn.2d 775, 790, 801 P.2d 975 (1990) (no coercion where the defendant was told officers would seek a search warrant if consent was not given to search the trunk of car). *See generally* 4 LaFave, *supra* § 8.2(c). On the other hand, police misrepresentation regarding the existence of a search warrant may invalidate consent to a search or seizure under the Fourth Amendment. *See Bumper*, 391 U.S. at 548, 88 S. Ct. 1788; *Rental Owners Ass'n v. Thurston Cty.*, 85 Wn. App. 171, 183, 931 P.2d 208 (1997) ("threats to obtain a search warrant may invalidate consent when grounds for obtaining a warrant do not exist"), *superseded by statute on other grounds as stated in Potala Vill. Kirkland, LLC v. Kirkland*, 183 Wn. App. 191, 198, 334 P.3d 1143 (2014); *State v. McCrorey*, 70 Wn. App. 103, 112 n.8, 851 P.2d 1234 (1993), *abrogated on other grounds by State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998).

5.9(c) Coercive Surroundings

If the officers make a show of force while seeking consent, or if the surroundings are coercive in other respects, the consent will generally not be considered voluntary. *See McNear v. Rhay*, 65 Wn.2d 530, 537, 398 P.2d 732 (1965), *abrogated on other grounds by State v. Hill*, 123 Wn.2d

641, 870 P.2d 313 (1994); *State v. Dresker*, 39 Wn. App. 136, 139, 692 P.2d 846 (1984). For example, where officers placed a defendant under physical restraint, searched her home illegally without consent, and had searched her home illegally without consent two days prior, the defendant did not voluntarily consent. *State v. Werth*, 18 Wn. App. 530, 535–36, 571 P.2d 941 (1977); *see supra* § 1.4(a). However, the U.S. Supreme Court has held that surroundings were not coercive when police officers boarded a bus and obtained permission to search where "[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, [and] not even an authoritative tone of voice." *United States v. Drayton*, 536 U.S. 194, 203–04, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(b) (5th ed. 2012). 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." *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998).

The fact that a defendant is in custody when he consents to a search does not by itself establish coercion or involuntary consent. *McNear*, 65 Wn.2d at 538, 398 P.2d 732; *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976). Custodial restraint is, however, a significant factor in assessing voluntariness. *See State v. Avila-Avina*, 99 Wn. App. 9, 14–15, 991 P.2d 720 (2000), *abrogated on other grounds by State v. Winterstein*, 167 Wn.2d 620, 634–35, 220 P.3d 1226 (2009) (en banc). In *Avila-Avina*, the court concluded that consent was invalid where the defendant was illegally detained and held in a patrol car for four hours after the initial purpose of the detainment was satisfied. *Id.* at 16, 991 P.2d 720; *see also Werth*, 18 Wn. App. at 535–36, 571 P.2d 941; *State v. Rodriguez*, 20 Wn. App. 876, 881, 582 P.2d 904 (1978).

Consent is likely voluntary even if, after arrest, the officers will not allow the defendant to return inside his dwelling unaccompanied to retrieve necessary belongings. In *State v. Nelson*, the court held the consent was voluntary and uncoerced where 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 Wn. App. 157, 163–64, 734 P.2d 516 (1987). There, the court did not consider the defendant's fear that his behavior might appear "crazy" if he accepted arrest without his jacket and keys equal to coercion. *Id.* at 163, 734 P.2d 516.

5.9(d) Awareness of the Constitutional Right to Withhold Consent

Although courts consider an individual's knowledge of the right to refuse a search when determining whether consent is voluntary, the State may prove that consent was voluntary without establishing such knowledge. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Shoemaker* 85 Wn.2d 207, 212, 533 P.2d 123 (1975); *State v. Rodriguez*, 20 Wn. App. 876, 880−81, 582 P.2d 904 (1978) (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* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(i) (5th ed. 2012). Where police seek to justify a warrantless search of a private home, however, knowledge of the right to refuse consent is an essential element. *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998) ("the only sure way to give such a protection substance is to require a warning of its existence"). But informing occupants of their right to refuse might not be required when the officers are simply providing backup for another investigatory agency. *State v. Bustamante-Davila*, 138 Wn.2d 964, 984, 983 P.2d 590 (1999) (no *Ferrier* warning required when officers were simply providing backup to a requesting INS agent and suspect permitted agent and officers into home in which officers saw rifle in plain sight).

5.9(e) Prior Illegal Police Action

A prior illegal act by the police may suggest that the defendant's consent was involuntary. *See, e.g.*, *State v. Werth*, 18 Wn. App. 530, 535, 571 P.2d 941 (1977) ("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* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(d) (5th ed. 2012). Thus, a prior illegal search or arrest may taint the subsequent consent and thereby render the consent invalid. *See State v. McCrorey*, 70 Wn. App. 103, 111−12, 851 P.2d 1234 (1993) (prior illegal police activity is one factor when considering the totality of the circumstances), *abrogated on other grounds by State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998). *See generally* 4 LaFave, *supra* § 8.2(d).

The State has the burden of proving that consent was not obtained by the exploitation of a prior illegal search. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). In *State v. Jensen*, the court found that the State had met this burden when it showed that although only two hours intervened between the 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. *State v. Jensen*, 44 Wn. App. 485, 488–89, 723 P.2d 443 (1986); *see also Taylor v. Alabama*, 457 U.S. 687, 690, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982); *State v. Tijerina*, 61 Wn. App. 626, 629, 811 P.2d 241 (1991).

5.9(f) Maturity, Sophistication, and Mental or Emotional State

In assessing the voluntariness of consent, the court always considers the sophistication and the emotional state of the defendant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) ("The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling [and] low intelligence."); *State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975) (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, 64 L. Ed. 2d 497 (1980). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(e) (5th ed. 2012). 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 Wn. App. 656, 662, 938 P.2d 351 (1997); *see also Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (voices directing the defendant to confess to murder were not the result of police coercion).

5.9(g) Police Deception as to Identity or Purpose

The use of deception by a police officer does not necessarily affect the voluntariness of consent to a 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 Wn.2d 229, 233, 830 P.2d 658 (1992) (the defendant had no constitutionally protected expectation of privacy in the residence where undercover officers had purchased cocaine); *State v. Hashman*, 46 Wn. App. 211, 216, 729 P.2d 651 (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 generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(m)–(n) (5th ed. 2012).

5.10 SCOPE OF CONSENT

A consensual search must be limited to the area covered by the authority given by the consenting party. *State v. Reichenbach*, 153 Wn.2d

126, 133, 101 P.3d 80 (2004); *State v. Davis*, 86 Wn. App. 414, 423, 937 P.2d 1110 (1997). The consenting party, expressly or implicitly, may limit the scope of consent by only consenting to a search with reduced duration, area, or intensity. *Davis*, 86 Wn. App. at 423, 937 P.2d 1110. Any search exceeding the scope of consent is invalid because exceeding the scope of consent is comparable to exceeding the scope of a search warrant. *Id.* at 423–24, 937 P.2d 1110. *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.1(a) (5th ed. 2012).

"A general and unqualified consent to search an area for a particular type of material permits a search of personal property within the area in which the material could be concealed." *State v. Mueller*, 63 Wn. App. 720, 722, 821 P.2d 1267 (1992). For example, in *State v. Jensen*, the defendant consented to a "complete" search of his vehicle for materials of any evidentiary value. *State v. Jensen*, 44 Wn. App. 485, 486, 723 P.2d 443 (1986). Officers conducting the search found cocaine in the pocket of a jacket in the back seat of the defendant's car. *Id.* at 487–88, 723 P.2d 443. The court held that the officers had not exceeded the scope of consent since the defendant did not expressly or implicitly limit his consent. *Id.* at 492, 723 P.2d 443. Furthermore, the defendant consented to the search for evidence that could have reasonably been kept in a jacket pocket. *Id.* 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 Wn. App. 371, 382–83, 699 P.2d 221 (1985). A general, unqualified consent does not extend to locked containers, which have additional privacy expectations under article I, section 7. *State v. Monaghan*, 165 Wn. App. 782, 791, 266 P.3d 222 (2012) (citing *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986)) (finding that the search of a locked container in the trunk of defendant's car was without warrant or the defendant's consent and was therefore without the authority of law required in Washington).

To determine whether consent to one search is extended to a later search, courts consider (1) whether the search is conducted by the same officers; (2) whether the second search has the same objectives; and (3) whether the time elapsed between the two searches suggests an abandonment or completion of the initial search. *State v. Koepke*, 47 Wn. App. 897, 905–06, 738 P.2d 295 (1987) (citing *State v. Gallo*, 20 Wn. App. 717, 725, 582 P.2d 558 (1978)).

Lastly, consent to a search or seizure may be implied by statute. For example, drivers of motor vehicles in Washington give implied consent to a breath test if, at the time of arrest, the arresting officer reasonably believes the person had been driving while under the influence of intoxicating liquor or drugs. RCW 46.20.308(1).

5.11 CONSENT BY THIRD PARTIES

In some situations, third parties may give consent for searches, and evidence discovered as a result of such searches may be used against a non-consenting defendant. *See State v. Mathe*, 102 Wn.2d 537, 543, 688 P.2d 859 (1984). The relationship between the defendant and the third party, among other considerations, affects the validity of third-party consent.

Under both article I, section 7 and the Fourth Amendment, third-party consent may be valid under the "common authority" or actual authority standard articulated in *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d. 242 (1974). *See also Mathe*, 102 Wn.2d at 543, 688 P.2d 859. Actual authority requires a sufficient relationship to, or mutual use of, property by people with joint access or control. *State v. Rison*, 116 Wn. App. 955, 961, 69 P.3d 362 (2003). Under this standard, if the non-consenting party is absent, (1) the consenting party must be able to permit the search in 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. *State v. Thompson*, 151 Wn.2d 793, 803–04, 92 P.3d 228 (2004); *Mathe*, 102 Wn.2d at 543–44, 688 P.2d 859.

Under article I, section 7, if the person only appears to have authority to consent and in fact does not, the search is invalid. *See State v. Eisfeldt*, 163 Wn.2d 628, 638–39, 185 P.3d 580 (2008) (repairman lacked actual authority to consent to search of home, and police officers' reasonable belief that he did was irrelevant). The Fourth Amendment imposes a lesser standard, which is satisfied when consent is given by one who only *appears* to have authority to consent, and so long as the police reasonably believe that the individual has this authority. *See Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). This "apparent authority" doctrine is grounded in the reasonableness of the search whereas the "common" or "actual authority" doctrine is grounded in reasonable expectations of privacy and the appropriate scope of the consent. *State v. Morse*, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.3(g) (5th ed. 2012).

The following sections discuss the relationships between a defendant and a third party that may give rise to third-party consent, including family members, co-tenants, landlords, employers, bailees, and guests.

5.11(a) Defendant's Spouse

Washington cases involving spousal consent are consistent with the "common authority" approach of *State v. Mathe*, 102 Wn.2d 537, 543, 688 P.2d 859 (1984). For example, a defendant's spouse, having an equal right to use an object or occupy the property, may consent to a search of the

object or premises, regardless of whether the area is kept for the exclusive use of the non-consenting spouse. *See State v. Gillespie*, 18 Wn. App. 313, 317, 569 P.2d 1174 (1977). However, also consistent with the "common authority" standard, the consent of a spouse is only valid against the non-consenting spouse if the non-consenting spouse is not present at the time of the search. *State v. Walker*, 136 Wn.2d 678, 679, 965 P.2d 1079 (1998). When police request entry pursuant to "knock and talk" in conducting a search pursuant to a warrant, either spouse may validly allow police entry. *State v. Hartnell*, 15 Wn. App. 410, 417–18, 550 P.2d 63 (1976); *see supra* § 3.7. *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.4(a) (5th ed. 2012).

5.11(b) Defendant's Parents

A parent has authority over all rooms in his or her home and consequently can consent to a search of a dependent child's room regardless of whether the child is a minor. *State v. Summers*, 52 Wn. App. 767, 772, 764 P.2d 250 (1988); *see also State v. Cotten*, 75 Wn. App. 669, 685, 879 P.2d 971 (1994) (finding that the defendant's mother could give valid consent to seizure of a shotgun found in defendant's bedroom). Furthermore, an adult child living rent-free with his parents does not create the type of relationship that would prevent his parents from consenting to a search. *State v. Thompson*, 151 Wn.2d 793, 807, 92 P.3d 228 (2004) (finding that police did not need defendant's consent to search his parents' boathouse, which he used while living with his parents rent-free). 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 relationship is more akin to a landlord and tenant relationship, leaving the parent without authority to consent to a search of the child's room. *Summers*, 52 Wn. App. at 771–73, 764 P.2d 250.

5.11(c) Defendant's Child

The defendant's child, in appropriate circumstances, may consent to police entry of the parent's home but not to police search of the home. *See, e.g.*, *State v. Jones*, 22 Wn. App. 447, 451–52, 591 P.2d 796 (1979) (reasoning that a minor child may consent to entry but declining to rule on the legal question of consent to search). For a general discussion of the scope and limitations of a child's consent to a search of the parent's house, see generally 4 Wayne R. LaFave, *Search and Seizure* § 8.4(c) (5th ed. 2012).

5.11(d) Co-Tenant or Joint Occupant

A co-tenant or joint occupant of the defendant's dwelling with common authority over or other sufficient relationship to the premises or effects sought to be inspected may give valid consent to a search of the premises or effects. *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); *see State v. Mathe*, 102 Wn.2d 537, 543, 688 P.2d 859 (1984); *see also State v. Jeffries*, 105 Wn.2d 398, 414, 717 P.2d 722 (1986) (common authority rule applicable to validate consent to search a homeless encampment located outside the city of Wenatchee). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.5(c) (5th ed. 2012). But when the non-consenting cohabitant is actually present on the premises, Washington courts have held that a cohabitant cannot give consent if the non-consenting cohabitant has equal or greater control over the premises. *State v. Morse*, 156 Wn.2d 1, 13, 123 P.3d 832 (2005) ("'[T]hat consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent.'") (quoting *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989)); *State v. Floreck*, 111 Wn. App. 135, 142–43, 43 P.3d 1264 (2002); *see also Mathe*, 102 Wn.2d at 541, 688 P.2d 859. Although a cohabitant cannot give valid consent to bedrooms or private areas when a non-consenting cohabitant is present, a cohabitant can give valid consent to police officers to enter the living room or an area that customarily receives visitors. *State v. Hoggatt*, 108 Wn. App. 257, 269, 30 P.3d 488 (2001); *see Leach*, 113 Wn.2d at 744, 782 P.2d 1035.

Courts have not extended the dual consent rule for cohabitants to the common authority shared by a driver and passenger in an automobile. *State v. Cantrell*, 124 Wn.2d 183, 192, 875 P.2d 1208 (1994) (passenger's consent to search automobile was sufficient to support warrantless search even though the defendant driver did not consent to the search; the court noted that a situation where a co-occupant overtly objected to search was not before the court).

5.11(e) Landlord, Lessor, or Manager

A landlord lacks authority to consent to a search when a tenant has the sole or undisputed possession of leased premises. *State v. Birdsong*, 66 Wn. App. 534, 537–39, 832 P.2d 533 (1992). This rule also applies to limited rental arrangements such as those found in motels, boarding homes, and room rentals. *State v. Mathe*, 102 Wn.2d 537, 544, 688 P.2d 859 (1984); *see also* George L. Blum, Annotation, *Admissibility of Evidence Discovered in Warrantless Search of Rental Property Authorized by Lessor of Such Property—State Cases*, 61 A.L.R. 5th 1, 124 (1998). However, the lessor or manager of an apartment building may

consent to a search of an area that is not within the lessee's exclusive possession. *State v. Talley*, 14 Wn. App. 484, 487, 543 P.2d 348 (1975) (finding the common areas of a property were not under exclusive control of the lessee-defendant); *see also State v. Kreck*, 86 Wn.2d 112, 123, 542 P.2d 782 (1975) (finding that the rental manager could consent to a search of an unrented half of a garage). 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 Wn.2d 655, 659, 628 P.2d 806 (1981). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.5(a), at 279–80 (5th ed. 2012).

Tenants, conversely, may consent to searches of common areas under the "common authority" rule, even over the objection of the landlord. *Cranwell v. Mesec*, 77 Wn. App. 90, 103–04, 890 P.2d 491 (1995). For additional discussion of consent by a lessee, see generally 4 LaFave, *supra* § 8.5(b).

5.11(f) Bailee

A bailee may consent to a search of the bailor's belongings when the bailee has a sufficient relationship to or a degree of control over the chattel. *See State v. Smith*, 88 Wn.2d 127, 139–40, 559 P.2d 970 (1977) (when hospital had joint control over patient-defendant's clothing, hospital ward clerk could consent to police seizure of the clothing); *see also State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000) (manager of storage units facility could give police permission to enter; officers subsequently viewed contraband through existing hole in container). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.6(a) (5th ed. 2012). For a discussion of consent by a bailor, see generally *id.* § 8.6(b).

5.11(g) Employee and Employer

An employer may consent to a search of the place of employment, even when the search would affect the belongings of an employee. Thus, under the common authority rule analysis, see *supra* § 5.11, 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 Wn. App. 620, 632–33, 736 P.2d 1079 (1987) (finding that the defendant shared the area but knew that his employer had greater authority and access to the area, decreasing his expectation of privacy). Further, under some circumstances, an employee may give consent to a search of an employer's premises. For a discussion of the rules governing consent within the employer–employee relationship, see 4 Wayne R. LaFave, *Search and Seizure* § 8.6(c)–(d) (5th ed. 2012).

5.11(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 Wn. App. 414, 419, 937 P.2d 1110 (1997). However, the hotel guest's expectation of privacy generally expires at checkout time. *See id.* at 419, 937 P.2d 1110 (finding that a motel guest loses expectation of privacy at the expiration of tenancy, unless late payment has been accepted by the motel or the motel has tolerated previous overtime stays). In Washington, courts require particularized suspicion to search a hotel registry, even if the hotel employee consents to such a search. *See State v. Jorden*, 160 Wn.2d 121, 130, 156 P.3d 893 (2007); *supra* § 1.3; *see also In re Nichols*, 171 Wn.2d 370, 376, 256 P.3d 1131 (2010).

5.11(i) Host and Guest

Generally, 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. Rodriguez*, 65 Wn. App. 409, 414–15, 828 P.2d 636 (1992); *State v. Koepke*, 47 Wn. App. 897, 903–04, 738 P.2d 295 (1987) (host–guest relationship found between lessee and defendant temporarily using one of lessee's rooms such that lessee's consent to search the room was valid). However, when numerous guests are present and police do not inquire about ownership of property, a host's consent to search may not be valid against guests' personal property. *See State v. Rison*, 116 Wn. App. 955, 962, 69 P.3d 362 (2003), *review denied*, 151 Wn.2d 1008, 87 P.3d 1184 (2004). For additional discussion, see 4 Wayne R. LaFave, *Search and Seizure* § 8.5(e) (5th ed. 2012). *See also supra* § 5.11 (common authority rule).

5.12 EXIGENT CIRCUMSTANCES: INTRODUCTION

The exigent circumstances exception justifies a warrantless search when law enforcement officers establish probable cause but have a pressing need for an immediate search or seizure that would be delayed by securing a warrant. *See State v. Cardenas*, 146 Wn.2d 400, 405–06, 47 P.3d 127 (2002); *State v. Hoffman*, 116 Wn.2d 51, 101, 804 P.2d 577 (1991). Washington courts use the following six factors as a guide in determining whether exigent circumstances justify a warrantless entry and search:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged;
>
> (2) whether the suspect is reasonably believed to be armed;

> (3) whether there is reasonably trustworthy information that the suspect is guilty;
>
> (4) [whether] there is strong reason to believe that the suspect is on the premises;
>
> (5) a likelihood that the suspect will escape if not swiftly apprehended; and
>
> (6) [whether] the entry is made peaceably.

Cardenas, 146 Wn.2d at 406, 47 P.3d 127 (citing *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986)); *see Hoffman*, 116 Wn.2d at 101, 804 P.2d 577 (same factors used in determining justification of warrantless home arrest). Not every factor must be present to find that exigent circumstances justified the officer's entry, only those factors necessary to show that the officer needed to act quickly. *Cardenas*, 146 Wn.2d at 408, 47 P.3d 127; *see, e.g.*, *State v. Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10 (1989) (no single factor is conclusive; weight varies with circumstances); *State v. Flowers*, 57 Wn. App. 636, 644, 789 P.2d 333 (1990) (the fact that some factors are not present is not controlling).

The courts have identified five situations in which exigent circumstances support a departure from the warrant requirement: "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence." *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983) (internal citations omitted); *see State v. Pressley*, 64 Wn. App. 591, 598, 825 P.2d 749 (1992) (police may seize evidence without a warrant if probable cause exists and the actions of the detainee give rise to a reasonable suspicion that evidence is in danger of loss or destruction); 2 Wayne R. LaFave, *Search and Seizure* § 4.1(b), at 566–73 (5th ed. 2012); *see also State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887 (2004) (no warrant needed to seize a gun placed in open view because of exigent circumstances); *Terrovona*, 105 Wn.2d at 644–45, 716 P.2d 295. However, exigent circumstances are not created merely because a serious offense has been committed. *See State v. Stevenson*, 55 Wn. App. 725, 732, 780 P.2d 873 (1989); *see also Counts*, 99 Wn.2d at 59–61, 825 P.2d 749.

When a crime is committed in an officer's presence after the officer has been admitted into a residence, exigent circumstances need not exist in order for the officer to lawfully make a warrantless arrest in the residence. *See State v. Dalton*, 43 Wn. App. 279, 286–87, 716 P.2d 940 (1986). In *Dalton*, an officer who obtained entry into a student's college dormitory room under the pretense of buying drugs, but with the actual intent of making an arrest, could make an arrest under RCW 10.31.100,

which permits an arrest without a warrant where the police officer has reasonable cause to believe a felony was or is being committed. *Id.* at 286, 716 P.2d 940.

5.13 EXIGENT CIRCUMSTANCES JUSTIFYING WARRANTLESS ENTRY INTO THE HOME

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, 26 L. Ed. 2d 409 (1970). Both the Fourth Amendment and article I, section 7 draw a firm line at the entrance of the house and maintain "that threshold may not reasonably be crossed without a warrant." *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89 (1985) (quoting *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)). Police may, however, make a warrantless entry into a home under the following circumstances: (1) when they attempt to arrest the suspect in a public place and the suspect retreats into the home; and (2) when 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. *See Warden v. Hayden*, 387 U.S. 294, 298–99, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); *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). While 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. 1642.

Washington courts hold that the location of the arrestee, not the location of the arresting officer, is critical in determining whether an arrest takes place in a home. *Holeman*, 103 Wn.2d at 429, 693 P.2d 89. Accordingly, 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. *Id.*; *see also supra* § 3.7 (knock and announce rule). The unenclosed front porch of a home, however, is a public place for purposes of arrest once probable cause has been established. *State v. Solberg*, 122 Wn.2d 688, 699–702, 861 P.2d 460 (1993). A police officer can arrest a suspect who voluntarily exits his or her home onto the unenclosed porch, even in the absence of exigent circumstances. *See id.* at 700, 861 P.2d 460; *see also State v. Bockman*, 37 Wn. App. 474, 481, 682 P.2d 925 (1984).

5.13(a) Hot Pursuit

In determining whether a warrantless entry into a home is justified by the exigent circumstance of hot pursuit, courts have focused on the immediate need to continue a promising criminal investigation in addition to the factors listed in *Cardenas*. *State v. Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10 (1989); *see supra* § 5.13; *see also Welsh v. Wisconsin*, 466 U.S. 740, 752–53, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (no hot pursuit when police did not engage in immediate or continuous pursuit of defendant from the scene of the crime); *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983) (no hot pursuit when police stood outside defendant's home for one hour after defendant retreated therein). Other Washington cases involving hot pursuit include *State v. Bessette*, 105 Wn. App. 793, 21 P.3d 318 (2001); *State v. Griffith*, 61 Wn. App. 35, 808 P.2d 1171 (1991) (escape, destruction of evidence); *State v. Hendricks*, 25 Wn. App. 775, 610 P.2d 940 (1980) (escape); *State v. Gallo*, 20 Wn. App. 717, 582 P.2d 558 (1978) (intent to kill).

5.13(b) Imminent Arrest

Even when a suspect has not been arrested, police officers 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 either armed or sought in connection with a violent crime. *Warden v. Hayden*, 387 U.S. 294, 298–300, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); *see State v. Cardenas*, 146 Wn.2d 400, 412, 47 P.3d 127 (2002) (holding that officers were excused from complying with knock and announce statute where officers suspected defendants were dangerous, the evidence could be easily destroyed, and officers observed defendants rushing toward back of the motel room following their knock). In addition, police officers may make a warrantless entry when they believe a suspect has alerted another accomplice of the arrest and the crime was one of violence. *State v. Reid*, 38 Wn. App. 203, 209–10, 687 P.2d 861 (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 that the suspect is armed. *State v. Dresker*, 39 Wn. App. 136, 139–40, 692 P.2d 846 (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 they are able to obtain a warrant. *See State v. Carter*, 127 Wn.2d 836, 840,

904 P.3d 290 (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). "A belief that contraband will be destroyed must be based upon sounds or activities observed at the scene or specific prior knowledge that a particular suspect has a propensity to destroy contraband"; mere presence of easily disposable drugs does not by itself constitute an exigency. *State v. Jeter*, 30 Wn. App. 360, 362, 634 P.2d 312 (1981).

Police may enter a home without a warrant in response to an emergency (including the imminent destruction of evidence) so long as they do not themselves create the exigency through conduct that violates the Fourth Amendment. *Kentucky v. King*, 563 U.S. 452, 464–466, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011) (officers do not create an exigency by conducting a knock and talk instead of obtaining a warrant even when it is reasonably foreseeable that their investigative tactics would "lead a drug suspect to destroy evidence"); *see State v. Drumhiller*, 36 Wn. App. 592, 596–97, 675 P.2d 631 (1984) (exigent circumstances existed when police observed occupants in the process of inhaling what police reasonably believed to be cocaine); *see also supra* § 3.7 (knock and announce rule).

5.13(c) Less Intrusive Alternatives

Courts have held warrantless home entries illegal when police officers could have kept the residence under surveillance until they obtained a warrant. *State v. Bessette*, 105 Wn. App. 793, 799–800, 21 P.3d 318 (2001). For example, exigent circumstances do not justify entry into a home when there is no threat to the health, safety, and welfare of citizens, or no risk of escape by a suspect once the suspect enters his or her home. *State v. Werth*, 18 Wn. App. 530, 536–37, 571 P.2d 941 (1977); *State v. Peele*, 10 Wn. App. 58, 63–64, 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). *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 6.5(c) (5th ed. 2012) (discussing the impoundment alternative).

Similarly, police officers are sometimes required to keep the occupants of a home under surveillance, instead of searching them, until they procure a warrant. *See, e.g.*, *United States v. Grummel*, 542 F.2d 789, 791 (9th Cir. 1976); *State v. Lewis*, 19 Wn. App. 35, 40, 573 P.2d 1347 (1978). Police may use methods that do not involve a search in order to secure premises in which they are legally present while awaiting the issuance of a search warrant. Non-search activity may include brief detention of a defendant while awaiting a warrant if there is sufficient probable cause and a risk that potential evidence would be destroyed.

Illinois v. McArthur, 531 U.S. 326, 331–33, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001); *see also State v. Terrovona*, 105 Wn.2d 632, 645–46, 716 P.2d 295 (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).

5.14 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 the public, flight, or the destruction of evidence. With regard to the officer and public safety exception, a pat-down search is unconstitutional absent a reasonable belief that the suspect is armed and currently dangerous. *Ybarra v. Illinois*, 444 U.S. 85, 92–93, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *see, e.g.*, *State v. Smith*, 165 Wn.2d 511, 199 P.3d 386 (2009) (finding exigencies to justify detaining suspect upon exiting home because of the grave and imminent safety risk posed by a tanker truck filled with a dangerous chemical parked next to a house in which a rifle had been seen). In addition, "even without probable cause or reasonable suspicion of criminal activity, it is reasonable for an officer executing a search warrant at a residence to briefly detain occupants of that residence, to ensure officer safety and an orderly completion of the search." *State v. King*, 89 Wn. App. 612, 618–19, 949 P.3d 856 (1998).

Regarding the destruction-of-evidence exception, the brief seizure of a person outside his home is permissible when police have probable cause to believe that the home contains illegal drugs and a reasonable belief that the person could destroy evidence before police could obtain a search warrant. *See State v. Carter*, 127 Wn.2d 836, 840, 904 P.3d 290 (1995); *see also Illinois v. McArthur*, 531 U.S. 326, 331–33, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001). For a definition of what constitutes a seizure, see *supra* § 1.4. As explained in section 5.12(b), the officers must have concrete facts to back up their belief that the evidence is in fact in danger. *State v. Jeter*, 30 Wn. App. 360, 362, 634 P.2d 312 (1981).

As the following sections discuss, exigent circumstances are used to justify the following three kinds of warrantless searches of persons: (1) fresh pursuit of a suspect fleeing from police; (2) searches that penetrate the body, such as blood tests and other invasive medical procedures; and (3) searches of persons located on the premises being searched.

5.14(a) Hot Pursuit

In *Wenatchee v. Durham*, 43 Wn. App. 547, 718 P.2d 819 (1986), the court identified the five criteria to be used when analyzing hot pursuit: (1) a felony must have occurred in the area; (2) the suspect must be attempting to flee or know that he is being pursued; (3) the police must pursue the suspect without delay; (4) the pursuit must be continuous; and (5) there must be a relationship between the time the crime was committed, the beginning of the pursuit, and the apprehension of the suspect. *Id.* at 550–51, 718 P.2d 819. Although the statutory definition of hot pursuit, or "fresh pursuit," relies in part on the common law, *Tacoma v. Durham*, 95 Wn. App. 876, 881, 978 P.2d 514 (1999), "courts are not limited by the common law definition, but may consider the Legislature's overall intent to use practical considerations in deciding whether a particular arrest across jurisdictional lines was reasonable." *Vance v. Dep't of Licensing*, 116 Wn. App. 412, 416, 65 P.3d 668 (2003), *review denied*, 150 Wn.2d 1004, 77 P.3d 651 (2003).

Police officers in Washington may engage in pursuit of anyone "who is reasonably believed to have committed a violation of traffic or criminal laws." RCW 10.93.070(6), 10.93.120. However, barring the presence of exceptional circumstances, a passenger may walk away from or stay at the traffic stop scene. *State v. Rehn*, 117 Wn. App. 142, 149, 69 P.3d 379 (2003).

5.14(b) Warrantless Searches Involving Intrusion into the Body

A medical procedure performed without a warrant under exigent circumstances must be reasonable and performed in a reasonable manner. *Schmerber v. California*, 384 U.S. 757, 767−68, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *see* 3 Wayne R. LaFave, *Search and Seizure* § 5.3(c), at 215–16 (5th ed. 2012). In addition, the state must show more than probable cause because of the intrusive nature of the search. *Schmerber*, 384 U.S. at 770–72, 86 S. Ct. 1826. The fact that evidence is likely to be destroyed will not automatically justify an intrusive medical procedure; the evidence must be essential to a conviction. *See Winston v. Lee*, 470 U.S. 753, 765–66, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (no need to retrieve bullet from defendant's body where other substantial evidence was available to convict him).

Where a serious crime involving intoxication is at issue, the natural dissipation of alcohol in the blood of a suspect may be an exigent circumstance justifying the nonconsensual extraction of a blood sample to determine the suspect's blood alcohol level. *See State v. Curran*, 116 Wn.2d 174, 185, 804 P.2d 558 (1991); *see also Schmerber*, 384 U.S. at 770–71, 86 S. Ct. 1826. *But see Missouri v. McNeely*, 569 U.S. 141, 145,

133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (dissipation of blood alcohol not sufficient per se to conduct a warrantless blood draw); *see also State v. Baird*, 187 Wn.2d 210, 221, 386 P.3d 239 (2016) (nor is dissipation of alcohol sufficient per se to conduct a less invasive breath test). Blood tests without a warrant have been upheld as reasonable searches under both the Fourth Amendment and article I, section 7 as long as a trained medic performs the test in a reasonable manner. *Curran*, 116 Wn.2d at 185, 804 P.2d 558.

In Washington, blood tests for alcohol intoxication are also justified by implied consent under RCW 46.20.308(4). *Curran*, 116 Wn.2d at 185, 804 P.2d 558 (no violation of article I, section 7 when a blood sample is taken pursuant to RCW 46.20.308(4)); *see also State v. Baldwin*, 109 Wn. App. 516, 518, 37 P.3d 1220 (2001). Notably, the lawful arrest of a motorist is a prerequisite for operation of the implied consent statute; otherwise, express consent is required for the blood test of a motorist who is not under arrest. *State v. Wetherell*, 82 Wn.2d 865, 870–71, 514 P.2d 1069 (1973). 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 Wn. App. 200, 211–13, 697 P.2d 1025 (1985) (officer used a passkey to enter an apartment and arrest suspect following felony hit and run). But, as stated above, the natural dissipation of blood alcohol does not provide an exigency per se in every case. *See McNeely*, 569 U.S. at 145, 133 S. Ct. 1552; *Baird*, 187 Wn.2d at 221, 386 P.3d 239.

In order to deter recidivism and identify persons who commit crimes, no warrant is required under the Fourth Amendment to collect a DNA sample from every adult or juvenile convicted of a felony, harassment, stalking, or communication with a minor for immoral purposes, or adjudicated guilty of an equivalent juvenile offense. *See* RCW 43.43.754(1); *State v. Surge*, 122 Wn. App. 448, 450, 94 P.3d 345 (2004) (holding that *State v. Olivas*, 122 Wn.2d 73, 856 P.2d 1076 (1993), is controlling on this issue); *see also Maryland v. King*, 569 U.S. 435, 466, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

5.14(c) Warrantless Searches and Seizures of Persons Located on Premises Being Searched

In limited instances, police may conduct a search of a person on the premises but not named in the warrant. *State v. Broadnax*, 98 Wn.2d 289, 301, 654 P.2d 96 (1982), *abrogated on other grounds by Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). To detain or search an individual other than the occupant, there must be "presence plus." *See id.* In other words, the officers must 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 Wn. App. 35, 38, 584 P.2d 408 (1978) (although a specific warrant to search premises cannot automatically be converted into a general one to search individuals, "defendant's suspicious conduct gave the police reasonable cause to search his person"). "Reasonable cause" requires that the person engage in some type of suspicious activity. *Broadnax*, 98 Wn.2d at 301, 654 P.2d 96. Officers may also conduct a limited search for weapons to protect themselves during the execution of the warrant. *Ybarra v. Illinois*, 444 U.S. 85, 93, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980). For a more complete discussion of when occupants may be searched during the execution of a premises search warrant, see *supra* § 3.7(b).

5.15 WARRANTLESS SEARCHES AND SEIZURES OF MOTOR VEHICLES: INTRODUCTION

The court treats automobiles and other motor vehicles 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 an article on a person. *See Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004) ("The Fourth Amendment does not treat a motorist's car as his castle."). Second, the mobility of a vehicle may make obtaining a warrant prior to a search or seizure impractical. *See id.*; *State v. Johnson*, 128 Wn.2d 431, 449, 453–54, 909 P.2d 293 (1996). Under both article I, section 7 and the Fourth Amendment, 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. *California v. Carney*, 471 U.S. 386, 393, 105 S. Ct. 2066, 85 L. Ed. 2d. 406 (1985); *Johnson*, 128 Wn.2d at 449, 909 P.2d 293 (lessened privacy interest for sleeper compartment of a tractor-trailer rig); *State v. Cantrell*, 124 Wn.2d 183, 190, 875 P.2d 1208 (1994). The reasonable expectation of privacy in motor vehicles is discussed in section 1.3(e). *See also* 3 Wayne R. LaFave, *Search and Seizure* § 7.2(b), at 731–49 (5th ed. 2012).

A vehicle may 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 the *Terry* stop-and-frisk exceptions. *See* 3 LaFave, *supra* § 7.1(b), at 673–96; *see also* 2 LaFave, *supra* § 4.9(d) (discussing the *Terry* stop-and-frisk search). Courts have also held that 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, 725–26 (8th Cir. 1978), but no Washington case has directly addressed the issue.

The search of a motor vehicle and its contents are treated differently under the Fourth Amendment than they are under article I, section 7. *Compare Arizona v. Gant*, 556 U.S. 332, 351, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (police may search a vehicle incident to a recent occupant's arrest to obtain evidence of the crime of arrest), *with State v. Valdez*, 167 Wn.2d 761, 779, 224 P.3d 751 (2009) (only preservation of evidence and officer safety are valid reasons to search a vehicle incident to arrest). The next sections set forth the standards under article I, section 7 and the Fourth Amendment. Then, the general principles governing automobile impoundment and inventory searches are addressed.

5.16 WARRANTLESS SEARCHES OF A VEHICLE UNDER THE WASHINGTON STATE CONSTITUTION

The warrantless search of a vehicle is much more restricted under article I, section 7 than it is under the Fourth Amendment. First, Washington does not allow warrantless searches of vehicles on probable cause grounds—the "automobile exception" applied in federal court. *State v. Patton*, 167 Wn.2d 379, 394–95, 219 P.3d 651 (2009). Second, exigent circumstances will be found only where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. *State v. Tibbles*, 169 Wn.2d 364, 373, 236 P.3d 885 (2010). Lastly, search of a vehicle incident to arrest is only proper if there are concerns for officer safety or destruction of the evidence. *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012); *State v. Valdez*, 167 Wn.2d 761, 779, 224 P.3d 751 (2009); *State v. Glenn*, 140 Wn. App. 627, 636, 166 P.3d 1235 (2007) (vehicle search justified under the officer safety exception by credible report that a gun had been displayed from the vehicle).

Once the immediate danger of harm to police or destruction of evidence is removed by arrest and police control of the vehicle, police must obtain a warrant or have another exception to search the vehicle. *State v. Afana*, 169 Wn.2d 169, 179, 233 P.3d 879 (2010) (the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk). In *Snapp*, the court held there could be no concerns for officer safety because the defendant was in custody and removed from the vehicle; therefore, the officers exceeded the scope of the search incident to arrest when they searched the passenger compartment of the vehicle. *Snapp*, 174 Wn.2d at 197, 275 P.3d 289.

Even if the officers may properly search the passenger compartment, they may not open locked containers. *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), *overruled on other grounds by Valdez*, 167 Wn.2d

761, 224 P.3d 751. This contrasts with 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* § 7.1(c), at 697–707 (5th ed. 2012). "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 Wn. App. 441, 446, 892 P.2d 106 (1995), *aff'd*, 128 Wn.2d 431, 909 P.2d 293 (1996) (discussing *Stroud*, 106 Wn.2d 144, 720 P.2d 436). Therefore, police in Washington must obtain a search warrant prior to searching any locked glove compartment or other locked container.

Police officers may make a limited entry and investigation into a vehicle that they have probable cause to believe has been the subject of a burglary, tampering, or theft. *State v. Lynch*, 84 Wn. App. 467, 477–78, 929 P.2d 460 (1996). Officers may search those areas they reasonably believe to have been affected and those areas reasonably believed to contain some evidence of ownership. *Id.* at 477–78, 929 P.2d 460. Officers may also make a warrantless entry into a vehicle to look in places where registration papers might be kept if the driver has fled the vehicle and the officer reasonably believed the vehicle had been stolen. *State v. Orcut*, 22 Wn. App. 730, 734–35, 591 P.2d 872 (1979).

5.17 WARRANTLESS SEARCHES OF A VEHICLE UNDER THE FOURTH AMENDMENT

In contrast to article I, section 7, the Fourth Amendment includes the "automobile exception," which allows officers to search a vehicle without a warrant so long as they have probable cause to believe that the vehicle contains contraband. *United States v. Johns*, 469 U.S. 478, 483, 105 S. Ct. 881, 83 L. Ed. 2d 890 (1985) (citing *Carroll v. United States*, 267 U.S. 132, 149, 162, 45 S. Ct. 280, 69 L. Ed. 543 (1925)); *United States v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). A warrant is not required because "the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll*, 267 U.S. at 153, 45 S. Ct. 280. Because the vehicle itself presents an exigency, the officers do not need a separate exigency to perform a warrantless search. *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 144 L. Ed. 2d 442 (1999) (no need for a separate finding of exigency in addition to probable cause); *Chambers v. Maroney*, 399 U.S. 42, 51–52, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (actual exigent circumstances not necessary to justify warrantless probable cause search). *But see Collins v. Virginia*, 138 S. Ct. 1663, 1671, 201 L. Ed. 2d 9 (2018) (automobile exception does not justify

a warrantless intrusion into the curtilage of a home to reach a parked motorcycle).

A search may extend to a vehicle in its entirety, including any of the vehicle's contents, both locked and unlocked. *Ross*, 456 U.S. at 821, 825, 102 S. Ct. 2157; *California v. Acevedo*, 500 U.S. 565, 579, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991); *see also Illinois v. Caballes*, 543 U.S. 405, 407, 125 S. Ct. 834, 160 L. Ed. 842 (2005) (warrantless search of car trunk valid where narcotics-detection dog alerted on trunk when police lawfully pulled the car over for a traffic stop). Furthermore, the U.S. Supreme Court has held that, even prior to arrest, police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295, 307, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999). 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 items sought may be hidden. *See id.*

The police may conduct a warrantless search of a vehicle even after they have taken the vehicle into custody and its contents are in no danger of removal or disturbance. *Carroll*, 267 U.S. at 153–54, 45 S. Ct. 280; *Florida v. Meyers*, 466 U.S. 380, 382, 104 S. Ct. 1852, 80 L. Ed. 2d 381 (1984). The rationale is that the initial justification for the warrantless search does not disappear after impoundment. *Johns*, 469 U.S. at 484, 105 S. Ct. 881. The vehicle, however, must have been mobile at the time of impoundment for the *Carroll* rule to apply. *Coolidge v. New Hampshire*, 403 U.S. 443, 460–62, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (a warrant was required when defendant was arrested in his home and had no access to a vehicle after arrest), *overruled in part on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *see also California v. Carney*, 471 U.S. 386, 390–91, 105 S. Ct. 2066, 85 L. Ed. 2d. 406 (1985). As discussed in section 5.15, Washington State has rejected the "automobile exception."

Under the Fourth Amendment and article I, section 7, officers may also search a vehicle absent probable cause incident to the lawful arrest of an occupant. *Arizona v. Gant*, 556 U.S. 332, 351, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). However, the difference between the Fourth Amendment's application and article I, section 7 is in the scope of the exception. Under the Fourth Amendment, officers may search the vehicle when there are concerns for officer safety, when there are concerns for destruction of the evidence, and when it is reasonable to believe that evidence relevant to the crime of arrest will be found in the vehicle. *Id.* The first two instances apply when the arrestee is unsecured and within reaching distance of the passenger compartment. *Id.* Thus, these two

instances will rarely justify a search. The third prong, allowing officers to search when evidence relevant to the crime of arrest may be found in the vehicle, is permissible only under the Fourth Amendment, not under article I, section 7. *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012) (allowing search incident to arrest only under the "unrestrained" exceptions).

5.18 WARRANTLESS VEHICLE SEARCHES BASED ON GENERALIZED SUSPICION: SPOT CHECKS OF MOTORISTS

Under the Fourth Amendment, a reasonable vehicle roadblock, or spot check, may be another exception to the warrant requirement. *See Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *see also Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449–50, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555–56, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). To determine the reasonableness of spot checks or vehicle checkpoints, the court will weigh the government's interest in the checkpoints, the extent to which the program advances the government's goals, and the amount of intrusion on the individual motorist. *Illinois v. Lidster*, 540 U.S. 419, 427, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004). For police to institute general spot check procedures, the procedures must constitute "a sufficiently productive mechanism to justify the intrusion." *State v. Marchand*, 104 Wn.2d 434, 437, 706 P.2d 225 (1985). 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 225.

Article I, section 7 prohibits sobriety checkpoints that impose no statutory constraints on officers' discretion to conduct intrusive searches involving extensive invasions of privacy, such as smelling suspect's breath, visual inspections of automobile, and tests of physical dexterity. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 459–60, 755 P.2d 775 (1988); *see also Indianapolis v. Edmond*, 531 U.S. 32, 48, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (a highway drug checkpoint is unconstitutional where officers and drug-detecting canine would examine, through open view, a predetermined number of drivers). Lastly, roadblocks randomly enforced or implemented to detect ordinary criminal wrongdoing are unreasonable. *Indianapolis*, 531 U.S. at 41, 121 S. Ct. 447. 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. *Prouse*, 440 U.S. at 663, 999 S. Ct. 1391 (randomly stopping drivers to check registration violated the Fourth Amendment).

The Washington Supreme Court has held sobriety checkpoint programs unconstitutional under both article I, section 7 and the Fourth Amendment. *Mesiani*, 110 Wn.2d at 458, 460, 755 P.2d 775. 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 *Mesiani* court rejected Seattle's argument that the stops fell within an exception to the warrant requirement. *Id.* at 457–58, 755 P.2d 775. In one of the cases relied upon by the city, *State v. Silvernail*, 25 Wn. App. 185, 605 P.2d 1279 (1980), the court permitted a warrantless search when there was information that a serious felony had recently been committed. *Id.* at 190, 605 P.2d 1279. The *Mesiani* court distinguished *Silvernail*, stating notice that a felony had recently been committed "is far different from an inference from statistics that there are inebriated drivers in the area." *Id.* at 458 n.1, 755 P.2d 775. This differs from the Fourth Amendment, which permits sobriety checkpoints if *all* vehicles passing through are detained. *Sitz*, 496 U.S. 444, 110 S. Ct. 2481.

5.19 FORFEITURE OR LEVY

Courts in Washington, while recognizing that "[s]earches and seizures of motor vehicles used in drug transactions are an everyday occurrence," have held that warrantless inventory searches of vehicles forfeited under drug laws are permitted under article I, section 7. *State v. McFadden*, 63 Wn. App. 441, 449, 820 P.2d 53 (1991), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998). In *Lowery v. Nelson*, 43 Wn. App. 747, 750, 719 P.2d 594 (1986), the court held that, under the Fourth Amendment, police are not required to obtain a search warrant before exercising the authority granted by the Uniform Controlled Substances Act to seize a vehicle used to transport a controlled substance. *Id.* at 750, 719 P.2d 594 (discussing RCW 69.50.505(1)(d)); *see also Rozner v. Bellevue*, 116 Wn.2d 342, 350, 804 P.2d 24 (1991); *State v. Gwinner*, 59 Wn. App. 119, 123, 796 P.2d 728 (1990) (upholding seizure under Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881). 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 or evidentiary search. *McFadden*, 63 Wn. App. at 449, 820 P.2d 53; *see* 3 Wayne R. LaFave, *Search and Seizure* § 7.5(c), at 892–98 (5th ed. 2012).

5.20 IMPOUNDMENT

"Impoundment is a seizure because it involves the governmental taking of a vehicle into its exclusive custody." *State v. Coss*, 87 Wn. App. 891, 898, 943 P.2d 1126 (1997). The facts of each case determine the reasonableness of each particular impoundment. *Id.* A vehicle may be impounded without a warrant in three circumstances: (1) when the vehicle itself is evidence of a crime; (2) when the removal of the vehicle is necessary as part of "community caretaking"; and (3) when the driver has committed one of the traffic infractions that authorizes impoundment. *State v. Simpson*, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980); *see also State v. Lynch*, 84 Wn. App. 467, 477–78, 929 P.2d 460 (1996). Officers do not need the defendant's consent to conduct an inventory search of an impounded vehicle. *State v. Tyler*, 177 Wn.2d 690, 711, 302 P.3d 165 (2013).

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. *Miranda v. Cornelius*, 429 F.3d 858, 864–66 (9th Cir. 2005). Similarly, impoundment is improper when the arrestee's release is imminent, and the vehicle does not pose a safety hazard. *See State v. Bales*, 15 Wn. App. 834, 836, 552 P.2d 688 (1976). Also, when police conduct warrantless impoundments and subsequent inventory searches, the searches may not form a pretext for a search that the police otherwise could not have made. *State v. White*, 83 Wn. App. 770, 774–75, 924 P.2d 55 (1996), *rev'd on other grounds*, 135 Wn.2d 761, 958 P.2d 982 (1998). *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 7.5(e) (5th ed. 2012).

5.20(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 Wn.2d 632, 647, 716 P.2d 295 (1986). In *Terrovona*, the Washington Supreme Court held that 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 295. Furthermore, an officer who has probable cause to believe a vehicle contains contraband or evidence of a crime may seize and hold the car for the reasonable time needed to obtain a search warrant, and the car may be towed to an impound yard during seizure. *State v. Huff*, 64 Wn. App. 641, 653, 826 P.2d 698 (1992).

5.20(b) Community Caretaking Function

The "community caretaking function" permits impoundment when an abandoned vehicle 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, 49 L. Ed. 2d 1000 (1976); *State v. Sweet*, 44 Wn. App. 226, 236, 721 P.2d 560 (1986). For example, *Sweet* held that impoundment was proper under the community caretaking exception when the arrestee was unconscious, items of value were visible inside the vehicle, and the vehicle was in a high-crime area. 44 Wn. App. at 236–37, 721 P.2d 560.

Under the community caretaking exception, police do not need to have a reasonable belief that the vehicle is connected with criminal activity. *See State v. Chisholm*, 39 Wn. App. 864, 866–67, 696 P.2d 41 (1985). However, police should first make an inquiry as to the availability of the owner or the owner's spouse or friends to move the vehicle. *See State v. Williams*, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984); *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980). Police should also consider the alternative of parking and locking the car. *Williams*, 102 Wn.2d at 743, 689 P.2d 1065.

5.20(c) Enforcement of Traffic Regulations

Officers may 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. *See State v. Hill*, 68 Wn. App. 300, 305, 842 P.2d 996 (1993). 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 996. 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. *State v. Coss*, 87 Wn. App. 891, 899, 943 P.2d 1126 (1997) (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 Wn. App. 113, 119, 702 P.2d 1222 (1985).

5.20(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 Wn. App. 253, 259, 716 P.2d 948 (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.*

5.21 INVENTORY SEARCHES OF IMPOUNDED VEHICLES

When a vehicle is lawfully impounded, police are permitted to conduct a warrantless inventory search. *Colorado v. Bertine*, 479 U.S. 367, 371, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987) (inventory searches are a well-defined exception to the warrant requirement); *State v. Morales*, 154 Wn. App. 26, 48, 225 P.3d 311 (2010), *rev'd in part on other grounds*, 173 Wn.2d 560, 269 P.3d 263 (2012); *State v. White*, 135 Wn.2d 761, 766–67, 958 P.2d 982 (1998) (scope of inventory search limited 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 would not be able to obtain otherwise. *South Dakota v. Opperman*, 428 U.S. 364, 375, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); *State v. White*, 83 Wn. App. 770, 775, 958 P.2d 982 (1996), *rev'd on other grounds*, 135 Wn.2d 761, 958 P.2d 982 (1998). Police do not need to obtain a defendant's consent before performing an inventory search. *State v. Tyler*, 177 Wn.2d 690, 711, 302 P.3d 165, 176 (2013).

Washington courts have long held that a non-investigatory inventory search of an automobile is proper when conducted in good faith for the purposes of (1) finding, listing, and securing property belonging to the detainee from loss during detention, and (2) protecting police and temporary storage bailees from liability due to dishonest claims of theft. *State v. Houser*, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980); *White*, 83 Wn. App. at 777, 958 P.2d 982. An inventory search does not violate the owner's Fourth Amendment rights when the search follows written, standardized inventory procedures. *State v. Mireles*, 73 Wn. App. 605, 612–13, 871 P.2d 162 (1994).

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 Wn.2d at 155, 622 P.2d 1218. For example, police in Washington may not open and examine a locked trunk "absent a manifest necessity for conducting such a search." *Id.* at 156, 622 P.2d 1218 (no great danger of theft to property left in trunk); *White*, 135 Wn.2d at 765–67, 958 P.2d 982 (police may not search a locked trunk, despite the fact that the trunk could be opened by a switch located inside the passenger compartment). Police also may not open luggage located in an impounded vehicle absent consent or exigent circumstances. *Houser*, 95 Wn.2d at 158, 622 P.2d 1218.

In *State v. Williams*, the court suggested that police must obtain the owner's consent before conducting an inventory search of an impounded vehicle pursuant to the community caretaking exception. 102 Wn.2d 733, 743, 689 P.2d 1065 (1984). However, an inventory search of a vehicle impounded pursuant to the community caretaking exception without the owner's consent was held to be valid in *State v. Sweet*, 44 Wn. 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 560; *see also State v. Tyler*, 177 Wn.2d 690, 711, 302 P.3d 165 (2013) (consent not required as a condition precedent to an inventory search).

5.22 WARRANTLESS SEARCHES IN SPECIAL ENVIRONMENTS

The court has permitted warrantless searches in special environments when the danger to the public is severe and the degree of intrusion small. For example, the court permitted warrantless magnetometer (metal detector) searches at airports to prevent hijackings and bombings. *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007). Conversely, the Washington Supreme Court has rejected as unconstitutional the warrantless pat down of patrons at rock concerts. *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 673–74, 658 P.2d 653 (1983). The *Jacobsen* court concluded there is a greater risk of danger at airports and courthouses than at rock concerts, and pat-down searches constitute a higher degree of intrusion than magnetometer and typical courthouse searches. *Id.*, 658 P.2d 653. For a discussion of warrantless searches in other special environments, see *infra* § 6.

5.23 WARRANTLESS SEARCHES AND SEIZURES OF OBJECTS IN THE PUBLIC AND PRIVATE MAILS

Law enforcement officers may seize first-class mail and packages transported by private carriers when they have probable cause to believe that the mail or packages contain contraband. *See United States v. Van Leeuwen*, 397 U.S. 249, 251–52, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970); *see also United States v. Jacobsen*, 466 U.S. 109, 121–22, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (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. 1652; *see also State v. Wolohan*, 23 Wn. App. 813, 820, 598 P.2d 421 (1979). A canine sniff may be used to establish

probable cause that a package lawfully held by police contains contraband. *State v. Jackson*, 82 Wn. App. 594, 606, 918 P.2d 945 (1996).

CHAPTER 6

Special Environments

This chapter first discusses the differences in reasonable expectations of privacy, burdens of proof, and warrant requirements in three special environments: (1) public schools, (2) detention and correctional facilities, and (3) international borders. Next, it discusses special considerations in administrative searches.

6.1 SCHOOLS

A student's legitimate expectation of privacy must be balanced against the school's legitimate need to provide an environment conducive to learning. Consequently, schools are considered a special environment in which the usual burdens of proof and warrant requirements are slightly relaxed. Section 6.1(a) discusses how this balance permits a school official to search a student without a warrant, or even probable cause, so long as a reasonable suspicion exists. Section 6.1(b) discusses this standard in the context of drug-testing programs for athletes.

6.1(a) Burden of Proof and Warrant Requirements

Under both the Fourth Amendment and article I, section 7, school authorities may conduct a warrantless search of a student without probable cause if, under the totality of the circumstances, the school official has a reasonable suspicion of criminal activity. *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985); *State v. Meneese*, 174 Wn.2d 937, 943, 282 P.3d 83 (2012). School officials may search a student with less than probable cause because their "primary duty [is] to maintain order and discipline at school, not discover and prevent crime like a police officer." *Meneese*, 174 Wn.2d at 943, 282 P.3d 83. However, if the search is conducted by a police officer and not a school official, the school exception does not apply and the officer must have a warrant. *Id.* (finding search of student's backpack by officer on school grounds unconstitutional without warrant or other exception). Of course, the school official still

must have particularized suspicion with respect to each individual searched. *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 599, 694 P.2d 1078 (1985) (individualized suspicion required for search of school band members' luggage). *See generally* 5 Wayne R. LaFave, *Search and Seizure* § 10.11(b), at 597–629 (5th ed. 2012).

A search is reasonable if (1) it is justified at its inception, and (2) it is reasonably related in scope to the circumstances that justified the interference in the first place. *State v. B.A.S.*, 103 Wn. App. 549, 553, 13 P.3d 244 (2000) (citing *T.L.O.*, 469 U.S. at 341, 105 S. Ct. 733). Additionally, there must be a nexus between the item sought and the infraction being investigated. *Id.* at 554, 105 S. Ct. 733 (holding that no connection existed between the school's closed campus policy that provided for searches of students found violating the policy and the likelihood that a student was bringing contraband onto school property). A search is unconstitutional if it exceeds the scope of initial reasonable suspicion. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009) (holding that a strip search of a 13-year-old student suspected of possessing illegal drugs was excessively intrusive).

Although Washington allows for school searches on less than probable cause, the Washington Supreme Court has not adopted a "special needs" exception as appears under the Fourth Amendment. *Compare York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 312, 178 P.3d 995 (2008) (no general special needs exception under article I, section 7), *with Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987), *and Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (drug testing under special needs exception). Thus, the court has "not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement." *York*, 163 Wn.2d at 314, 178 P.3d 995. Thus, a school cannot conduct a general, suspicionless search. *Id.*

6.1(b) Drug Testing of Student Athletes

The Washington Supreme Court has held that random and suspicionless drug testing of student athletes is not permissible under article I, section 7 of the Washington Constitution. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 310, 178 P.3d 995 (2008). Conversely, the Fourth Amendment allows random drug testing without individualized suspicion. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995); *see also Bd. of Educ. of Indep. Sch.*

Dist. No. 92 v. Earls, 536 U.S. 822, 838, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002) (holding mandatory drug testing as a condition of participating in extracurricular sports is constitutional).

Specifically, the Washington Supreme Court held that a student athlete's fundamental privacy interest in controlling his or her bodily functions required school officials to meet a "reasonableness" or "individualized" suspicion standard. *York*, 163 Wn.2d at 308, 178 P.3d 995 (citing *State v. McKinnon*, 88 Wn.2d 75, 558 P.2d 781 (1977) (holding school officials must have some "reasonable" or "individualized" suspicion to protect students from unreasonable searches)). In *McKinnon*, the 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 Wn.2d at 81, 558 P.2d 781 (citations omitted). Because Washington has not adopted any general special needs exception, a search without reasonable and individualized suspicion is unconstitutional. *York*, 163 Wn.2d at 308, 178 P.3d 995.

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 warrant requirements. This section provides a sampling of some of the ways incarceration, or even conviction alone, alters search and seizure protections.

6.2(a) Reasonable Expectation of Privacy

Prisoners are not accorded the same expectations of privacy in their cells and effects that citizens generally enjoy in their homes and effects. *Matter of Personal Restraint of Benn*, 134 Wn.2d 868, 909, 952 P.2d 116 (1998) (holding convicted "prisoners have no legitimate expectation of privacy and . . . the Fourth Amendment's prohibition on unreasonable searches does not apply [to] prison cells") (quoting *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984))). Pretrial detainees, like prisoners, may be subjected to unannounced searches of their living areas. *Block v. Rutherford*, 468 U.S. 576, 589–91, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984); *Bell v. Wolfish*, 441 U.S. 520, 555–57, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Additionally, jailed suspects have no expectation of privacy in property located in the property room at the prison. *State v. Cheatam*, 112 Wn. App. 778, 785–87, 51 P.3d 138 (2002),

aff'd, 150 Wn.2d 626, 81 P.3d 830 (2003). This holds true when the defendant is transferred to a hospital along with his or her personal effects. *State v. Puapuaga*, 164 Wn.2d 515, 523–24, 192 P.3d 360 (2008) (no privacy interest in personal effects when transferred to mental institution).

A convicted sex offender has a minimal expectation of privacy in personal body fluids; thus, the State may remove blood for testing without a defendant's consent. *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 92–93, 96, 847 P.2d 455 (1993) (upholding constitutionality of RCW 70.24.340, which mandates HIV testing for adults and juveniles who have been convicted of a sexual offense under RCW ch. 9A.44). Additionally, under RCW 43.43.754, the state may obtain blood samples and perform DNA tests without the defendant's consent following conviction. *State v. Olivas*, 122 Wn.2d 73, 98, 856 P.2d 1076 (1993) (upholding the statute's constitutionality under Fourth Amendment).

After a defendant has been convicted of an offense and released, his or her privacy interests remain diminished. For example, the warrantless search of the home of a convict released pending appeal does not violate constitutional protections. *State v. Lucas*, 56 Wn. App. 236, 240–41, 783 P.2d 121 (1989) ("one released pending appeal . . . should expect close scrutiny."). And, as discussed below, police may search a parolee's vehicle based on a "well-founded" suspicion of criminal activity. *State v. Coahran*, 27 Wn. App. 664, 666, 620 P.2d 116 (1980).

6.2(b) Warrantless Searches and Seizures

Warrants are not required for searches of prisoners or pretrial detainees. *See Block v. Rutherford*, 468 U.S. 576, 591, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984); *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). Probable cause and individualized suspicion are also not required for such searches. *See Bell v. Wolfish*, 441 U.S. 520, 555–60, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (pretrial detainees); *State v. Baker*, 28 Wn. App. 423, 424–25, 623 P.2d 1172 (1981) (prisoners). Permitting routine and warrantless searches of inmates' cells is reasonable because security interests of the correctional institution outweigh the minimal intrusion into inmates' privacy. *State v. Rainford*, 86 Wn. App. 431, 438, 936 P.2d 1210 (1997) ("Washington courts have held that an inmate's expectation of privacy is necessarily lowered while in custody and that warrantless searches may be conducted if reasonable.").

Warrants are also not required for searches of parolees, probationers, work release inmates, and convicts released pending appeal, or for any of these groups' homes and effects. *See generally United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) (discussing

whether a parole condition permitting the search of the "person, property, place of residence, vehicle, [and] personal effects . . . with or without a search warrant" satisfies the Fourth Amendment); *see also Samson v. California*, 547 U.S. 843, 857, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) (neither probable cause nor warrant required for search of parolee stopped by police officer in public); *State v. Campbell*, 103 Wn.2d 1, 22–23, 691 P.2d 929 (1984); *State v. Lucas*, 56 Wn. App. 236, 243–44, 783 P.2d 121 (1989). Furthermore, persons residing with prisoners who are released to a home-detention program are required to sign consent forms that allow for warrantless searches and seizures of the property where the person and the prisoner reside. *State v. Cole*, 122 Wn. App. 319, 323, 93 P.3d 209 (2004).

6.2(c) Strip and Body Cavity Searches of Arrestees and Detainees

In Washington, routine strip searches are governed by statute and administrative regulation. *See* RCW 10.79.060–170; WAC §§ 289-02-020, 289-02-100, 289-02-200. 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 Wn. App. 897, 904, 908, 894 P.2d 1359 (1995) (holding that RCW 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). Only a reasonable suspicion is required to conduct a "dry cell search" of a prisoner. *State v. Rainford*, 86 Wn. App. 431, 433, 435 n.1, 936 P.2d 1210 (1997) ("dry cell search" typically involves placing prisoner in private room under 24-hour observation until prisoner has undergone three bowel movements and then examining the feces for signs of drug use).

For strip and body cavity searches conducted prior to a detainee's first court appearance, probable cause and a warrant are required unless (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 have a reasonable suspicion that the detainee is concealing contraband, weapons, or fruits or instrumentalities of crime on his or her person. WAC §§ 289-16-100 to -200; *cf. State v. Hartzog*, 96 Wn.2d 383, 396–97, 635 P.2d 694 (1981) (visual and body cavity searches of prisoners leaving penal institution for court appearance are permissible); *State v. Brown*, 33 Wn. App. 843, 848, 658 P.2d 44 (1983) (reasonable suspicion for strip search of prisoner found after prisoner had personal contact with visitor).

6.3 INTERNATIONAL BORDERS

Searches and seizures of travelers at or near the international borders fall within the scope of the Fourth Amendment and article I, section 7, but courts generally do not require such intrusions to meet the strict levels of proof and warrant requirements of ordinary searches and seizures. This section briefly describes some of the situations in which traditional proof and warrant requirements have been relaxed.

6.3(a) Permanent Border Checkpoints

Customs officials may search persons and vehicles crossing the border at permanent checkpoints into the United States under 19 U.S.C. § 1467. *See United States v. Flores-Montano*, 541 U.S. 149, 154, 124 S. Ct. 1582, 158 L. Ed. 2d 311 (2004) ("[A]utomobiles seeking entry into this country may be searched."); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 566, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) ("[S]tops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant."); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 345, 178 P.3d 995 (2008) (recognizing border exception). Although border agents do not need a warrant to conduct a search at a border crossing, the statute does not obviate the requirement that a particular search or seizure be reasonable within the meaning of the Fourth Amendment. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973) (holding that although a statute authorizes customs searches without probable cause or mere suspicion, no act of Congress can authorize a violation of the Constitution). Race or color is not a sufficient basis for making an investigatory stop by border patrol agents. *See State v. Almanza-Guzman*, 94 Wn. App. 563, 567, 972 P.2d 468 (1999).

The scope of a *Terry* stop at the border may be relatively intrusive when border patrol agents suspect individuals are smuggling narcotics. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 544, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) (individual fitting courier profile of alimentary canal smuggler may be detained for 16 hours pending bowel movement). But if the search is intrusive—as intrusive as a body cavity search—the Ninth Circuit requires a showing of "a real suspicion, directed specifically to that person," supported by specific and articulable facts before the officials may search the suspect. *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970); *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967). If agents have only reasonable suspicion, they may not hold the suspect for an unreasonable amount of time. *Florida v. Royer*, 460 U.S. 491, 502–03, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (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, 77 L. Ed. 2d 110 (1983) (90-minute detention of luggage at international airport unreasonable when law enforcement officers had only reasonable suspicion of smuggling).

6.3(b) Roving Patrols: Illegal Aliens and Searches Away from the Border

To stop a vehicle, officers conducting roving patrols near borders must have a reasonable suspicion, based on "specific articulable facts," that the vehicle contains illegal aliens. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). Washington has declined to follow the Fourth Amendment jurisprudence on this matter, allowing a search away from a border only with probable cause. *See York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 312 n.19, 178 P.3d 995 (2008) (discussing *State v. Quick*, 59 Wn. App. 228, 232, 796 P.2d 764 (1990), and its deviation from the *Brignoni–Ponce* federal standard).

6.4 ADMINISTRATIVE SEARCHES

The Fourth Amendment governs searches conducted for administrative purposes, regardless of whether criminal prosecution is anticipated. *See, e.g.*, *Michigan v. Clifford*, 464 U.S. 287, 291–93, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984) (determining that the 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 not criminal conduct); *Bosteder v. Renton*, 155 Wn.2d 18, 35, 117 P.3d 316 (2005) (superseded by statute on other grounds); *Dodge City Saloon, Inc. v. Washington State Liquor Control Bd.*, 168 Wn. App. 388, 288 P.3d 343 (2012), *review denied*, 290 P.3d 994 (2012).

The following sections examine a subject's reasonable expectations of privacy during a warrantless search, the warrant requirements in administrative searches, and the various level of proof requirements.

6.4(a) Reasonable Expectation of Privacy

An individual's reasonable expectation of privacy is not affected by the fact that a search is part of an administrative or regulatory program or has a purpose other than criminal prosecution. *See Camara v. Mun. Court*, 387 U.S. 523, 532–33, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (search of home for housing code violations); *See v. City of Seattle*, 387 U.S. 541, 545–46, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967) (search of commercial premises for fire code violations). As with other searches, if there is no

expectation of privacy in the area searched, the search does not fall under Fourth Amendment protections. *Centimark Corp. v. Dep't of Labor & Indus.*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005) (no expectation of privacy in roofing job site when inspector could readily see that the workers were not wearing fall protection). An administrative search does not fall under constitutional protections if those conducting the search are not state actors. *See Pasco v. Shaw*, 161 Wn.2d 450, 166 P.3d 1157 (2007) (finding that neither the Fourth Amendment nor article I, section 7 is violated when a landlord and a privately engaged inspector inspect a rental property for code violations that impact health and safety).

Although some pervasively regulated industries are denied reasonable expectations of privacy, the Fourth Amendment protects against civil and criminal searches of commercial as well as residential premises. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (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 Michigan v. Clifford*, 464 U.S. 287, 291, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984). If the industry is granted only a limited expectation of privacy, that interest must be balanced against the need for a particular administrative search. *See Murphy v. State*, 115 Wn. App. 297, 313, 62 P.3d 533 (2003) (holding a patient has a limited expectation of privacy in prescription records that is outweighed by the government's statutorily mandated interest in monitoring the flow of drugs from pharmacies to patients). However, there is no general "heavily regulated industry" exception in Washington. *See State v. Miles*, 160 Wn.2d 236, 248–51, 156 P.3d 864 (2007); *see also Bosteder v. Renton*, 155 Wn.2d 18, 29, 117 P.3d 316 (2005).

Finally, certain government employees have a reduced expectation of privacy given the special needs and legitimate workplace purpose. *See Ontario v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010) (holding that a police officer's Fourth Amendment rights were not violated when a supervisor read his personal text messages on a department-issued pager).

6.4(b) Warrant Requirements

Generally, warrants are required for administrative searches of private and commercial premises. *See Camara v. Mun. Court*, 387 U.S. 523, 532–33, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). However, when the traditional exceptions to the warrant requirement apply, a warrant is unnecessary. *See Michigan v. Clifford*, 464 U.S. 287, 294–95, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984) (warrant not required for entry onto premises

when consent given or exigent circumstances present because "evidence 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 law enforcement makes searches pursuant to comprehensive and predictable legislative schemes. *See Donovan v. Dewey*, 452 U.S. 594, 598–99, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981). Such situations are characterized by a substantial governmental 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. 2534 (congressional scheme authorizing warrantless inspections of mines found constitutional); *see also Murphy v. State*, 115 Wn. App. 297, 307–08, 62 P.3d 533 (2003) (state statute requiring pharmacies to keep records of dispensed prescriptions and to make them available for inspection by state pharmacy board or other law enforcement officer does not violate search and seizure provisions of state or federal constitutions). 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. *Donovan*, 452 U.S. at 603, 101 S. Ct. 2534.

In Washington, there is no general administrative search warrant exception for "heavily regulated industries." Any administrative exception must be expressly stated in an applicable law or regulation. *See State v. Miles*, 160 Wn.2d 236, 248–51, 156 P.3d 864 (2007); *see also Bosteder v. Renton*, 155 Wn.2d 18, 29, 117 P.3d 316 (2006) (holding that administrative warrants are not constitutional under the Fourth Amendment except when made pursuant to an authorizing statute or rule).

Warrants are also not always required for license, registration, and equipment spot checks of vehicles. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (holding that a non-random highway sobriety checkpoint program did not violate the Fourth Amendment). However, some random spot checks require warrants if the officer has discretion over which vehicles to stop. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). Importantly, Washington has held sobriety checkpoints to be unconstitutional. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988). Additionally, Washington courts found a statute unconstitutional because it allowed state patrol officers to stop any motor vehicle and require the driver to display his or her driver's license and submit the vehicle to an inspection to ascertain whether the vehicle complied with minimum requirements. *State v. Marchand*, 104 Wn.2d 434, 441, 706 P.2d 225 (1985).

6.4(c) Level of Proof Requirements

To obtain an administrative warrant to search commercial or residential premises, law enforcement officers must 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 v. Barlow's, Inc.*, 436 U.S. 307, 320–21, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (brackets in original) (citation omitted) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)). However, when fire officials seek an administrative warrant 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 victim's privacy, and that the search will be executed at a reasonable and convenient time." *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984).

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. *City of Seattle v. Leach*, 29 Wn. App. 81, 85, 627 P.2d 159 (1981). Conclusory statements are inadequate. *Id.*

CHAPTER 7

The Exclusionary Rule

Under the exclusionary rule, evidence obtained in violation of a person's constitutional rights must be suppressed in a defendant's criminal trial. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002); *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000). The exclusionary rule applies both to federal and state violations of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 660, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), as well as violations of article I, section 7, *State v. Winterstein*, 167 Wn.2d 620, 633, 220 P.3d 1226 (2009) (the general rule is that "violation of a constitutional immunity automatically implies exclusion of the evidence seized") (quoting *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990)).

This chapter addresses five topics: first, general considerations of the exclusionary rule; second, the good-faith exception to the exclusionary rule; third, the rule's operation in non-trial settings; fourth, searches by private individuals; and finally, exclusion of evidence as fruit of the poisonous tree and various exceptions to the rule.

7.0 INTRODUCTION

As stated above, the exclusionary rule operates to suppress any evidence found through unconstitutional government action. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). The exclusionary rule prohibits the use of "derivative evidence," real or testimonial, that is the "fruit," or product, of the illegally obtained evidence. *Murray v. United States*, 487 U.S. 533, 536, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988); *State v. Smith*, 165 Wn. App. 296, 309, 266 P.3d 250 (2011), *aff'd on other grounds*, 177 Wn.2d 533, 303 P.3d 1047 (2013); *see, e.g.*, *State v. Samalia*, 186 Wn.2d 262, 279, 375 P.3d 1082 (2016); *State v. Hinton*, 179 Wn.2d 862, 869 n.2, 319 P.3d 9 (2014); *State v. Faford*, 128 Wn.2d 476, 488, 910 P.2d 447 (1996); *State v. Salinas*, 121 Wn.2d 689, 697, 853 P.2d 439 (1993). However, if the evidence will be used only as impeachment evidence and not in the government's case-in-chief, the evidence may be

admissible for the limited purpose of impeachment. *Walder v. United States*, 347 U.S. 62, 64–65, 74 S. Ct. 354, 98 L. Ed. 503 (1954); *State v. Simpson*, 95 Wn.2d 170, 179–80, 622 P.2d 1199 (1980); *see also United States v. Havens*, 446 U.S. 620, 627–28, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980) (defendant's statements in cross-examination also subject to impeachment by illegally obtained evidence that is inadmissible as substantive evidence of guilt).

Although most of the discussion in this section centers upon the exclusion of evidence when compelled by the federal or state constitutions, statutory law can also provide the basis for exclusion of evidence. *See, e.g.*, *State v. Williams*, 94 Wn.2d 531, 541, 617 P.2d 1012 (1980) (recordings made in violation of Washington privacy statute, although permitted under federal wiretap statute, are inadmissible in state court proceedings); *see* 1 Wayne R. LaFave, *Search and Seizure* § 1.5(b) (5th ed. 2012) (state may compel exclusion of illegally seized evidence even when the federal constitution does not require such exclusion).

7.1 General Considerations

This section first explores the standing requirements under article I, section 7. Next, it examines the broad differences between the application of the exclusionary rule under the Fourth Amendment and the rule under article I, section 7. Lastly, the section discusses the criticisms of a broad-reaching exclusionary rule.

7.1(a) Standing

A defendant must have standing to object to a search or seizure, but, while the U.S. Supreme Court has abandoned the automatic standing doctrine, *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980), a Washington defendant may rely on automatic standing if the challenged police action produced the adverse evidence. *See State v. Jones*, 146 Wn.2d 328, 331–35, 45 P.3d 1062 (2002); *State v. Williams*, 142 Wn.2d 17, 21–23, 11 P.3d 714 (2000). Still, a defendant asserting automatic standing must assert his or her own rights, not those of a third-party. *State v. Libero*, 168 Wn. App. 612, 619, 277 P.3d 708 (2012) (holding that while a defendant could challenge the legality of a search through asserting automatic standing, he still must show a violation of his own rights to suppress the challenged evidence); *see State v. Hinton*, 179 Wn.2d 862, 869 n.2, 319 P.3d 9 (2014) (a defendant has standing to challenge a search upon showing it infringed upon his privacy rights). For a general discussion of standing, see 1 LaFave, *supra* § 1.6.

To invoke the exclusionary rule, a defendant must make a timely objection. *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *rev'd in part on other grounds*, 99 Wn.2d 663, 664 P.2d 508 (1983).

7.1(b) Difference in Purpose Between the Fourth Amendment and Article I, Section 7

The differences between the federal and state exclusionary rules are largely based on the difference in wording and intent between the Fourth Amendment and article I, section 7. Historically, the exclusionary rule served (1) to deter unreasonable searches and seizures, *Mapp v. Ohio*, 367 U.S. 643, 656, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); (2) to preserve judicial integrity by preventing courts from becoming accomplices to the willful disobedience of the Constitution, *id.* at 659, 81 S. Ct. 1684; 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, 38 L. Ed. 2d 561 (1974) (Brennan, J., dissenting). The U.S. Supreme Court considers deterrence of police misconduct to be the most important justification to the rule. *United States v. Leon*, 468 U.S. 897, 916–18, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

Conversely, the primary purpose of article I, section 7 underlying the exclusionary rule is the protection of individual privacy interests against unreasonable governmental intrusions. *See State v. Winterstein*, 167 Wn.2d 620, 631−32, 220 P.3d 1226 (2009); *see also State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010); *State v. Duncan*, 146 Wn.2d 166, 176–77, 43 P.3d 513 (2002); *State v. Rife*, 133 Wn.2d 140, 148, 943 P.2d 266 (1997). As a secondary concern, the rule also deters unlawful police activity and preserves the integrity of the judiciary by excluding evidence obtained through illegal means. *See Afana*, 169 Wn.2d at 180, 233 P.3d 879; *Rife*, 133 Wn.2d at 148, 943 P.2d 266. Thus, while the Fourth Amendment is primarily concerned with deterrence of police conduct, article I, section 7 is more concerned with individual privacy. *Compare State v. Crawley*, 61 Wn. App. 29, 35, 808 P.2d 773 (1991), *and State v. White*, 97 Wn.2d 92, 109–12, 640 P.2d 1061 (1982), *with Leon*, 468 U.S. at 916–18, 104 S. Ct. 3405.

7.1(c) Criticism of the Exclusionary Rule

A number of judges and legal scholars have opposed a broad-reaching exclusionary rule. *See generally* 1 Wayne R. LaFave, *Search and Seizure* § 1.2(a) (5th ed. 2004). First, commentators argue that the rule impedes the police by handicapping the detection and prosecution of crime. *Id.* § 1.2(a), at 32–33. On the other hand, the Fourth Amendment itself, not the rule, has that effect. *Id.* This very argument was rejected

when the Amendment was adopted. *See id.* at 33. In fact, commentators suggest that illegally issued warrants cause the loss of only a negligible portion of felony arrests. *See id.* § 1.3(c), at 75.

Second, commentators argue that the rule only aids the guilty and does not deter illegal police action. *Id.* § 1.2(b), at 36–39. After the rule's creation, however, 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 v. Powell*, 428 U.S. 465, 492, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). As a result of the rule's deterrent effect, innocent persons are spared intrusive, illegal police procedures. 1 LaFave, *supra* § 1.2(a), at 32–33. Suggested alternatives to the exclusionary rule include providing civil damages as the sole remedy, limiting the rule to knowing violations, or limiting the rule to minor crimes. *See generally id.* § 1.2(a)–(f), at 31–67; *see also* Samuel Estreicher & Daniel P. Weick, *Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. REV. 949 (2010) (proposing legislation providing for comprehensive overview by the Department of Justice of agency-by-agency constitutional compliance programs); L. Timothy Perrin, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669 (1998) (providing an empirical study of the exclusionary rule and suggesting a civil administrative remedy to partially replace the rule); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999) (suggesting an administrative damages regime wherein Fourth Amendment violations could be brought directly against police).

7.2 UNLAWFUL SEARCHES AND SEIZURES CONDUCTED IN GOOD FAITH

While federal courts have adopted a good-faith-reliance exception to the exclusionary rule, Washington courts have rejected such an exception. *See State v. Afana*, 169 Wn.2d 169, 184, 233 P.3d 879 (2010); *State v. Huft*, 106 Wn.2d 206, 212, 720 P.2d 838 (1986) (declining to apply "good faith" exception under the Washington constitution). This distinction stems from the fact that, unlike the Fourth Amendment, article I, section 7 of the Washington State Constitution "clearly recognizes an individual's right to privacy with no express limitations." *Afana*, 169 Wn.2d at 180, 233 P.3d 879 (quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). Thus, even if an officer acts in good faith reliance on an invalid warrant, the evidence must be suppressed. *State v. Crawley*, 61 Wn. App. 29, 35, 808 P.2d 773 (1991).

Under the federal good-faith exception, the exclusionary rule does not apply when evidence is seized in reasonable, good faith reliance on a search warrant that the court later finds to be unsupported by probable cause. *See United States v. Leon*, 468 U.S. 897, 919–21, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). This good-faith exception applies because "the 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. 3405. Likewise, if the warrant is technically invalid, the evidence may be admitted when the police reasonably believed that the search was valid. *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984). Moreover, when police mistakes are the result of negligence rather than systemic error or reckless disregard, the exclusionary rule does not dictate suppression. *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

7.3 APPLICATIONS OF THE EXCLUSIONARY RULE IN CRIMINAL PROCEEDINGS OTHER THAN TRIALS

During a trial, the exclusionary rule applies in full force. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002); *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000). The rule, however, is not likely to apply in other portions of the trial process. The following sections discuss applications of the exclusionary rule in criminal proceedings other than trials.

7.3(a) Application of the Exclusionary Rule to Pre-Trial Matters

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, 38 L. Ed. 2d 561 (1974). The exclusionary rule is not applied to grand jury proceedings because its application would have only a marginal deterrent effect. *Id.* at 351–52, 94 S. Ct. 613. In determining whether to employ the rule, courts weigh the deterrent value of applying the rule against the costs of excluding the type of evidence in question. *Id.* at 349, 94 S. Ct. 613.

The exclusionary rule does not apply to indictments based on illegally obtained evidence. *Lawn v. United States*, 355 U.S. 339, 350, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958). Again, excluding the evidence, even if it means dismissing an indictment, would have only marginal deterrent value. *Calandra*, 414 U.S. at 351–52, 94 S. Ct. 613.

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, 2 L. Ed. 2d 1503 (1958) (holding that it would not be sound judicial administration to remand to district court for a special hearing regarding probable cause because illegally seized evidence was introduced at trial). For example, recordings made by federal agents in a matter inconsistent with state law (therefore, inadmissible at trial), nevertheless, may be used to furnish probable cause for a court-sanctioned search. *State v. O'Neill*, 103 Wn.2d 853, 867–72, 700 P.2d 711 (1985).

The Washington Supreme Court has not yet decided whether illegally obtained evidence must be suppressed at a bail hearing. Other jurisdictions that have considered the issue suggest that the evidence may not be suppressed. *See State v. Tucker*, 101 N.J. Super. 380, 383, 244 A.2d 353 (1968) (no need to go into detail concerning admissibility of the evidence for purposes of bail application when state makes prima facie showing of admissibility); *Steigler v. Super. Ct.*, 252 A.2d 300, 305 (Del. 1969).

7.3(b) Application of the Exclusionary Rule to Post-Trial Matters

Washington's Sentencing Reform Act of 1981, effective July 1, 1984, structured, but did not eliminate, discretionary decisions affecting sentencing. RCW 9.94A.010. Under this provision, the sentencing process is limited to the present conviction and the defendant's prior convictions. As a result, illegally obtained evidence may not be admitted. This contrasts somewhat with sentencing under the Federal Sentencing Guidelines. The majority of circuits have maintained that the exclusionary rule does not apply in sentencing hearings. *See United States v. Kim*, 25 F.3d 1426, 1432–36 (9th Cir. 1994); *United States v. Montoya-Ortiz*, 7 F.3d 1171, 1181–82 (5th Cir. 1993); *United States v. Jenkins*, 4 F.3d 1338, 1344–45 (6th Cir. 1993); *United States v. Tejada*, 956 F.2d 1256, 1260–61 (2d Cir. 1992); *United States v. Lynch*, 934 F.2d 1226, 1234 (11th Cir. 1991); *United States v. Torres*, 926 F.2d 321, 324–25 (3d Cir. 1991).

Washington courts are divided on whether article I, section 7 requires the application of the exclusionary rule to probation revocation hearings. *State v. Murray*, 110 Wn.2d 706, 708–09, 757 P.2d 487 (1988) (recognizing the division and uncertainty that exists around the article I, section 7 exclusionary rule in revocation hearings, but not resolving the uncertainty). *Compare, e.g.*, *State v. Kuhn*, 7 Wn. App. 190, 194, 499 P.2d 49 (1972) (excluding evidence obtained as result of an illegal search is not applicable to probation revocation hearings), *with State v. Lampman*, 45 Wn. App. 228, 232, 724 P.2d 1092 (1986) (requiring application without exception to probation revocation proceedings). Notably, there must be a "nexus between the property search and the alleged probation violation."

State v. Cornwell, 190 Wn.2d 296, 304, 412 P.3d 1265 (2018). However, because parolees experience a lower expectation of privacy, it is less likely that evidence will be illegally obtained while the parolee is on release. *State v. Parris*, 163 Wn. App. 110, 117, 259 P.3d 331 (2011).

Under the Fourth Amendment, the exclusionary rule does not apply to parole revocation hearings. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365–66, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998). The Court has reasoned that applying the exclusionary rule would hinder the functions of the state parole systems and alter the traditionally flexible administrative nature of parole revocation proceedings, while providing only minimal deterrence benefits. *Id.* at 364, 118 S. Ct. 2014.

7.4 Application of the Exclusionary Rule in Quasi-Criminal and Administrative Proceedings

While Washington courts have rarely addressed the matter, the exclusionary rule has been applied in quasi-criminal and administrative proceedings as well. First, the exclusionary rule has generally been applied in juvenile delinquency proceedings. In Washington, criminal court rules are automatically applied to juvenile proceedings. JuCR 1.4(b). Other jurisdictions have also taken this approach. *See In re Robert T.*, 8 Cal. App. 3d 990, 993, 88 Cal. Rptr. 37 (1970); *In re Marsh*, 40 Ill. 2d 53, 55, 237 N.E.2d 529 (1968). However, some jurisdictions have found that it might be unwise to apply the rule in dependency hearings based on the possible damage to the child. *See, e.g.*, *In re Christopher B.*, 82 Cal. App. 3d 608, 615, 147 Cal. Rptr. 390 (1978). Along the same reasoning, the rule has not been applied to other conservatorship proceedings because of concern for the individual's well-being and society's safety. *See Conservatorship of Susan T.*, 8 Cal. 4th 1005, 1019–20, 40 Cal. Rptr. 2d 40, 884 P.2d 988 (1994).

Second, whether the exclusionary rule is applied in an administrative proceeding depends on the nature of the proceeding. If the proceeding is closer to criminal in nature, then the rule will be applied. For example, the exclusionary rule is 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, 702, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965); *Deeter v. Smith*, 106 Wn.2d 376, 378–79, 721 P.2d 519 (1986).

Courts have also applied the exclusionary rule when the disposition is relatively significant and when application of the rule is likely to deter unlawful searches and seizures. *See New Brunswick v. Speights*, 157 N.J. Super. 9, 20–21, 384 A.2d 225 (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). In contrast, the exclusionary rule is generally not applied to administrative proceedings. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) (exclusionary rule not applied in civil deportation hearings held by INS); *see also Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998) (exclusionary rule incompatible with traditionally flexible administrative procedure). However, in the Ninth Circuit, "administrative tribunals are still required to exclude evidence that was 'obtained by deliberate violations of the Fourth Amendment or by conduct a reasonable officer should know is in violation of the Constitution.'" *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016 (9th Cir. 2008).

7.5 SEARCHES BY PRIVATE INDIVIDUALS

Article I, section 7 and the Fourth Amendment only apply to government actor's searches. As such, evidence found during a private actor's search need not be excluded if the search fails to conform to constitutional requirements. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 65 L. Ed. 1048 (1921) (papers obtained through theft by a private individual and delivered to federal prosecutors admissible against defendant); *State v. Clark*, 48 Wn. App. 850, 855, 743 P.2d 822 (1987). But the evidence must have come from an actively conducted search; if the private individual merely observes incriminating evidence, article I, section 7 protection will apply. *See State v. Eisfeldt*, 163 Wn.2d 628, 635–39, 185 P.3d 580 (2008) (rejecting the private search doctrine under article I, section 7); *State v. Faford*, 128 Wn.2d 476, 488–89, 910 P.2d 447 (1996) (independent basis was required for police search made pursuant to information obtained from a nosey neighbor who was eavesdropping on the defendant's cordless telephone conversations).

Importantly, once the private party gives the evidence to the government, the government search may not exceed the scope of the private party's previous search. *In re Teddington*, 116 Wn.2d 761, 766, 808 P.2d 156 (1991) (police properly read letter when sergeant had inventoried defendant's locker and turned over incriminating letter to police); *State v. Walter*, 66 Wn. App. 862, 866, 833 P.2d 440 (1992) (no violation when photo lab turns pictures over to police). The intrusion is considered of the same scope even if officers test a substance that was merely looked at by the private party. *State v. Bishop*, 43 Wn. App. 17, 20, 714 P.2d 1199 (1986) (no violation when police reopened packets and tested substance that was found by private security guard in the telephone mouthpiece of defendant's hospital room).

7.5(a) Government Involvement

For a search to be truly "private"—therefore, not subject to constitutional limitations—the actor must not be a government actor nor acting under the state's authority. *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 600, 694 P.2d 1078 (1985) (when private person acts under authority of state, Fourth Amendment applies; thus, school search of students' luggage must conform to constitutional requirements). If the actor is a private individual, the defendant has the burden of proving that he or she conducted the search as an agent or instrumentality of the state. *State v. Swenson*, 104 Wn. App. 744, 754, 9 P.3d 933, 938 (2000); *State v. Clark*, 48 Wn. App. 850, 856, 743 P.2d 822 (1987).

Under an agency theory, a search is not private if a government officer ordered or requested it. *Burdeau v. McDowell*, 256 U.S. 465, 474–75, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). For example, an airline employee's search was not private when conducted under the supervision of government agents' request. *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 336, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (holding that school officials act as representatives of the state and as such are government actors). No agency relationship exists unless the state actively encourages or instigates the citizen's actions. *See Clark*, 48 Wn. App. at 855–56, 743 P.2d 822. Courts consider as factors 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 end. *Swenson*, 104 Wn. App. at 753, 9 P.3d 933 (father intended to assist police by obtaining defendant's phone records and, although police knew of the father's efforts, there was no evidence that they instigated, encouraged, counseled, or directed the father to obtain the phone records).

Under a joint endeavor theory, when the police accompany a citizen on a search, the search becomes a government search. *Corngold*, 367 F.2d at 5–6 (contraband discovered by airline agents inadmissible when government agents actively joined in search). "It is immaterial whether the official originated the idea or simply joined in it while the search was in progress." *Lustig v. United States*, 338 U.S. 74, 79, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949). But 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 admissible when discovered by airline agent who opened unclaimed bag to determine its owner, because it was a private search even though a police officer was present during search).

If a public employee conducts a search in his or her private capacity, the search is not a state action merely because the individual is a public

employee. *State v. Ludvik*, 40 Wn. App. 257, 263, 698 P.2d 1064 (1985) (state game warden, residing across the street from defendant, observed suspected drug transactions and informed police). 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 (1976) (deputy sheriff acted as private citizen when he notified law enforcement officials of defendant's marijuana plants). When a private party, however, 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*, 477 Pa. 93, 100, 383 A.2d 838 (1978).

Lastly, a majority of jurisdictions have decided that when evidence is seized to aid the government and 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).

7.6 VIOLATION OF WARRANT PROCEDURE

"[A]bsent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of an otherwise sufficient warrant or suppression of its fruits." *State v. Aase*, 121 Wn. App. 558, 567, 89 P.3d 721 (2004) (emphasis omitted). For example, when the police failed to give a defendant a copy of the warrant before commencing an otherwise lawful search, the evidence was still admissible because the defendant was not prejudiced by receiving the warrant several minutes after the search began, and the search would not have been less intrusive had the defendant been able to immediately see the warrant. *State v. Kern*, 81 Wn. App. 308, 311, 914 P.2d 114 (1996).

7.7 DERIVATIVE EVIDENCE AS "FRUIT OF THE POISONOUS TREE": GENERAL RULE

Whether evidence obtained illegally will 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, 9 L. Ed. 2d 441 (1963) (The question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.") (internal

quotations omitted); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319 (1920); *State v. Byers*, 88 Wn.2d 1, 10, 559 P.2d 1334 (1977) (defendants' confessions inadmissible when obtained as a result of defendants being in custody after an unlawful arrest and being confronted with illegally obtained evidence); *State v. Magneson*, 107 Wn. App. 221, 226–27, 26 P.3d 986 (2001) (evidence was not admissible under the plain view doctrine when officers entered home with what was later determined to be an invalid search warrant and seized drugs from a third person in the home at the time of the search); *State v. McReynolds*, 104 Wn. App. 560, 571, 17 P.3d 608 (2000) (court remanded for lack of findings regarding whether subsequently obtained evidence from valid warrants was tainted by an illegal search). The following sections discuss three exceptions that have been used to determine whether a given piece of evidence constitutes derivative "fruit of the poisonous tree" and should therefore be suppressed. *See generally* 6 Wayne R. LaFave, *Search and Seizure* § 11.4 (5th ed. 2004).

7.7(a) Attenuation Test

The attenuation test suggests that where there are intervening, independent factors along the chain of causation, the taint of illegally obtained evidence becomes so dissipated as to preclude suppression of derivative evidence as "fruit" of the illegal police action. *State v. Warner*, 125 Wn.2d 876, 888, 889 P.2d 479 (1995) (remanded for determination of whether both sources of information were compelled; if only one was compelled, the other would constitute independent source and any "fruits" need not be excluded); *see* 6 Wayne R. LaFave, *Search and Seizure* § 11.4 (5th ed. 2012). Put another way, the detrimental consequences of excluding the evidence become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. *Brown v. Illinois*, 422 U.S. 590, 608–09, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) (Powell, J., concurring); *State v. Spotted Elk*, 109 Wn. App. 253, 262, 34 P.3d 906 (2001) (finding that the defendant's and parole officer's testimony was insufficiently attenuated from a law enforcement officer's *Miranda* violation because the defendant's improperly admitted incriminatory statements regarding heroin compelled her to explain and later testify about why she was carrying the substance); *State v. Reid*, 38 Wn. App. 203, 213, 687 P.2d 861 (1984).

For example, in *Reid*, the police arrested the defendant shortly after he emerged from his apartment building and got into a car. *Reid*, 38 Wn. App. at 205, 687 P.2d 861. When the defendant refused to identify 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. *Id.* at 205–06, 687 P.2d 861. The police then entered the apartment, observed evidence in plain view, and later returned and seized the evidence pursuant to a warrant. *Id.* at 206, 687 P.2d 861. 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 861. "[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." *Id.* at 209, 687 P.2d 861.

As of the end of 2018, Washington courts have not explicitly adopted the attenuation doctrine, but they have applied it. *See State v. Eserjose*, 171 Wn.2d 907, 919, 259 P.3d 172 (2011) (evaluating the challenged evidence to see if it was "fruit of the poisonous tree" or so "attenuated as to dissipate the taint"); *cf State v. Samalia*, 186 Wn.2d 262, 279, 375 P.3d 1082 (2016) (limiting the application of attenuation when not asserted or supported in response to suppressing evidence at the trial level). *But see State v. Mayfield*, 192 Wn.2d 871, 434 P.3d 58 (2019) (explicitly adopting a narrow application of the attenuation doctrine compatible with article I, section 7). The court in *Eserjose* held that the defendant's confession obtained at the sheriff's office following an illegal arrest at the defendant's home was an act of free will sufficient to purge the primary taint of the illegal arrest. *Id.* at 929, 259 P.3d 172.

7.7(b) Independent Source Test

Under the independent source exception, illegally obtained evidence is not suppressed under the exclusionary rule when the evidence was ultimately obtained pursuant to a valid warrant or other lawful means, independent of the unlawful government action. *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). Thus, "where an unlawful [action] has given investigators knowledge of facts *x* and *y*, but fact *z* has been learned by other means, fact *z* can be said to be admissible because [it is] derived from an 'independent source.'" *Murray v. United States*, 487 U.S. 533, 538, 108 S. Ct. 2533, 101 L. Ed. 2d 472 (1988). When police lawfully obtain evidence, the fact that police also came by the evidence unlawfully does not make the evidence suppressible. *State v. O'Bremski*, 70 Wn.2d 425, 429–30, 423 P.2d 530 (1967) (a missing child's testimony was admissible because she was not discovered solely as a result of unlawful search). The underlying policy is that, although the government should not benefit from illegal activity, it should not end up in a worse position than

it otherwise would have been if it had not performed the illegal activity. *Murray*, 487 U.S. at 542, 108 S. Ct. 2533.

The independent source exception has been held to comply with article I, section 7 of the Washington State Constitution. *Gaines*, 154 Wn.2d at 722, 116 P.3d 993 (probable cause existed to search trunk independent of initial, illegal search and police would have sought a warrant for the trunk even absent the initial, illegal search). Under the exception, unlawful police activity does not invalidate a later search if (1) the search warrant was based on independently obtained information, and (2) the police were not motivated by the prior unlawful activity in seeking the search warrant. *State v. Miles*, 159 Wn. App. 282, 284, 244 P.3d 1030 (2011); *see also State v. Smith*, 165 Wn. App. 296, 266 P.3d 250 (2011), *aff'd on other grounds*, 177 Wn.2d 533, 303 P.3d 1047 (2012) (police entry into motel room was based on independent information because victim sought police assistance as community caretakers and the emergency need was an intervening factor that allowed emergency aid exception to the warrant requirement).

7.7(c) Inevitable Discovery Doctrine

The last exception to the exclusionary rule is the inevitable discovery doctrine. *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). Unlike federal courts, Washington courts do not recognize the inevitable discovery doctrine. *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). This is attributed to the express protection of individual privacy in article I, section 7 and the Washington State Supreme Court's dislike of the doctrine's speculative analysis. *See id.* at 635, 220 P.3d 1226; *State v. Hilton*, 164 Wn. App. 81, 91−92, 261 P.3d 683 (2011) ("Washington courts will not entertain the speculative question about whether the police ultimately would have obtained the same information by other, lawful means.").

Under the federal exception, the inevitable discovery doctrine is an extrapolation of the independent source doctrine: if evidence is admissible because it was discovered through an independent source, then it should be admissible if it would have inevitably been discovered through an independent source. *Murray v. United States*, 487 U.S. 533, 539, 108 S. Ct. 2535, 101 L. Ed. 2d 472 (1988); *see also Nix*, 467 U.S. at 444, 104 S. Ct. 2501 (location of murdered child's body derived from coerced statement was not suppressed when searchers would have located child anyway). Under the doctrine, originally tainted evidence is admissible if the police, while following routine procedure, would inevitably have uncovered the evidence. *United States v. Young*, 573 F.3d 711, 721 (9th Cir. 2009). This reasoning requires a "speculative analysis" of police

behavior. *State v. Smith*, 165 Wn. App. 296, 310, 266 P.3d 250 (2011). Specifically, the doctrine examines the police's actions and their motivations to take such actions. *Hilton*, 164 Wn. App. at 92, 261 P.3d 683. However, the doctrine does not excuse police failure to obtain a search warrant where the police had probable cause, but simply did not seek to obtain a warrant. *Young*, 573 F.3d at 723 (inevitable discovery doctrine did not apply when police failed to secure a warrant to search defendant's hotel room after defendant was arrested, but before defendant had checked out).

7.8 EVIDENCE DISCOVERED AS A RESULT OF ILLEGAL ARREST OR DETENTION

7.8(a) Confession as Fruit of Illegal Arrest

Generally, when a defendant voluntarily confesses, a court may admit the defendant's confession into evidence consistent with the Fifth Amendment. *Jackson v. Denno*, 378 U.S. 368, 379, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). However, when a confession is the fruit of an illegal seizure, the court must ensure that the confession is admissible despite the constitutional violation. *Brown v. Illinois*, 422 U.S. 590, 600–03, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); *see State v. Dane*, 89 Wn. App. 226, 233–34, 948 P.2d 1326 (1997). In many cases, the temporal location of the illegal arrest in relation to the confession will be a deciding factor. 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, 9 L. Ed. 2d 441 (1963).

There are three other factors to determine whether the taint of a confession has dissipated. *Brown*, 422 U.S. at 603–05, 95 S. Ct. 2254. First, the giving of *Miranda* warnings may indicate sufficient attenuation. *Id.* However, the fact that a defendant received and understood *Miranda* warnings is not sufficient by itself to purge the taint of an illegal seizure. *Dunaway v. New York*, 442 U.S. 200, 216–17, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). When a person is unlawfully detained because probable cause is lacking, but is not formally arrested, the confession is inadmissible even if the person was first given *Miranda* warnings so long as his or her confession is causally connected to the detention. *Id.* at 117–18, 99 S. Ct. 2248.

Second, the presence of any intervening circumstances may provide sufficient attenuation. The court in *State v. Eserjose*, 171 Wn.2d 907, 919–29, 259 P.3d 172 (2011), held that the defendant's confession

obtained at the sheriff's office following an illegal arrest at the defendant's home was an act of free will sufficient to purge the primary taint of the illegal arrest. *Id.* The arrest was illegal because of lack of consent, and the defendant only confessed later at the police station upon hearing that his co-conspirator had implicated him. *Id.* Because the co-conspirator's confession elicited the defendant's confession, and not the illegal arrest, the intervening circumstance was sufficient to purge the taint of the illegal arrest. *Id.*

Lastly, the officer's purpose and the level of the constitutional violation are also instructive in determining whether the confession should be suppressed. *Brown*, 422 U.S. at 603–05, 95 S. Ct. 2254; *see also State v. Johnston*, 38 Wn. App. 793, 800–01, 690 P.2d 591 (1984).

7.8(b) Search as Fruit of Illegal Arrest or Detention

When a search is incidental to an illegal arrest, courts may suppress the fruits of the search unless intervening factors, such as a valid arrest, occur between the illegal arrest and the search. *United States v. Walker*, 535 F.2d 896, 898–99 (5th Cir. 1976). The search may also 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 in section 7.8(a) above. *See generally* 6 Wayne R. LaFave, *Search and Seizure* § 11.4(b) (5th ed. 2012); *see also State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975).

The defendant's voluntarily statement does not prove the voluntariness of consent. *State v. Avila-Avina*, 99 Wn. App. 9, 15–16, 991 P.2d 720 (2000), *abrogated on other grounds by State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009); 4 LaFave, *supra* § 8.1(a)–(c). Washington courts have considered the totality of the circumstances to determine whether consent to a search incident to arrest was voluntary. *State v. O'Neill*, 148 Wn.2d 564, 588–89, 62 P.3d 489 (2003) (stating that repeated requests for consent is one factor to consider); *State v. Tagas*, 121 Wn. App. 872, 876, 90 P.3d 1088 (2004) (agreeing that totality of circumstances is normally the appropriate test); *cf. supra* §§ 5.9–5.10 (*Ferrier* warnings).

7.8(c) Identification of the Suspect as Fruit of Illegal Arrest

Whether illegally obtained evidence may be used to identify the defendant varies based on the means of identification. Washington courts have rarely considered the issue, but courts in other jurisdictions have excluded evidence of post-arrest identifications, at-trial identification, photo identification, and fingerprinting. First, in Washington, a court has found that a post-arrest identification by one officer immediately after a

warrantless arrest was not sufficiently attenuated from the illegal arrest and therefore had to be suppressed. *State v. Le*, 103 Wn. App. 354, 362–65, 12 P.3d 653 (2000) (admitting the identification would "conveniently assum[e] that the police would eventually effect a lawful arrest of the defendant . . . . [S]uch a result would eviscerate the exclusionary rule by readily excusing police failure to obtain a warrant."). Under the Fourth Amendment, the evidence may be admitted if, under the *Brown* factors, the link between the illegal action and the identification is broken. *See supra* § 7.8(a); *Johnson v. Louisiana*, 406 U.S. 356, 365, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (defendant may consent to lineup and hence purge taint of illegal action). *See generally* 6 Wayne R. LaFave, *Search and Seizure* § 11.4(a)–(j) (5th ed. 2012). Of course, if police make 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).

The second issue arises when a witness identified the defendant in court but had also previously identified the defendant at a line-up following the illegal arrest. Because the arrest was illegal, the initial line-up identification was illegal. If both the police officer's knowledge of the accused's identity and the victim's independent recollection of the accused predate the unlawful arrest, the victim's in-court identification of the accused is untainted by either the arrest or the pretrial identification arising therefrom. *State v. Mathe*, 102 Wn.2d 537, 546–47, 688 P.2d 859 (1984). A basic attenuation test is applied, but with additional factors specific to in-court identification. *United States v. Crews*, 445 U.S. 463, 474, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980). The court should also consider (1) the witness's prior opportunity to observe the criminal act; (2) any discrepancy between the defendant's pre-lineup description and the defendant's actual description; (3) the identification of someone else prior to the lineup; (4) identification of the defendant's picture before the lineup; (5) failure to identify the defendant on a prior occasion; and (6) the time between the criminal act and the lineup identification. *United States v. Wade*, 388 U.S. 218, 241, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

Courts have excluded other types of evidence identifying the defendant if the evidence was associated with an unlawful arrest. A photo identification produced by an unlawful arrest is not admissible. *Crews*, 445 U.S. at 474, 100 S. Ct. 1244. And fingerprints must be suppressed when police unlawfully arrest a suspect for the purpose of obtaining the suspect's fingerprints so as to prosecute the suspect for the crime of arrest. *Davis v. Mississipp*i, 394 U.S. 721, 727, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).

7.9 TYPES OF EVIDENCE DISCOVERED AS A RESULT OF AN ILLEGAL SEARCH

7.9(a) Confession as Fruit of Illegal Search

Attenuation, including the *Brown* factors, is not applicable to a confession following an unlawful search. *See supra* § 7.8(a). Unlike an unlawful arrest, a suspect is more likely to confess as a result of an unlawful search. *People v. Robbins*, 54 Ill. App. 3d 298, 304–05, 369 N.E.2d 577, 12 Ill. Dec. 80 (1977); *see also State v. Eserjose*, 171 Wn.2d 907, 917, 259 P.3d 172 (2011) (defendant's confession following illegal arrest not suppressed "since '[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction.'") (quoting *United States v. Crews*, 445 U.S. 463, 474, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)). Thus, a confession is suppressible if it would not have been made but for the illegal search. *See State v. White*, 97 Wn.2d 92, 102–04, 640 P.2d 1061 (1982).

7.9(b) Search or Arrest as Fruit of Illegal Search

An illegal search that took place prior to securing a valid warrant will not invalidate the execution of that warrant, assuming it is based on untainted evidence; evidence seized during the execution of the valid warrant will be admissible. *Segura v. United States*, 468 U.S. 796, 814, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984) (second search of home is not tainted by prior illegal entry). But if the search warrant for the second search is supported by both tainted and untainted evidence, and the untainted evidence alone does not establish probable cause, evidence seized pursuant to the warrant must be excluded. *State v. Ross*, 141 Wn.2d 304, 314–15, 4 P.3d 130 (2000); *see also United States v. Marchand*, 564 F.2d 983, 1001–02 (2d Cir. 1977); *United States v. DiMuro*, 540 F.2d 503, 515 (1st Cir. 1976); *United States v. Nelson*, 459 F.2d 884, 889 (6th Cir. 1972).

7.9(c) Testimony of Witness as Fruit of Illegal Search

Testimony and physical evidence are treated differently under the exclusionary rule. *United States v. Ceccolini*, 435 U.S. 268, 277–79, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). Verbal testimony carries with it an exercise of free will, and the cost of excluding the evidence is great. Consequently, suppression of derivative witness testimony depends on several factors. First, suppression depends on whether the search and testimony were close in time. *See id.* at 277–78, 98 S. Ct. 1054 (witness testimony not excluded where "substantial periods of time" had elapsed

between the illegal search and the government's first contact with the witness).

Second, suppression depends on 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). Suppression may also depend on whether the fruits of the illegal search were used in questioning the witness. *See State v. Rogers*, 27 Ohio Op. 2d 105, 198 N.E.2d 796, 806 (1963) (testimony about gun suppressed because witness would not have been questioned about gun but for unlawful 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. *State v. Swaite*, 33 Wn. App. 477, 484 n.4, 656 P.2d 520 (1982).

Third, suppression may depend on the officer's intent and prior knowledge of the existence of the witnesses. If the intent of an illegal search was to find witnesses, the evidence should be excluded. *See People v. Martin*, 382 Ill. 192, 201, 46 N.E.2d 997 (1942) (testimony of witnesses suppressed when witnesses' names were obtained from papers found during illegal search). *See generally Ceccolini*, 435 U.S. 268, 98 S. Ct. 1054. Admission of the testimony is also more likely if the officers knew of the witness's existence before the search. *See State v. O'Bremski*, 70 Wn.2d 425, 429–30, 423 P.2d 530 (1967) (although girl was found during illegal search, her testimony was admissible because her whereabouts were discovered through independent information).

7.10 Crime Committed During Illegal Arrest or Search

Generally, evidence that the defendant attempted to bribe or attack an officer is admissible even if the arrest was illegal. *State v. Mierz*, 127 Wn.2d 460, 473–475, 901 P.2d 286 (1995). In addition, evidence of a suspect speeding away from an unlawful traffic stop has been found admissible at trial because it is considered sufficiently distinguishable from the unlawful intrusion. *State v. Owens*, 39 Wn. App. 130, 135, 692 P.2d 850 (1984).

The rationale for admission of this evidence is that acts of free will purge the taint of the illegal police activity; thus, the application of the exclusionary rule would only marginally deter illegal police behavior. In addition, exclusion would allow persons unlawfully arrested to assault officers with minimal risk of criminal liability. *Mierz*, 127 Wn.2d at 474, 901 P.2d 286. The evidence would be inadmissible, however, if it were the product of questionable police action. *See id.* at 475, 901 P.2d 286.

7.11 WAIVER OR FORFEITURE OF OBJECTION

A defendant may waive or forfeit his or her constitutional objection and render the objectionable evidence admissible in three ways: (1) by failing to make a timely objection, (2) by testifying at trial about the evidence, and (3) by entering a guilty plea. *See* 6 Wayne R. LaFave, *Search and Seizure* § 11.1(a), (c)–(d) (5th ed. 2012).

7.11(a) Failure to Make a Timely Objection

Jurisdictions have different 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 objection if the party had knowledge of the illegality of the search or seizure prior to the hearing. *See* Wash. CrR 4.5(d); *see also State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294 (2011), *review denied*, 173 Wn.2d 1017, 272 P.3d 247 (2012) ("Under RAP 2.5(a), a party may raise manifest error affecting a constitutional right for the first time on appeal. 'A failure to move to suppress evidence, however, constitutes a waiver of the right to have it excluded.'" (footnote omitted)) (quoting *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65 (1994)). Thus, a defendant's failure to move to suppress evidence at trial that he or she later contends was illegally gathered constitutes a waiver of any error associated with the admission of the evidence. *Mierz*, 127 Wn.2d at 468, 901 P.2d 286.

Importantly, a defendant may only appeal suppression issues on the bases raised during the trial. *State v. Garbaccio*, 151 Wn. App. 716, 731, 214 P.3d 168 (2009), *review denied*, 168 Wn.2d 1027, 230 P.3d 1060 (2010) (reasoning that because the defendant's "present contention was not raised in his suppression motion, and because he did not seek a ruling on this issue from the trial court, [the court] will not consider it for the first time on appeal.").

7.11(b) Testimony by Defendant Concerning Suppressed Evidence

Unless a timely objection was made, on appeal a defendant may not raise a Fourth Amendment claim challenging the admission of evidence if the defendant gave testimony at trial admitting to the possession of that evidence. *See State v. Peele*, 10 Wn. App. 58, 67, 516 P.2d 788 (1973). However, a Fourth Amendment claim may be raised on appeal if the defendant's testimony was induced by the erroneous admission of the evidence. *Id.* at 67–68, 516 P.2d 788; *see also Harrison v. United States*, 392 U.S. 219, 224–25, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968). The rationale for the general rule is that the testimony may make the admission of the illegal evidence harmless error. *See Peele*, 10 Wn. App. at 66, 516

P.2d 788. *See generally* 6 Wayne R. LaFave, *Search and Seizure* § 11.1(c) (5th ed. 2004).

7.11(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 the evidence in advance of the plea. *See Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). Courts recognize this limitation because "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *State v. Butler*, 17 Wn. App. 666, 676, 564 P.2d 828 (1977) (citing *Tollett*, 411 U.S. at 267, 93 S. Ct. 1602). But if the plea itself can be characterized as the fruit of illegally obtained evidence and should have been suppressed upon the defendant's timely motion, then the plea was not entered voluntarily or knowingly. *See Tollett*, 411 U.S. at 267, 93 S. Ct. 1602 (defendant may attack the voluntariness of the plea under the factors set forth in *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)); *see also State v. Wilson*, 162 Wn. App. 409, 414–15, 417, 253 P.3d 1143 (2011) ("[A] 'guilty plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the government's legal power to prosecute regardless of factual guilt.'") (quoting *State v. Brandenburg*, 153 Wn. App. 944, 948, 223 P.3d 1259 (2009)).

7.12 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 Wn.2d 329, 352–53, 610 P.2d 869 (1980); *State v. Flicks*, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). Where an error infringes on a constitutional right, the error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. *See State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004); *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663 (2003); *State v. Spotted Elk*, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that, in light of the overwhelming untainted evidence, a jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

CONCLUSION

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 similar. This survey attempts to expand upon basic search and seizure issues by referencing recent Washington search and seizure cases. While this survey is not comprehensive and will require continual updating, we hope it will continue to be a useful tool for practitioners and judges who must assess the scope of protection that the Washington State Constitution and the U.S. Constitution afford persons against unlawful searches and seizures.

TABLE OF AUTHORITIES

Federal Cases

Washington State Cases

Other State Cases

Federal Statutes

State Statutes and Administrative Regulations

Court Rules

Miscellaneous